AMERICAN CENTER
for LAW & JUSTICE

August 5, 2024

VIA EMAIL AND FEDERAL EXPRESS

Honorable Christine E. Wormuth
Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0101

Re: The Army's violation of Operation Rescue's First Amendment Rights.

Dear Secretary Wormuth:

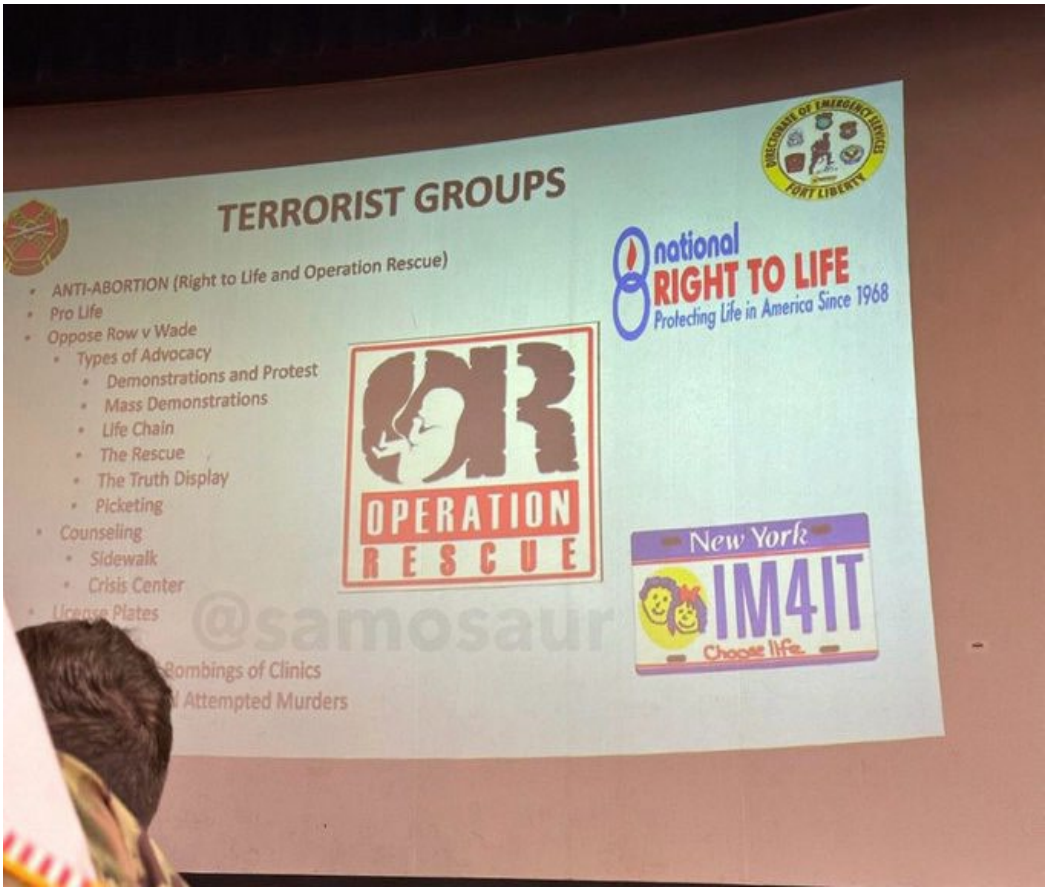
The American Center for Law and Justice ("ACLJ") represents Operation Rescue, a pro-life nonprofit organization, regarding Army training materials at Fort Liberty that falsely identified Operation Rescue as a terrorist group. These slides, singling out pro-life groups for disfavored treatment because of their political advocacy against the now-overruled decision in *Roe v. Wade*, constituted an egregious violation of our client's First Amendment right to engage in advocacy. We demand that the Army immediately, publicly recognize that none of the listed pro-life organizations on these materials, including specifically our client by name, constitute terrorist organizations.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.[1]

[1] *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1523 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

STATEMENT OF FACTS

On July 10, 2024, the image of this slide was posted on X[2]:

