

CASE OF *MOUVEMENT RAËLIEN SUISSE* v. SWITZERLAND: A BLOW TO FREEDOM OF EXPRESSION IN THE INTERNET AGE

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Abstract: On March 7, 2001, the Raël Movement (the Movement), a Geneva-based non-profit organization that aims to establish contact and good relations with extraterrestrials, sought permission from Swiss authorities in the city of Neuchâtel to put up posters for its April campaign. The Swiss authorities' denial of the request was upheld in all four levels of Swiss appellate courts. The Movement appealed the case to the European Court of Human Rights (ECtHR) under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On July 13, 2012, The Grand Chamber of the ECtHR found that the Swiss authorities' ban of the Movement's poster campaign was justified. This Comment examines the Grand Chamber's reasoning and argues that the court's decision has dangerous implications for freedom of expression and Internet content jurisprudence.

INTRODUCTION

The Raélien Movement (the Movement) is a Geneva-based non-profit organization that aims to establish first contact and good relations with extraterrestrial beings.¹ Founded in 1976 by Claude Vorilhon, also known as “Raël,” the Movement's ideology emphasizes scientific and technological progress and eschews many of the contemporary ideals of society, including a democratic political system.² The Movement is based on Raël's alleged contact with an extraterrestrial race known as the “Elohim,” who are credited with the creation of life on Earth and various world religions.³ The Movement's unconventional beliefs have resulted in a nearly decade-long legal battle in both Swiss and European courts, which concluded on July 13, 2012, when the Grand Chamber of the European Court of Human Rights (ECtHR) upheld the Swiss government's ban of the Movement's 2001 poster campaign.⁴

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¹ *Mouvement Raélien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 373, ¶ 10.

² *See id.* ¶¶ 10–12.

³ *Id.* ¶ 11.

⁴ *See id.* ¶¶ 16, 76–77.

Among the numerous beliefs of the Movement, there are three views in particular that have attracted controversy in Switzerland.⁵ First, the Raélien Movement advocates for a political system referred to as a “geniocracy,” or the belief that only the most intelligent should be given the power to govern society.⁶ Second, the Movement has demonstrated support for human cloning and has advocated for the cloning-related services company Clonaid.⁷ Members of the Movement believe that cloning will allow the “transfer of conscience” from one body to another, thus allowing human beings to achieve immortality.⁸ Under Swiss law, human cloning is illegal pursuant to Article 119 of the Swiss Constitution.⁹ Lastly, and perhaps most importantly, the Movement has endorsed the doctrine of “sensual meditation,” a term coined by Raël in his book *Sensual Meditation*, in which people are urged to “discover his/her body and especially to learn how to use it to enjoy sounds, colors, smells, tastes, caresses, and particularly a sexuality felt with all one’s senses”¹⁰

On March 7, 2001, the Movement sought permission from the police administration of the city of Neuchâtel, Switzerland to put up posters for a campaign from April 2 to April 13, 2001.¹¹ On March 29, 2001, the Neuchâtel police denied the Movement’s request and referred to the two previous denials the police had issued the Movement, a 1995 French parliamentary report on sects, and a judgment of the Civil Court for the La Sarine district (Canton of Fribourg) that stated the Movement engaged in activities contrary to public order and morality as justification for the denial.¹² After a lengthy appeal process in Switzerland, in which each of the four national authorities above the police administration found that the denial of the freedom of expression was justified based on Neuchâtel regulations and the concern for public safety, the Movement appealed the case to the ECtHR under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).¹³ On January 13, 2011, the Chamber ruled that there was no violation of Article 10 of the Convention.¹⁴ On July 13, 2012, the Grand Chamber of the ECtHR agreed with the Chamber and found that the national authorities “were reasonably entitled to consider, having regard to all the cir-

⁵ See *id.* ¶¶ 15–17.

⁶ *Id.* ¶ 12.

⁷ See *id.* ¶¶ 11, 17.

⁸ *Id.* ¶ 11.

⁹ CONSTITUTION FÉDÉRALE [CST][CONSTITUTION] Apr. 18, 1999, RO 101, art. 119 (Switz.).

¹⁰ *Mouvement Raélien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 13.

¹¹ *Id.* ¶ 14.

¹² *Id.* ¶ 15.

¹³ See *id.* ¶¶ 16–21, 28.

¹⁴ *Id.* ¶ 33. The ECtHR is comprised of two levels: a Chamber and a Grand Chamber. EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 5 (Feb. 2014), http://www.echr.coe.int/Documents/50Questions_ENG.pdf [<https://perma.cc/48YA-BQAN>]. After a Chamber decision, parties can appeal their case to the Grand Chamber. *Id.*

cumstances of the case, that it was indispensable to ban the campaign in question in order to protect health and morals, protect the rights of others[,] and to prevent crime.”¹⁵

Part I of this Comment provides background facts of *Mouvement Raëlien Suisse v. Switzerland* as well as the applicable Swiss and international laws. This part also delves into the intricate five-stage procedural history of the case in Switzerland as well as the two-stage process at the ECtHR. Part II explains the parties’ arguments and the Grand Chamber’s reasoning in the 9-8 judgment. Part III engages in a discussion on the dangerous precedent set by the Grand Chamber of the ECtHR’s decision and examines the impact the ruling may have on future cases involving freedom of expression and Internet content.

