IMMIGRANT LAW CENTER of MINNESOTA

Supporting families and strengthening communities since 1996

February 23, 2026

RE: Written Testimony on HF103

Dear Members of the House Judiciary Committee,

Immigrant Law Center of Minnesota (ILCM) is a nonprofit, nonpartisan 501(c)(3) organization that provides free immigration legal services to low-income immigrants and refugees across Minnesota. We write to express our support for HF103 which seeks to prohibit the use of reverse-location and reverse-keyword data warrants. These reverse tracking warrants present serious, far-reaching civil liberties concerns for all Minnesotans, regardless of citizenship status. They also present specific concerns for the communities our office serves.

Reverse tracking warrants can bring people into contact with law enforcement and the criminal legal system by virtue of simply being near a particular cell phone tower at a particular time, or conducting a certain Google search. For some people this may be a hassle; for low-income immigrants and refugees that our office serves, including green card holders, asylees, and victims of torture and domestic violence, this could not only be traumatizing, but could also cause life-altering immigration consequences. Immigrants and refugees, even those with lawful status, can potentially face immigration consequences, up to and including deportation, for simply being arrested for a crime, even if they are never charged.

Reverse tracking warrants create exactly the type of situation for this kind of devastating outcome to occur, simply because a person walked down Street A instead of Street B. ILCM does not believe that is an acceptable risk for the state of Minnesota to carry when it has the means via HF103 to mitigate it.

We urge to Committee to support HF103.

Sincerely,

Julia Decker
Policy Director
Immigrant Law Center of Minnesota

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INSTITUTE FOR JUSTICE

Testimony in Support of HF 3477
Minnesota House Judiciary Finance and Civil Law

February 23, 2026

Dear Chair Liebling, Chair Scott and Members of the Committee:

Thank you for the opportunity to testify in support of HF 3477. My name is Meagan Forbes, and I am the Legislative Director and Senior Legislative Counsel at the Institute for Justice. The Institute for Justice is a nonprofit public interest law firm that works to protect civil liberties and to increase government accountability. This bill responds to a serious problem: When a person's constitutional rights are violated by federal officials, there are not meaningful legal remedies available in federal or state courts.

This bill supports the Constitution. Under our legal system, constitutional rights are supposed to come with enforcement mechanisms. If a right does not have a remedy, it is not much of a right at all.

Over the last several decades, federal law has greatly limited the ability of people to recover damages when federal officials act unconstitutionally.[i] This bill restores a basic accountability mechanism that was once available at common law and under U.S. Supreme Court precedent but that now has been largely gutted.[ii] It does not expand rights. It simply enforces the Constitution, and it fits squarely within federal law.

Federal supremacy is not threatened by this bill. The Westfall Act explicitly allows this kind of state action. In 1988, the Westfall Act was enacted to protect federal employees from personal liability for torts committed within the scope of their employment. It allows suits against the federal government in federal court and makes the Federal Tort Claims Act the exclusive remedy available for people when federal actors commit torts. However, the Westfall Act has an important exception: It "does not extend or apply to a civil action against an employee of the Government— . . . which is brought for a violation of the Constitution of the United States . . . ."[iii] This bill is therefore consistent with the Westfall Act and furthers federal law by upholding the Constitution.

HF 3477 is also consistent with history and founding-era practices in our nation. For most of the country's history, constitutional violations by federal officials were handled at common law in state courts.[iv] And while framed as torts, they often involved constitutional claims, such as a trespass suit challenging the legality of a search under the Fourth Amendment.

In 1971, the U.S. Supreme Court also created a federal cause of action against federal agents for constitutional violations in *Bivens v. Six Unknown Federal Narcotics Agents*.[v] It was clear in this case that the cause of action was supplemental and not intended to replace what states had allowed at common law. However, over a series of subsequent cases, the Supreme Court has severely limited what can be brought as a *Bivens* action in federal court, but again, *Bivens* itself was not intended to foreclose state action. Therefore, this bill is also consistent with federal jurisprudence.

The state plays an important role in safeguarding constitutional rights. A few states already have state causes of action authorizing suits for damages for constitutional violations, including California, Illinois, Maine, Massachusetts and New Jersey.

These laws help maintain law and order. In the United States, no one should be above the law. Research shows that a lack of accountability causes civil unrest and even harms law enforcement officers.[vi] Trust is an important part of law enforcement. When people think government agents can act with impunity, it breaks down trust. This makes law enforcement encounters more confrontational and less effective. It also affects the professional reputation of officers and increases risks to officers and the public.

Lastly, while this bill opens the courthouse door, judge-made immunity defenses will continue to shield government officials from liability and make these cases difficult. Some states have also removed immunity defenses so civil rights plaintiffs have the same chance as other plaintiffs to prove the merits of their case. There is bipartisan legislation this session that would waive immunity defenses. It complements this bill well and would also bring much-needed reform.

To wrap things up, the Constitution matters. It is essential for maintaining the rule of law, preventing government abuse, and protecting the everyday freedoms we have and enjoy. We encourage the committee to stand with the Constitution and the state's right to enforce it with this bill. Thank you for your time and consideration of this important issue.

Sincerely,

Meagan Forbes
Senior Legislative Counsel
Institute for Justice
Mforbes@ij.org

[i] Harrison Stark, *Explainer: State-Created Damages Remedies Against Federal Officials*, State Research Democracy Initiative, p. 1 (Aug. 1, 2025), https://statedemocracy.law.wisc.edu/featured/2025/explainer-state-created-damages-remedies-against-federal-officials/.
[ii] *See Hernandez v. Mesa*, 589 U.S. 93, 115-16 (2020) (Thomas, J., concurring).
[iii] 28 U.S.C. sec. 2679(b)(2)(A).
[iv] Jennifer L. Mascott, *Egbert v. Boule: Federal Officer Suits by Common Law*, Cato Supreme Court Review, p. 112 (2022), https://scholarship.law.edu/cgi/viewcontent.cgi?article=2162&context=scholar#:~:text=For%20many%20decades%20after%20the,remained%20available%20against%20federal%20officers (explaining that "[f]or many decades after the ratification of the U.S. Constitution, federal officers faced lawsuits for damages under state common law when they allegedly engaged in unlawful acts, as multiple scholars have explained. A not-uncommon fact pattern included an individual suing a federal officer for trespass connected with a search, seizure, or arrest, to which the officer would plead the defense of lawful federal authority connected with a federally authorized act. Constitutional questions sometimes arose because the contours of the federal officer's defense were subject to the constraint that the federal officer carrying out a search could not do so unreasonably under the Constitution's Fourth Amendment.").
[v] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).
[vi] James Craven, Jay Schweikert, and Clark Neily, *How Qualified Immunity Hurts Law Enforcement*, Cato Institute, (Feb. 15, 2022), https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement.

SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT

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STATEMENT OF
CORINNE WORTHINGTON
ADVOCACY & COMMUNITY ENGAGEMENT MANAGER
SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT ("S.T.O.P.")

SUBMITTED TO THE MINNESOTA HOUSE OF REPRESENTATIVES JUDICIARY FINANCE AND CIVIL LAW COMMITTEE

SUBMITTED
February 23, 2026

SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT

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Members of the Committee, my name is Corinne Worthington, Advocacy and Community Engagement Manager at the Surveillance Technology Oversight Project. The Surveillance Technology Oversight Project ("S.T.O.P.") is a civil rights and anti-surveillance group. S.T.O.P. advocates and litigates against discriminatory surveillance. I am grateful for the opportunity to submit testimony in support of HF103 banning reverse location and reverse-keyword search warrants and HFXXX banning the acquisition and use of facial recognition by government entities.

I. Reverse Location and Reverse-Keyword Search Warrants are Unconstitutional.

Reverse location search ("geofence") warrants and reverse keyword search warrants pose a clear threat to Minnesotans, putting them at risk of false arrest, chilling First Amendment rights to protest and worship, and giving police an Orwellian power to track the public. "Geofence warrants" allow police to compel tech companies to identify every person in a specified place during a specified period. This geographic area could be as small as an apartment or as large as a city, allowing police to track nearly limitless numbers of people with a single court order. Similarly, reverse keyword search warrants compel Google and other search engines to reveal everyone who searched for a specific name, event, or address.

Unlike normal search warrants, which require probable cause that an individual is suspected of a particular crime, these search warrants are issued when the police don't even know how many people's information will be provided, let alone have probable cause that they each have a connection to a crime. It's akin to police searching every home in a neighborhood where there was a robbery. Both of these general warrants violate the Constitution and could easily be weaponized to track political protests, religious services, and other sensitive sites. Indeed, the Fifth Circuit held in *United States v. Smith* that geofence warrants are categorically unconstitutional general warrants, and the Supreme Court has now taken up *Chatrie v. United States* to resolve whether the Fourth Amendment prohibits their use.

Even if a company were to refuse such a request, data brokers would readily sell our information to any bidder, including the police. HF103 would also ban police purchases of similar data from tech companies and data brokers. Increasingly, police are able to buy the information that they can't force companies to hand over in court. We can't put a price on the Fourth Amendment, but police departments routinely do, and it's shockingly low.

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II. Facial Recognition Technology is Harmful and Discriminatory

Facial recognition technology (FRT) is biased and error prone. FRT systems can be up to 99% accurate for middle-aged white men under ideal lighting in laboratory conditions but can be wrong more than 1 in 3 times for some women of color, even under similar conditions.[1] The same exact software, the same exact hardware—but dramatically different outcomes for Black and brown Minnesotans. In banning government entities from acquiring or using facial recognition technology, HFXXX protects Minnesotans from the harms of facial recognition including unjust denial of benefits or even wrongful arrest.

The issues of bias and inaccuracy of facial recognition are of particular concern when it comes to law enforcement use, where an incorrect match can have devastating consequences, including wrongful arrest and detention, and in fact, facial recognition has already led to numerous wrongful arrests, mostly of Black Americans.[2] Law enforcement officers have used facial recognition to identify Black Lives Matter protestors,[3] and ICE has used it to track immigrant families.[4]

ICE agents now use a smartphone app called Mobile Fortify to scan people's faces in the field, matching them against a database of over 270 million biometric records—without individualized warrants or meaningful consent.[5] The app is notoriously unreliable: in one documented case, Mobile Fortify was used to scan the same person twice during a single encounter and returned two entirely different—and incorrect—names.[6] Yet ICE has told Congress that a biometric match from Mobile Fortify is "definitive," and that agents may disregard evidence of American citizenship—including a birth certificate—if the app says otherwise.[7]

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[1] Joy Buolamwini, Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, Proceeds of Machine Learning Research*, vol 81, 1-15, 2018 p. 1.
[2] Maria Cramer & Kashmir Hill, *How the N.Y.P.D.'s Facial Recognition Case Fell Apart*, N.Y. TIMES (Aug. 26, 2025), https://www.nytimes.com/2025/08/26/nyregion/nypd-facial-recognition-dismissed-case.html; Kashmir Hill, *Eight Months Pregnant and Arrested After False Facial Recognition Match*, N.Y. TIMES, Aug. 6, 2023, https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html; Khari Johnson, *How Wrongful Arrests Based on AI Derailed 3 Men's Lives*, WIRED, March 7, 2022, https://www.wired.com/story/wrongful-arrests-ai-derailed-3-mens-lives/.
[3] Kevin Rector and Alison Knezevich, *Maryland's Use of Facial Recognition Software Questioned by Researchers, Civil Liberties Advocates*, THE BALTIMORE SUN, Oct. 18, 2016, https://www.baltimoresun.com/news/crime/bs-md-facial-recognition-20161017-story.html; George Joseph & Jake Offenhartz, *NYPD Used Facial Recognition Technology in Siege of Black Lives Matter Activist's Apartment*, GOTHAMIST, Aug. 14, 2020, https://gothamist.com/news/nypd-used-facial-recognition-unit-in-siege-of-black-lives-matter-activists-apartment.
[4] Taylor Hatmaker, Clearview AI landed a new facial recognition contract with ICE, TECH CRUNCH, (Aug. 14, 2020), https://techcrunch.com/2020/08/14/clearview-ai-ice-hsi-contract-2020/.
[5] Joseph Cox, *ICE Is Using a New Facial Recognition App to Identify People, Leaked Emails Show,* 404 MEDIA, June 26, 2025, https://www.404media.co/ice-is-using-a-new-facial-recognition-app-to-identify-people-leaked-emails-show/.
[6] Joseph Cox, *Ice's Facial Recognition App Misidentified a Woman. Twice,* 404 MEDIA, January 19, 2026, https://www.404media.co/ices-facial-recognition-app-misidentified-a-woman-twice/.
[7] Stephen Prager, *ICE's 'Frightening' Facial Recognition App is Scanning US Citizens Without Their Consent,* COMMON DREAMS, November 1, 2025, https://www.commondreams.org/news/ice-facial-recognition.

