

IN THE EUROPEAN COURT OF HUMAN RIGHTS
Application no. 61435/19
Case of Macaté v. Lithuania

THIRD PARTY INTERVENTION

Professor David Kaye,
International Justice Clinic, University of California, Irvine, School of Law,

ARTICLE 19: Global Campaign for Free Expression, and
European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex
Association

A. INTRODUCTION

1. This intervention is submitted jointly by Professor David Kaye, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA-Europe”), and ARTICLE 19: Global Campaign for Free Expression (“ARTICLE 19,” jointly the Interveners), based on the decision of the Court from 7 December 2021.

2. In the present case the Court is asked to evaluate whether the late Applicant’s freedom of expression, protected under Article 10 of the European Convention on Human Rights (“ECHR”), was violated when her book containing fairy tales that depicted same-sex couples was marked as “harmful”, referencing the public policy of protecting children. This case may best be understood within the context of threats to the freedom of expression on the basis of sexual orientation and gender identity, or otherwise against LGBT persons, in contravention of international human rights law. The human rights mechanisms of the UN system have increasingly raised concerns about a rise in anti-LGBT legislation and discriminatory treatment of LGBT persons inconsistent with international law.¹

3. The case also raises serious questions about the freedom of expression of artists and children’s access to information and ideas of all kinds. The key issues relate to the degree to which a publisher – together with the state authorities – can limit or otherwise negatively impact distribution of published work targeting certain age groups and whether authors may seek redress against such limitations based on discriminatory grounds. The Court’s judgment on these issues is likely to be relevant and influential to the interpretation and application of international human

¹ See, for instance, *Inaugural Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, Victor Madrigal-Borloz, [A/HRC/38/43](#), ¶ 38 (11 May 2018); *Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, Victor Madrigal-Borloz on *Social Inclusion*, [A/74/181](#), ¶ 34 (17 July 2019) [hereinafter “Report on Social Inclusion”]; *Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, Victor Madrigal-Borloz on *Gender (Part II): Practices of Exclusion*, [A/76/152](#), ¶ 7 (15 July 2021) [hereinafter “Report on Gender (Part II): Practices of Exclusion”].

rights standards on the right to freedom of expression under the ECHR and beyond.

4. In order to assist the Court in its deliberation, we use this intervention to answer the following questions: (1) whether States and private parties can impose limitations on distribution of artistic work, through “warnings” or otherwise, and whether such limitations are compatible with the protection of the right to freedom of expression; (2) whether and if so to what extent such warnings may be justified under human rights law for the protection of children; and (3) whether limitations on freedom of expression that have a discriminatory intent and impact on members of protected groups, in particular LGBT members, are permissible under international human rights law.

B. THE LEGAL STANDARDS

5. The right to freedom of opinion and expression, protected under Article 10 of the ECHR and Article 19 of the ICCPR, is a robustly articulated right, facilitating not only human curiosity and learning (seeking and receiving) and sharing (imparting), but also framing the object of protection as broadly as possible (information and ideas *of all kinds*).² Freedom of artistic expression — in all its mediums, including books, movies, paintings, songs, among many others — is a part of freedom of expression.³ Indeed, the enjoyment of artistic expression “is a value in itself” according to this Court.⁴ Echoing the approach of the UN Human Rights Committee — the monitoring body of the ICCPR—⁵ the UN Special Rapporteur in the field of cultural rights has stated that the right to freedom of artistic expression includes the rights to freely contribute to and disseminate artistic expression and creation and also to freely experience, access and enjoy artistic expression.⁶ Consequently, any restriction on artistic expression must also meet the same three-part test from Article 10(2) of the ECHR and Article 19(3) of the ICCPR.

6. Restrictions of freedom of expression take various forms and with varying degrees of severity, including criminalization of speech on a particular topic,⁷ removal of an artistic work

² *Research Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye on Artistic Expression*, [A/HRC/44/49/Add.2](#) (24 July 2020) [hereinafter “Research Report on Artistic Expression”].

