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Re: Private Paramilitary Activity and Voter Intimidation

Dear District Attorneys:

I am the Legal Director of Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (ICAP). At ICAP, our mission is to defend American constitutional rights and values in and out of court. Over the past several years, as a result of [successful litigation](#) we brought against unlawful militia organizations that participated in the Unite the Right rally in

Charlottesville, Virginia, in 2017, we have developed an expertise in the regulation of public protests and demonstrations in a manner that protects public safety while respecting individuals' constitutional rights. Most recently, we have been working with jurisdictions across the country to combat unlawful militia activity and safeguard the electoral process.¹

I am writing because of increasing public concern that self-styled private militias may position themselves at polling places on Election Day in a manner that may intimidate voters and result in violent confrontations. Newsweek reported just today that Democrats in Georgia were forced to abandon a rally scheduled to take place in Rome, Georgia, due to local “militia” presence.² In addition, both local and national news sources cite Georgia as one of five states designated as “high risk” for militia activity before, during, and after Election Day from groups like the Three Percenters (III%er), the Georgia Militia, and the Not Fucking Around Coalition (“NFAC”), among others.³

The Three Percenters, the Georgia Militia, NFAC, and any other private group of individuals—whether calling themselves militias or not—have no authority to engage in functions reserved to law enforcement or the state militia, on or after Election Day. The state militia (i.e., the National Guard and other state-sanctioned military forces) also can play a role in ensuring public safety, but only when called forth by the governor under Georgia law. We hope that the following information will help you prepare to protect against voter intimidation, as well as armed intimidation post-election, while preserving and fostering constitutional rights.

Several provisions of Georgia law require all militia activity to be under the control and authority of the state. In particular, the Georgia Code makes clear that the Governor is the commander-in-chief and has the sole power to call forth the militia into active service. Ga. Code Ann. § 45-12-27. When ordering both the organized and unorganized militia into active service, the Governor must declare a state of emergency in the relevant locality. Ga. Code Ann. § 38-2-6(c). When so called forth, the Georgia state militia is commanded and administered by the Governor, as

¹ ICAP has produced fact sheets for every state explaining the laws that bar unauthorized private paramilitary organizations and what to do if groups of armed individuals are near a polling place, <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-paramilitaries/state-fact-sheets/>. ICAP also has produced a fact sheet on voter intimidation, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/Voter-Intimidation-Fact-Sheet.pdf>, guidance for law enforcement, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-General-Law-Enforcement-Guidance.pdf>, a resource for election officials, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-Election-Official-Guidance-10-27-20.pdf>, and guidance regarding driver activity around election sites, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/11/Driver-Guidance-11.1.20.pdf>.

² David Child, *Georgia Democrats Abandon Rally Due to Concerns About Large Militia Presence*, NEWSWEEK (Nov. 2, 2020), <https://www.newsweek.com/georgia-democrats-rally-cancelled-militia-presence-1543948>.

³ Tim Mak, *Here's Where the Threat of Militia Activity Around The Elections Is The Highest*, NPR (Oct. 22, 2020), <https://www.npr.org/2020/10/22/926339006/heres-where-the-threat-of-militia-activity-around-the-elections-is-the-highest>; Will Peeble, *Savannah police are 'keeping an eye on' three militia groups during the election*, AUGUSTA CHRONICLE (Oct. 29, 2020), <https://www.augustachronicle.com/news/20201029/savannah-police-are-keeping-eye-on-three-militia-groups-during-election>; Hampton Stall, Roudabeh Kishi, & Clionadh Raleigh, *Standing By: Right-Wing Militia Groups & the US Election*, ACLED (Oct. 2020), https://acleddata.com/acleddatanew/wp-content/uploads/2020/10/ACLEDMilitiaWatch_StandingByMilitiaGroups_2020Web.pdf.

commander-in-chief, through the Georgia Department of Defense and its Military Division. Ga. Code Ann. § 38-2-132. Private militia organizations or other armed groups have no authority to self-activate or to engage in functions reserved to the state militia or law enforcement.

Additionally, Georgia criminal law broadly prohibits paramilitary activity. State law makes it unlawful for a body of men other than the organized militia to associate as a military unit or parade in public with firearms. Ga. Code Ann. § 38-2-277(a). Furthermore, it is a felony in Georgia to “teach, train, or demonstrate” how to use, apply, or make “any illegal firearm, dangerous weapon, explosive or incendiary device capable of causing injury or death,” intending or knowing “that such . . . will be unlawfully employed for use in a civil disorder;” or to assemble “with one or more other persons for the purpose of being taught, trained, or instructed in the use of any illegal firearm, dangerous weapon, explosive or incendiary device capable of causing injury or death to persons, knowing or intending that such “will be unlawfully employed for use in or in furtherance of a civil disorder, riot, or insurrection.” Ga. Code Ann. § 16-11-151.

Georgia law is in keeping with the Second Amendment, which does not protect private, unauthorized paramilitary organizations that are dangerous to public safety and good order. The Supreme Court decided in 1886—and repeated in 2008—that the Second Amendment “does not prevent the prohibition of private paramilitary organizations,” *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)), and indeed all 50 states prohibit them.⁴ Accordingly, although individuals have a constitutional right to bear arms for individual self-defense, they have no constitutional right to organize themselves as private military units projecting public authority wholly outside of governmental accountability.

Moreover, both federal and state laws prohibit voter intimidation. In addition to other federal provisions, Section 11 of the federal Voting Rights Act makes it unlawful to “intimidate, threaten, or coerce” another person, or attempt to do so, “for voting or attempting to vote” or “for urging or aiding any person to vote or attempt to vote.” 52 U.S.C. § 10307(b). Georgia law makes it a felony to use or threaten force or violence or otherwise intimidate anyone to cause a person to “vote or refrain from voting,” vote for or against any particular person, or register to vote. Ga. Code Ann. § 21-2-567(a). It is also a felony to interfere in elections by using or threatening violence to prevent a voter from voting or a poll worker from performing their duties or to block or attempt to block “the avenue to the door of any polling place.” Ga. Code Ann. § 21-2-566. And it is illegal to carry a firearm within 150 feet of a polling place. Ga. Code Ann. § 16-11-127(b).

ICAP has developed several resources that may be of further help, including our voter intimidation fact sheet, guidance to law enforcement, and toolkit for constitutional protest.⁵

Please do not hesitate to reach out if ICAP can assist you in protecting against armed unauthorized activity during and after the election. ICAP has brought together a coalition of national law firms that have committed to assisting communities in preventing unsanctioned paramilitary activity and voter intimidation. Because we and our law firm partners do this work on a pro bono

⁴ Institute for Constitutional Advocacy and Protection, *Prohibiting Private Armies at Public Rallies* (Sept 2020), available at <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf>.

⁵ ICAP, *supra* note 1; Institute for Constitutional Advocacy and Protection, Georgetown Law, *Protests & Public Safety: A Guide for Cities and Citizens*, available at <https://constitutionalprotestguide.org/>.

basis, any consultation would be at no cost to you. Thank you in advance for your efforts to safeguard voters' rights this election.

Sincerely,

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