INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

Hearing before the House Committee on the Judiciary
On House Bill 2572-1

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Chairman Kropf, Vice Chair Andersen, Vice Chair Wallan, and distinguished members of the Committee, I am pleased to testify today in support of House Bill 2572-1.

My name is Mary McCord and I am the Executive Director of the Institution for Constitutional Advocacy and Protection (ICAP) and a Visiting Professor of Law at Georgetown University Law Center. Prior to helping found ICAP in 2017, I spent most of my career at the U.S. Department of Justice, most recently as the Acting Assistant Attorney General for National Security, and before that, the Principal Deputy Assistant Attorney General for National Security between 2014 and 2017. Previously, I was an Assistant United States Attorney in the U.S. Attorney's Office for the District of Columbia for nearly 20 years.

At ICAP, we have developed an expertise in legal options to counter paramilitary activity, including bringing successful litigation in state courts in both Virginia and New Mexico[1] to obtain injunctions against private militia activity in

[1] *See City of Charlottesville v. Pa. Light Foot Militia*, Consent Decrees, No. CL 17-560, at 1 (Va. Cir. Ct. July 29, 2018), https://www.law.georgetown.edu /icap/wp-content/uploads/sites/32/2018/08/All-Consent-Decrees-and-Default-Judgments-without-photos.pdf; *State of New Mexico v. New Mexico Civil Guard*, Order Granting: (1) Plaintiff's Motion for Entry of Default Judgment Against Defendant New Mexico Civil Guard, for Order to Show Cause, and for Spoliation Sanctions; and (2) Plaintif's Motion for Entry of Default Judgment Against Defendant

those states. We have also consulted with local and state officials, law enforcement, and civil society across the country on how to protect public safety while preserving constitutional rights. This includes legal options during demonstrations and protests and also during state legislative sessions, local board meetings, and at or near polling places. We have seen that unlawful paramilitary activity is a danger to public safety and law enforcement regardless of the ideology motivating it.

HB 2572-1 is consistent with the United States Constitution as well as the Oregon state constitution and statutory law. It is a viewpoint-neutral bill that applies to *conduct* that is not protected by the First or Second Amendments. The bill does not prohibit freedom of expression, freedom of association, or lawful possession and carrying of firearms for self defense. Instead, the bill prohibits armed paramilitary activity by persons who are part of or acting on behalf of or in furtherance of the objectives of a private paramilitary organization.

Paramilitary activity is not authorized by federal or state law; it is not protected by the Second Amendment or Supreme Court precedent; and it is unlawful in all 50 states.

First, the "well regulated Militia" referred to in the Second Amendment has always meant regulated by the government, even before the founding. Early state constitutions made clear that the militia, made up of able-bodied men between certain ages, were always to be strictly subordinate to civilian governmental control.[2] By the time of the Constitutional Convention in 1787, the founders included the Militia Clauses in the U.S. Constitution to ensure that only Congress

New Mexico Civil Guard, No. D-202-CV-2020-04051 (N.M. Dist. Ct. Oct. 7, 2022), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2022/10/2022-10-07-Order-on-Motions-for-Default.pdf.

[2] Mary B. McCord, *Dispelling the Myth of the Second Amendment*, Brennan Center for Justice at New York University School of Law (June 29, 2021), https://www.brennancenter.org/our-work/research-reports/dispelling-myth-second-amendment.

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would have the authority to provide for the organizing, disciplining, and calling forth of the militia. U.S. Const. art. 1, clauses 15 and 16. Congress thereafter exercised its power under the Militia Clauses to create the National Guard system and also to authorize the states to maintain their own defense forces outside the National Guard system. 32 U.S.C. §§ 102-104, 109. The U.S. gives no authority to private individuals to form their own private militias or paramilitary organizations outside of governmental control.

Second, the Supreme Court has been clear since 1886 that the Constitution does not protect private paramilitary organizations. In *Presser v. Illinois*, 116 U.S. 252, 267 (1886), the Supreme Court upheld a state anti-militia bill against constitutional challenge. The Court held the First Amendment does not provide a "right voluntarily to associate together as a military company or organization" outside of the control of the government. The Court explained:

> 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.

Id. The Court further held that prohibitions on private paramilitary activity "do not infringe the right of the people to keep and bear arms," and that states must be able to prohibit private paramilitary organizations as "necessary to the public peace, safety, and good order." *Presser* 116 U.S. at 265, 268. In 2008, the Supreme Court restated what it had made clear in *Presser*—that the Second Amendment "does not prevent the prohibition of private paramilitary organizations." *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008).