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Interstate abortion seekers and individuals seeking gender-affirming care are also at risk of having a match put them at risk of prosecution. Facial recognition is also used to surveil, identify, and target protestors, chilling free speech.[8] Because of its documented biases and its replication of historically flawed police practices, facial recognition should stay out of the hands of police. Banning police use of facial recognition is necessary to protect Minnesotans from wrongful arrest and other discriminatory policing.

Thank you for the opportunity to submit this testimony.

[8] George Joseph & Jake Offenhartz, *NYPD Used Facial Recognition Technology in Siege of Black Lives Matter Activist's Apartment*, GOTHAMIST, Aug. 14, 2020, https://gothamist.com/news/nypd-used-facial-recognition-unit-in-siege-of-black-lives-matter-activists-apartment.

ACLU Minnesota

February 23, 2026

House Judiciary Committee_HF3414 & HF3477 support
Co-chairs Liebling, Scott & members of the committee,

We are testifying today in support of HF3414 and HF3477. For the last few months, Minnesotans have watched as their neighbors have been gassed and sprayed, dragged from their cars, detained without cause for hours sometimes days, and two extrajudicial killings.

There is virtually no pathway for private individuals to sue federal officers for violations of the U.S. constitution. While 42 U.S.C. § 1983 provides a federal remedy for constitutional violations by ***state and local government*** officials, there is no comparable federal statutory remedy for such violations by ***federal government*** officials.

State legislatures can and must fix this gap by creating their own laws—sometimes known as "converse 1983" laws—that allow individuals to sue federal officers for violating the U.S. Constitution.

This bill does apply uniformly though – it provides remedies under the federal and state constitutions and against federal, state, and local law enforcement officers. That parity – that equal treatment of government officers provides this bill a necessary constitutional grounding. Currently, people can bring claims:

- Against state and local officials for violations of constitutional rights (42 USC 1983)
- Against federal officials for state tort claims – injuries to themselves or to property – but not for violations of their constitutional rights (Federal Tort Claims Act (FTCA))

In 1971, the Supreme Court held that the U.S. Constitution itself created a right to sue federal government officials for violations of the U.S. Constitution in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* 403 U.S. 388 (1971)[1]. But subsequent case law following that decision has whittled away that right, creating a legal accountability gap for federal officers that is especially alarming in light of their current behavior.

We support this bill because it fills that crucial gap – remedies for violations of constitutional rights by federal actors – but also because it provides an independent, state-level remedy for violations of constitutional rights by state and local officials separate from the federal 1983 statute.

We urge the committee to support HF3414 & HF3477.

John Boehler
Policy Counsel, ACLU-MN

[1] *See* https://www.lawfaremedia.org/article/reckoning-with-bivens ("Congress never created a cause of action, and courts have long proved ill-suited to fashion one. *Bivens* was, from the start, a judicial workaround and, as it turns out, not an especially effective one, regardless of whose perspective is being considered: civil rights plaintiffs, civil rights defendants, or the bench. *Bivens* is a false promise of the very worst sort.")

FACIAL RECOGNITION

What is facial recognition technology?

Facial recognition technology (FRT) – also known as face surveillance or facial analysis – is designed to analyze images of human faces to identify and track people.

How does facial recognition technology work?

In most cases, a computer program will analyze an image of a person's face, taking measurements of their facial features to create a unique "faceprint." This faceprint, together with surveillance cameras and databases, can be used to identify and track a person wherever they go.

Who uses facial recognition technology?

The Minneapolis Police Department, Saint Paul Police Department, and other law enforcement agencies in Minnesota have reportedly used facial recognition technology called Clearview AI. Clearview AI a regates data from people's online footprints, usually without their knowledge. However, without sufficient oversight laws or regulations in Minnesota or nationwide, we do not have a complete view of the government's use of face sur veillance.

Is facial recognition software accurate?

No. Numerous studies show facial recognition technology has a significant racial and gender bias. One peer-reviewed study from MIT has shown that face surveillance technology frequently misidentifies darker-skinned faces and women.

For more information, contact ACLU-MN Policy Associate Munira Mohamed at:
mmohamed@aclu-mn.org or 612-978-6841.

FACIAL RECOGNITION

How is facial recognition harmful?

Facial recognition technology's inaccuracy threatens Americans' constitutional rights. Robert Williams, a Black man and Michigan resident, is the first known person wrongfully arrested in the U.S. because of this technology. Based on an incorrect face match, he was arrested by Detroit police and jailed overnight. While Mr. Williams was eventually released after 30 hours, even minimal contact with the criminal legal system can have lasting impacts on a person's life. And his release did not erase the wrongfulness of his arrest. In addition, unwarranted government collection and retention of individuals' biometric data en masse through things like facial recognition technology represents an intrusion on individual privacy rights that should be heavily scrutinized.

Are there any laws governing facial recognition?

Cities in California, Massachusetts, Mississippi, and Oregon have prohibited law enforcement use of facial recognition technology. Minnesota does not currently have a statewide law regarding the use of facial recognition technology.

What can we do?

The Legislature should pass a comprehensive bill on face surveillance that protects the constitutional rights of Minnesotans. Law enforcement should be prohibited from using facial recognition technology unless or until adequate safeguards can be established to protect individuals' basic constitutional rights.

For more information, contact ACLU-MN Policy Associate Munira Mohamed at: mmohamed@aclu-mn.org or 612-978-6841.

ACLU
Minnesota

REVERSE WARRANTS

Reverse warrants – also known as keyword or location warrants – are a form of invasive digital surveillance that put people at risk. Law enforcement can use these warrants to force companies to reveal who has searched for a specific word or phrase on their computers or cell phones, or who was in a certain area at a particular time.

THE PROBLEM

Warrants are supposed to be narrow, specific, and based on probable cause. Reverse warrants are the opposite – they allow the government to do widespread surveillance on everyone within a geographic area and/or timeframe, which violates the Fourth Amendment. The government can force tech companies such as Google to reveal our personal data based on words or phrases in search engines or our cell phone location data.

