Testimony Before the House Judiciary Committee of the

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As reflected in the attached CV, I am a professor of law at Northwestern Pritzker, specializing in the law of federal jurisdiction and constitutional remedies. I'm here today to offer testimony on proposed H. 849 which would add a new chapter 205 to the Vermont Statutes, creating a new civil action for deprivations of rights under the federal Constitution. I will break my testimony into three parts: what this new statute would add to the system of constitutional remedies already in place; what kinds of lawsuits the proposed statute would facilitate; and what one might expect were the federal government to challenge the statute's viability as inconsistent with supreme federal law. I do not claim any special expertise as to the content of Vermont state law.

1. Constitutional Remedies for Officials Acting under Color of State and Federal Law

The impetus for legislation such as H.849 lies in a gap in available constitutional remedies. While 42 U.S.C. § 1983 provides a federal right of action for those injured by constitutional violations committed under color of state law, the statute does not apply to comparable violations by federal officials. Two judge-made doctrines nonetheless provide remedies for constitutional violations by federal officials: the *Ex parte Young* doctrine (as extended to federal official action) authorizes suits for injunctive relief against threatened or continuing violations of constitutional rights and the *Bivens* doctrine authorizes suits for damages for a narrow range of violations, namely those committed by law enforcement officials under the Fourth Amendment, by prison officials under the Eighth Amendment, and perhaps by some other officials under the Equal Protection component of the Fifth Amendment.[1] But the Supreme Court has taken an exceedingly narrow view of the scope of these judge-made *Bivens* claims, confining the doctrine to its existing context.[2]

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[1] *See* Ex parte Young, 208 U.S. 123 (1908); Bivens v. Six Unknown-Named Agents, 403 U.S. 388 (1971). On the availability of remedies for federal government misconduct, see Baude, et al., Hart & Wechsler's The Federal Courts and the Federal System (8th ed. 2025). Apart from *Bivens*, a Fourth Amendment case, the Court has upheld the right to pursue such claims in *Carlson v. Green,* 446 U.S. 14 (1980) (Eighth Amendment claim for indifference to prisoner's need for medical treatment) and *Davis v. Passman,* 442 U. S. 228 (1979) (Fifth Amendment equal protection claim for sex-based discrimination in federal employment).

[2] *See* Goldey v. Fields, 606 U.S. 942, 944 (2025) (describing the recognition of new actions as a "disfavored judicial activity"); Egbert v. Boule, 596 U. S. 482, 492 (2022) (concluding that a *Bivens* action could not proceed against an immigration official engaged in law enforcement activity near the Canadian border in the United States); Hernández v. Mesa, 589 U.S. 93 (2020) (rejecting a *Bivens* suit brought by Mexican nationals seeking redress for the cross-border shooting of their son by federal immigration officials).

The Court's doctrine rests on the assumption that the legislature (not the federal courts) should bear responsibility for authorizing a suit for damages that would more generally enable the enforcement of constitutional rights against federal officials.[3]

During the past five years, a number of states have adopted legislation that would authorize such damages suits against federal officials. In Illinois, for example, the governor recently signed into law the "Illinois Bivens Act," which authorizes suit against officials, state and federal, who violate the Constitution and other specified rights in the course of enforcing the immigration laws.[4] The California Bane Act similarly authorizes suits against state and federal actors. Other states have adopted similar measures. For a discussion, see Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 Nw. U. L. Rev. 737 app. A at 809–13 (2021) (collecting state statutes).[5]

Proposed H.849 would join this collection of statutes, authorizing suit against state and federal officials. It reads as follows:

> (a) Every person who, under color of any statute, ordinance, regulation, custom, or usage, subjects or causes to be subjected, any citizen of the State of Vermont or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States 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 the officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
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> (b) For purposes of this section, "color of any law, statute, ordinance, regulation, custom, or usage" includes color of any statute, ordinance, regulation, custom, or usage of the United States and of any U.S. state or territory or the District of Columbia.

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[3] A growing scholarly literature considers the viability of state authorized suits against federal officials, an idea first suggested in Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1428 n.15 (1987) (identifying the possibility of a state-created "converse-1983" suit against federal officials).

[4] *See* Ill. Public Act 104-0440, formerly H.B. 1312, sec. 5-10(a) ("Any person may bring a civil action against any person who, while conducting civil immigration enforcement, knowingly engages in conduct that violates the Illinois Constitution or the United States Constitution."). The federal government has sued to enjoin the enforcement of Illinois's law. See Justice Department Sues J.B. Pritzker, Kwame Raoul Over the Illinois Bivens Act (Dec. 22, 2025), https://www.justice.gov/opa/pr/justice-department-sues-jb-pritzker-kwame-raoul-over-illinois-bivensact.

