President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 18, 2026

**WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT,
MARYLAND SHALL ISSUE,
IN SUPPORT WITH AMENDMENTS TO SB 346 and HB 332**

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), all-volunteer, non-partisan, non-profit organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia and the Bar of Maryland. I retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License ("HQL") and a certified NRA instructor in rifle, pistol and personal protection in the home and outside the home and muzzle loading. I appear today as President of MSI in SUPPORT WITH AMENDMENTS SB 346 and the cross-file, HB 332 ("the Bill").

The Bill: The Bill, dubbed the "No Kings Act," amends MD Code, Courts and Judicial Proceedings, §§ 3-2701, 3-2702, to create a new cause of action for lawsuits in Maryland Courts, providing that AN AGGRIEVED PARTY MAY BRING AN ACTION AGAINST AN INDIVIDUAL WHO, UNDER COLOR OF LAW, DEPRIVES THE AGGRIEVED PARTY OR CAUSES OR ALLOWS THE AGGRIEVED PARTY TO BE DEPRIVED OF A RIGHT, A PRIVILEGE, OR AN IMMUNITY SECURED BY THE U.S. CONSTITUTION. The Bill defines "law" to include (1) THE U.S. CONSTITUTION; (2) THE MARYLAND DECLARATION OF RIGHTS (3) THE MARYLAND CONSTITUTION; (4) THE LAWS OF THE UNITED STATES; AND (5) THE LAWS OF MARYLAND. The Bill provides that AN AGGRIEVED PARTY MAY SEEK DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF. The Bill further provides that A COURT MAY AWARD REASONABLE FEES AND COSTS, INCLUDING ATTORNEY'S FEES AND EXPERT WITNESS FEES, TO A PREVAILING PLAINTIFF UNDER THIS SECTION. Finally, A DEFENDANT IN AN ACTION UNDER THIS SECTION MAY ASSERT A DEFENSE OF ABSOLUTE OR QUALIFIED IMMUNITY TO THE SAME EXTENT AS A PERSON SUED UNDER 42 U.S.C. § 1983 UNDER LIKE CIRCUMSTANCES.

Discussion:

The Westfall Act: We support this Bill if it is amended as suggested below. But before we get into suggested amendments, we wish to provide information to the

Committee concerning the legal context in which this Bill will operate. Specifically, from the testimony of the sponsor and others during hearing before JPR on the Senate cross-file of this Bill, it appears that the Bill will be amended in the Senate to limit the cause of action created by this Bill to federal officials ONLY. At the very least, the Bill, as originally drafted, will create a cause of action against federal officers, as well as other "individuals" acting under "color of" federal and Maryland law. Given that change in focus, we have revised our written testimony given in the Senate to take these changes into account. For the reasons set forth below, application of this Bill solely to federal officials will almost certainly fail.

The Westfall Act and *Osborn v. Haley*: First, this Bill is unlikely to overcome the Westfall Act, 28 U.S.C. § 2679(b)(1). Under the Westfall Act, federal employees "have absolute immunity" from claims "arising out of acts they undertake in the course of their official duties." *Osborn v. Haley* , 549 U.S. 225, 229 (2007). Such "acts" would necessarily encompass this Bill's coverage of actions taken by individuals under color of THE LAWS OF THE UNITED STATES.

Specifically, Section 2679(b)(1) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title[1] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

Section 2679(d)(1) provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court *shall be deemed an action against the United States* under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(Emphasis added).

Section 2679(d)(2) then provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident

[1] The cross-reference to "sections 1346(b) and 2672 of this title" is to provisions of the Federal Tort Claims Act.

> out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court *shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending*. Such action or proceeding *shall be deemed* to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, *and the United States shall be substituted as the party defendant*. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(Emphasis added).