- Reverse warrants subject large groups of innocent people to scrutiny by law enforcement.
- While reverse warrants threaten everyone's privacy, they can wrongly put innocent and vulnerable people including Black and Brown communities, religious minorities, LGBTQ+ people and low-income people in police crosshairs.
- Someone could become a suspect by simply driving home from work near the area where a crime was committed.
- The warrants weaponize our intimate data against us. By reviewing private web searches, the government can gather deeply private information about our medical conditions, finances, sexual orientation, and religious beliefs. Police can identify people seeking abortions or gender-affirming care.
- Judges are meant to act as a firewall when reviewing a digital warrant but often don't fully understand the technology or how broad the scope of a reverse warrant is.
- People should not have to fear that the government is peering over their shoulders into their personal lives while on their phones or computers.

THE SOLUTION

The ACLU-MN supports a bill to ban reverse warrants.

For more information, contact ACLU-MN Policy Associate Munira Mohamed at: mmohamed@aclu-mn.org or (612) 978-6841. The ACLU of Minnesota is a nonprofit, nonpartisan organization dedicated to defending and expanding the civil rights and civil liberties of all Minnesotans through litigation, legislation, and community engagement.

MINNESOTA DEPARTMENT OF PUBLIC SAFETY

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Alcohol and Gambling Enforcement

Bureau of Criminal Apprehension

Driver and Vehicle Services

Emergency Communication Networks

Homeland Security and Emergency Management

Minnesota State Patrol

Office of Communications

Office of Justice Programs

Office of Traffic Safety

State Fire Marshal

February 23, 2026

Dear Chairs Leibling and Scott,

I am writing to oppose the following two bills that are scheduled to be heard House Judiciary Finance and Civil Law on Tuesday, February 24:

HF103 (Feist): Government entities prohibited from requesting or obtaining reverse-location information, uses of reverse-location data by various entities prohibited, and civil cause of action provided when data is obtained by a government entity.

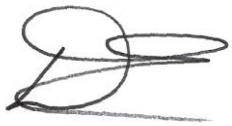
HF3146 (Gomez): Acquisition and use of facial recognition technology by government entities prohibited. To be introduced.

I am writing to express our concern with these bills as currently drafted. They would have a major detrimental effect on public safety in Minnesota given these tools have the ability to assist in complex criminal investigations. While I certainly appreciate both Representative Feist's and Representative Gomez's intentions to protect individuals' privacy rights with these advanced technological capabilities, limiting or banning these critical investigative tools – utilizing reverse-location data and facial recognition – would have extensive negative consequences in local and state investigations and the ability for law enforcement to prevent and solve crimes and to hold individuals accountable.

BCA supports reasonable safeguards for data privacy protections when utilizing these investigative tools; however, the scope of these bills to severely limit reverse-location searches and to outright ban facial recognition, is not in the best interest of public safety or the citizens of Minnesota. There ae numerous examples of case investigations where these investigative tools have saved lives, even just recently.

I ask committee members to consider the implications of such sweeping legislation. BCA has met with the ACLU on these proposals and is more than willing to collaborate on possible solutions to implement more safeguards while still preserving these important technological tools. Thank you for your time and consideration.

Sincerely,



Drew Evans, Superintendent

House Judiciary Finance and Civil Law Committee
February 24, 2026

Written Testimony of Matt Ehling, as an individual
In support of HF 103

Co-chair Liebling, Co-chair Scott, Representative Feist, and members of the House Judiciary Finance and Civil Law Committee,

I am writing as an individual to testify in support of Representative Feist's HF 103.* For over three decades, I have followed civil liberties and constitutional issues closely.** Over the past fifteen years I have testified on my own behalf in support of bills that would ensure greater protections against unreasonable governmental searches and seizures (*see*, for instance, HF 327, Scott, Minnesota Legislature, 2015 session).

I write in support the aims of HF 1013, and appreciate all efforts to protect the Fourth Amendment from threats — whether those threats are precipitated by technological changes, or by problematic legal interpretations. The circumstances that have led to the introduction of HF 103 involve both of these things. The advent of our era of prolific electronic communications has led law enforcement entities in certain

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*I am testifying on my own behalf, since Minnesotans for Open Government (an organization for which I serve as a volunteer board member) only takes positions related to information policy and government transparency, as opposed to search and seizure policy.

**Including as a principal in the organization The Forum for Constitutional Rights (FCR), which files amicus briefs in cases involving constitutional rights and related legal principles (*see,* for instance, *Federal Bureau of Investigation v. Yonas Fikre* (U.S. 2024) (FCR amicus brief on prevailing side of U.S. Supreme Court case on mootness standard); *State v. Schaffer* (Minn. 2023) (FCR amicus brief on prevailing side of Minnesota Supreme Court case on fee shifting in eminent domain matters); *Snell v. Walz I* (Minn. 2023) (FCR amicus brief on prevailing side of mootness matter involving Minnesota's Emergency Management Act).

jurisdictions to seek warrants that permit the government to acquire location information on an undefined number of electronic devices that happen to be present within a particular geographic location, at a particular point in time — without the specificity required by traditional warrants. Such over-broad searches lack the particularity required by the Fourth Amendment to the United States Constitution, and function as the kind of "general warrants" that were opposed by America's founding generation.

Such "reverse-location" warrants have been challenged in court, and one such case will be heard soon by the United States Supreme Court.

HF 103 likewise seeks to address "reverse-location" warrants by instituting limitations on the ability of Minnesota government entities to seek such warrants, other than in exceptional circumstances. No matter the outcome of the upcoming U.S. Supreme Court case, state legislatures are able to institute their own parameters regarding the protection of citizen's rights, so long as those parameters do not fall beneath the "floor" established by the federal Constitution (whose Bill of Rights protections are incorporated against the states through the Fourteenth Amendment).

Indeed, Minnesota has acted to supplement the federal Bill of Rights in a variety of instances — including in the protection of property rights otherwise addressed by the Fifth Amendment to the U.S. Constitution. In 2006, for example, the Minnesota Legislature added additional protections for property owners facing "eminent domain" proceedings in the wake of the United States Supreme Court's *Kelo v. City of New London* decision. (*See*, generally, Minn. Stat. § 117.012, barring "takings" for economic development purposes; Minn. Stat. § 117.031(a), creating attorney fee-shifting provision for eminent domain proceedings). When *Kelo* was seen as insufficient to protect the property rights of Minnesota citizens, the Legislature added these additional protections in state law.