I. BACKGROUND

A. The Poster

On March 7, 2001, the Movement requested permission to conduct a poster campaign in Neuchâtel from the city police administration.¹⁶ The proposed poster measured ninety-seven centimeters by sixty-nine centimeters and was dark blue in color with large yellow characters located on the upper and lower parts of the poster.¹⁷ The large yellow characters on the upper part of the poster stated: “The Message from Extraterrestrials.”¹⁸ Below that, in the middle part of the poster, were images of extraterrestrials’ faces and a pyramid.¹⁹ An image of a flying saucer was depicted in the upper left corner of the poster, and an image of the Earth was situated in the lower left corner of the poster.²⁰ The lower part of the poster contained the Movement’s website and telephone number in France, both of which were similar in size to the large yellow characters in the upper part of the poster, only in a bolder type.²¹ The very bottom of the poster contained yet another quote: “Science at last replaces religion.”²² The police administration of Neuchâtel denied the Movement’s request for a poster campaign on March 29, 2001 on the basis that the Movement engaged in immoral activities that were contrary to Swiss public order.²³

¹⁵ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 72.

¹⁶ *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 373, ¶ 14.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Rónán Ó Fathaigh, *Banning Speech in the Public Space*, STRASBOURG OBSERVERS (Mar. 10, 2011), <http://strasbourgoobservers.com/2011/03/10/banning-speech-in-the-public-space/> [<https://perma.cc/TG45-B63J>]

²¹ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 14.

²² *Id.*

²³ *Id.* ¶ 15.

B. Procedural History in Switzerland and at the ECtHR

From 2001 to 2005, *Mouvement Raëlien Suisse v. Switzerland* trickled through four different national authorities in Switzerland, all of which upheld the police administration's initial ban in 2001 and found that the interference with the group's freedom of expression was warranted based on the group's radical views.²⁴

After the Neuchâtel police administration's ban, the Movement appealed the decision to the municipal council of the city of Neuchâtel, which in turn dismissed the appeal on December 19, 2001.²⁵ The municipal council explained that although the ban on the posters did indeed interfere with the group's freedom of expression, the denial was consistent with Article 19 of the Administrative Regulations for the City of Neuchâtel, which allow freedoms to be interfered with in proportion to the protection of the public interest.²⁶ The municipal council further noted that the Movement could not rely on the protection of religious freedom because it was regarded as a "dangerous sect."²⁷

On October 27, 2003, the Neuchâtel Land Management Directorate (the Directorate) upheld the municipal council's decision.²⁸ The Directorate noted that, although there was nothing offensive in the text of the poster itself, the Movement's views on human cloning, genocracy, and sensual meditation were prejudicial to Swiss morals and the rights of others in Swiss society.²⁹ Lastly, the Directorate emphasized that the Movement had other means by which to make their views known.³⁰

The Movement appealed the case once again to the Administrative Court for the Canton of Neuchâtel, which dismissed the appeal on April 22, 2005.³¹ Echoing the Directorate, the court explained that the Movement's posters had to be taken into consideration in conjunction with the message conveyed on its website and within its literature, and not solely by images or wording presented on the poster itself.³² The court concluded that human cloning, the Movement's support of Clonaid, and the group's beliefs in "sensual meditation" were contrary to Swiss societal order.³³

The final stage of the case's progress in Switzerland was the Raëlien Movement's public law appeal against the Administrative Court's judgment.³⁴

²⁴ See *id.* ¶¶ 15–21, 70–71.

²⁵ *Id.* ¶ 16.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* ¶ 17.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* ¶ 19.

³² *Id.*

³³ See *id.*

³⁴ *Id.* ¶ 20.

The Swiss Federal Court dismissed the appeal on September 20, 2005.³⁵ The court stated that according to Swiss case law on freedom of expression, “citizens do not have an unconditional right to extended use of public space, in particular when a means of advertising on the public highway involves activity of a certain scale and duration[.]”³⁶ The Federal Court concluded that the Movement’s advocacy of human cloning and support for Clonaid, as well as its belief in sexual meditation and genocracy, undermined the “maintaining of public order, safety and morality.”³⁷ The court noted, however, that the group’s views on genocracy were expressed as a utopian ideal and thus did not constitute as much of a threat to public order.³⁸ The Swiss Federal Court found that it was legitimate for authorities to look into the content of the group’s website and literature rather than just evaluate the poster’s content on its own.³⁹ Lastly, the court maintained that the Swiss authorities’ action respected the principle of proportionality under Swiss law.⁴⁰

Like the Swiss national authorities before it, the Chamber of the ECtHR found that the prohibition of the Raëlien Movement’s poster constituted an interference with the Movement’s freedom of expression; however, the interference was prescribed by Swiss law and was in pursuit of the legitimate aims of promoting societal order.⁴¹ In particular, the Chamber focused on the wide margin of appreciation afforded to states concerning the regulation of extended use of public space and the capability of the states in reasoning such matters.⁴² The Chamber also emphasized the limited scope of the ban imposed on the Movement.⁴³

The Grand Chamber of the ECtHR agreed with the Chamber’s reasoning.⁴⁴ The Grand Chamber likened the content to commercial speech rather

³⁵ *Id.* ¶ 21.

