

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 – 1789
www.rutherford.org

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Commonwealth of Virginia General Assembly
House of Delegates
Courts of Justice Committee

VIA ELECTRONIC MAIL

Re: House Bill No. 1601 / Violation of Constitutional Rights

Dear Members of the Courts of Justice Committee:

As a civil liberties organization committed to protecting and ensuring a robust First Amendment, The Rutherford Institute¹ is greatly concerned about the danger posed by House Bill No. 1601, which purports to blacklist groups espousing unpopular ideas, thereby endangering and undermining legitimate First Amendment activities by organizations of all stripes across the entire social and political spectrum.

At stake here is the fundamental freedom to associate protected by the First Amendment.

House Bill No. 1601, which was introduced in the Virginia General Assembly and assigned to the Courts of Justice Committee, proposes to broadly and vaguely define “domestic terrorist organizations” as a new class of associations that would be subject to numerous burdens and sanctions.

The First Amendment right of association protects “the practice of persons sharing common views banding together to achieve a common end,” a right that is deeply embedded in the American political process and is vital “in guaranteeing the right of people to make their voices heard on public issues[.]”² Laws that threaten the right of association require “precision of regulation” so that the freedom to speak out on matters of public concern is not chilled.³

For the reasons set forth below, House Bill No. 1601 fails this test.

¹ The Rutherford Institute is a national non-profit civil liberties organization that educates the public on civil rights issues and provides assistance to those whose fundamental liberties have been threatened or infringed.

² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982).

³ *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Given the breadth of the definition of “acts of domestic terrorism,” almost any political organization risks being designated a “domestic terrorist organization”

The basic purpose of House Bill No. 1601 is to label certain organizations “domestic terrorist organizations.” Inclusion as such an organization is based on the commission of “acts of domestic terrorism” by the organization or its members. Once designated a “domestic terrorist organization” by the Superintendent of the Department of State Police, a group or association is prevented from obtaining “material support or resources.”

Almost any political organization would be in jeopardy of being designated a “domestic terrorist organization” given the breadth of the definition of “acts of domestic terrorism.” A long list of offenses are deemed “acts of terrorism,” including petty offenses such as misdemeanor assault,⁴ trespass,⁵ and damaging property on the land of another.⁶

The proposed law goes on to make such trivial offenses acts of terrorism if done “for the purpose of restraining that person from exercising his rights under the Constitution or law of this Commonwealth or of the United States.” Thus, the destruction of a political sign on the front yard of a home or throwing a plastic bottle at a protester one disagrees with could be considered “acts of domestic terrorism” under the proposed law since the acts could be construed as hindering another from exercising their First Amendment right.

House Bill No. 1601 would classify organizations as terrorist organizations based merely on minimal associations with individuals engaged in acts of so-called domestic terrorism

This overbreadth problem is compounded by the provision of House Bill No. 1601 which makes an organization or association a terrorist organization if its “members *individually* . . . have engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more acts of domestic terrorism[.]”

Under this provision, an organization or association can be designated a terrorist organization not simply for offenses it collectively plans or participates in, but for acts committed by a member *individually*, regardless of whether the organization participated in or condoned the offense.

⁴ Va. Code § 18.2-57.

⁵ Va. Code § 18.2-119.

⁶ Va. Code § 18.2-121.

The Supreme Court has made clear that “[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected.”⁷

House Bill No. 1601, if it becomes law, would violate this principle by allowing organizations to be deemed terrorist organizations on the basis of the independent acts of persons with mere informal connections to the organization.

House Bill No. 1601 allows organizations to be classified as “domestic terrorists” based on secret proceedings and without any assurance of due process or opportunity to challenge such a finding

The manner in which organizations are placed on the “domestic terrorist organization” list under this proposed law also raise grave concerns. House Bill No. 1601 delegates this responsibility to the Superintendent of the Department of State Police, but other than requiring that the Superintendent “create an administrative record,” there are no procedures set forth in the proposed law ensuring fairness and transparency in this process.

Indeed, while the designation is premised on the commission of so-called crimes considered acts of terrorism, nothing in the proposed law requires the Superintendent to find beyond a reasonable doubt that the organization or its members committed the crimes.

Thus, an organization may be designated a “domestic terrorist organization” after secret proceedings and without any opportunity to be heard or respond to the evidence on which the designation is based. Because the sanctions resulting from being designated a “domestic terrorist organization” under House Bill No. 1601 clearly impact upon the liberty and constitutional rights of an organization so designated, organizations must be afforded due process before that designation is imposed.