I also write today to offer one suggestion related to the language of HF

103. Lines 2.13 through 2.19 set out the "exigency" triggers for when the bill's general ban on reverse-location warrants may be lifted. At present, the ban may be lifted in various circumstances occurring when a Minnesota governor has declared a peacetime emergence under Minnesota's Emergency Management Act (Minnesota Statues, Chapter 12).

Given that the Minnesota Supreme Court has held that Chapter 12 emergency powers can be invoked for an "act of nature" fairly liberally, even absent an evidentiary showing (see *Snell v. Walz II* (Minn. 2024)), using the same Chapter 12 terminology as an "exigency trigger" may give the government greater leeway to seek exceptions to the bill's restrictions than intended. I would suggest further work of the exigency trigger language, in aide of refining this very useful and needed bill.

In closing, I thank Representative Feist for seeking to protect the rights of Minnesota citizens by bringing HF 103 forward.

Document Number:	**801**
Document Name:	**Facial Recognition Technology**
Effective Date:	*July 20, 2023*
Document Status:	*Approved*

801.1 PURPOSE AND SCOPE

Facial recognition technology involves the ability to examine and compare distinguishing characteristics of a human face using biometric algorithms contained within a software application. This technology can be a valuable investigative tool.

The Office has established the capability to conduct facial recognition investigations to support law enforcement activities. This capability is managed by the Criminal Intelligence Division (CID) and Criminal Information Sharing and Analysis (CISA) unit.

801.2 DEFINITIONS

Examiner – Personnel trained in facial comparison and identification processes.

Facial Identification – The process of assisting to help identify an unknown person from a photo database – known as the enrollment database or gallery – to answer the question, "Can this unknown person be matched to any image enrolled in the database?" It is often referred to as one-to-many matching because it compares a probe image to all images in the enrollment database.

Facial Recognition – The automated searching of a facial image as a probe in a facial recognition system, typically resulting in a group of facial images being returned to a human operator in ranked order based on a system-evaluated similarity. Also, the mental process by which an observer identifies a person as being one they have seen before.

Gallery – A facial recognition system database that typically contains all known-person biometric references (samples or templates, or both).

Morphological Analysis – A direct comparison of class and individual facial characteristics without explicit measurement.

Probe – A facial image or template searched against the gallery in a facial recognition system.

801.3 OBJECTIVES

This policy provides Office personnel with strict guidelines for the facial recognition program to ensure responsible and appropriate use. This policy ensures that all facial recognition

investigations are consistent with authorized purposes while not violating anyone's privacy, civil rights, and civil liberties. Further, this policy will delineate the way requests for facial recognition information are received, processed, cataloged, and acted upon.

The policy assists the Office's use of facial recognition with:

1. Increasing public safety and improving state, local, tribal, territorial, and national security.
2. Minimizing the threat and risk of injury to specific individuals.
3. Minimizing the threat and risk of physical injury or financial liability to law enforcement and others responsible for public protection, safety, or health.
4. Minimizing the potential risks to individual privacy, civil rights, civil liberties, and other legally protected interests.
5. Protecting the integrity of criminal investigatory, criminal intelligence, and justice system processes and information.
6. Making the most effective use of public resources allocated to public safety entities.

801.4 GENERAL USE

All applications of facial recognition must be for official use for law enforcement purposes only. A request for facial recognition analysis to the CID will only be for official investigations that have a criminal predicate or an articulated public safety concern. The following are the authorized uses of facial recognition applications:

1. To investigate a reasonable suspicion that an identifiable individual has committed a criminal offense or is involved in or planning criminal conduct or activity that presents a threat to any individual, the community, or the nation and that the information is relevant to the criminal conduct or activity.
2. To assist in an active or ongoing criminal or homeland security investigation.
3. To mitigate an imminent threat to health or safety through short-term situational awareness or other means.
4. To assist in the identification of a person who lacks capacity or is otherwise unable to self-identify (such as an incapacitated, deceased, or otherwise at-risk person).
5. To investigate or corroborate tips and leads with criminal predicate or a public safety concern.
6. To assist in the identification of potential witnesses or victims in criminal investigations.
7. To support law enforcement in critical incident responses.

The use of facial recognition for the sole purpose of intelligence gathering is prohibited. Additionally, the technology will not be used solely for identifying anyone exercising their constitutionally protected rights.

The use of facial recognition technology in conjunction with public safety cameras outside the above guidelines is prohibited. Facial recognition technology will not be used for surveillance and/or tracking of any kind.

Valid law enforcement use of facial recognition includes:

1. As a lead generation tool to support criminal investigations.

2. Persons who lack capacity or are otherwise unable to identify themselves and who are a danger to themselves or others.
3. Persons who are deceased and not otherwise identified.

801.5 PROGRAM MANAGEMENT

The CID will be responsible for deploying, managing, and controlling access to the facial recognition program. The CISA unit Lieutenant will designate a program manager tasked to ensure that access, management, and use of the technology is consistent with Office policy.

The Office is authorized to access and perform facial recognition searches utilizing enrollment databases composed of booking photos only. The following are authorized enrollment databases:

1. Office booking photos gallery
2. Law enforcement shared gallery that meets the Office policy.

The Office's facial recognition gallery is strictly composed of booking photo images. The Office does not allow the use of DMV image galleries, privately sourced, non-booking photo galleries or any gallery containing images sourced from websites (i.e., social media).

Facial recognition investigations will only be performed by personnel assigned to the CID. Such investigations will be conducted only by personnel who have completed all required facial recognition training and only during lawful duties in furtherance of a valid law enforcement purpose and in accordance with this policy.

All Office facial recognition examiners will undergo facial comparison and identification training. Examiners will also be taught the use of the facial recognition system, process, protocols, and policy related to facial recognition. Continued training will also be conducted annually to ensure examiners' proficiency with the system.

Before Office personnel are authorized to request a facial recognition investigation, the Office will require participation in training on the implementation of and adherence to this facial recognition policy. Any misuse of facial recognition data may result in disciplinary action, up to termination.