[5] For examples of the text of such statutes, see Cal. Civ. Code § 52.1(c) ("Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with [by threat, intimidation, or coercion] may institute and prosecute in their own name and on their own behalf a civil action for damages"); Mass. Gen. Laws ch. 12, § 11I ("Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with [by threats, intimidation, or coercion] may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages").

The proposed statute thus tracks the language of 42 U.S.C. § 1983 in authorizing suit for relief in law and equity for violations of the Constitution but omits (properly in my view) any reference to suit to enforce federal or state laws. Given that federal, state and local officials in Vermont already owe a duty to comply with the federal Constitution, the proposed statute would not alter the legal obligations of those acting under color of state or federal law. But by enabling enforcement of those obligations against both state and federal actors, the proposed statute would express the state's even-handed commitment to protecting the rights of the people of Vermont from unconstitutional conduct by officials at all levels of government.

The statute's language answers some questions about expected application and coverage and raises others that the legislature may want to consider. For starters, the text defines color of law broadly to include action taken under color of the law of the United States and any state or territory or the District of Columbia. It would thus plainly reach unconstitutional conduct by federal officials as well as that of state officials, thus extending the reach of the statute beyond the state-action covered by § 1983. The statute says nothing about the doctrine of qualified immunity and would apparently leave the decision about whether to apply the doctrine to the courts called upon to hear claims under the statute. Notably, the statute tracks § 1983, which has been interpreted to assume the existence of a doctrine of qualified immunity from suits for money damages. Given that, the text's failure to countermand qualified immunity could lead courts to view the doctrine as implicitly applicable to claims under the new law.

Interpretation of the statute will typically occur in the federal courts, at least insofar as the suit names federal officials as defendants. The federal officer removal statute entitles such defendants to remove tort-based and other claims against federal agencies and officers from state to federal court. See 28 U.S.C. § 1442. Attorneys called upon to defend federal officers sued in state court will routinely opt to remove the action to federal court. In addition, it seems entirely conceivable that suits against federal officials may be brought in federal court in the first instance, invoking jurisdiction under 28 U.S.C. § 1331.[6] Importantly, though, Vermont law authorizes the state's supreme court to answer controlling questions of state law on certification from federal district and appellate courts, including the Supreme Court. *See* Vermont Rule of Appellate Procedure 14.

The text may extend the statute's application to some constitutional claims that arise from events outside Vermont. It offers citizens of Vermont a right to sue and specifically refers to unconstitutional official action under color of any state law, the law of any territory, or that of the District of Columbia. One can surely imagine the possibility of a multi-state task force in which officers from various states and territories venture to Vermont for law enforcement purposes. But encounters between Vermont citizens and officers of other states will more likely occur, if at all,

[6] Although state law would create the cause of action under the contemplated Vermont statute, any claim would necessarily incorporate a substantial issue of constitutional law. *See* Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308 (2005).

in those other states. The extension of the statute to encounters outside the state, especially those involving federal law enforcement officers, would appear consistent with the general purpose of the statute to offer Vermont citizens broader protection from constitutional torts. If the state where the encounter occurred had no comparable provision, authorizing suit for a constitutional violation, one might well expect the plaintiff to invoke Vermont law and, in doing so, to pose a choice of law question that only a law professor could love.

2. Constitutional Claims Enforceable in Suits for Money Damages

Much but not all constitutional tort litigation arises from encounters between law enforcement officers and members of the public. Many of these encounters occur on the street in instances of what one might call retail law enforcement. Many occur in state and federal prison facilities, such as the detention centers in Vermont that the federal government operates for immigration purposes under contracts with the state. Some occur as the result of a botched federal investigation, one that has led to searches, seizures, and charges that the government ultimately dismisses as misbegotten. For a summary of the range of claims available, see Martin A. Schwartz, et al., Section 1983 Litigation (2025) (six volume treatise).

