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GEORGETOWN LAW

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VIA EMAIL

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February 7, 2022

Re: House Bill No. 475

Dear Speaker Bedke and President Pro Tempore Winder:

We are attorneys at Stoel Rives in Boise, Idaho, and Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (ICAP). Over the past several years, since bringing successful litigation in 2017 against private paramilitary organizations that participated in the Unite the Right rally in Charlottesville, Virginia, ICAP has developed an expertise in state anti-paramilitary laws, including their history and court decisions upholding them against constitutional challenge. ICAP has partnered with attorneys at Stoel Rives and other large law firms across the country to educate and inform the public about these laws. We write to respond to comments made by Major Steven Stokes, general counsel to the Idaho Military Division, when proposing a bill to the House Transportation and Defense Committee on January 26, 2022. The bill, thereafter entered as House Bill No. 475, would repeal in its entirety an Idaho law that prohibits unauthorized paramilitary organizations that are not accountable to state or federal authorities. Specifically, the law that House Bill No. 475 would repeal provides:

46-802. UNORGANIZED ASSOCIATIONS PROHIBITED — PARADES PROHIBITED — EXCEPTIONS.

> No body of men, other than the regularly organized national guard, the unorganized militia when called into service of the state, or of the United States, and except such as are regularly recognized and provided for by the laws of the state of Idaho and of the United States, shall associate themselves together as a military company or organization, or parade in public with firearms in any city or town of this state.
>
> No city or town shall raise or appropriate any money toward arming or equipping, uniforming, or in any other way supporting, sustaining or providing drill rooms or armories for any such body of men; but associations wholly composed of soldiers honorably discharged from the service of the United States or members of the orders of Sons of Veterans, or of the Boy Scouts, may parade in public with firearms on Memorial Day or upon the reception of any regiment or companies of soldiers returning from such service,

> and for the purpose of escort duty at the burial of deceased soldiers; and students in educational institutions where military science is taught as a prescribed part of the course of instruction, may with the consent of the governor, drill and parade with firearms in public, under the superintendence of their teachers. This section shall not be construed to prevent any other organization authorized by law parading with firearms, nor to prevent parades by the national guard of any other state or territory.

When proposing the repeal of this statute, which has been part of Idaho's laws since 1927, Major Stokes represented that "The restrictions in this code section are antiquated and are clear violations of the First and Second Amendments to the U.S. Constitution and Article I, Sections 9, 10, and 11 of the Idaho Constitution." Statement of Purpose, RS29018C1/H0475 (Jan. 27, 2022). This is incorrect. The prohibition against unauthorized paramilitary organizations is fully consistent with the First and Second Amendments to the U.S. Constitution and with the Idaho Constitution and Idaho's substantial regulation of military and paramilitary activity.

Section 46-802 does not violate the First or Second Amendments

In 1886, the U.S. Supreme Court upheld an Illinois law substantially the same as § 46-802, which is just one of 29 similar state laws that remain on the books to this day. The Illinois law at issue in *Presser v. Illinois* made it unlawful "for any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this state, without the license of the governor thereof."[1] Although the Second Amendment had not yet been held applicable to the states in 1886, the Supreme Court nevertheless did not equivocate on the limit of its protections:

> We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, *do not infringe the right of the people to keep and bear arms*.[2]

The Court next examined the First Amendment to determine whether it created a right "voluntarily to associate together as a military company or organization, or to drill or parade with arms" and concluded it did not, holding that,

> Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the state and federal governments, acting in due regard to their respective prerogatives and powers.[3]

The Court continued:

> It cannot be successfully questioned that the state governments, unless restrained by their own constitutions . . . have also the power to control and regulate the organization, drilling,

[1] *Presser v. Illinois*, 116 U.S. 252, 253 (1886).
[2] *Id.* at 264-65 (emphasis added).
[3] *Id.* at 267.