801.6 PROCEDURE

Processing a facial recognition request is a technical procedure utilizing vendor-specific software. This procedure details the steps involved in the submission and analysis of probe imagery in accordance with this policy and vendor-specific specifications. All requests for facial recognition analysis will require a probe image, which is a digital image depicting the face of the subject whose identity is unknown. For the most accurate results, this photo needs to be of the best quality possible and ideally an original, not a copy of a copy.

Requesting investigator will:

1. Make every effort to obtain the highest quality image file possible when digital photographic evidence of an unknown person is located and is authorized for submission in accordance with this policy.
2. Complete a facial recognition request via the current established request process, ensuring all required information (incident and/or case number (ICR/CCN)) is submitted.
3. Include digital probe imagery in all requests.

Technical operations facial recognition examiner will:

1. Receive facial recognition request and ensure proper completion.
2. Review the digital probe imagery to ensure it meets or exceeds minimum program standards. The minimum standard for submission often depends on multiple factors including camera angle, subject proximity, pose, illumination, lighting, and expression.
3. Submit the probe imagery according to the vendor-specific process.
4. Examine the returned candidates according to facial identification and comparison training and practices.
5. Document the findings of the completed facial recognition investigation.

Requesting investigator will:

1. Receive the results of the facial recognition investigation.
2. Only utilize positive findings of a facial recognition investigation as a tip or lead. A tip or lead will not be considered probable cause, which must be established separate from any facial recognition investigation findings.
3. Ensure that facial recognition investigation findings are available for discovery in the judicial process by documenting the use of the technology in case management systems and, if applicable, in the appropriate arrest reports.

801.7 FACIAL RECOGNITION RESULTS

All entities receiving the results of a facial recognition investigation must be cautioned that the resulting candidate images do not provide positive identification of any subject and are considered advisory in nature as an investigative lead only. Resulting candidate images do not establish probable cause to obtain an arrest warrant without further investigation and other facts or evidence. Any possible connection or involvement of the subject to the investigation must be determined through additional investigative methods.

801.8 USE OF EXTERNAL FACIAL RECOGNITION SYSTEMS

Facial recognition technologies depend on the use of proprietary information systems including photo databases that may be owned and managed by third parties. In certain situations, the public safety concern justifies the use of a non-HCSO facial recognition system. The use of such external systems must remain consistent with the understanding that protecting privacy, civil rights and civil liberties is critical to ensuring community trust.

The CID is the designated division responsible for the management and use of facial recognition technologies. This centralized approach ensures all facial recognition investigations, whether they involve HCSO or non-HCSO systems, conform to Office policy.

Direct user access by Office employees to a non-HCSO facial recognition system is prohibited outside of the CID. This policy is designed to allow Office employees to seek facial recognition queries from other law enforcement entities or privately owned systems when circumstances conform to this policy.

The use and/or requested use of any non-HCSO facial recognition system will be coordinated through the CID. Additionally, more stringent criteria must be met for the use of any non-HCSO facial recognition system:

1. A request for a facial recognition investigation must have been submitted to the CID and have proven to be unsuccessful.
2. The request must be related to a criminal investigation.
3. All other investigative means and alternatives must have been reasonably considered and exhausted.

Any information received will be subject to the guidelines established in the Facial Recognition Results section above.

FREEDOM OF THE PRESS FOUNDATION

Feb. 23, 2026

Members of the Judiciary Finance and Civil Law Committee
Minnesota House of Representatives
658 Cedar St.
Saint Paul, MN 55155

VIA EMAIL to DFL Committee Administrator Josh Sande, josh.sande@house.mn.gov

Re: Support for HF 103

Dear Mr. Sande and Honorable Committee Members:

Freedom of the Press Foundation (FPF) writes in support of HF 103. FPF strongly opposes "reverse-location" court orders and requests, also known as "geofence warrants," because they chill journalism that serves the public interest. HF 103 would protect both journalists and confidential sources from unwarranted invasions of privacy that harm press freedom.

The dangers of geofence warrants and government requests for voluntary disclosures of data

Geofence warrants are a controversial tool that allows police to obtain a court order to demand location data from tech companies (often Google) to see every device in a specific area at a specific time. Imagine drawing a digital fence around a crime scene and demanding a list of every phone that crossed into it.

Similarly, authorities may also request that tech companies voluntarily disclose records revealing the location of devices within a specific area at a specific time, and companies may sometimes disclose these records without a court order.

These demands or requests can reveal precise details about people's movements and locations. Authorities can pinpoint where someone stood within a couple of yards and whether they were on the first or second floor of a building. But geofence warrants are also imprecise:

They sweep up the movements not just of suspects but also of innocent people who happen to be within the digital fence.

The harm to press freedom

For journalists and their confidential sources, the threat of their location data landing in the government's hands is real. As our digital security training team at FPF has explained:

> *"Consider a sensitive story in which you are meeting a high-risk, anonymous source in person. Your adversaries could use location data to determine that you and the source were in the same spot at the same time, leading to the possible exposure of the source's identity.*
>
> *"Or perhaps you need to visit a particular location (e.g., a government building) that could put a given department or agency on notice that you are investigating them, in turn making the reporting process more challenging."*

Geofence warrants could expose confidential sources or tip off powerful government institutions that a reporter is investigating them. A single geofence warrant centered on a newsroom, for instance, could reveal everyone who's visited, from whistleblowers to workers.

Even reporters and sources who take precautions, like meeting in neutral locations, might not be safe. A geofence warrant could place them within yards of each other in the same parking garage or cafe, revealing their connection.

The free press can't exist in a surveillance state. Every journalist, source, and citizen deserves greater privacy protections like those offered under HF 103.

If you have any questions, please do not hesitate to contact me.

Regards,

Adam Rose
Deputy Director of Advocacy
Freedom of the Press Foundation

Representatives Scott and Liebling
Co-Chairs, Judiciary, Finance, and Civil Law Committee
Delivered via electronic submission to *josh.sande@house.mn.gov*

Dear Co-Chairs Scott and Liebling and Members of the House Judiciary, Finance, and and Civil Law Committee,

Protect Democracy United is a 501(c)(4) nonpartisan organization dedicated to protecting the rule of law. It commends the Minnesota House Judiciary, Finance, and Civil Law Committee for its consideration of a universal constitutional remedies bill, H.F. 3414, that would allow any Minnesotan 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 Minnesota 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 U.S. 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 federal 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 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 federal 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 Minnesota 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. Protect Democracy has been working closely with several states, and appreciates the opportunity to support your great work in Minnesota.