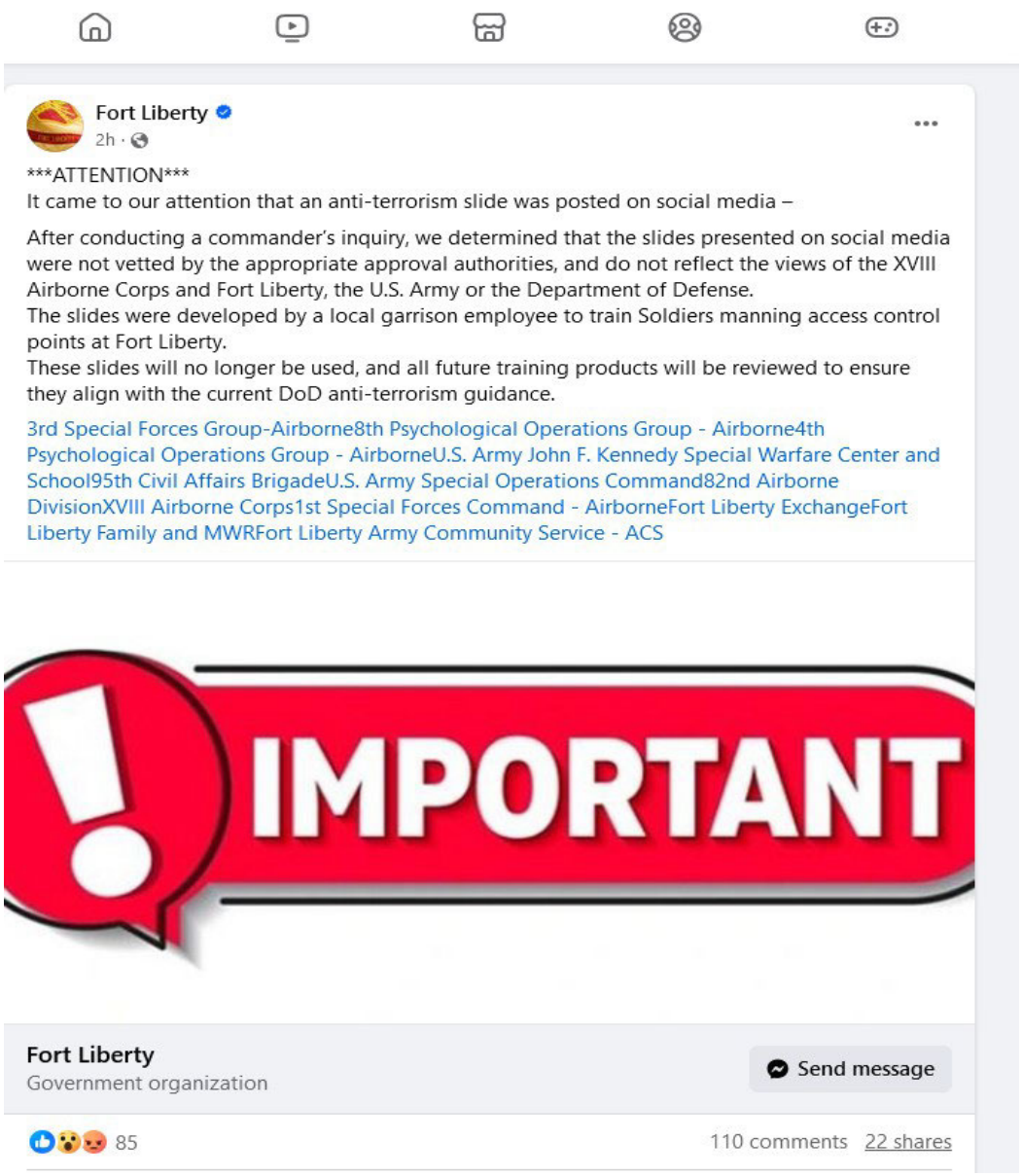


You have subsequently confirmed that this slide was utilized to brief soldiers at Fort Liberty, and you have confirmed that these slides have been used for at least seven years. This slide directly identifies Operation Rescue as a terrorist group, and does so because of its "advocacy," including such core First Amendment activities as demonstrations and protests. The slides identify Operation Rescue, "Choose Life" license plate holders, and anyone who opposes *Roe v. Wade*, which was rightfully overturned by the Supreme Court, as members of terrorist groups. The "terrorist" activities listed are core activities protected by the First Amendment, from protesting to sidewalk counseling.