³⁶ *id.*, quoting Tribunale Federale [TF][Federal Supreme Court] Sept. 20, 2005, 1P.336/2005, ¶¶ 5.2–5.7 (Switz.).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* Under Article 36(3) of the Swiss Constitution, the principle of proportionality states that any restriction on a fundamental right must be proportionate to the aim pursued. CONSTITUTION FÉDÉRALE [CST] Apr. 18, 1999, RO 101, art. 36, para. 3 (Switz.). Here, the Swiss Federal Court found that the prohibition of the posters was proportionate because the Movement had other means by which to communicate its views. *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 21, quoting TF Sept. 20, 2005, 1P.336/2005, ¶¶ 5.7–5.7.4.

⁴¹ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 33.

⁴² *Id.* Margin of appreciation refers to a state’s authority to regulate or interfere with a person or a group’s fundamental rights. *Id.* Depending on the right at issue and the circumstances of the case, a state can have a wider or narrower margin of appreciation. *Id.* ¶ 61. For example, states have a narrow margin of appreciation for political speech under Article 10 of the Convention, but have a wider margin of appreciation for types of speech that are likely to offend others. *Id.* ¶ 61.

⁴³ *Id.* ¶ 33.

⁴⁴ *Id.* ¶¶ 76–77.

than political speech, thus guaranteeing that the state has a broad margin of appreciation in the regulation of the poster.⁴⁵ Furthermore, the Grand Chamber deferred to the judgment of the Swiss national authorities, stating that “[t]he Court cannot interfere with the choices of the national and local authorities, which are closer to the realities of their country[.]”⁴⁶ The Grand Chamber concluded that the Swiss authorities’ reasons for banning the posters were “relevant and sufficient” and met a “pressing social need.”⁴⁷

II. DISCUSSION

A. Applicable Domestic and International Law

Switzerland has adopted extensive regulation on gene technology.⁴⁸ Furthermore, Switzerland allows its municipalities to govern themselves in matters of public advertisement or billboards.⁴⁹ Neuchâtel and other Swiss municipalities entrust the management of posters in public areas to private companies.⁵⁰

Although three international conventions apply to the case,⁵¹ Article 10 of the Convention is the most relevant to the case at hand and provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions[,] or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity[,] or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of infor-

⁴⁵ *Id.* ¶¶ 61–62.

⁴⁶ *Id.* ¶ 64.

⁴⁷ *Id.* ¶ 76.

⁴⁸ *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 373, ¶ 23 (2012); see CONSTITUTION FÉDÉRALE [CST] Apr. 18, 1999, RO 101, art. 119 (Switz.). Article 119 of the Swiss Federal Constitution regulates the field of reproductive medicine and gene technology and expressly prohibits “all forms of cloning and interference with the genetic material of human reproductive cells and embryos.” CONSTITUTION FÉDÉRALE [CST] Apr. 18, 1999, RO 101, art. 119(1)(a) (Switz.); *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 23.

⁴⁹ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 25.

⁵⁰ *Id.*

⁵¹ *Id.* ¶¶ 26–28. The three international conventions that apply are the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the Additional Protocol to the Oviedo Convention, and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.*

mation received in confidence, or for maintaining the authority and impartiality of the judiciary.⁵²

B. The Parties' Arguments

The Movement based its claim on the Swiss authorities' alleged violation of Article 10 of the Convention.⁵³ Its argument was twofold.⁵⁴ First, the Movement attacked the Chamber's decision to allow Switzerland a wide margin of appreciation in regulating the use of public space.⁵⁵ The Movement contended that allowing such a wide margin of appreciation could lead a state to permanently deny minority groups from expressing their ideas in public for fear that the state would become associated with such ideas.⁵⁶ Second, the Movement argued that the poster ban was due to the existence of a link to the Movement's website on the poster as it was agreed by the parties that the poster contained nothing illegal or offensive.⁵⁷ The Movement claimed that the Chamber's conclusion that there were other fora in which the group could express their views, such as on the Internet, was undermined when it was prohibited from putting up its posters because of the existence of the link.⁵⁸ Thus, the group argued, this essentially created a situation in which the group could not easily promulgate its ideas.⁵⁹

The Swiss government, in turn, agreed with the Chamber's decision, asserting that individuals did not have an unconditional right to the use of public space, particularly for advertising purposes.⁶⁰ The government noted that the poster in question was not of a political nature, but rather more in line with an advertisement, especially considering the presence of the link on the poster.⁶¹ Furthermore, the government stated that the Movement's ideas postulated on its website were capable of offending portions of the population.⁶² As a result, the state is afforded a wide margin of appreciation concerning the governance of such matters.⁶³ Lastly, the government relied on the idea that the Movement had other means by which to disseminate its ideas, namely though the Internet, and that the scope of the prohibition was limited because only the posters were

⁵² European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Sept. 3, 1953, 213 U.N.T.S. 221.

