



Representative Martin LaLonde
Chair, Vermont House Committee on Judiciary
Delivered via electronic submission

February 19, 2026

Dear Chairman LaLonde and Members of the House Committee on Judiciary,

Protect Democracy United is a 501(c)(4) nonpartisan organization dedicated to protecting the rule of law. It commends the Vermont House of Representatives for its consideration of a universal constitutional remedies bill that would allow any Vermonter to have an effective remedy when their federal constitutional rights are violated so that no officer—federal, state, or local—is above the law.

Passage of a universal constitutional remedies bill in Vermont is necessary to correct an imbalance in how federal, state, and local officials are held accountable to the U.S. Constitution. While a federal law, 42 U.S.C. § 1983 (“Section 1983”), allows people to sue state and local officials for federal constitutional violations, no equivalent federal law exists for suing federal officials. Instead, people injured by federal officials have for the last fifty years generally relied on a “*Bivens* action”—an implied right to sue directly under the Constitution.

But the Supreme Court has sharply curtailed the availability of *Bivens* actions in recent years. *E.g.*, *Egbert v. Boule*, 596 U.S. 482, 486 (2022). And as *Bivens* has been narrowed to apply only in the most limited scenarios, people have effectively lost the only meaningful legal tool that would allow them to hold federal officers accountable for violations of their constitutional rights. In the wake of *Bivens*’ demise, a dangerous gap has emerged: federal officers often have *de facto* immunity and cannot be sued for damages, even for willful violations of constitutional rights.

This lack of accountability violates the longstanding and foundational legal principle that “every right, when withheld, must have a remedy, and every injury its proper redress.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). And one need not look further than the recent killings of Renee Good

and Alex Pretti in Minnesota to see closing that gap is necessary. In a country where no officer should be above the law, whether Ms. Good's and Mr. Pretti's families should have a legal remedy for the loss of their loved ones should turn on whether their rights were violated, not what badge the officers were carrying when they pulled the trigger. Unfortunately, that is not the law today: if a state or local officer violates someone's constitutional rights, that individual can sue the officer for damages and other relief under Section 1983; if a federal officer commits the same violations, no such option exists.

The U.S. Constitution permits the Vermont Legislature to pass a universal constitutional remedies bill to fix that accountability gap. “[N]othing . . . stop[s] a state from creating a new cause of action allowing plaintiffs to directly allege federal constitutional violations” against federal officers. *Buchanan v. Barr*, 71 F.4th 1003, 1016 (D.C. Cir. 2023) (Walker, J., concurring). This was by design, as the Founders viewed states as an important check on federal authority. *See, e.g.,* The Federalist No. 28 (A. Hamilton); The Federalist No. 51 (J. Madison). Indeed, as Seth Waxman (the U.S. Solicitor General during the Clinton Administration) has observed, there is “notable historical precedent supporting” a state law cause of action for federal constitutional violations that is enforceable against federal officers. Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2247 (2003). After all, “from the Founding until the 1970s,” then, “state suits were *the* primary regime for holding federal officers accountable for constitutional violations.” *Buchanan*, 71 F.4th at 1017.

Unsurprisingly then, over ten universal constitutional remedies bills have already been proposed across the country this year. ***We believe that pending bills in California (SB747) and Massachusetts (SD3677)¹ would be excellent models for Vermont to follow and adapt.***² Both proposals appear to be best positioned to respond to three potential constitutional attacks that the

¹ Sen. Brownsberger (the President pro tempore of the Massachusetts Senate) has provided an informative and well-reasoned explanation for his drafting choices when preparing SD3677. *See*

<https://willbrownsberger.com/protecting-the-civil-rights-of-persons/>

² Full disclosure: Protect Democracy United is a co-sponsor of SB747 in California.

United States Department of Justice is likely to make so as to best manage litigation risk.

First, both the California and Massachusetts proposals closely adapt their causes of action from the statutory text of 42 U.S.C. § 1983 to guard against a Westfall Act preemption argument. See SB747, § 53.8(b); SD3677, § 1(a).

The Westfall Act has the effect of preempting all state law causes of actions against federal officers for *most* civil wrongs. There is an important exception, however: the Westfall Act expressly carves out, i.e., does *not* preempt, state law causes of action “brought for a violation of the Constitution of the United States.” 28 U.S.C. § 2679(b)(2)(A). Thus, it is important that any provision creating liability for federal officials limit their coverage to violations of the federal Constitution and nothing more. Any provision in a Vermont bill attempting to impose liability on *federal* officials for violations of the Vermont Constitution will be preempted by federal law.³

The California and Massachusetts bills provide models for minimizing the risk of Westfall preemption by closely tracking the language of federal Section 1983 with only two variations: (i) they adjust the “under color of law” language to include federal officers, and (ii) they do not impose liability for violating federal statutes. That is the right approach: while the language of Section 1983 may seem antiquated and invite edits for clarity, the language now has a well-established legal meaning that is critical to minimizing litigation risk. In particular, the Supreme Court has already concluded that Section 1983 is of strictly “procedural character:” it does not “provide for any substantive rights” and it serves “only to ensure that an individual had a cause of action for violations of the Constitution.” *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 617 (1979). Thus, statutory language closely tracking Section 1983 will give Vermont the best argument in court that the bill is not preempted by the Westfall Act because all the bill does is create a permissible procedural cause of

³ Of course, nothing stops Vermont from creating a separate cause of action against state and local officers for violations of the state constitution in the same bill, but it is likely advisable to do so in a distinct statutory provision to avoid clouding the Westfall Act preemption analysis.

action “for a violation of the Constitution of the United States.” 28 U.S.C. § 2679(b)(2)(A), and nothing more.