³ *Research Report on Artistic Expression*, ¶¶ 4-6. See also the Council of Europe, Steering Committee for Culture, Heritage and Landscape, [Manifesto on the Freedom of Expression of Arts and Culture in the Digital Era](#), (10 Nov. 2020).

⁴ ECtHR, *Marta Jelševar and others v. Slovenia*, Application no. 47318/07, 11 March 2014. See also Council of Europe, Steering Committee for Culture, Heritage and Landscape, [Manifesto on the Freedom of Expression of Arts and Culture in the Digital Era](#), (10 Nov. 2020).

⁵ *Cfr.* *Research Report on Artistic Expression*. Human Rights Committee, *General Comment No. 34 on the right to freedom of expression*, [CCPR/C/GC/34](#), (12 September 2011), ¶¶13-14 [hereinafter “General Comment 34”]; See, e.g., Human Rights Committee, *Mavlonov v. Uzbekistan*, 29 April 2009, Communication No. 1334/2004, CCPR/C/95/D/1334/2004, ¶8.4. See also, Toby Mendel, [Restricting Freedom of Expression: Standards and Principles](#), March 2010.

⁶ *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed on the right to freedom of artistic expression and creativity*, [A/HRC/23/34](#), 14 March 2013, ¶85 [hereinafter “Report on artistic expression and creativity”]. See also, Communication to Egypt. [EGY 9/2015](#). 19 August 2015.

⁷ The Belarus Free Theatre, an international underground theatre company in Belarus led by artistic directors in exile, use art to address a variety of social issues, including LGBT rights, and bring about systemic change. Their members have been arrested and ‘blacklisted’ - restricting them from performing in official art institutions. *Research Report on Artistic Expression*, ¶32.

from circulation⁸ or its outright censorship,⁹ restriction of online content¹⁰, the imposition of labels¹¹ or disclaimers to forms of artistic expression. Each ultimately aims to limit the creation and dissemination of artistic work. As the UN Special Rapporteur in the field of Cultural Rights has stated, restrictions are regularly imposed at various stages of the artistic creation, “from the development of the idea through to production, performance, publication and distribution.”¹² She also stated that regulations, understood as “the disinterested classification of content according to publicly available guidelines”¹³, may limit freedom of expression “and may be acceptable only to the extent that they fully comply with international standards.”¹⁴ There is also an organic relationship between the artist and the public and States have an obligation to ensure enabling environments in which this relationship can be free and flourish.¹⁵

7. Article 10(2) of the ECHR and Article 19(3) of the ICCPR provide narrow and strict bases upon which a State may limit the freedom of expression. Any restriction to be lawful must be provided by law and necessary and proportionate to protect a legitimate interest. A government imposing a restriction or some form of burden on expression must demonstrate that the measure adopted meets the tripartite test of legality, legitimacy, and proportionality.

8. Restrictions to freedom of expression “must also themselves be compatible with the provisions, aims and objectives of the [ICCPR]. Laws must not violate the non-discrimination provisions of the Covenant.”¹⁶ The principles of equality and non-discrimination are part of the foundations of the rule of law and human rights (Article 2 and 26 of the ICCPR and Article 14 and Protocol 12 to the ECHR). As the UN Human Rights Committee has emphasized, restriction based on discriminatory grounds cannot be said to constitute one of the enumerated legitimate grounds for restrictions to freedom of expression.¹⁷ The UN High Commissioner for Human Rights encouraged States to adopt an expansive approach to their anti-discrimination policies and enact comprehensive anti-discrimination legislation that includes sexual orientation and gender identity among protected grounds.¹⁸ The UN Special Rapporteur for freedom expression observed in his report on artistic freedom of expression that discrimination is often the underlying reason for unlawful restrictions, noting that

“[m]inority groups are particularly vulnerable to restrictions on artistic expression because the art will frequently be challenged solely for its existence and not any alleged challenge to state

⁸ In Thailand, the Third Committee of Film and Video Censorship Board of the Ministry of Culture issued a banning order prohibiting the distribution of the film *Shakespeare Must Die*. The Board deemed that the movie “has content that causes disunity among the people of the nation.” Research Report on Artistic Expression, ¶27. Communication to Thailand, [THA 2/2013](#), 15 March 2013.