⁵³ *Id.*; see *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 38.

⁵⁴ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶¶ 34–35.

⁵⁵ *Id.* ¶ 34.

⁵⁶ *Id.*

⁵⁷ *Id.* ¶ 35.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ *Id.* ¶¶ 39–40.

⁶¹ See *id.* ¶ 40.

⁶² *Id.* ¶ 41.

⁶³ *Id.*

banned and the organization was still allowed to disseminate its ideas, albeit through other means.⁶⁴

C. The Grand Chamber's Findings

The Grand Chamber of the ECtHR found the Swiss government's argument compelling and upheld the Chamber's decision, finding no violation of Article 10 of the Convention.⁶⁵ In its discussion, the court focused on whether the impugned measure taken—the banning of the poster—was necessary in a democratic society.⁶⁶ In particular, the court found persuasive the government's arguments that the ban was limited and that individuals do not have an unconditional right to use public space.⁶⁷ The court discussed at length the margin of appreciation allowed to states in assessing the need for interference in freedom of expression cases.⁶⁸ The Grand Chamber explained that the margin of appreciation depends on the type of speech at issue; here, it reasoned, a wider margin of appreciation was allowed because the speech at issue involved matters “liable to offend intimate personal convictions within the sphere of morals, or especially, religion.”⁶⁹ The court also noted that states have a wider margin of appreciation in matters concerning commercial advertisement, and the court found the poster more akin to commercial advertisement than to political speech.⁷⁰ As a result, the court concluded that Switzerland had a wide margin of appreciation in regulating the use of public space.⁷¹

Moreover, the court found that the interference of the government was “proportionate to the legitimate aims pursued” and satisfied a “pressing social need.”⁷² The court reasoned that it would be illogical to look only at the poster itself and that examining the content of the website in conjunction with the poster was necessary to determine whether the ban constituted a pressing social need.⁷³ The Grand Chamber found that the views and opinions expressed on the Movement's website were, together, enough to justify the ban “in order to protect health and morals, protect the rights of others and to prevent crime.”⁷⁴ Finally, the court concluded that the ban was limited in scope, as the Movement had various ways to disseminate their beliefs.⁷⁵

⁶⁴ *Id.* ¶ 45.

⁶⁵ *See id.* ¶ 77.

⁶⁶ *Id.* ¶ 56.

⁶⁷ *Id.* ¶ 58.

⁶⁸ *Id.* ¶¶ 59–60.

⁶⁹ *Id.* ¶ 61.

⁷⁰ *Id.* ¶ 62.

⁷¹ *Id.*

⁷² *Id.* ¶¶ 67, 76.

⁷³ *See id.* ¶ 69.

⁷⁴ *Id.* ¶¶ 71–72.

⁷⁵ *Id.* ¶ 73.

D. The Dissents

There are three dissents to the majority opinion.⁷⁶ The Joint Dissenting Opinion of Judges Tulkens *et al.* found the reasons for the ban lacking because there were no indications of clear and imminent danger.⁷⁷ Furthermore, the Judges called the scope of the ban paradoxical as it banned the poster based on the content of the website, but did not ban the website.⁷⁸ The Joint Dissenting Opinion of Judges Sajó *et al.* reasoned that the poster was not a commercial advertisement.⁷⁹ Furthermore, they found the government's suggestion that allowing a poster campaign effectively endorses the views of the organization "contrary to the function and nature of the public forum" and government neutrality.⁸⁰ Finally, the Dissenting Opinion of Judge Pinto de Albuquerque argued that the state had negative obligations to the Movement, pursuant to Article 10 of the Convention, and thus should have had a narrower margin of appreciation.⁸¹ Additionally, Judge Pinto de Albuquerque emphasized that the state has "a narrow margin of appreciation with regard to information disseminated through [the Internet]" and echoed the Joint Dissenting Opinion of Judges Sajó *et al.* by pointing out the contradiction in banning the poster for the reasons put forth, but tolerating the existence of the group itself.⁸²

III. ANALYSIS

The split 9-8 decision of the Grand Chamber of the ECtHR and the three accompanying dissents illustrate the inherent tension in European freedom of expression cases.⁸³ Although European courts are eager to preserve the right to free speech in democratic societies, those same courts are wary of exposing the public to controversial and potentially dangerous viewpoints.⁸⁴ The Grand Chamber of the ECtHR seems attuned to protecting public morality and the "rights of others," namely those people within the majority who do not hold

⁷⁶ See *infra* notes 77–82 and accompanying text.