Subsequently, on Fort Liberty's official social media Twitter account on July 11, 2024, Fort Liberty posted the following on its social media account[3]:

[2] Shoe (@samosaur), X (July 10, 2024, 8:37 PM), https://x.com/samosaur/status/1811198101522391419.

[3] Fort Liberty, FACEBOOK (July 11, 2024), (https://www.facebook.com/FortLibertyPublicAffairs/posts/pfbid02Y61a3R5ahNYj4AFZuqfCUXrAtwGs3p83GC7dtQ2Yo1XLSEu5L1bfPvXZFwCo2j7hl?rdid=dRYYDnndNFOXjszp.



On July 16, 2024, you wrote a letter to Senator Ted Budd regarding this anti-terrorism training. In that letter, you did, correctly, acknowledge that "nonprofit groups such as National Right to Life and PETA are not terrorist groups." However, you did not address whether the other listed non-profit groups on the slides, such as specifically our client, are considered terrorist groups by the Army or not. Although you indicated that these slides would no longer be used to train soldiers, you also indicated that these slides, describing our client as a terrorist group, have "been used for at least the last seven years by the Directorate of Emergency Services at Fort Liberty to train Soldiers as they prepare to take on installation access control duties." Your letter contained no reference to our client and no disclaimer of the description of our client as a terrorist organization.

STATEMENT OF LAW

Designation of terrorist organizations is no light thing. The Supreme Court has stated that ". . . the right of the individual to engage in any of the common occupations of life . . . [is] essential to the orderly pursuit of happiness by free men." *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Here, the burden of a terrorist designation without any process available whatsoever to challenge the designation, has been imposed on Operation Rescue and all its members. It is inherently inconsistent with due process to identify a nonprofit organization as a terrorist group, with all the attendant legal penalties, without even attempting to properly adjudicate whether the organization is itself in that category, giving it an opportunity to respond, or acting according to the proper requirements before a group can be designated as a terrorist entity.

In contrast with what occurred here, the authority to designate an entity a "foreign terrorist organization" rests with the Secretary of State. 8 U.S.C. §§ 1189(a)(1), (d)(4), who can only make such a designation in certain enumerated circumstances. An entity designated a foreign terrorist organization may seek review of that designation before the D.C. Circuit within 30 days of that designation. § 1189(c)(1). There is thus more process available to actual foreign terrorist organizations to challenge their adjudication as such than there is to Operation Rescue, designated a terrorist organization for its political activity. In upholding the foreign terrorist designation statute, the Supreme Court emphasized that "Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns[,]" and accordingly, "[t]here is, and always has been, a limited number of those organizations designated by the Executive Branch, … and any groups so designated may seek judicial review of the designation." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010). None of those core constitutional protections existed here.

Even more protections are in place before someone is designated a domestic terrorist. The term "domestic terrorism" is also defined by Congress: it means activities that "involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State"; "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping"; and "occur primarily within the territorial jurisdiction of the United States." 18 U.S.C. § 2331(5). The only distinction between the two is that domestic terrorism occurs within the United States. It is a heinous crime, and one of particular repulsion to society and with specific national security implications. The Federal Bureau of Investigation (FBI) and the Department of Homeland Security (DHS) use the term Domestic Violent Extremist (DVE) to describe domestic terrorists, recognizing that the disfavored underlying ideology cannot itself be a crime.[4] FBI guidelines emphasize that "no investigative activity may be based solely on First Amendment Activity," *Id.*, which is precisely what occurred here. They also emphasize that "mere advocacy of ideological positions and/or the use of strong rhetoric does not constitute violent extremism." *Id.* None of these guidelines were followed here.