⁹ In Egypt the Ministry of Culture has the authority to approve, deny or revoke permits required for artistic works and may oversee both the creation of an artwork and any future developments or change by its author. Communication to Egypt, [OL EGY 9/2015](#), 19 August 2015.

¹⁰ Research Report on Artistic Expression, ¶41-47.

¹¹ The certification system in Turkey has been widely used to limit the circulation of films according to their consistency with public order, moral values, spiritual and physical well-being of youth, human dignity and copyright. Research Report on Artistic Expression, ¶ 38.

¹² Report on artistic expression and creativity, ¶53.

¹³ 2010 Arts Community Position Paper on Censorship and Regulation, Singapore, p. 3. Cited in Report on artistic expression and creativity, ¶62.

¹⁴ Report on artistic expression and creativity, ¶62-64.

¹⁵ IACtHR., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*. February 5, 2001. Series C No. 73. ¶65.

¹⁶ General Comment 34, ¶ 26.

¹⁷ General Comment 34, ¶ 26, 32.

¹⁸ See *Report of the Office of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity*, (4 May 2015) [A/HRC/29/23](#).

authority or public outcry. Women and members of the LGBTI community are especially targeted.”¹⁹

9. The right to freedom of expression is enjoyed by “everyone,” not limited by any criteria, including (if not *especially*) children and members of historically discriminated groups. The Convention on the Rights of the Child (“CRC”) recognizes that it is unacceptable to use the immaturity of children as a justification for depriving them of rights that would otherwise only be enjoyed by adults.²⁰ Children’s rights are often restricted under the guise of promoting public morals, traditional values, and family. Given that Article 13 of the CRC closely follows the wording of Article 19 of the ICCPR, any restriction to freedom of expression and access to information should also follow the three-part test of legality, legitimacy and necessity and proportionality (as described above).²¹

C. SUBMISSION

Compatibility of limitations of distribution of artistic work – through “warnings” or otherwise – with international freedom of expression standards

10. Labels on books are commonly used to give information to potential readers and are sometimes referred to as a “viewpoint-neutral directional aid.”²² Labels may therefore not always be intended to persuade readers of a particular point of view. An example of a label could be one that depicts the genre, such as romance, fiction, or mystery. By contrast, a “prejudicial label would be a label that tries to persuade or establish an institutional preference for something.”²³

11. Labels and warnings signaling that a book may be ‘harmful’ in some sense can cast a negative light on the work regardless of its literary merit or the author’s intent.²⁴ Such labeling may also restrict access to the work, as it may hinder its availability in bookstores and libraries, and deter buyers from acquiring it wherever it is available.²⁵ A study conducted by the non-governmental organization PEN America found that “[m]any librarians, teachers, and school administrators freely admit that they decline to order certain books out of fear that someone might find the content objectionable”²⁶, in particular books that are written “by or are about people of color, LGBTQ people, and/or disabled people” since these are the ones that have been challenged

¹⁹ Research Report on Artistic Expression, ¶ 33.

²⁰ *Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue on the right of the child to freedom of expression*, (Aug. 21, 2014) [A/69/335](#), ¶ 2 [hereinafter “Report on the right of the child to freedom of expression”].

²¹ Committee on the Rights of the Child, General comment No. 25 (2021) on children’s rights in relation to the digital environment, [CRC/C/GC/25](#) (2 March 2021) ¶ 59. *See also*, Report on the right of the child to freedom of expression, ¶ 23.

²² American Library Association, Labeling and Rating Systems Q & A, <https://www.ala.org/advocacy/intfreedom/labelingratingqa>

²³ *Id.*

²⁴ The US National Council of Teachers of English has explained that the process of rating casts “a negative light on listed books regardless of their literary worth [and] defers to a minority who object to a book -- often for random, personal, or ideological reasons -- rather than the thousands who have read, taught, enjoyed, and benefitted from the book. More importantly, ‘red-flagging’ privileges the concerns of would-be censors over the professional judgment of teachers and librarians.” National Coalition Against Censorship, *Letter to Superintendent Lane*, (1 Aug 2016), <https://ncac.org/wp-content/uploads/2016/08/ChesterfieldLetter.pdf>

