



American Civil Liberties Union of the National Capital Area

1400 20th Street N.W., Suite 119 Washington, DC 20036-5920 202-457-0800

www.aclu-nca.org

November 22, 2010

Hon. Vincent C. Gray
Chairman
Council of the District of Columbia
350 Pennsylvania Avenue, N.W. Suite 504
Washington, DC 20004

Re: Bill 18-63, the “Residential Tranquility Amendment Act of 2010”

Dear Chairman Gray:

The American Civil Liberties Union of the Nation’s Capital urges the Council to **defeat** Bill 18-63, the “Residential Tranquility Amendment Act of 2010.” This legislation would restrict freedom of speech by creating an unnecessary new crime when all that is really needed is the enforcement of existing laws.

Background

Bill 18-63 was introduced in response to complaints by a few residents that they have been made to feel threatened by the activities of “animal rights” protesters outside their homes. According to these residents, small groups of demonstrators sometimes appear in the evening on the sidewalks near their homes, often wearing masks, and shout threatening words. The police are called and arrive very quickly, whereupon the demonstrators depart or stop making threats. According to the residents and the police, the individuals who shouted threats cannot be arrested because they do not commit crimes when the police are present and cannot be identified for later arrest because they were wearing masks and could be identified.

As originally introduced, Bill 18-63 would have made it a crime “for any person to repeatedly engage in unwanted targeted picketing before or about an individual’s dwelling place in a residential neighborhood with the intent to intimidate, threaten, abuse, annoy, or harass the individual.” The ACLU had many objections to that bill, and it has been substantially revised. But in some ways the Committee Print is even worse, because it now makes peaceful demonstrations into crimes *without* requiring any criminal intent. **Purely peaceful, quiet, non-threatening communication will now be made a crime.**

Hon. Vincent C. Gray
Re: Bill 18-63
November 22, 2010
Page two

Peaceful residential picketing is a quintessential First Amendment activity and is a valuable part of our expressive freedom, as Justices Brennan, Marshall and Stevens recognized in *Frisby v. Schultz*, 487 U.S. 474 (1988). While they were in dissent, that does not change the fact that they were right. Here in the District of Columbia, we have a long history of peaceful residential picketing that should not lightly be discarded.

There are also entirely legitimate reasons why a person might want to wear a mask while engaged in targeted residential picketing. For example, an employee picketing at his or her employer's home, or a tenant picketing at his or her landlord's home, may have a well-founded fear that identification will result in discharge, eviction, or lesser forms of retaliation. Or a group of protesters may want to engage in "street theater," wearing masks depicting political figures or conveying ideas. *See, e.g., Egolf v. Witmer*, 526 F.3d 104 (3rd Cir. 2008) (demonstrators dressed as hooded prisoners at Abu Ghraib prison while President Bush's motorcade drove by). The right to engage in anonymous speech is generally protected under the First Amendment precisely because there are legitimate reasons for speaking anonymously. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).

For these reasons, any new laws restricting that right should be narrowly and carefully tailored to address real problems that are not already addressed by existing general laws. Under that standard, Bill 18-63 does not pass muster.

Bill 18-63

Bill 18-63 seeks to address the problem described above by creating an overly broad new crime called "unlawful protesting in a residential area." If this bill is passed:

— it will be a crime for three or more persons to demonstrate in front of a residence *at any time of day* while wearing masks, even if they are entirely peaceful, even *silent*, and even if they notify the police in advance of the demonstration.

— it will also be a crime for three or more persons to demonstrate in front of a residence *at any time of day*, even if they are not wearing masks and are entirely peaceful, even *silent*, if they have not provided the police with at least two hours advance notice of the demonstration.

— it will also be a crime for three or more persons to demonstrate in front of a residence between 10:00 p.m. and 7:00 a.m., even if they are not wearing masks and are entirely peaceful, even *silent*, and even if they notify the police in advance of the demonstration.

Hon. Vincent C. Gray
Re: Bill 18-63
November 22, 2010
Page three

In our view, none of these peaceful, non-threatening, free speech activities ought to be a crime, or needs to be made a crime in order to protect residents against threatening conduct.

Of course, making threats ought to be a crime. *It already is.* See D.C. Code § 22-407. Nothing in Bill 18-63 addresses threats. **Thus, Bill 18-63 is not needed to prohibit threats.**

Of course, wearing a mask for the purpose of committing a crime and avoiding identification ought to be a crime. *It already is.* See D.C. Code § 22-3312.03(b)(5). In fact, existing law *already* prohibits wearing a mask:

— “With the intent to intimidate, threaten, abuse or harass any other person,” D.C. Code § 22-3312.03(b)(3), or

— “With the intent to cause another person to fear for his or her personal safety,” D.C. Code § 22-3312.03(b)(4), or

— “[W]here it [was] probable that reasonable persons [would] be put in fear for their personal safety by the [person’s] actions, [and the person acted] with reckless disregard for that probability,” D.C. Code § 22-3312.03(b)(4), or

— “While [the person was] engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification.” D.C. Code § 22-3312.03(b)(5).

Thus, Bill 18-63 is not needed to deal with masks.

Of course, disturbing the peace in a residential area at night ought to be a crime. *It already is.* See D.C. Code § 22-1321(3).¹ Additionally, creating a “noise disturbance” is *already* unlawful under 20 DCMR § 2799.1. **Thus, Bill 18-63 is not needed to deal with conduct that disturbs people in their homes because of its noise.**

Bill 18-63 also authorizes an officer to arrest a person without a warrant if the officer has probable cause to believe the person has committed the new offense of unlawful protesting in a residential area. But that provision is also unnecessary; officers are *already* authorized to make warrantless arrests in any of the crimes involving masks that are listed

¹ Bill 18-425, the “Disorderly Conduct Amendment Act of 2010,” would make that prohibition even more specific. Under Section 3 of that bill, the amended D.C. Code § 22-1321(d) would provide that “It is unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences.”

Hon. Vincent C. Gray
Re: Bill 18-63
November 22, 2010
Page four

above. *See* D.C. Code § 23-581(a-3). **Thus, Bill 18-63 is not needed to authorize warrantless arrests in connection with the conduct that supposedly justifies this bill.**

The new prohibitions in this bill are therefore *pointless* restrictions on freedom of speech. They will restrict the activities of peaceful, law-abiding demonstrators while having no impact on those who are allegedly committing crimes.

Apparently none of the representatives of the Metropolitan Police Department, the Office of Attorney General, or the United States Attorney's Office who were present at the hearing on Bill 18-63 were aware of the range of law enforcement authority that already existed to deal with these "animal rights" protests. Apparently the many MPD officers who have been called to the scenes of residential protests at which criminal conduct has allegedly occurred were also unaware that they already had this range of authority.

We therefore urge the Council to defeat this pointless and unnecessary anti-free-speech bill, and instead to exercise its oversight authority to inquire why the police department is not using the powers it already has to respond to the problems reported by the residents that lead to the introduction of this bill.

Sincerely yours,

Johnny Barnes
Executive Director

Stephen M. Block
Legislative Counsel

Arthur B. Spitzer
Legal Director

cc: all Councilmembers