Thank you for your time and attention to this critical issue. We urge the Minnesota House Judiciary, Finance, and Civil Law Committee to pass this bill providing for a universal remedy for violations of the United States Constitution so that Minnesotans can exercise their constitutional rights knowing they are enforceable rights, not just hollow promises. Please contact me at travis.bruner@protectdemocracy.org if you would like to discuss the bill further with us.

Respectfully,

Travis Bruner
Policy Strategist

SUPPORT THE MINNESOTA CONSTITUTIONAL REMEDIES ACT

TO PROTECT OUR CONSTITUTIONAL RIGHTS

WHAT IS THIS LEGISLATION?

HF3414 (Long) / SF3629 (Fateh)
HF3477 (Long) / SF3628 (Champion)

The legislation creates a cause of action for violations of civil rights by state or federal government actors. It would allow for any individual to seek damages in state court for the deprivation of any rights, privileges or immunities secured by the U.S. or Minnesota Constitution.

WHY IS THIS IMPORTANT?

When any government official violates someone's constitutional rights in Minnesota, they deserve a real path to seek justice. Currently, when federal authorities violate Minnesotans' civil rights, victims have narrow and limited options in federal court.

It is a fundamental principle of our democracy that no one—regardless of the position they hold or the uniform they wear—is above the law. Accountability is essential to build public trust, ensure constitutional policing, and prevent abuses of power such as violations of constitutional rights, misconduct or excessive force.

This bill is a necessary tool to hold our state and federal government accountable to our Constitution and foster a culture of integrity and trust within our institutions. When an individual's rights are violated by those entrusted with public power, they deserve a meaningful path to seek justice and repair, and most Americans and Minnesotans agree the law should provide it. Our constitutional rights are rendered meaningless without a practical mechanism for recourse.

SUPPORTERS

ACLU Minnesota

Institute for Justice

Justice Action Network

Minnesota Justice Research Center

February 22, 2026

Rep. Tina Liebling, Co-Chair
House Judiciary Finance & Policy Committee
Centennial Building, 5th Floor
St. Paul, MN 55155

Rep. Peggy Scott, Co-Chair
House Judiciary Finance & Policy Committee
Centennial Building, 2nd floor
St. Paul, MN 55155

Dear Co-Chairs Liebling and Scott:

On behalf of the Justice Action Network, a national bipartisan organization dedicated to advancing smarter justice policies that improve public safety outcomes and create stronger communities nationwide, which has advocated for evidence-based criminal justice reforms in Minnesota since 2016, we write to express our support for HF3414/HF3477(Long). This bill represents a critical step forward in ensuring that the constitutional rights of all Minnesotans are protected by providing a clear, legal mechanism for accountability when those rights are violated by those acting under color of law.

Police and government accountability is a non-partisan issue. It is a fundamental principle of our democracy that no one—regardless of the position they hold or the uniform they wear—is above the law. Accountability is essential to build public trust, ensure constitutional policing, and prevent abuses of power such as misconduct or excessive force. Without a practical mechanism for recourse, even the most well-intentioned reforms remain ineffective. If there is no recourse for misconduct, the standards you set as a state become mere suggestions rather than requirements.

This bill is a necessary tool to foster a culture of integrity within our institutions. When a person's rights are violated by those entrusted with public power, they deserve a meaningful path to seek justice and repair, and most Americans agree the law should provide it. Accountability is not an abstract principle—it is a safeguard for individuals and families who bear the real-world consequences of unconstitutional actions Attached is a sampling of writing from different groups, spanning a broad ideological spectrum, explaining their support for measures that would allow such accountability. Recent events have shown that Minnesotans need protection from all levels of government overreach and unconstitutional actions.

This bill is not anti-law enforcement, it is pro-Minnesotans. We know that effective law enforcement is an important part of keeping our communities safe. This bill ensures that the rights guaranteed to us on paper are enforceable in practice, and that individual bad actors will be held responsible for the harm they cause. By passing this legislation, Minnesota can lead the way in affirming that our state stands by the principle of equal justice. I encourage you to support this bill and work toward their passage.

Respectfully,

Estrella López, Senior State Policy Manager
Justice Action Network

C: Members of the House Judiciary Finance & Policy Committee
Representative Jamie Long

WHAT NATIONAL GROUPS ARE SAYING ABOUT POLICE ACCOUNTABILITY

American Civil Liberties Union (ACLU)

The ACLU is a non-partisan nonprofit that defends and preserves individual rights and liberties guaranteed by the U.S. Constitution and laws, working through litigation, advocacy, and public education to protect freedoms like speech, privacy, equality, and due process for all people.

"Police are supposed to protect and serve all members of the public. Performing this job effectively does not require sacrificing civil liberties, something that happens too often to BIPOC communities, even leading to killings by police. All Minnesota law enforcement agencies - from the state patrol to city police forces - need to respect the rights of individuals while enforcing the law. And when allegations of police misconduct arise, there must be policies and mechanisms to hold police accountable for their actions."

Cato Institute

The Cato Institute is a nonpartisan, independent research organization that describes its core values as supporting "individual liberty, limited government, free markets, and peace." As a 501(c)3 the Cato Institute has a policy of not taking an official position for or against any piece of legislation, but they have written extensively on the topic of the importance of policy accountability, and specifically why it is necessary that for there be a state cause of action so victims of misconduct have a recourse for being made whole. Below is a sampling of their writing on the matter.

"[P]olice cannot do their jobs effectively without the trust and support of the communities they serve. But public confidence in police is at an all time low, and that seriously impairs their ability to do the most important part of their jobs, which is not handing out traffic tickets, resolving domestic disputes, or making misdemeanor arrests for rinky-dink crimes like low-level drug possession, but keeping our neighborhoods safe from violence and theft."

"[E]ven the most well-intentioned, seemingly relevant policing reforms—like changes to use-of-force standards or duties to intervene—will mean little if officers can continue to violate those laws with impunity. Robust civil accountability is an essential component of true policing reform…"

"According to research from the Cato Institute and Pew Research Center, 63–66 percent of Americans now support repealing the doctrine [of qualified immunity] so that citizens can sue police for wrongful misconduct."