²⁵ Pen America found that the “current patterns of challenges to children’s books reveals that a large portion relate to children’s and young adult books that are either authored by or are about people of color, LGBTQ people, and/or disabled people (referred to in this report as “diverse books”). And even if a particular challenge fails, teachers and librarians are aware that diverse books may draw unwanted scrutiny, prompting some of them to avoid assigning these books or putting them into library circulation in the first place.” PEN America, *Missing From The Shelf: Book Challenges and Lack of Diversity in Children's Literature* (2016), https://pen.org/sites/default/files/PEN_childrens_lit_report_FINAL_online.pdf

²⁶ PEN America, *Missing From The Shelf: Book Challenges and Lack of Diversity in Children's Literature* (2016).

more frequently.²⁷ A label would reinforce such fears.

12. The possibility of having the artistic expression labeled as “harmful” is likely to have a significant chilling effect on freedom of expression for at least two reasons. Firstly, it potentially provides a powerful – if somewhat uncertain – basis for public authorities to limit the publication of controversial material (see more details below). Secondly, the research, writing or production and publication of a book is a major undertaking. Faced with the threat that a publication on topics touching on “controversial” areas may be subject to such restrictions, writers, producers or publishers are likely to shy away from such topics and concentrate on less potentially problematic areas. Even outside the scope of publications for children, with the threat that such warning labels could be attached to any form of publication, *The Color Purple* by Alice Walker, *Orlando* by Virginia Woolf, *Lolita* by Vladimir Nabokov or *The Picture of Dorian Gray* by Oscar Wilde may not have been published.

13. To respond to the first question, State and private parties may impose labels and “warnings” on artistic work only in accordance with the rules of international human rights law. Because imposed labels compel a creator to carry expression and limit the possibility of the work’s dissemination, they must be treated carefully and subject to the strictest scrutiny of the three-part test under Article 10(2) of the ECHR and Article 19(3) of the ICCPR. It is conceivable that, with appropriate evidence, a state may demonstrate that a label communicating that a work contains explicit depictions of realistic violence may be permissible in light of the social and cognitive develop of children under a certain age. By contrast, a label expressing a “warning” concerning members of groups protected against discrimination under international law should be suspect on its face, given the illegitimacy of discriminatory restrictions on expression. Such a label promotes a discriminatory “concern” based on stereotypes of gender sexuality deeply-rooted in cultural norms and beliefs about the concept of the “traditional” family²⁸ or “morals”. Labels and warnings on books or other forms of expression may constitute a burden on the freedom expression that must be assessed according to the standards of international human rights law.

Justification of warnings under human rights law for the protection of children

14. With regards to the second question, the protection of the rights of children is a legitimate aim to restrict the distribution of artistic work. It has been evident, however, that states will often argue that protection of children demands limitations on access to information and ideas. The Special Rapporteur on freedom of expression has directly addressed this point, concluding that there must be a demonstrated necessity in each case, just as with all restrictions on the freedom of expression:

“Child protection arguments are part of a new pattern in which children are increasingly used to justify restrictions not only on their access to information, but also on the rights of adults. In many cases, the restrictions are rooted in a genuine, well-meaning desire to protect children from harmful information, while in others they have been used to defend

²⁷ In the context of the study, a challenge is a “a formal, written complaint, filed with a library or school requesting that materials be removed because of content or appropriateness.” PEN America, *Missing From The Shelf: Book Challenges and Lack of Diversity in Children’s Literature* (2016).

