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May 6, 2026

The Honorable Wes Moore
Governor of Maryland
State House, 100 State Circle
Annapolis, Maryland 21401

RE: House Bill 351 and Senate Bill 346, “Civil Actions – Violation of Constitutional Rights (No Kings Act)”

Dear Governor Moore:

I have reviewed House Bill 351 and Senate Bill 346, both entitled “Civil Actions – Violation of Constitutional Rights (No Kings Act)” (“the Act”), for constitutionality and legal sufficiency.¹ It is our view that the bills are legally sufficient and not clearly unconstitutional, but there is a significant risk that a reviewing court may determine that the civil actions authorized by the Act are preempted by federal law.

The purpose of the Act is to establish a so-called “converse 1983”² action that would authorize a State law remedy for civil damages against federal officials for violations of federal constitutional or statutory rights, similar to the existing federal cause of action established under 42 U.S.C. § 1983, which provides a federal cause of action for civil damages against state and local actors for constitutional violations. The Act creates a cause of action against a “covered

¹ HB 351 and SB 346 are not cross-filed bills, and they are not identical. There are two differences. In HB 351, new Courts and Judicial Proceedings Article § 3-2702(d)(1) (page 3, line 24) says “after the cause of action accrues,” whereas the same provision of SB 346 (page 3, line 30) uses the past tense, “after the cause of action accrued.” Also, § 3-2702(d)(2)(i) in SB 346 (page 4, line 1) states that the section may not be construed to abrogate “any *State or local* government liability under State or common law for the actions of State or local government employees” (emphasis added), but the same provision of HB 351 (page 3, line 26) says “any *local government* liability under State or common law” (emphasis added). The words “State or” in HB 351 appear to have been unintentionally excluded in the amendment process, as the Senate Judicial Proceedings Committee indicated an intent to conform the language of HB 351 to the previously adopted version of SB 346, which included that language. See Senate Judicial Proceedings Committee, Voting Session, April 8, 2026, at 1:13:06-23; Judicial Proceedings Committee Amendment HB0351/683028/01 to House Bill 351. Therefore, I recommend that if both bills are signed, that SB 346 be signed last.

² See Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. Colo. L. Rev. 159, 160 (1993).

officer”³ for the deprivation of a right, privilege, or an immunity secured by the United States Constitution or the laws of the United States. The Act authorizes a plaintiff, either an aggrieved party or the Office of the Attorney General, to seek damages and declaratory and injunctive relief and allows a court to award reasonable fees and costs to a prevailing plaintiff. Defendants in an action under the Act may assert any defense or immunity that was available at the time the cause of action accrued.

Although a handful of states have enacted laws allowing civil suits against federal actors for violating constitutional rights,⁴ there are only a few cases — and none that are binding in Maryland — addressing the use of such statutes to sue federal officials for violations of federal constitutional rights, so the outcome of any potential legal challenge to the Act is unclear. Based on the current case law and legal commentary, I foresee two potential ways that the constitutionality of the Act might be challenged.

First, it might be argued that the Supremacy Clause of the U.S. Constitution bars such actions. The United States government makes this argument in its pending lawsuit challenging the Illinois Bivens Act, which established a cause of action against any person who, while conducting civil immigration enforcement, knowingly violates the Illinois Constitution or United States Constitution. In its complaint, the United States alleges that the Illinois Bivens Act (1) unlawfully regulates the federal government by directly subjecting federal officers to court proceedings and punitive damages and (2) unlawfully discriminates against the federal government by targeting officers who conduct civil immigration enforcement.⁵

I believe Maryland’s Act is distinguishable and defensible against such a claim. There are reasonable arguments that the Act is not discriminatory. Although the Act applies only to “covered officers,” defined in relevant part as those who can make arrests for violations of United States Code, this limitation does not single out federal officers for disfavored treatment. Instead, as the General Assembly recognized repeatedly when discussing HB 351 and SB 346, the Act brings parity as State and local law enforcement officers are already subject to civil suit for constitutional violations under 42 U.S.C. § 1983. Courts are not limited to the face of a single law when considering whether the law discriminates against the federal government.⁶ Moreover, because the Act authorizes suits for violations of the U.S. Constitution and federal law only, not State law, the Act does not attempt to regulate federal operations or subject federal officers performing their duties to State law standards.

³ “Covered officer” means an officer who may make an arrest with or without a warrant for violations of the United States Code and may carry firearms in the performance of duty, but does not include a law enforcement officer, as defined in § 1-101 of the Public Safety Article, acting under the authority of a joint task force that primarily enforces the United States Code. New Courts & Jud. Proc. Art. § 3-2701(b).

⁴ At least five states, California, Illinois, Maine, Massachusetts, and New Jersey, have enacted variations of a “converse 1983” cause of action that authorize damages against federal officials for federal constitutional violations.

⁵ See Complaint, *United States v. Illinois*, No. 3:25-cv-02220 (S.D. Ill. Dec. 22, 2025).

⁶ See, e.g., *United States v. California*, 921 F.3d 865, 884 (9th Cir. 2019) (concluding that state law applying only to immigration detention facilities did not discriminate against the federal government to the extent that law’s requirements duplicated preexisting inspection demands imposed on state and local detention facilities).