These provisions were authoritatively construed by the Supreme Court in *Osborn*.[2] *Osborn* holds that the Attorney General's certification that the federal employee was acting within the scope of his or her employment is conclusive for purposes of removal to federal district court and thus federal district courts have "no authority to return cases to state courts on the ground that the Attorney General's certification was unwarranted." 549 U.S. at 241. The Court thus held that any contention that the certification was unwarranted must be adjudicated solely in federal district court *without any remand to state court*. *Id*. at 243 ("§ 2679(d)(2) renders the federal court exclusively competent and categorically precludes a remand to the state court."). (Emphasis added). That means the Westfall Act strips Maryland courts of any power to adjudicate the cause of action created by this Bill where the Attorney General has issued such a certification. Significantly, the Westfall Act further provides that in cases where the Attorney General has refused to issue the certification, the federal employee may contest that decision after removing the case to federal court. See 28 U.S.C. § 2679(b)(3) ("In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment.").

Osborn also squarely holds that the Attorney General's certification may be based on a denial of the allegations of the complaint. As the Court stated, Section 2679(d)(1) "encompasses an employee on duty at the time and place of an 'incident' alleged in a complaint who denies that the incident occurred." 549 U.S. at 247. While the Court noted that the Attorney General's certification is subject to judicial review by the district court, the Court made clear that the merits of such a denial (and hence an adjudication of the case itself) must be adjudicated in federal district court. The Court explained that such a determination *is without a jury* because the United States is substituted for the individual officer upon certification under Section 2679(d)(2) at the outset, and there is no right to a jury trial in suits against the United States. *Osborn*, 549 U.S. at 252-53. If the district court overturns the Attorney General's certification, then the federal employee has a right to an immediate appeal of that determination under the collateral order doctrine because

[2] Full disclosure, the undersigned was counsel for the United States in *Osborn*.

the Westfall Act was "designed to immunize covered federal employees not simply from liability, but from suit." *Id.* at 238.

The upshot of the Westfall Act is that a plaintiff is effectively left to a suit against the United States and is entitled only to the remedies provided by the Federal Tort Claims Act. See, e.g., 28 U.S.C. § 2680(h). If the FTCA does not provide any remedy, then the suit is barred by the sovereign immunity of the United States, and the complaint must be dismissed for lack of jurisdiction under Rule 12(b)(1) (federal sovereign immunity is jurisdictional) or for failure to state a claim upon which relief can be granted under Rule 12(b)(6). See, e.g., *Ferrari v. United States,* 2021 WL 5277089 (9th Cir. 2021); *Williams v. United States,* 71 F.3d 502 (5th Cir. 1995); *Omnipol, A.S. v. Multinational Defense Services, LLC*, 32 F.4th 1298 (11th Cir. 2022).

***Bivens*-type Claim and Section 1442 Removal:** The Westfall Act immunity does not apply to suits which are "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Such a suit is directly based on the Constitution itself and was recognized in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for a violation of Fourth Amendment rights in *Davis v. Passman*, 442 U.S. 228 (1979), for a former congressional staffer's Fifth Amendment sex-discrimination claim, and in *Carlson v. Green*, 446 U.S. 14 (1980), for a federal prisoner's inadequate-care claim under the Eighth Amendment. Since these decisions, however, the Supreme Court has refused to recognize such suits for violations of other constitutional rights outside of those three cases. See *Egbert v. Boule*, 596 U.S. 482, 486, 493-94 (2022) (summarizing the case law and refusing to recognize a *Bivens* claim against federal agents for excessive force and for retaliation for the exercise of First Amendment rights).

By definition, the exclusion from Westfall Act immunity for suits brought for a violation of federal constitutional rights would not apply to suits for violation of rights secured by federal statutory law, or by State statutory law (such as this Bill) or by common law or by State constitutions. Those kinds of suits against federal officials would continue to be barred by the Westfall Act, as discussed above. This Bill thus effectively seeks to create, *by statute*, a *Bivens*-type remedy *in State court* for claims based on violations of rights secured by the United States Constitution. That attempt will fail with respect to federal officials. First, federal law permits federal defendants to remove such claims to federal district court under 28 U.S.C. § 1442. Section 1442 provides for such removal of suits against "[t]he United States *or any agency thereof or any officer* (*or any person acting under that officer*) of the United States or of any agency thereof, *in an official or individual capacity*, for or relating to any act *under color of such office* …." (Emphasis added). The Bill's attempt to authorize adjudication of such federal constitution claims *in State court* under the cause of action created by this Bill would thus be pointless under Section 1442. See *Mesa v. California*, 489 US. 121 (1989).