⁷⁷ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 411–12 (Tulkens, J. et al., dissenting).

⁷⁸ *Id.* at 412–13.

⁷⁹ *Id.* at 415 (Sajó, J. et al., dissenting).

⁸⁰ *Id.* at 417, 423.

⁸¹ *Id.* at 433–34 (Pinto de Albuquerque, J., dissenting).

⁸² *Id.* at 436, 444.

⁸³ See Press Unit, European Court of Human Rights [ECtHR], *Factsheet: Hate Speech* at 1 (Mar. 2016), http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf [<https://perma.cc/DEM4-2RR8>], quoting *Erbakan v. Turkey*, App. No. 59405/00, Eur. Ct. H.R., ¶ 56, (2006) ("[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance . . .").

⁸⁴ See *id.*

the controversial views at issue.⁸⁵ This dichotomy presents a serious problem for European courts in approaching cases involving freedom of expression and Internet content.⁸⁶ The Grand Chamber's reasoning for allowing controversial views to be disseminated in public falls on narrow yet highly malleable criteria, such as the margin of appreciation, and results in far-reaching and potentially restrictive guidelines for the way in which beliefs or ideas can be circulated throughout modern society.⁸⁷

A. Commercial or Political Speech?

The essence of the Grand Chamber's decision fell on the category of speech of the poster.⁸⁸ The court incorrectly likened the poster to commercial speech rather than political speech because "it can be reasonably argued that the poster campaign in question sought mainly to draw the attention of the public to the ideas and activities of a group[.]"⁸⁹ The court further stated that the poster sought only to bring attention to the Movement's website and that the website's "main aim" was to attract people to the Movement's cause and not to engage in political debate within Switzerland.⁹⁰ As a result, the court concluded that the speech in question was not political speech because the speech had "a certain proselytising [sic] function" that is associated more with commercial speech than political speech.⁹¹

This line of reasoning rings hollow for a variety of reasons.⁹² First, as the court admits, the Movement was not trying to sell goods or products, but was rather trying to sell *an idea or set of beliefs* to the Swiss public.⁹³ Commercial speech refers to speech regarding economic matters with an underlying intent to make profit at the center of such speech.⁹⁴ Here, there is no intent to profit,

⁸⁵ See *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 373, ¶¶ 54–55 (2012).

⁸⁶ See *id.*; Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and Inter-American Court of Human Rights*, 11 NW. J. INT'L HUM. RTS. 28, 54–55 (2012); see also Press Unit, ECtHR, *supra* note 83, at 1. Contreras states that "[t]he major problem of the [margin of appreciation] doctrine is, at the same time, its most praised advantage: its flexibility and malleability in adjusting different States' particularities with supranational human rights standards." Contreras, *supra*, at 55. Contreras emphasizes that the margin of appreciation analysis is "based on the particularities of each case" and the application of the principle "shapes the extension of the European Convention rights, especially in freedom of expression and freedom of religion issues." *Id.* at 54–55.

⁸⁷ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶¶ 54–55; Contreras, *supra* note 86, at 54–55.

⁸⁸ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶¶ 61–62.

⁸⁹ See *id.* ¶ 62.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *id.* at 438 (Pinto de Albuquerque, J., dissenting).

⁹³ See *id.*; *id.* ¶ 62 (majority opinion).

⁹⁴ See *id.* at 437 (Pinto de Albuquerque, J., dissenting); MONICA MACOVEI, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON

at least based on the Movement's poster campaign.⁹⁵ Indeed, the court conceded that the poster campaign sought to bring attention to the "ideas and activities of a group . . . referring for this purpose to a website address" rather than seeking any monetary gain.⁹⁶

Second, though there is a proselytizing function involved in the Movement's poster campaign, it would be grossly incorrect to claim that political speech has little or less of a proselytizing function than commercial speech.⁹⁷ Although the ultimate aim of commercial speech is to get potential customers to buy a product or good to make a profit, the ultimate aim of political speech is arguably to try to get members of the public to *buy into* the ideas or beliefs being promulgated by a particular group.⁹⁸

Lastly, the court's conclusion that the speech was not political because the main aim of the Movement's website was to draw people to the cause rather than to engage in political debate disregards the ultimate purpose and nature of politics.⁹⁹ The Movement's views, as far-fetched or controversial as they might seem, were in fact political because the Movement ultimately desires to attract members of the public to its cause and gain support.¹⁰⁰ The Movement seeks to gain leverage within society and aims to at least have some effect on political life within Switzerland.¹⁰¹ Furthermore, the Movement's views on genocracy

HUMAN RIGHTS 9 (2d ed. 2004), [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02\(2004\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02(2004).pdf) [<https://perma.cc/26A2-H35S>] ("Freedom to impart information and ideas on economic matters (known as *commercial speech*) is also guaranteed under Article 10.").