Third, paramilitary activity is unlawful in all 50 states. Forty-eight states including Oregon have a provision in their state constitutions providing that the

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military shall be strictly subordinate to the civil power.[3] Twenty-nine states have an anti-militia law nearly identical to the law upheld by the Supreme Court in 1886, which generally bars bodies of men from associating as a military company or military unit or parading or drilling in public with firearms.[4] Twenty-five states have anti-paramilitary laws much like Oregon's § 166.660. These laws generally prohibit teaching, demonstrating, instructing, training, and practicing in the use of firearms, explosives, or techniques capable of causing injury or death, for use during or in furtherance of a civil disorder.[5] Eleven states prohibit falsely assuming or engaging in the functions of peace officers, law enforcement officers, or public officials.[6] Another nine states have laws that ban wearing the uniforms of, or similar to, the uniforms of the United States military or foreign military.[7]

Oregon's constitution and state statutes regulate its militia, law enforcement, and security services.

Although the Oregon State Constitution guarantees the people "the right to bear arms for the defence [sic] of themselves, and the state," it also makes clear that "the Military shall be kept in strict subordination to the civil power." Or. Const. art. I, § 27. The Oregon Constitution further stipulates that "[t]he Legislative Assembly shall provide by law for the organization, maintenance and discipline of a state militia for the defense and protection of the State." Or. Const. art. X, § 1. The governor is the "commander in chief of state military forces," and

[3] *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.

[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

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is the only government actor with the powr to "call out such forces to execute the laws, to suppress insurection [sic], or to repel invasion." Or. Const. art. X, § 3.

By statute, Oregon's "militia" is comprised of the "organized" and "unorganized" militia. Or. Rev. Stat. § 396.105(1). The "organized militia" is composed of the Oregon National Guard and the Oregon Civil Defense Force "when duly organized." *Id.* § 396.105(2). The "unorganized militia" generally consists of "all able-bodied residents of the state" between certain ages. *Id.* at § 396.105(3). Only the governor has the power to call forth the unorganized militia. *Id.* §§ 396.135, 396.140. Private individuals have no authority to form their own militias. Moreover, existing Oregon law makes it a felony to engage in certain paramilitary activity, including training to use firearms, explosives or incendiary devices, or techniques capable of causing injury or death with the intent to unlawfully to use them in a civil disorder." Or. Rev. Stat. § 166.660.

Oregon also heavily regulates law enforcement and security services in Chapter 181A of the Oregon Revised Code. In addition to establishing the Department of State Police and requiring certification, minimum standards, and mandatory training for police officers throughout the state, Oregon's law also prohibits persons from engaging in private security services without having obtained a certificate from the Board on Public Safety Standards and Training and meeting certain qualifications. *See* Or. Rev. Stat. §§ 181A.850, 181A.855. Private individuals have no authority to form their own security services organizations outside of requirements of Oregon Law.

HB 2572-1 would provide a more effective enforcement tool against the continuing threat of violence from armed paramilitary organizations by prohibiting *conduct* that endangers the public and law enforcement, without regard to the ideology that may motivate the conduct.

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Although Oregon law currently criminalizes certain paramilitary activity, the language of the law and its lack of a civil enforcement mechanism have limited its effectiveness. HB 2572-1 would create a criminally and civilly enforceable prohibition on specific types of armed activity by individuals acting as part of or in furtherance of the objectives of an unauthorized private paramilitary organization, with a focus on the ***actions*** that threaten civic life and public safety. The prohibited categories of unauthorized, armed private paramilitary activity include public patrolling, drilling, or engaging in techniques capable of causing injury or death; interfering or attempting to interfere with government proceedings or operations; wrongfully asserting authority over others by assuming the functions of law enforcement; interfering with or intimidating another person in the exercise of their constitutional rights, such as engaging in protected free expression, petitioning the government, and voting; and training to do the foregoing.

Importantly, the bill also defines exceptions for activities such as historic reenactments, self-defense clinics, training in the safe handling and use of firearms, and other training authorized by the state or federal government.

The bill defines "private paramilitary organization" to apply to groups of three or more persons associating under a command structure to function in public or train to function in public as a combat, combat support, law enforcement, or security services unit.

Key to the HB 2572 providing an more effective alternative to existing law, the bill includes a civil enforcement mechanism by which the Attorney General may seek injunctive relief against those engaging in prohibited activity, as well as

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a private cause of action for individuals harmed by private paramilitary activity to seek money damages and/or injunctive relief.

Thank you for the opportunity to address the Committee. I look forward to your questions.

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