Second, it seems highly doubtful that a federal court would be willing to adjudicate the merits of this newly created State cause of action for *Bivens*-type constitutional

claims, especially in light of the Supreme Court's repeated refusal to broaden the *Bivens* remedy. See *Egbert*, 596 U.S. at 486. *Unlike Bivens*, which, again, was based directly on a cause of action implied by the *Constitution itself*, the cause of action created by this Bill is a State *statutory right of action*. State statutory causes of actions against federal officials are precluded by the immunity accorded by the Westfall Act, as noted above. Any claim based on this Bill will thus likely fail for that reason alone. *Bivens*-type claims based directly on the Constitution would be controlled by federal law and are thus limited to the three situations already recognized by the Supreme Court. This Bill is not necessary to preserve those limited claims which can be brought in State or federal court already. If brought in State court, the claim is just removed to federal district court under Section 1442. The Bill's attempt to accord jurisdiction to state courts will thus fail.

Federal Defenses: Suits for actions taken by federal officers under color of federal law are *always* subject to *federal* defenses, which cannot be abolished or limited by States under the Supremacy Clause of the United States Constitution, Art. VI, cl.2. Those defenses include (but are not limited to) federal sovereign immunity, absolute immunity (e.g., the President, prosecutors, judges, Members of Congress), qualified immunity, preemption and inter-governmental immunity. See, e.g., *Trump v. United States*, 603 US. 593 (2024) (absolute immunity); *United States v. Washington*, 596 U.S. 832 (2022) (holding that "the intergovernmental immunity doctrine" prohibits "state laws that either regulat[e] the United States directly or discriminat[e] against the Federal Government or those with whom it deals' (e.g., contractors)"), quoting *North Dakota v. United States*, 495 U.S. 423, 435, (1990) (plurality opinion); *Hammer v. United States Department of Health and Human Services,* 905 F.3d 517 (7th Cir. 2018) (federal sovereign immunity); *Geo Group, Inc. v. Newsom*, 50 F.4th 745 (9th Cir. 2022) (en banc) (preemption). These principles were applied recently by the federal district court in California to enjoin enforcement of a California law that barred the use of masks by federal law enforcement agents. *United States v. California*, --- F.Supp.3d ----, 2026 WL 363346 (C.D. Calif. Feb. 9, 2026) (applying Supremacy Clause immunity and the intergovernmental immunity). Again, all such defenses would be litigated in federal court under 28 U.S.C. § 1442, not in Maryland state court.

Given all these legal realities, if the Bill is limited or applied to federal officials as suggested by the Senate sponsor, then the Bill can be reasonably viewed as performative rather than truly creating any viable cause of action against federal officials. See "Performative," Merriam-Webster Dictionary (defining the term to mean an act "made or done for show (as to bolster one's own image or make a positive impression on others)"). The undersigned respectfully submits that performative legislation is "beneath the dignity" of the General Assembly as a constitutional body. Cf. *Saunders v. State*, 2023 WL 118518 at *13 (Md. Appellate Court 2023) (State's Attorney's office).

Suggested Amendments:

No amendment to this Bill can overcome the obstacles to recovery against federal officials outlined above. But the Bill can be amended to protect the rights of Marylanders in other contexts. First the Bill is seriously and inappropriately limited to suits against "AN INDIVIDUAL" for deprivation of A RIGHT, A PRIVILEGE, OR AN IMMUNITY SECURED BY THE U.S. CONSTITUTION. For a Bill grandly dubbed the "No Kings Act," both limitations are wholly unwarranted. It should go without saying that **governments** ("Kings") may violate the constitutional rights of individuals. That includes the governments of Maryland. The Bill should thus be amended to provide that a suit may be brought against AN INDIVIDUAL, THE STATE OF MARYLAND, ITS AGENCIES AND ANY COUNTY, CITY OR MUNICIPALITY OF THE STATE OF MARYLAND. Such language would waive the State's sovereign immunity from suit and open Maryland courts to individuals who have suffered a deprivation of rights because of the actions of the State, its agencies and other Maryland governmental bodies. See, e.g., *Board of Educ. of Baltimore County v. Zimmer-Rubert*, 409 Md. 200 (2009)("'the General Assembly may waive sovereign immunity either directly or by necessary implication'")(citation omitted).