²⁸ *Inaugural Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, Victor Madrigal-Borloz, [A/HRC/38/43](#), ¶45 (11 May 2018).

discrimination and censorship.”²⁹

15. Additionally, the Commissioner for Human Rights of the Council of Europe has clearly stated “[t]here is no evidence that dissemination of information advocating a positive attitude towards LGBTI people would adversely affect children. Rather, it is in the best interests of children to be informed about sexuality and gender diversity.”³⁰ For its part, the European Commission for Democracy through Law (“Venice Commission”) has stressed that evoking the protection of children as an argument to block children from accessing information about LGBTI people fails to pass the necessity and proportionality test required by this Court.³¹

16. Children, like adults, have the right to engage with various types of perspectives in order to form their own views and beliefs. As the UN Special Rapporteur on freedom of expression has noted, the ability to develop opinions, as well as to express them clearly, stems from a learning process that begins in early childhood and requires appropriate encouragement and respect in order to completely develop.³² The UN Committee on the Rights of the Child has stated that children need access to information in formats that are appropriate to their age and capacities on all issues of concern to them, like information related to their rights.³³ Additionally, international law has recognized that the right to freedom of expression regarding children is extended as they mature and develop their process of personal autonomy.³⁴ In this sense, “freedom of expression has been regarded as having a developmental aspect, since its aim is to enable children to develop their minds and themselves in society with others and grow into citizens participating in public life.”³⁵ Consequently, restriction on freedom of expression should take children’s “childness” into account.

17. From a comparative perspective, the Interveners also note that even in cases when a publication of a book would cause a psychological harm to a child concerned by the content of this particular book, the Supreme Court of the United Kingdom found that there was no precedent for an order preventing a person from publishing a book for fear of its causing psychiatric harm to a vulnerable person. In *OPO v MLA*,³⁶ the Supreme Court discharged an injunction that prevented the publication of an autobiographical book. For the Court prohibiting the publication of a book for the potential effects it can have on one potential reader infringes too greatly on the freedom of expression of an author. The Court ruled that “the only proper conclusion is that there is every justification for the publication. [...] Of course vulnerable children need to be protected as far as reasonably practicable from exposure to material which would harm them, but the right way of doing so is not to expand *Wilkinson v Downton* to ban the publication of a work of general interest.”

18. In *Sund v. City of Wichita Falls* a Federal Judge in Texas, United States struck down a local

²⁹ Report on the right of the child to freedom of expression, ¶ 52.

³⁰ Council of Europe. Human Rights Commissioner. [LGBTI children have the right to safety and equality](#) (2 Oct. 2014).

³¹ European Commission for Democracy through Law. Opinion on the issue of the Prohibition of so-called “propaganda of homosexuality” in the light of recent legislation in some member states of the Council of Europe. Opinion 707 / 2012. CDL-AD(2013)022 (18 June 2013). Cited in Council of Europe. Human Rights Commissioner. [LGBTI children have the right to safety and equality](#) (2 Oct. 2014).

³² Report on the right of the child to freedom of expression, ¶ 83.

³³ Committee on the Rights of the Child, General Comment No. 12 (2009) on the right of the child to be heard, [CRC/C/GC/12](#) (20 July 2009) ¶ 82.

³⁴ IACHR, [Childhood, Freedom of Expression, and the Media](#) OEA/SER.L/V/II CIDH/RELE/INF.23/19 (Feb. 2019) ¶ 18.

³⁵ Report on the right of the child to freedom of expression, ¶ 13.

³⁶ Supreme Court of the United Kingdom. [James Rhodes \(Appellant\) v OPO \(by his litigation friend BHM\) and another \(Respondents\)](#). [2015]UKSC 32 (20 May 2015).

law that restricted public library access to two books about gay parenting. The Court found that the policy, “both on its face and as applied to the removal of *Heather Has Two Mommies* and *Daddy’s Roommate* from the children’s area of the Library to the adult section”³⁷ violated federal and state constitutional rights to receive information. The Court also found that “the resolution and the book removals burden fully protected speech on the basis of content and viewpoint and they therefore cannot stand.”³⁸

Comparative standards address warnings or restrictions on distribution for certain age groups on the basis of gender and sexual orientation.

19. To answer the third question, singling out and labeling content as “harmful to children” because it has content on or about LGBT people constitutes a discriminatory purpose. In other words, given the discriminatory basis of labeling content as harmful merely because it has representations of LGBT people, such labels may not be seen as aiming to promote a legitimate purpose under Article 10(2) of the ECHR or Article 19(3) of the ICCPR. Many States attempt to justify restrictions on freedom of expression by evoking public morals, but the underlying discriminatory intent renders the restriction unlawful.³⁹ In such cases, UN Special Rapporteurs and this Court refused to allow States to hide behind the veil of public morals when engaging in discriminatory practices.⁴⁰ As the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has pointed out, there is an increased “weaponization of public morals” that is used to silence women and sexual minorities.⁴¹ Such weaponization is rooted in discrimination.