Apart from law enforcement claims, some constitutional tort suits implicate the equal protection component of the Fifth and Fourteenth Amendments in seeking redress for discrimination at the hands of government officials. Obviously, workplace discrimination gives rise to a range of statutory and constitutional claims and federal workers in particular may be entitled to various forms of redress through federal agency and other internal processes. Claims may arise under the First Amendment, outside the law enforcement context, either by virtue of efforts by government officials to suppress free speech and assembly or by virtue of workplace pressure that aims to compel or forbid certain kinds of political activity. Official discrimination against the free exercise of religion may give rise to First Amendment claims. Often, suitors will litigate these matters through applications for injunctive relief, something the proposed statute contemplates with its provision for suits in law and equity.

Not every alleged constitutional violation gives rise to a suit for money damages. On the one hand, the Supreme Court has held in the context of § 1983 litigation, that individuals may sue for a retaliatory arrest or prosecution – one made without probable cause to punish the plaintiff for the exercise of rights of free expression under the First Amendment. See Gonzalez v. Trevino, 602 U.S. 653 (2024); Hartman v. Moore, 547 U.S. 250 (2006). On the other hand, the Court has refused to allow a suit for money damages stemming from a violation of an individual's *Miranda* rights in the course of an investigation. Vega v. Tekoh, 597 U.S. ___ (2022). In the prison context, suits may proceed for use of excessive force and for deliberate indifference to the health and safety of those being detained. These claims range from instances of wanton cruelty to claims that the prison administrators recklessly failed to address serious medical needs or a threat of prison violence. See Taylor v. Riojas, 592 U.S. ___ (2020) ("deplorably unsanitary" conditions of confinement); Farmer v. Brennan, 511 U.S. 825 (1994) (evident risk of prison violence).

3. State-Created Rights to Sue as Applied to Constitutional Violations Under Color of Federal Law: Federal Preemption

The federal government may challenge the provision in H.849 that extends a right to sue to individuals injured by actions under color of federal law as inconsistent with the supremacy of federal law. Two potential arguments, those based on so-called Supremacy Clause preemption and inter-governmental immunity, do not appear to offer relevant foundations for finding the proposed statute preempted. Supremacy Clause preemption displaces certain state criminal proceedings that would threaten federal officials with criminal liability for actions undertaken in the course of employment. But as the Court recently explained, reversing a lower court's extension of Supremacy Clause immunity to FTCA suits, "[t]o date at least, this Court has also generally understood [the doctrine] as providing federal officers a shield against only state criminal prosecution, not (as here) state tort liability." Martin v. United States, 145 S. Ct. 1689, 1702 n.2 (2025).

Inter-governmental immunity forbids the states from adopting laws that "either regulat[e] the United States directly or discriminat[e] against the Federal Government or those with whom it deals." United States v. Washington, 596 U.S. 832, 838 (2022) (cleaned up). The Vermont statute does not regulate the federal government; by authorizing a right to sue, the statute would enforce constitutional provisions that already govern the conduct of federal officials. On this basis, a court could plausibly conclude that the regulatory burden on federal officials stems from the obligation to comply with the federal Constitution, rather than any rights or duties conferred or imposed by state law. As the Court has explained, non-discriminatory state laws may impose some added costs and burdens on the federal government without running afoul of the inter-governmental immunity doctrine. See Washington, 596 U.S. at 839.

Two other arguments may carry greater weight but neither one in my judgment should persuade a court to displace the Vermont statute. Under settled preemption doctrine, state law must give way when it conflicts with federal law. *See* Wyeth v. Levine, 555 U.S. 555 (2009) (reaffirming the preemption principle but concluding that no such conflict existed in light of the fact that the defendant could comply with both state and federal law). One might argue that the Court has deliberately declined to authorize rights to sue in various settings involving unconstitutional conduct by federal officials. To the extent those decisions reflect a finding that the federal Constitution or laws prohibit the recognition of a right to sue, then the state's decision to furnish a right to sue might be said to conflict with federal law. But the decisions in which the Court has declined to extend the *Bivens* doctrine do not proceed on the basis that something in federal law necessarily immunizes federal officers from liability. Instead, the decisions recite a persisting concern with the legitimacy of *judge-made* constitutional tort remedies, such as that recognized in *Bivens*. In rejecting suits for damages in such cases, the Court has repeatedly emphasized the importance of allowing the legislative process to take the

lead in fashioning a right to sue. *See* Ziglar v. Abbasi, 582 U.S. 120, 135 (2017) (characterizing the judicial recognition of new *Bivens* actions as a "disfavored judicial activity").