Notably, the California and Massachusetts bills also do nothing *less* than provide a cause of action for a violation of *any* right, privilege, or immunity secured by the U.S. Constitution. Not only does this language most closely track Section 1983 and therefore minimize litigation risk, Vermonters should not have to pick and choose among their constitutional rights. A bill that closely tracks Section 1983 will provide Vermonters with access to a robust remedy for *any* violation of their constitutional rights.

Second, both the California and Massachusetts proposals treat federal, state, and local officials equally to avoid offending the intergovernmental immunity doctrine’s non-discrimination rule. See SB747, § 53.8(b),(j); SD3677, § 1(a).

The intergovernmental immunity doctrine’s non-discrimination rule prohibits, among other things, state laws that “discriminat[e] against the Federal Government.” *United States v. Washington*, 596 U.S. 832, 838 (2022) (cleaned up)). Thus, any bill must treat federal officers at least as well as it treats a similarly situated state officer. In other words, while Vermont could treat federal officers *more* favorably than state officers in the eventual bill—by, for example, making only state and local officers liable for violations of the Vermont Constitution—it cannot treat federal officers *worse*. If Vermont violates that rule, the law will likely be ruled unconstitutional for “violat[ing] the Supremacy Clause.” *Washington*, 596 U.S. at 839.⁴

⁴ For example, a California anti-masking bill that applied to federal and local but not state officers was just invalidated under the intergovernmental immunity doctrine. *See United States v. California*, No. 2:25-CV-10999-CAS-AJR, 2026 WL 363346, at *13 (C.D. Cal. Feb. 9, 2026) (“[T]he Act treats federal law enforcement officers differently than similarly situated state law enforcement officers. Accordingly, the Court finds that the United States is likely to succeed on the merits of its claim that [the Act] unlawfully discriminates against the federal government in violation of the intergovernmental immunity doctrine.”).

As a result, both the California and Massachusetts bills—which treat all officers federal, state, and local officers equally—would be good models for Vermont to follow.

Third, both the California and Massachusetts bills provide defendants with the same defenses available in federal Section 1983 actions to avoid an obstacle preemption attack. See SB747, § 53.8(d); SD3677, § 1(b).

Under obstacle preemption, state laws can be preempted when they “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hillsborough Cty. v. Automated Med. Lab’s Inc.*, 471 U.S. 707, 713 (1985). It is highly likely that the U.S. Department of Justice would argue that any Vermont law appearing to deny federal officers at least qualified immunity is preempted by the federal interest in energetic, good-faith federal law enforcement efforts. Whatever the merits of that argument (legal authorities are divided on the point⁵), explicitly providing that officers have the same defenses they have in federal Section 1983 cases should sidestep any such constitutional attack. There is no federal interest in violations of clearly established constitutional law, and so imposing liability for actions that officers “should know” are “outside . . . clearly established constitutional limits,” will not “unduly interfere with the exercise of official judgment.” *Butz v. Economou*, 438 U.S. 478, 506-07 (1978).

However, Protect Democracy United also recognizes that qualified immunity can be (for good reason) a controversial subject. To the extent that the Vermont Legislature has any concern about the potential codification of qualified immunity, it could again look to California’s proposal and borrow California’s statutory language cabining the qualified immunity defense recognized by the bill to actions brought under the bill. *See* SB747 § 53.8(d) (explaining that provision creating the qualified and absolute immunity defenses “does not alter, amend, create, or support a qualified or absolute immunity defense in any other action or proceeding brought under any other provision of California law”). That explicit cabining language could be adapted in Vermont to avoid any detrimental

⁵ Compare Waxman & Morrison, *supra*, 112 Yale L.J. at 2249 with Vikram David Amar, *Converse § 1983 Suits in Which States Police Federal Agents an Idea Whose Time Has Arrived*, 69 Brook. L. Rev. 1369, 1395–96 (2004).



side effects from the inclusion of a qualified immunity defense in a universal constitutional remedies bill by disavowing any support for a qualified immunity defense under any *other* provision of Vermont law.

Thank you for your time and attention to this critical issue. We urge the Vermont Legislature to pass a bill providing for a universal remedy for violations of the United States Constitution so that Vermonters can exercise their constitutional rights knowing they are enforceable rights, not just hollow promises. Please contact me at jane.bentrott@protectdemocracy.org if you would further discuss any of the issues in this letter.

Respectfully,

/s/

Jane Bentrott
Counsel