Whenever the government proposes to take action that will deprive a person of liberty or property, it must first afford the person due process by providing notice of the proposed action and an opportunity to be heard.⁸

Nothing in the proposed law provides organizations and their members these fundamental protections. The fact that organizations are allowed to appeal their designation as a “domestic terrorist organization” does not cure this constitutional defect.

⁷ *Claiborne Hardware Co.*, 458 U.S. at 908.

⁸ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972).

The process for mounting an appeal of a “domestic terrorist” designation is overly burdensome and skewed

The sanctions resulting from the designation would deprive organizations of their First Amendment rights, the loss of which for even a short amount of time constitute irreparable harm.⁹

Furthermore, the proposed law makes invocation of the right to appeal burdensome by requiring organizations or affected individuals to file an appeal only in the City of Richmond and not in their local circuit court.

Even if an appeal is filed, the proposed law sets standards of review that are highly deferential to the Superintendent’s decision by requiring an aggrieved party show the designation is “arbitrary, capricious” or “lacking substantial support in the administrative record[.]”¹⁰

House Bill No. 1601 provisions clearly violate the First Amendment by imposing undue burdens upon the rights of persons to associate for political purposes

Once an association or organization is designated a “domestic terrorist organization,” the provisions of House Bill No. 1601 would essentially prohibit any activities by the organization, even legitimate and constitutionally-protected political activities. This would result from the bill’s provision making anyone who “knowingly provides material support or resources to a domestic terrorist organization” guilty of a Class 5 felony.

“Material support or resources” as defined by the proposed law includes virtually any goods or service: “property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial service, lodging, training,” and “communications equipment,” among other things.

The ban on designated organizations obtaining “material support” is so broad that it would shut down these organizations even with respect to their legitimate and constitutionally-protected activities. Significantly, the proposed law’s ban on provision of “material support” is *not* limited to providing support for illegal or terrorist acts; under the terms of House Bill No. 1601, once an organization is designated a “domestic terrorist organization,” it becomes a crime to provide it material support under *any* circumstance.

⁹ *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

¹⁰ *Johnston-Willis Ltd. v. Kenley*, 6 Va. App. 231, 242 (1988) (where the issue is whether there is substantial evidence to support an administrative agency decision, great deference is to be accorded the agency decision).

Thus, an organization could not ask a printer to produce leaflets or flyers with political statements because the printer would be providing the organization a “service.” Organization members would be hampered in traveling to places where rallies or demonstrations are occurring because local hotels would be barred from providing those persons with “lodging.” Indeed, the organization could not maintain a banking account or obtain cell phone services under the proposed ban on the provision of “material support.”

These provisions clearly violate the First Amendment by imposing undue burdens upon the rights of persons to associate for political purposes.

While the Commonwealth certainly can prohibit conspiracies to commit violence and other criminal acts and restrict the ability of others to knowingly provide support for such unlawful acts, it cannot prevent organizations from engaging in constitutionally protected activities or common activities of commerce.

Indeed, to do so on the basis of the unlawful acts of individuals associated with, but not acting for, the organization is an egregious affront to the United States Constitution.

House Bill No. 1601 impermissibly burdens the right of political association protected by the First Amendment

The Commonwealth is not powerless to protect itself from organized violence. However, it should not threaten the fundamental right of citizens to band together to make their voices heard on public issues in order to do so.

House Bill No. 1601 presents such a threat by proposing to blacklist organizations on the basis of conduct that the organization may not have authorized or ratified and before it has the opportunity to show that it is not a “domestic terrorist organization.” This impermissibly burdens the right of political association protected by the First Amendment.¹¹

Indeed, under this law, organizations associated with civil rights leader Martin Luther King Jr.—who was viewed in his day as a domestic terrorist for his acts of civil disobedience—would also be labeled as domestic terrorists and blacklisted.

This is about as McCarthyist and un-American as it gets.

¹¹ *Claiborne Hardware Co.*, 458 U.S. at 931.

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We urge the Committee to carefully consider the damage this bill will inflict on rights of the citizens of the Commonwealth and act to prevent any further erosion of the First Amendment by rejecting House Bill No. 1601.

As former Supreme Court Justice William O. Douglas rightly observed, “[T]he safety of our civilization lies in making freedom of thought and freedom of speech vital, vivid features of our life... Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.”

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead
President

cc: The Honorable Ralph S. Northam
Governor of the Commonwealth of Virginia

The Honorable Mark Herring
Attorney General of the Commonwealth of Virginia