⁹⁵ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 437 (Pinto de Albuquerque, J., dissenting); *see id.* ¶ 62 (majority opinion).

⁹⁶ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 62; *see id.* at 437 (Pinto de Albuquerque, J., dissenting).

⁹⁷ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 62 (majority opinion); *id.* at 438 (Pinto de Albuquerque, J., dissenting); *see also* Annabelle Torres Colberg, *Trademarks and Political Speech*, 3(2) U.P.R. BUS. L.J. 296, 301 (2012) ("Marketing strategies apply to both political and commercial speech due to the fact that their goal is to generate a commercial transaction[:] one, by the profit that his or her ideas generate by prevailing in the election, and the other, by experiencing an increase in sales."); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 596 (1991) (noting the U.S. Supreme Court's reasoning in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), that "indeed, persuasion is the purpose of political speech").

⁹⁸ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 62 (majority opinion); *id.* at 438 (Pinto de Albuquerque, J., dissenting); *see also* MACOVEI, *supra* note 94, at 9; Colberg, *supra* note 97, at 301; Fisch, *supra* note 97, at 596.

⁹⁹ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 62 (majority opinion); *id.* at 438 (Pinto de Albuquerque, J., dissenting); *see also* MACOVEI, *supra* note 94, at 9; Colberg, *supra* note 97, at 301; Fisch, *supra* note 97, at 596.

¹⁰⁰ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 437–38 (Pinto de Albuquerque, J., dissenting).

¹⁰¹ *See id.* Judge Pinto de Albuquerque notes that "the speech in issue also takes on a clear political connotation, which is reinforced by a general criticism of the present-day model of social, political[,] and economic structures of Western societies." *Id.* at 437. Here, the term "political life" is used

and human cloning, in particular, have a direct correlation to Swiss political life as they express the Movement's ideal vision of society.¹⁰²

The court's conclusion illustrates its very narrow view of the term "politics."¹⁰³ When the court implicitly refers to this standard category of political debate, those views or opinions that fall outside this category are relegated from joining the majority views and forced to remain at the margins of society, effectively blocking minority views from being aired.¹⁰⁴ The court's line of reasoning about the speech type in question lacked the intense scrutiny arguably required for cases dealing with such important rights as freedom of expression in a democratic society.¹⁰⁵

B. Poster as a Conduit to Inflammatory Material Online

Despite the ban of the Movement's poster, there was no move made by Swiss officials to block the offensive material on the Movement's website.¹⁰⁶ This decision to ban an inoffensive poster but allow the offensive content on a website exposed an inherent contradiction in the Grand Chamber's reasoning.¹⁰⁷ If indeed the Movement's views were dangerous enough to meet the "pressing social need" requirement of Article 10 of the Convention, it would make more sense to ban the website and its correspondingly dangerous content

to mean the "present-day model of social, political and economic structures" of Switzerland. *See id.* at 437–38.

¹⁰² *See id.* at 437–38.

¹⁰³ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 62 (majority opinion); *id.* at 446–47 (Pinto de Albuquerque, J., dissenting); Information Note on Court's Case Law No. 98, *Iparralde* Regional Organisation v. France, App. No. 71251/01, Eur. Ct. H.R. (2007), <http://hudoc.echr.coe.int/eng?i=002-2677> [<https://perma.cc/Z3AN-BC8S>]. *Iparralde* stems from a combined Article 11 (freedom of association) and 10 claim based on the Convention from the French branch of the Spanish Basque Nationalist Party. Information Note, *Iparralde*, *supra*. Though the case was mostly evaluated in regards to Article 11 of the Convention, the court found the prohibition of the party acceptable because allowing foreign funding of political parties within France would "be detrimental to the expression of national sovereignty; the aim pursued thus related, in their view, to the protection of the 'institutional order.'" *Id.* The court's acceptance of France's argument illustrates its narrow view of politics; politics within France encompasses only those associations that prescribed to the expression of national sovereignty and "institutional order." *See id.* Thus, those groups that do not fit within that narrow sphere are relegated to the sidelines. *See id.*

¹⁰⁴ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 62 (majority opinion); *id.* at 446–47 (Pinto de Albuquerque, J., dissenting); Information Note, *Iparralde*, *supra* note 103.

¹⁰⁵ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 62 (majority opinion); *id.* at 410 (Tulkens, J. et al., dissenting) ("The right to freedom of expression under Article 10 is an essential provision because it underpins the democracy that lies at the heart of the Convention. Any restriction of that freedom must be strictly justified by a pressing social need and narrowly circumscribed by relevant and sufficient reasons."); Information Note, *Iparralde*, *supra* note 103.

¹⁰⁶ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 444 (Pinto de Albuquerque, J., dissenting).