> and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the states *is necessary to the public peace, safety and good order*.[4]

More than 120 years later, recognizing for the first time that the Second Amendment protects an individual right to bear arms for self-defense, the Supreme Court restated what it had made clear in *Presser*: the Second Amendment "does not prevent the prohibition of private paramilitary organizations."[5] Indeed, Justice Antonin Scalia, writing for the majority in *District of Columbia v. Heller*, noted that no one supporting the individual rights interpretation of the amendment had even contended that states could not ban such groups.[6]

Other lower courts have reached the same conclusions. In 1982, a federal district court in Texas upheld its anti-militia law, also substantially the same as Idaho's § 46-802, against constitutional challenge.[7] It held that private paramilitary operations were "impermissible 'conduct' not 'speech,'"[8] and that even if the conduct contained elements of protected expression, the state could regulate it under the Supreme Court's decision in *United States v. O'Brien*,[9] because the Texas law's restriction on First Amendment freedoms was no greater than necessary to further an important governmental interest.[10] The court articulated that interest as "protecting citizens from the threat of violence posed by private military organizations," which it described as "vital" because the proliferation of such organizations "threatens to result in lawlessness and destructive chaos."[11] The court concluded that equitable principles dictated that it could enforce the Texas statute through injunctive relief, emphasizing that "[m]ilitary organizations are dangerous wherever they exist, because of their interference with the functioning of a democratic society and because of their inconsistency with the State's needs in operating its militia."[12]

More recently, a Virginia state court allowed a civil suit for declaratory and injunctive relief against paramilitary organizations in a lawsuit that ICAP brought on behalf of the City of Charlottesville, local businesses, and residential associations after the 2017 Unite the Right rally. The claims were based on a state constitutional provision and state statutes that also exist in Idaho, as described below.[13] The court concluded that "[t]here appears to be no place or authority for private armies or militia apart from the civil authorities and not subject to and regulated by the federal, state,

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[4] *Id.* at 267-68 (emphasis added).
[5] *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008).
[6] *Id.* at 620 ("*Presser v. Illinois* held that the right to keep and bear arms was not violated by a law that forbade 'bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law. This does not refute the individual-rights interpretation of the Amendment; no one supporting that interpretation has contended that States may not ban such groups.") (internal citations omitted.).
[7] *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982). The Texas law, Tex. Rev. Civ. Stat. Ann. art. 5780(6), provided: "No body of men, other than the regularly organized State Military Forces of this state and the troops of the United States, shall associate themselves together as a military company or organization or parade in public with firearms in any city, or town of this State; provided that students in the educational institutions where military science is a prescribed part of the course of instruction, and soldiers honorably discharged from the service of the United States may, with the consent of the Governor, drill and parade with firearms in public. Nothing herein shall be construed to prevent parades by the active militia of any other state as hereinafter provided."
[8] *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 208.
[9] 391 U.S. 367 (1968).
[10] *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 209.
[11] *Id.* at 216.
[12] *Id.* at 218.
[13] *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657 (Va. Cir. Ct. July 7, 2018).

or local authorities."[14] It rejected First and Second Amendment arguments made by the defendants, holding:

> No one is being denied their right to speak, to assemble and protest, or even to bear firearms. But when a group comes as a unit, in uniform, with military or law enforcement weapons, equipment, tactics, and appearance, under a clear chain of command authority, looking like the police or military, and they are neither a part of or subject to the local, state, or federal military or police, and are subject to neither, this is a legitimate concern . . . .[15]

Section 46-802 is Consistent with Idaho's Constitution and Statutory Scheme

When presenting the proposed bill to repeal § 46-802, Major Stokes asserted that the law violated §§ 9, 10, and 11 of Article I of the Idaho Constitution, which are Idaho's versions of the U.S. Constitution's First Amendment rights to speech and peaceful assembly and Second Amendment right to keep and bear arms. Major Stokes failed to acknowledge that Article I, § 12 of the Idaho Constitution forbids private military units from operating outside of state authority, providing that "[t]he military shall be subordinate to the civil power."

Article I, § 12 is substantially similar to provisions in the constitutions of 48 states,[16] which have their roots in early militia laws. Concerned about the dangers of standing armies, the colonies adopted militia laws long before the drafting of the Second Amendment. The "militia" consisted of able-bodied men between certain ages who could be called forth in defense of the state. The need for them to be "well regulated" was well recognized. As far back as 1647, Massachusetts recognized that "the well managing of the Militia of this Common-wealth is a matter of great concernment, therefore that it may be carried an end with the utmost safety and certaintie for the best benefit of the Countrie."[17] In 1724, New York's militia law provided that "an orderly and well disciplin'd Militia is justly esteemed to be a great Defence and Security to the Welfare of this Province."[18]

Early state constitutions made clear that the militia was always to be under civilian governmental control. Virginia's 1776 Bill of Rights provided that "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that *in all cases the military should be under strict subordination to, and governed by, the civil power.*"[19] In conjunction with the constitutional designation of the governor as commander in chief, this "subordination" clause provided for military authority to be "integrated with the popular will as expressed through