Second, a court would consider whether the Act is preempted by existing federal law that governs lawsuits for violations of constitutional rights by federal actors. The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the “Westfall Act,” provides federal employees absolute immunity from common-law tort claims for acts taken in the course of their duties. 28 U.S.C. § 2679(b), (d). The Westfall Act provides a process to substitute the United States as the defendant in such suits, and a claim may proceed under the Federal Tort Claims Act (“FTCA”). This process is the exclusive way to seek money damages for injuries caused by federal employees acting in the course of their employment, and, except for limited exceptions in the Westfall Act, all other such civil actions are barred. *See* 28 U.S.C. § 2679(b)(1).⁷

The Westfall Act provides an exception for two types of civil actions against federal employees: (1) civil actions brought for violations of the United States Constitution, and (2) civil actions brought for violations of federal statutes that authorize civil actions against an individual. 28 U.S.C. § 2679(b)(2). In general, most scholars and courts view the exception for constitutional violations narrowly “as a carveout to accommodate *Bivens* actions.” *Rise v. Bagshaw*, No. 1:24-cv-2388-RCL, 2025 WL 1380478, *13 (D.D.C. May 13, 2025) (slip opinion) (citing *Hernandez v. Mesa*, 589 U.S. 93, 111 n.9 (2020)). “*Bivens* actions” refers to the implied private cause of action for damages against federal officers for violations of constitutional rights created by the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Such actions are limited.

However, some legal scholars have argued that the Westfall Act’s constitutional exception is broader and allows for state remedies, such as a converse 1983 cause of action.⁸ Part of the argument for a broad reading of the exception is that there is historical precedent for state causes of action: “[f]or most of our history, state tort suits were the primary mechanism for holding federal officers accountable” for constitutional violations. *Buchanan*, 71 F.4th at 1014 (Walker, J., concurring). Also, Congress could have used more explicit or narrow language had it wished to limit the exception to *Bivens* claims only.

Still, a split panel of the U.S. Court of Appeals for the Third Circuit has held, albeit with little analysis, that the Westfall Act barred an arrestee’s claim under New Jersey’s converse 1983 statute, the New Jersey Civil Rights Act, against United States marshals for federal constitutional violations. *Henry v. Essex County*, 113 F.4th 355, 364 (3rd Cir. 2024) (explaining that the Westfall

⁷ *See also Hui v. Castaneda*, 559 U.S. 799, 806 (2010) (“The Westfall Act amended the FTCA to make its remedy against the United States the exclusive remedy for most claims against [federal] Government employees arising out of their official conduct.”).

⁸ *See, e.g.,* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 514, 573 (2013); Thomas A. Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights*, 75 CATH. U. L. REV. (forthcoming 2025), <https://ssrn.com/abstract=4462807>; *see also Buchanan v. Barr*, 71 F.4th 1003, 1016-17 (D.C. Cir. 2023) (Walker, J., concurring) (explaining that the Westfall Act’s constitutionality exception *might* be interpreted expansively to preserve state tort suits brought to remedy constitutional injuries); *Black Lives Matter D.C. v. Barr*, No. 20-CV-1469 (DLF), 2024 WL 3300158, at *4-*5 (D.D.C. July 4, 2024) (explaining possible readings of the exception).

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exception is for *Bivens* actions only).⁹ Other federal district courts that have considered this issue have also rejected broader interpretations of the Westfall Act exception, though they are distinguishable because they have not specifically ruled on the constitutionality of converse 1983 statutes like the Act.¹⁰ In light of the prevailing interpretation of the Westfall Act that *Bivens* actions are the exclusive remedies for damages against federal actors for federal constitutional deprivations, there is a significant risk that a reviewing court could find that the Act is preempted under federal law. Moreover, the Westfall Act would also preempt civil actions under the Act for violations of “the laws of the United States” if the federal statute does not authorize a civil action. *See* 28 U.S.C. § 2679(b)(2)(B).

Nevertheless, there are reasonable arguments that the Act is not fully preempted by federal statute, and there is no controlling case law in federal courts in Maryland or the Fourth Circuit, so the Act is not clearly unconstitutional.

Sincerely,

A handwritten signature in black ink, appearing to read "AG Brown".

Anthony G. Brown

cc: The Honorable Susan C. Lee, Secretary of State
Jeremy Baker, Chief Legislative Officer
Victoria L. Gruber, Exec. Director of DLS

⁹ *See also Quiñonez v. United States*, No. 22-cv-3195-WHO, 2023 WL 5663156, at *2-*3 (N.D. Cal. Aug. 30, 2023) (concluding that the FTCA precluded the plaintiffs’ claims under California’s Tom Bane Civil Rights Act premised on First and Fourth Amendment violations).

¹⁰ *See Pompy v. First Merchants Bank*, No. 24-1249, 2025 WL 2694801, at *10 (6th Cir. May 23, 2025), *cert. denied sub nom. Pompy v. Moore*, No. 25-826, 2026 WL 795070 (U.S. Mar. 23, 2026) (declining to adopt view that Westfall exception went beyond *Bivens* claims); *Rise Slip Op.*, at *14-*16 (rejecting the broadest, “purposive” interpretation of the Westfall exception); *Black Lives Matter D.C.*, 2024 WL 3300158, at *5-*6 (rejecting “broadest reading of the Westfall Act’s constitutional carveout, one on which a lawsuit is brought ‘for a violation of the Constitution’ whenever it would help vindicate a plaintiff’s constitutional rights,” but leaving open a possibility that the exception accommodates actions where a constitutional violation is an element).