¹⁰⁷ *See id.*

rather than an innocuous poster.¹⁰⁸ Judge Pinto de Albuquerque's dissent notes this logical contradiction, explaining that if the website is lawful, "the poster which simply refers to it is necessarily lawful."¹⁰⁹

Indeed, it seems that the Swiss government's banning of the poster was simply a conduit through which the government could regulate what it perceived as the dissemination of dangerous views.¹¹⁰ The poster essentially functioned as an intermediary to get to the offensive content of the website.¹¹¹ To actually access and learn about the Movement's belief system, one would have to go to the Movement's website, download Raël's treatises, and parse through the content himself.¹¹² The court entirely skipped over this process, and any independent action taken by the individual to access the Movement's controversial material was effectively ignored.¹¹³ As a result, the poster came to represent the allegedly controversial views of the Movement without actually explicitly stating those views.¹¹⁴

C. Practical Implications

Perhaps the most startling aspect of this case is the precedent it sets for the extension of state power in regulating what the state deems as potentially controversial material.¹¹⁵ By allowing Switzerland to ban the Movement's

¹⁰⁸ See European Convention on Human Rights, *supra* note 52, art. 10; *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 76; *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 444 (Pinto de Albuquerque, J., dissenting).

¹⁰⁹ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 444 (Pinto de Albuquerque, J., dissenting).

¹¹⁰ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 411–12 (Tulkens, J. et al., dissenting); *id.* at 445–46 (Pinto de Albuquerque, J., dissenting).

¹¹¹ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 445–46 (Pinto de Albuquerque, J., dissenting).

¹¹² See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 19 (majority opinion).

¹¹³ See *id.* ¶¶ 69, 72.

¹¹⁴ See *id.*

¹¹⁵ See *id.* ¶¶ 76–77; *id.* at 445–46 (Pinto de Albuquerque, J., dissenting); ECtHR, High Level Conference on the Future of the European Court of Human Rights, Apr. 19–20, 2012: Brighton Declaration, art. B, para. 11 (2012), http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf [<https://perma.cc/K4VG-3RZ7>] [hereinafter Brighton Declaration]; Gabrielle Guillemin, *Case Law, Strasbourg: Mouvement Raelien Suisse v. Switzerland, Of Aliens and Flying Saucers*, STRASBOURG OBSERVERS (July 31, 2012), <http://strasbourgobservers.com/2012/07/31/case-law-strasbourg-mouvement-raelien-suisse-v-switzerland-of-aliens-and-flying-saucers/> [<https://perma.cc/L3MG-7945>]. Guillemin explains that the court's approach may have been impacted by the Brighton Declaration, in which the ECtHR was "encouraged to give 'great prominence' to the principles of subsidiarity and the margin of appreciation." Guillemin, *supra*; see Brighton Declaration, *supra*. Indeed, the Brighton Declaration states:

[T]he Convention system is subsidiary to the safeguarding of human rights at [the] national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. . . . In this respect, the role of the

poster from being displayed in public, the Grand Chamber of the ECtHR effectively lengthened the reach of the states by allowing them to jump, unhindered and without any set rules or guidelines, from one medium of communication to another to enforce the ban.¹¹⁶ Although the court's reasoning for allowing this is sound on its face, upon considering future implications, this concession to the states is patently dangerous.¹¹⁷ The Internet is widely used to disseminate and promulgate different ideas in modern society, and many print-ad campaigns by companies, groups, or even the government reference or contain links to the groups' webpages.¹¹⁸ This decision can potentially cause an activist state to go looking for offensive material—in any form, through any link—to prevent the dissemination of what it considers dangerous ideas throughout society.¹¹⁹

This hypothetical, which went unconsidered by the majority, presents two major problems.¹²⁰ First, the Grand Chamber of the ECtHR made no comment on just how far a state could go in terms of following website links to find of-

[c]ourt is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Brighton Declaration, *supra*. Thus, the court is essentially deferring to member states' decisions and is arguably reinforcing states' views rather than acting as an independent arbiter of the Convention. *See id.*; Guillemin, *supra*.

¹¹⁶ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 435–36 (Pinto de Albuquerque, J., dissenting); Brighton Declaration, *supra* note 115; Guillemin, *supra* note 115.

¹¹⁷ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 435–36, 444–45 (Pinto de Albuquerque, J., dissenting); Brighton Declaration, *supra* note 115; Guillemin, *supra* note 115; *see also* Press Release, Amnesty International, Brighton Declaration: States Must Be Serious about European Court's Judgments Instead of Tampering with Its Independence (Apr. 24, 2012), <http://www.amnestyusa.org/news/press-releases/brighton-declaration-states-must-be-serious-about-european-court-s-judgments-instead-of-tampering-wi> [<https://perma.cc/8NEB-6H9K>] (“[T]he Brighton Declaration worryingly shows member states telling the [ECtHR] how it should interpret the Convention. . . . In particular, the Brighton Declaration . . . puts pressure on the [c]ourt to give [the States] prominence when it applies the Convention.”).