[4] *Domestic Terrorism: Definitions, and Methodology*, FBI (Nov. 2020), https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-definitions-terminology-methodology.pdf/view.

The First Amendment prohibits government officials from using their power and authority to target the speech of those they dislike. "[P]olitical expression [is] 'at the core of our . . . First Amendment freedoms.'" *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). In recognition of the core constitutional principle that the government must never be in the business of proscribing political activity, the Supreme Court has regularly emphasized that "the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech." *NRA of Am. v. Vullo*, 602 U.S. 175, 198 (2024).

The Constitution forbids the use of the authority and power of government to suppress unfavored beliefs and views. "Ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional." *Rosenberger v. Rectors & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995). Protection against retaliation for political activity is at the very core of the First Amendment; a prohibition of any government official from using their power to target the speech they dislike. "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U. S. 250, 256 (2006); *see Gonzalez v. Trevino*, 219 L. Ed. 2d 332, 336 (2024). This principle is not novel: The First Amendment ensures that government officials may not rely on the "threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression" of disfavored speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). In *NRA of Am. v. Vullo*, the Supreme Court recently and forcefully emphasized that "[g]overnment officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." 602 U.S. 175, 180 (2024).5 While a government official can freely express her views, "[w]hat she cannot do, however, is use the power of the State to punish or suppress disfavored expression." *Vullo*, 602 U.S. at 188. Punishment and suppression can take many forms.

Here, the Department of Defense's shocking conduct at Fort Liberty, and apparently at other locations as well, falls squarely within the warnings of *Vullo*. Members of the government – its military department no less – used their authority to exercise power against Operation Rescue and others, training soldiers in charge of access to treat them as terrorist groups, because of Operation Rescue's political beliefs in opposition to *Roe v. Wade*, 410 U.S. 113, 116 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 215 (2022). None of this is hidden; the materials explicitly tell the Nation's soldiers to treat Operation Rescue as a terrorist organization and expressly identifies its political views as a reason for that designation. It is political targeting, of the very kind addressed in *Vullo*. And it is far more egregious than what occurred in *Vullo*, for at least two reasons. First, The Court in *NRA v. Vullo* emphasized Vullo's existent broad authority to regulate; that authority "serves as a backdrop to the NRA's allegations of coercion. The power that a government official wields, while certainly not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive." 602 U.S. at 191. The United States Army has far greater power and authority than any state agency. When it

5 The Supreme Court held that the NRA successfully pled a claim that Maria Vullo, former superintendent of New York's Department of Financial Services, violated the First Amendment "by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups." *Id.* at 181. Vullo took actions towards entities that dealt with the NRA that she could claim were facially appropriate, threatening enforcement of apparently real infractions of New York's insurance laws. But she did so explicitly because she sought to use her power and authority to weaken the NRA.

speaks, it speaks with the authority of the United States Government. When it acts it acts with the capacity of the greatest military in the world. Accordingly, when it falsely identifies an organization as a terrorist group, until that identification is disclaimed, the entire weight and authority of the United States military is behind that identification. For example, unless this identification is disclaimed, Operation Rescue employees envisage significant challenges in traveling through airports, as they have now been publicly identified by the United States Government's military department as terrorists.

Second, the descriptions used by Vullo were subtle, *insinuating* that a relationship with the NRA was not in the best interest of insurance companies, but those subtle identifications were still enough to show impermissible retaliation. Here, not content to settle for implication and subtlety, the Army was far more direct; it identified Operation Rescue as a terrorist organization and did so expressly because of its advocacy. Being labeled as a terrorist has obvious and significant implications. As the Supreme Court emphasized in *TransUnion LLC v. Ramirez*, 594 U.S. 413, 433 (2021), an inherent harm exists from being labeled a terrorist or a potential terrorist. There, the Court held that the dissemination of credit reports identifying individuals as potential terrorists harmed those individuals because "a person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party." *Id.* at 432 (quoting *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 13 (1990)). Labeling someone a "potential terrorist" is inherently harmful, and such a label constitutes "a concrete harm that qualifies as an injury in fact." *Id.* In other words, "[a] false statement that someone is or may be a terrorist inherently injures that person's reputation even if no pecuniary or economic harm directly results." *Angulo v. Truist Bank*, 2023 U.S. Dist. LEXIS 22100, *6 (N.D. Ill. 2023). Labelling Operation Rescue a terrorist organization, defamation per se, is a particularly egregious violation of Operation Rescue's First Amendment rights. It inherently casts the nonprofit organization into disfavor and does so for its religious and political views and activities.