Refusing to permit recovery against the State and its agencies and municipalities for violations of constitutional and rights secured by state and federal law would be hypocritical in the extreme. Federal law, 42 U.S.C. § 1983,[3] already permits **damages** suits and suits in equity against municipalities, including fee recoveries, under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690 (1978). See *Uzuegbunam v. Preczewski*, 484 Md. 534, 551 (2021). And while the State and State agencies have sovereign immunity from **damages** awards under Section 1983, they are nonetheless subject to Section 1983 suits in State and federal court seeking declaratory and injunctive relief (and fee awards) under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). See, e.g., *Trump v. CASA,* 606 U.S. 831, 846 n.9 (2025) (collecting caselaw). Section 1983 litigation has led to the advancement of federal constitutional and statutory rights since the enactment of Section 1983 on April 20, 1871, as Section 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. Marylanders are entitled to no less protection under State law and the State Constitution and Declaration of Rights.

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[3] Section 1983 provides:

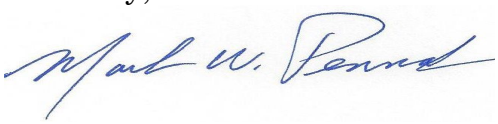
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Bill authorizes suits only for deprivation of rights SECURED BY THE U.S. CONSTITUTION. As applied to federal officials, that limitation is performative for all the reasons set forth above. That point aside, one is compelled to wonder why the Bill ignores the rights "secured by" the Maryland Constitution and the Maryland Declaration of Rights and other rights "secured by" federal and State law. The Bill defines "law" to include rights originating from all these sources but unaccountably then **limits** the application of that definition to actions taken by an INDIVIDUAL who acts UNDER COLOR OF LAW. Are the rights secured by the Maryland Constitution and the Maryland Declaration of Rights (and other State and federal law) somehow **less important** than the rights secured by the U.S. Constitution? By limiting the cause of action to violations of the U.S. CONSTITUTION, the General Assembly would make these provisions into second-class rights. Maryland already waives sovereign immunity for common law tort actions under the Maryland Tort Claims Act. See, e.g., *Williams v. Morgan State University*, 484 Md. 534, 551-52 (2023). Such an amendment would be a useful addition to that waiver to include State and federal statutory claims as well. *Id.*

Third, the Bill incorporates the standards for qualified immunity established in the caselaw under 42 U.S.C. § 1983, but that endorsement is unfortunate and ill-advised. See David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 74 (1989); *Baxter v. Bracey*, 140 S.Ct. 1862 (2020) (mem) (Thomas, J., dissenting from the denial of certiorari). Federal qualified immunity often unfairly leaves the victim without any remedy. The officials of the State and its agencies and municipalities who violate the constitutional and statutory rights of the victim should be held fully liable for the consequences of their actions.

Finally, the Bill also authorizes the award of attorneys' fees and costs but does not define any governing standard, such as developed under 42 U.S.C. § 1988, for such awards. That oversight should be corrected. Section 1988 fees have been sharply limited by the Supreme Court to preclude fee awards under the "catalyst theory." See, e.g., *Lackey v. Stinnie*, 604 U.S. 192 (2025). Before the Supreme Court abolished any use of that theory in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603 (2001), the federal courts routinely awarded Section 1988 fees where the suit acted as a "catalyst" to the relief sought because lawsuit brought about voluntary change in defendant's conduct. 532 U.S. at 605-06. See e.g., *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574 (1st Cir. 1999). *Buckhannon* abrogated that line of precedent, holding that a person cannot be a prevailing party under Section 1988 without obtaining *court ordered* relief. This Bill provides an opportunity for the State to make clear that a "prevailing party" under this Bill may also include parties who also prevail under the catalyst theory. With that exception, the Bill should cross-reference Section 1988 standards for fee awards under the Bill. These changes would provide important guidance to Maryland courts and minimize the potential for expensive and protracted disputes over fee awards.

Sincerely,



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