¹¹⁸ *See* RESEARCH DIVISION, COUNCIL OF EUR., INTERNET: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 12–13, 14 (2015), http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf [<https://perma.cc/XF5C-L4T9>] [hereinafter INTERNET: CASE-LAW]; *see also* Graham Charlton, *How Can Marketers Use TV Ads to Drive People Online?*, ECONSULTANCY (July 4, 2011), <https://econsultancy.com/blog/7731-how-can-marketers-use-offline-ads-to-drive-people-online/> [<https://perma.cc/5E4S-PKML>] (“A recent survey by Nominet found that 65% of all UK print and television advertising now includes a web address.”); Mickey Galin, *From Print to Web: The Magazine Ads That Best Drove Readers to Websites*, ADVERTISINGAGE (Nov. 21, 2013), <http://adage.com/article/media/magazine-ads-drove-readers-websites/245330/> [<https://perma.cc/FMN9-2N5Q>] (“The latest data . . . show that ads for a wide range of product categories, from cosmetics to cruises, were effective in prompting consumers to visit websites.”).

¹¹⁹ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69; Brighton Declaration, *supra* note 115; Guillemin, *supra* note 115; *see also* Press Release, Amnesty International, *supra* note 117.

¹²⁰ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69; *id.* at 435–36 (Pinto de Albuquerque, J., dissenting); Brighton Declaration, *supra* note 115; Guillemin, *supra* note 115; *see also* Press Release, Amnesty International, *supra* note 117.

fensive material.¹²¹ Based on this case, three or four links may be sufficient to deem published material offensive.¹²² This is an expansive broadening of state power.¹²³ The failure of the court to recognize the implications of this ruling, or to establish any set guidelines in allowing the state to follow website links from print campaigns, represents a stark danger to the way in which modern society advertises products and promulgates views.¹²⁴

Second, this ruling suggests that a group with a print-poster campaign referencing its website must carefully parse through the content of any links it shares on its website for fear of potentially offensive material being presented in one of those links.¹²⁵ Thus, the Grand Chamber's decision greatly expands the liability of the original group or individual.¹²⁶ This places an onerous burden on the original group desiring to make its views known to the public, particularly if the group is a minority group with limited funds.¹²⁷ As a result, this decision could prevent groups or individuals from expressing their opinions in public in the first place, particularly those individuals or groups who hold non-majority opinions.¹²⁸

These problems may fundamentally change the way in which information is shared on the Internet as access to information becomes that much less readily available.¹²⁹ The broadening of state power, coupled with greater liability on the part of the individual eager to express his or her views may very well lead to a dampening of civil discourse in society.¹³⁰ This in turn could promote reluctance within society to promulgate minority views, which would subsequently make those minority views less readily available and accessible to the

¹²¹ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶¶ 67–69 (majority opinion).

¹²² See *id.*; Brighton Declaration, *supra* note 115; Guillemin, *supra* note 115; see also Press Release, Amnesty International, *supra* note 117.

¹²³ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69; *id.* at 435–36 (Pinto de Albuquerque, J., dissenting); Brighton Declaration, *supra* note 115; Guillemin, *supra* note 115; see also Press Release, Amnesty International, *supra* note 117.

¹²⁴ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 435–36 (Pinto de Albuquerque, J., dissenting); Brighton Declaration, *supra* note 115; Guillemin, *supra* note 115; see also Press Release, Amnesty International, *supra* note 117.

¹²⁵ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 435–36 (Pinto de Albuquerque, J., dissenting).

¹²⁶ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 435–36 (Pinto de Albuquerque, J., dissenting).

¹²⁷ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 444–45 (Pinto de Albuquerque, J., dissenting).

¹²⁸ *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 446–47 (Pinto de Albuquerque, J., dissenting); see *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69.

¹²⁹ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 446–47 (Pinto de Albuquerque, J., dissenting); INTERNET: CASE-LAW, *supra* note 118, at 12–13, 14.

¹³⁰ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 446–47 (Pinto de Albuquerque, J., dissenting); Guillemin, *supra* note 115.

public, in both print and online forms of media.¹³¹ Thus, this decision effectively reinforces majoritarian views at the expense of minority views.¹³²

CONCLUSION

The ECtHR's decision in *Mouvement Raëlien Suisse v. Switzerland* to uphold the Movement's poster ban sets a dangerous precedent and is a blow to the freedom of expression in both print and online media. Allowing member states to hop from one medium to another without any set test for finding potentially offensive material for the protection of public morality or the rights of others grants states too much power in an age where much of the material disseminated is linked in some way or another, either through print media or the Internet. This medium jumping should not be permitted without a rigorous set of guidelines imposed by the ECtHR that dampen the ability of the states to move with ease from one medium to another to find offensive material. Though this may not be an easy task, it is a necessary one to maintain both the accessibility of ideas and beliefs on the Internet and to curb state power in regulating a minority group's right to freedom of expression.

¹³¹ See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 446-47 (Pinto de Albuquerque, J., dissenting).

¹³² See *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. 373, ¶ 69 (majority opinion); *id.* at 446-47 (Pinto de Albuquerque, J., dissenting).