20. The rise in suppression of freedom of expression on the grounds of “traditional values” is also connected to discrimination against LGBT communities. A group of UN experts released a statement that

“[b]eing ‘highly subjective and dependent on societal power structure’, traditional values can be easily misused as a tool for the repression of fundamental human rights. They are often used to ‘justify’ negation of the rights of already marginalized groups who have historically been excluded from positions of power to shape public opinion and influence decision-making processes.”⁴²

21. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that “[m]any countries criminalize [...] LGBTQ+ information on grounds of morals, traditional values and child protection. Evidence shows that such an approach fosters intolerance, stigmatization and violence, and deprives people from access to accurate information.”⁴³ Recently, the European Commission addressed the decision of the

³⁷ U.S. District Court for the Northern District of Texas - 121 F. Supp. 2d 530 (N.D. Tex. 2000) (20 Sept 2000).

³⁸ U.S. District Court for the Northern District of Texas - 121 F. Supp. 2d 530 (N.D. Tex. 2000) (20 Sept 2000).

³⁹ For instance, Russia referenced public morals when it adopted its “homosexual propaganda” law. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan on Gender justice and freedom of expression*, (30 July 2021) [A/76/258](#), ¶28 [hereinafter “Report on Gender justice and freedom of expression”]. Similarly, the Government of Poland referenced “traditional family norms” when adopting “LGBT-free zone” legislation, putting restrictions on Pride marches, and proposing a bill that would criminalize sexuality education in schools. *See generally* AL POL 1/2020.

⁴⁰ *See id*; *Bayev and Others v. Russia* (EctHR, 2017).

⁴¹ *See generally* Report on Gender justice and freedom of expression.

⁴² “Human Rights are essential tools for an effective intercultural dialogue,” [statement](#) by a group of United Nations experts on the world Day on Cultural Diversity for Dialogue and Development (21 May 2010).

⁴³ Report on Gender justice and freedom of expression, ¶27.

Hungarian Consumer Protection Authority that required the publisher of a children’s book to include a disclaimer that the book portrays forms of “behaviour deviating from traditional gender roles” because it included LGBTI people in it. The Commission considered “that by imposing an obligation to provide information on a divergence from ‘traditional gender roles’, Hungary restricts the freedom of expression of authors and book publishers [...] [and] discriminates on grounds of sexual orientation in an unjustified way [...].”⁴⁴

22. Given the discriminatory intent of anti-LGBT labels, such warnings fail to meet the three-part test of Article 10(2) of ECHR and Article 19(3) of the ICCPR. Indeed, one need not even reach the necessity test, given that it can never be necessary for a law to discriminate against a member or members of a group protected under international human rights law. Certainly, when governments add labels and warnings to content by and about LGBT people, they contribute to exclusionary policies incompatible with human rights norms.⁴⁵ The UN Independent expert on protection against violence and discrimination based on sexual orientation and gender identity has stated that

“negative portrayals and/or the invisibility of sexual and gender diversity in educational materials enable exclusion, as such things can contribute to feelings of isolation and low self-esteem for LGBT students and foster discriminatory attitudes among peers [...] The adoption of comprehensive sexuality education that is inclusive of sexual and gender diversity can significantly reduce physical and psychological health risks for LGBT and gender-diverse youth,”⁴⁶

Affixing warning labels to articles, stories, books, and movies that shed light on the experiences of the LGBT community allows for continuous exclusion of LGBT people from public life and imagination.

