Testimony for the Senate Judicial Proceedings Committee
February 10, 2026

SB 346 - Civil Actions – Violation of Constitutional Rights (No Kings Act)

FAVORABLE WITH AMENDMENT

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The ACLU of Maryland supports, with an amendment, SB 346 (No Kings Act), which seeks to create state authorization for individuals to sue government officials who violate their federal constitutional rights. Federal law enforcement officers operating in the state of Maryland should be held to the same legal standard as state and local law enforcement officers and subjected to the same consequences for unconstitutional conduct. We support the bill on the condition of an amendment to remove references to "qualified immunity."

The Maryland General Assembly can and should create a state cause of action to enforce the U.S. Constitution.

An aggressive immigration enforcement agenda has had deadly consequences across the country, including the recent murders of Keith Porter Jr., Renee Good, and Alex Pretti by federal agents. Maryland parents, children, neighbors, workers, and students are suffering as federal officers stop, arrest, and jail people throughout our communities, indiscriminately and without consequence. The recent purchase of a warehouse in Hagerstown indicates their intention to continue these operations despite public demands to leave us alone. The Maryland General Assembly can and should urgently limit what these agents do to the people of Maryland, in the state of Maryland, and create state law to hold them legally liable for their unconstitutional conduct.

There is little legal recourse for an individual to sue a federal law enforcement agent for violating their rights as guaranteed by the United States Constitution. While 42 U.S.C. § 1983 provides a federal remedy for constitutional violations by state and local government officials, there is no comparable statutory remedy for such violations by federal government officials. For most of our nation's history, state laws were the primary way to enforce constitutional rights against federal officers.

After the Supreme Court's recognition of the federal Bivens[1] remedy in 1971, state-law claims for constitutional violations were rarely invoked. Since then, the scope of judicial remedies via "Bivens" actions against federal officials for violations of constitutional rights has been narrowed to a point where there is virtually no pathway for private individuals to sue federal officers for violations of the U.S. constitution. This legal gap is especially alarming amid renewed and amplified abuses of federal power that we have seen in Maryland and throughout the country in recent months. It is essential that the state legislature act to provide this bare minimum protection to the people of Maryland against unconstitutional law enforcement.

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SB 346 must be amended to remove any reference to "qualified immunity"

In addition to the absence of a state cause of action for violations of the U.S. constitution, another significant procedural and legal hurdle to a meaningful remedy for constitutional violations is the doctrine of qualified immunity. Qualified immunity is a pernicious legal doctrine, applicable to suits brought under 42 U.S.C. § 1983 challenging violations of federal constitutional rights by local or state officials. It says that it is not enough for a plaintiff to establish that their rights were violated. In order to prevail, they must also establish that the violation was "clearly established" by prior binding decisions. While there is a huge body of scholarship criticizing the Supreme Court's creation of qualified immunity, from across the political spectrum[2], this bill does not seek to tackle that issue. However, qualified immunity does not currently exist in Maryland law and has never been adopted or recognized by the Maryland General Assembly. It should not be explicitly incorporated into state law for the first time here, in remedial legislation intended to create a remedy for federal constitutional violations. Doing so would risk further expanding this doctrine into cases raising purely state law claims and would have the effect of permanently enshrining the doctrine in state law even if the Supreme Court or Congress later eliminate it.
This problem is easily fixed, without changing the meaning or intent of this legislation, by striking lines 15-17 on p.2, replacing (2) with (B) in line 18, deleting "sovereign" in line 19, deleting "available" in line 19,

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[1] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971)

[2] E.g. ACLU, Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable, March 23, 2021 (https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable); NAACP, Qualified Immunity FAQ (https://www.naacpldf.org/qualified-immunity/); Institute for Justice, Unaccountable, Feb. 7, 2024 (https://ij.org/report/unaccountable/); Cato Institute, Qualified Immunity: A Legal, Practical, and Moral Failure, Sep. 14, 2020 (https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure#).

and adding the following after "otherwise", APPLICABLE TO SUITS UNDER 42 U.S.C. § 1983 UNDER LIKE CIRCUMSTANCES AT THE TIME THAT THE ACTION HEREUNDER ACCRUES." Making these edits would preserve the defense of qualified immunity in suits brought under this section, without specifically incorporating it into state law, and without leaving it in state law if it is changed in federal law by Congress or the Supreme Court.

If references to qualified immunity in SB 346 are removed, the bill would fill a crucial gap in the enforcement of constitutional rights for the people of Maryland. For the foregoing reasons, the ACLU of Maryland supports SB 346, with the suggested amendment.

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