Moreover, these Army officials did not merely identify our client and the other pro-life groups as terrorist organizations as if in some passive statement of opinion – which itself would have been problematic. Instead, they used these materials *to train soldiers* as they prepare to take on installation access control duties, warning them to consider our client a terrorist organization as they go about their duties. In other words, you were fortifying the access points of Fort Liberty so that a pro-life individual attempting to enter would be considered a terrorist on the same level of Hamas. *And you have publically admitted that this identification has been going on for seven years*. The full effects of this cannot be known, but they are inevitably catastrophic; for example, a family member of a service member could easily have been denied access, based on this identification of Operation Rescue as a terrorist organization. Moreover, now when any participant in Operation Rescue travels, they face significant burdens and uncertainty, as they have now been publicly identified by the United States Army as a member of a terrorist organization.

These actions also create a First Amendment freedom of association problem here. "[T]he protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive.'" *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 618-619 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963). In other words, when it comes to the First Amendment rights of speech and

association, the "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Button*, 371 U.S. 433. Simply designating an organization as a terrorist organization will on its face have a chilling effect on speech, threatening speech with government disfavor based on its political viewpoint. When done, as here, without any justification or basis for that designation, it lacks *any* legitimate interest.

One example of the problems caused here by the Army is this: In the past, we have seen media reports used to open criminal investigations, even when the information was leaked from the law enforcement agency itself. Would the United States Army designating a person or group as a domestic terrorist constitute or aid in a law enforcement agency's showing of probable cause for surveillance, investigatory, or detention purposes? The Army made no legal or due process available to our client. All core constitutional protections have been evaded by its passive-aggressive terrorist labeling tactics. Our client has been injured and continues to be injured as a result.

Finally, be reminded that employees of the United States Government are only immune from suit for defamatory statements that they make while acting within the scope of their employment. *See, e.g., Nadler v. Mann*, 951 F.2d 301 (11th Cir. 1992). Conduct of an employee is "not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228 (1958) (Restatement). Your public letter claims that the conduct of these Army officials, disseminating these slides, was unauthorized and beyond the scope of the conduct they were authorized to take. If that is the case, those individuals acted beyond the scope of their government employment and may accordingly be liable for a tort, such as defamation, for the harm their actions caused. Other forms of legal relief against the United States Government are available as well, including declaratory and injunctive relief. *See generally* 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States. . . ."); 28 U.S.C. §§ 2201 and 2202.

DEMAND

A statement indicating some officials failed to properly vet a slide is not enough, especially when considering these unlawful actions have occurred for seven years. The situation described herein is serious and its impact on the First Amendment is grave. It injures the rights of our client and threatens those of Americans to engage in free political advocacy without fear that they will be made a target of United States Army operations. As you yourself acknowledged in your letter, "it is critical for the Army to remain politically neutral."

Our demand is a simple one: Apologize and acknowledge in writing, using clear and direct language approved by us, that not a single organization named in the aforementioned materials is considered a domestic terrorist organization by the United States Army, including by name our client, Operation Rescue. It must express an assurance that such baseless labeling and training will not reoccur absent lawfully sound justification, describe steps taken to ensure the same, and provide information regarding when and where these training materials have been used in other

Army installations. Without this, the injury, uncertainty, threat, stigma and First Amendment chilling of being identified as a terrorist organization remains.

Time is of the essence to mitigate the ongoing injury. We must have this written statement no later than August 12, 2024. Should we not receive these assurances by that date, we will pursue appropriate legal remedies.

Thank you for your prompt attention to this important matter.

Respectfully,

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