23. Warnings labeling content as harmful because it has content on or about LGBT are not only inconsistent with the anti-discrimination norms at the heart of human rights law but they can contribute to other forms of discrimination faced by the LGBT community. Indeed, the UN Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity has stated that “exclusionary narratives exploit preconceptions, stigma and prejudice to create an atmosphere of panic and moral concern and create the risk of perpetuating violence and discrimination.”⁴⁷ When such a label is added to content by and about LGBT people, it allows for further alienation and isolation of LGBT people and serves as a manifestation of institutional “LGBTIphobia.”⁴⁸

24. UN mechanisms have noted that, when governments adopt laws that explicitly or implicitly limit expression on or about LGBT people, they contribute to discrimination based on sexual orientation and gender identity. The UN Independent expert on protection against violence and discrimination based on sexual orientation and gender identity – a post created because of the spread of anti-LGBT legislation and violence – has stated that several governments

“criminalize statements, publications or actions that discuss or refer to the identity or

⁴⁴ European Commission, *December infringements package: key decisions* (2 Dec. 2021).

⁴⁵ See generally OHCHR, “[Combating discrimination based on sexual orientation and gender identity.](#)”

⁴⁶ *Report on Social Inclusion*, ¶6 and 8.

⁴⁷ Report on Gender (Part II): Practices of Exclusion, ¶ 77 (15 July 2021).

⁴⁸ ILGA-Europe, *ILGA-Europe’s key demands for the recognition of diverse families*, 2014, at 4 [hereinafter “Key demands for the recognition of diverse families.”], at 4.

expression of lesbian, gay, bisexual, trans and gender non-conforming persons, often referred to as ‘gay propaganda’ [...] These laws tend to exacerbate police abuse and harassment, extortion and acts of violence against people based on their perceived or real sexual orientation or gender identity, drawing them into the criminal justice system, sometimes leading to further incidents of discrimination and violence.”⁴⁹

25. Several human rights organizations, including ILGA-Europe, have also highlighted “the heightened vulnerability to discrimination” that members of the LGBT community face.⁵⁰ Despite progress in the area of recognizing and protecting LGBT and women’s rights, many governments still contribute to the problems of stigmatization, discrimination, and unequal treatment that labeling reinforces.⁵¹

26. Finally, labels and warnings signaling content discussing or addressing diverse sexual orientation experiences as harmful not only restrict expression because authors who want to write for young children must avoid content about LGBT people, but the warnings also limit children’s access to information. As previously mentioned, school librarians, teachers and parents – among others – might be dissuaded from acquiring books that are labeled as harmful to children, therefore limiting children’s access to a wide variety of information just because it refers to LGBT people.

D. CONCLUSION

27. The following conclusions may be drawn based on the above legal analysis:

- a. Adding labels and warnings to content by and about LGBT people involves significant threats to freedom of expression and must be subjected to rigorous scrutiny under Article 10(2) requirements;
- b. Protection of the rights of children and public morals is often used as a pretext for discrimination against members of the LGBT community and as justification for disproportionate restrictions on freedom of expression.

28. Given the rise in anti-LGBT legislation and practices worldwide, the current case presents the Court with a valuable opportunity to further address the ways in which discriminatory warning labels interfere with the right to freedom of expression. In so doing, the Interveners urge the Court to take into account:

- a. The detrimental effects of discriminatory warning labels on the effective exercise of rights under Article 10 of the ECHR;
- b. How discriminatory labels amount to discrimination on the grounds of sexual orientation, contrary to Article 14 of the Convention read in conjunction with Article 10.

29. This amicus filing has shown why discriminatory warning labels are a serious interference

⁴⁹ Id., ¶ 38.

⁵⁰ ILGA-Europe, [ILGA-Europe’s key demands for the recognition of diverse families, 2014](#), at 4 [hereinafter “Key demands for the recognition of diverse families.”].

⁵¹ *Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz on Gender Theory*, [A/HRC/47/27](#) ¶ 3-12 (3 June 2021).

with the rights under Article 10 of the ECHR and consequently how this leads to the application of a strict standard of review in the assessment of the legitimate aim, legality, and necessity and proportionality of the restriction.

Yours sincerely,

Arpi Avetisyan
Head of Litigation
ILGA-Europe

Barbora Bukovska
Senior Director for Law and Policy
ARTICLE 19

David Kaye
Clinic Professor of Law
International Justice Clinic, University of California, Irvine School of Law