True, the Court often refers in dicta to the comparative advantage of "Congress" in weighing the costs and benefits of authorizing a new right to sue. *See* Goldey v. Fields, 606 U.S. at 944 (in deciding whether to extend the Bivens doctrine to a new context, courts must ask whether there are "special factors" indicating that "the Judiciary is at least arguably less equipped than Congress to `weigh the costs and benefits of allowing a damages action to proceed'") (quoting Egbert v. Boule, 596 U. S. 482, 492 (2022). While such statements express a preference for legislative engagement as an alternative to the extension of judge-made law, the references to Congress do not purport to address, let alone to displace, the legislative role of the states or to foreclose state legislatures from weighing the relevant costs and benefits.

Indeed, as a matter of history, state laws and state courts played a lively role in assuring that federal officials remained within the boundaries of the Constitution. *See* Merriam v. Mitchell, 13 Me. 439 (1836) (upholding judgment against federal official for false imprisonment); Smith v. Shaw, 12 Johns. 257 (N.Y. 1815) (same, false imprisonment); *see also* James E Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 Cal. L. Rev. 737 (2019) (collecting examples of successful state court trespass and habeas claims against federal military officials by those unlawfully detained during the War of 1812). For application of similar common law principles in federal court litigation, see Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 150 (1836) (confirming availability of assumpsit as a remedy for wrongful federal tax collection); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 128 (1851) (upholding substantial trespass judgment against federal official for conduct during the Mexican-American war).

To be sure, much nineteenth century litigation proceeded on the basis of general common law, a body of law that the Court disavowed in 1938 after concluding that common law was best understood as law of the states. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (treating common law as the law of the state, obligatory in federal court in cases where it applies, unless superseded by federal law). But states continued to deploy common law remedies against federal officials. Indeed, so well recognized was the state common law alternative that the federal government argued in the *Bivens* case itself that the presumptive availability of state legal controls on federal action eliminated any need for the recognition of an implied federal right of action. *See* James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau* in Federal Courts Stories 275-99 (V. Jackson & J. Resnik eds. 2010). While the *Bivens* Court disagreed, and fashioned a federal right to sue, it gave no indication that the new *Bivens* action was to be regarded as displacing the availability of state remedies. It would be strange indeed to conclude that the modern Court's *refusal* to recognize an implied right of action, in such cases as *Goldey* and *Egbert*, would displace the state's remedial role.

One final possible preemption argument deserves consideration. In the Federal Tort Claims Act, Congress imposed vicarious liability on the federal government for certain torts committed by federal officials. Later, in the Westfall Act, Congress made the federal government's liability exclusive and then precluded individuals from pursuing like and related claims against the officials themselves. *See* 28 U.S.C. § 2679. While the Supreme Court has taken an exceedingly broad view of the scope of such Westfall Act preemption, *see* United States v. Smith, 499 U.S. 160 (1991), its decisions do not comport with the more limited terms of the Act itself, which provides federal exclusivity for only those state law claims against federal officers that overlap with a claim that Congress had made viable under the FTCA. See generally, James E Pfander & Rex Alley, *Federal Tort Liability After* Egbert v. Boule*: A Textual Case for Restoring the Officer Suit at Common Law*, 138 Harv. L. Rev. 985 (2025).

To the extent that a constitutional tort claim against a federal law enforcement official could be re-characterized as a common law tort claim within the scope of the law enforcement proviso, the Westfall Act's preclusion provision could be seen as providing a statutory source of preemption. However, the Westfall Act proviso expressly saves from displacement any civil action brought against a federal official "for a violation of the Constitution." 28 U.S.C. § 2679(b)(2)(A). While state common law tort claims may not qualify as suits for violation of the Constitution, claims brought under the contemplated Vermont statute would surely do so. While the Court has occasionally referred to the provision as the "*Bivens* exception" in dicta, *Hui v. Castaneda*, 559 U.S. 799, 807 (2010), the FTCA contains no textual statement that would limit the scope of the constitutional-violation exception to judge-made rights to sue under the *Bivens* doctrine. Nor does it limit the exception to civil actions under legislation adopted by Congress or otherwise indicate an intent to preempt constitutional tort claims authorized under state statutes.[7]

I look forward to the Committee's questions.

[7] The only circuit-level authority on point concludes that the Westfall Act preempts a state constitutional tort claim. See Henry v. Essex Cnty., 113 F.4th 355, 364 (3d Cir. 2024). But the plaintiff failed to brief the point and the majority assumed without analysis that the Westfall Act exception for constitutional violations extends only to a "Bivens action" and thus rejected a suit under a state statute. One judge refused to join that portion of the court's opinion.