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[14] *Id.* at *4.
[15] *Id.* at *12. In September 2021, a state court in New Mexico similarly rejected First and Second Amendment challenges to an enforcement action by the District Attorney against a private militia brought under similar provisions of New Mexico's state constitution and state statutes. *See State of New Mexico v. New Mexico Civil Guard*, No. D-202-CV-2020-04051 (N.M. Dist. Ct. Sept. 13, 2021), *available at* https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2021/09/2021.09.13-NMCG-Ord-Grnt-Deny-Mot-Jdgmnt-Pldgs-Deny-MTStay.pdf.
[16] *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions*, Inst. for Const. Advoc. & Protection (Sept. 2020), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf [hereinafter ICAP 50-State Catalog].
[17] The Book of the General Lauues And Libertyes Concerning The Inhabitants of The Massachusets 39 (Cambridge, Mass. 1647).
[18] An Act for Settling and Regulating the Militia 269 (New York, William Bradford 1724).
[19] Va. Const. art. I, § 13 (1776) (emphasis added).

the elected officials of the Commonwealth."[20] Moreover, it "ensure[d] the right of all citizens to fight in the defense of their nation and to live free from the fear of an alien soldiery commanded by men who are not responsible to law and the political process."[21]

Idaho's constitution similarly provides that the Governor of Idaho is the "commander-in-chief of the military forces of the state" who has the "power to call the militia to execute the laws, to suppress insurrection, or to repel invasion." Art. IV, § 4. The "militia" under the Idaho constitution consists of "[a]ll able-bodied male persons, residents of this state, between the ages of eighteen and forty-five." Art. XIV, § 1; *see also* Idaho Code § 46-102. The legislature of Idaho is responsible for providing for their "enrolment, equipment and discipline," art. XIV, §2, and the governor is responsible for commissioning all militia officers, *id.* § 3.

Under the Idaho Code, the militia of the state is divided into three classes: the National Guard, the organized militia, and the unorganized militia. Idaho Code § 46-103. "Whenever the governor as commander-in-chief, shall call into the active service of the state the unorganized militia or any part thereof, it shall be organized into such units and shall be armed and equipped in such manner as the governor in his discretion shall deem proper." *Id.* § 46-106. The unorganized militia, when called into service by the governor, becomes part of the organized militia of the state. *Id.* § 46-103.

Indeed, the Idaho Attorney General issued an opinion in 1995 that reiterated the government's control over the militia. In opining about a proposed initiative that would have allowed citizens to organize and train as volunteer militias without government oversight and be considered part of the organized militia under their own leadership when called into service by the governor, the Attorney General concluded: "[T]he proposed initiative is unconstitutional. Under the proposed initiative, volunteer organizations would be able to organize and train without any oversight or interference from governmental authorities. However, the Idaho Constitution requires control of the state militia by the governor and through laws passed by the legislature." Certificate of Review, Initiative Regarding Volunteer Militia Organizations, Letter from Attorney General of Idaho to Secretary of State of Idaho (Oct. 13, 1995).

In short, the law that House Bill 475 seeks to repeal is entirely consistent with Idaho's constitution and statutory regulation of the state militia. There is no authority for any "body of men, other than the regularly organized national guard, the unorganized militia when called into service of the state, or of the United States" to "associate themselves together as a military company or organization, or parade in public with firearms in any city or town of this state." Idaho Code § 46-802.

Section 46-802 is Consistent with Idaho Laws Regulating Paramilitary and Law Enforcement Activity

In addition to § 46-802's prohibition on private paramilitary organizations, it is also a felony in Idaho to "assemble[] with one (1) or more persons for the purpose of training or instructing in the use of, or practicing with, any technique or means capable of causing property damage, bodily injury or death with the intent to employ such training, instruction or practice in the commission of

[20] A.E. Dick Howard, Commentaries on the Constitution of Virginia 274 (1974).
[21] *Id.* at 277.

a civil disorder." Idaho Code § 18-8103(3). Moreover, it is a crime under state law for any person to "unlawfully exercise or attempt to exercise the functions of . . . a deputy sheriff, marshal, policeman, constable or peace officer" or bring into the state "any armed or unarmed body of men for the suppression of domestic violence." *Id.* § 18-711(1). Idaho's prohibition on private paramilitary organizations is entirely in keeping with Idaho's robust regulation of paramilitary and law enforcement activity.

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Please do not hesitate to contact us if we can assist the legislature as it considers a bill that would repeal a law designed to protect public safety against the threat of private paramilitary organizations unaccountable to governmental authorities.

Sincerely,

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