American Enterprise Institute

The American Enterprise Institute is a public policy think tank dedicated to defending human dignity, expanding human potential, and building a freer and safer world.

"Until recently, interest in reining in qualified immunity was growing in both parties. Supreme Court justices Clarence Thomas and Sonia Sotomayor have both expressed skepticism about the current version of it. What we're seeing in Virginia, and elsewhere, is a good idea falling victim to partisan polarization… Reforming qualified immunity may … allow victims of unconstitutional police conduct a real day in court instead of an impenetrable legal shield that too often protects officers from civil liability even where rights have clearly been violated."

R Street Institute

The R Street Institute is a center-right, pragmatic think tank that promotes free markets and limited, effective government through a philosophy of "real solutions" to complex policy problems. R Street Institute advances incremental, evidence-based reforms in areas like criminal justice, technology, and harm reduction.

"Despite frequent media narratives to the contrary, there is strong bipartisan support for accountable policing, including on-the-ground conservative and Republican support. At a recent meeting on criminal justice at this year's Conservative Political Action Conference (CPAC) in Virginia, polling showed that 85 percent of Republican voters agreed with both supporting law enforcement and holding them accountable for excessive use of force."

Right on Crime

Right On Crime is a conservative criminal justice reform initiative. It aims to gain support for reform by sharing research, mobilizing leaders, and raising public awareness.

"Conservative policing reform is about improving our policing functions of government. It is not anti-cop to hold our police accountable, but rather it is consistent with conservative scrutiny on government power. Seeking areas to make the police more effective and efficient while preserving, or in some case returning, our individual rights is consistent with conservative values and traditional respect for the law enforcement function and institution… If a police action is reprehensible, but also legal, then it is the fault of the breadth of discretionary behavior more than the police as an institution. If it is already illegal, then the police officer or agency responsible need to be held accountable."

Council on Criminal Justice

The Council on Criminal Justice is an independent, nonpartisan think tank and member organization dedicated to advancing understanding of the criminal justice policy choices facing the nation and builds consensus for solutions that enhance safety and justice for all.

"It is essential in a democratic society that people who believe that their rights have been violated have the ability to seek remedy in a court of law. As such, individual police officers and the governmental agencies that employ them should be subject to liability. Liability also incentivizes agencies and officers to take adequate precautions to prevent such violations. Like all employers, policing agencies have a responsibility to ensure that their officers act in a manner that respects rights and minimizes risk of violations. A sound liability scheme would provide redress for victims, while also encouraging agencies to develop policies, practices, training, and discipline systems that ensure officers respect the constitutional rights of all community members. Under the existing system, none of this occurs."

Major Cities Chiefs Association

The Major Cities Chiefs Association (MCCA) is a professional organization of police executives representing the largest cities in the United States and Canada. The mission of MCCA is to provide a forum for police executives from large population centers to address the challenges and issues of policing, to influence national and international policy that affects police services, to enhance the development of current and future police leaders, and to encourage and sponsor research that advances this mission.

"Officers who engage in conduct that is criminal must be held accountable—a failure to do so undermines the trust between law enforcement and the community that is critical to good policing.... [O]fficers who break the law or intentionally violate an individual's constitutional rights should be held accountable civilly or criminally…"

Letter in Support of HF 3414 - MN Constitutional Remedies Act
February 24, 2026
Judiciary Finance and Civil Law Committee

Chairs Liebling and Scott, members of the committee,

The Minnesota Justice Research Center writes in favor of HF 3414, the MN Constitutional Remedies Act. This legislation creates a cause of action for violations of civil rights by state or federal government actors. It would allow for any individual to seek damages in state court for the deprivation of Constitutional rights.

At the Minnesota Justice Research Center, we believe that our criminal legal system should be equitable, restorative, and accountable when delivering justice. It should act fairly and protect those historically harmed by the system from being targeted or discriminated against. It should be trustworthy for those who work within it, so that officers know they are following just and humane orders. The system also needs to be effective, so Black and Brown Americans showing up to court aren't trapped into detention or deportation. And, most importantly, the system must ensure that the resources afforded to it by the people's tax dollars are being used to administer just policy and practices, instead of unconstitutionally targeting and intimidating residents. When federal agents and officials fail to protect or uphold Constitutional rights, they must be held accountable.

After the Civil War, Congress enacted 42 U.S.C. § 1983 to ensure that state and local officials could not violate individuals' federal constitutional rights. There is no comparable statute for victims of constitutional violations perpetuated by federal officials. HF 3414 takes steps to remedy this and expand avenues for accountability and justice. No one is above the law.

Will Cooley, Policy Director, Minnesota Justice Research Center

State Democracy Research Initiative
UNIVERSITY OF WISCONSIN LAW SCHOOL

Explainer: State-Created Damages Remedies Against Federal Officials

Harrison Stark, Senior Counsel
Published: August 1, 2025
Updated: February 9, 2026
Previous August 1, 2025 version available here

Introduction & Summary

What recourse do people have if federal agents violate their constitutional rights? In recent months, this question has taken on new urgency. Across an array of contexts, individuals and institutions are encountering what they see as unconstitutional abuses of federal power, from excessive uses of force to property destruction to discrimination to speech suppression. And with the federal government deploying record-numbers of immigration agents to cities across the country, high-stakes encounters with federal law enforcement may become even more commonplace.

This Explainer discusses a potential remedial pathway that is receiving increased attention: state-created causes of action authorizing money damages against federal officials who violate federal constitutional rights. This idea has long percolated in legal scholarship. Professor Akhil Amar first wrote about the concept nearly four decades ago, dubbing it "converse 1983."[1] But the idea is only beginning to garner broader interest from litigants, policymakers, and courts.

Today, victims of unconstitutional federal action have limited remedial options. When individuals experience a rights violation that is ongoing, they can go to court and seek declaratory or injunctive relief—that is, a court order telling the government to stop. There have already been hundreds of such lawsuits filed against the Trump administration, and similar lawsuits challenged the actions and policies of previous administrations. But because injunctive remedies aim to address injuries prospectively, they are frequently useless—or unavailable—to individuals who suffered government misconduct in the past. In the quintessential Supreme Court case

[1] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1428 n.15 (1987).

exemplifying this point, a victim of a police chokehold was denied injunctive or declaratory relief because he couldn't show that he was likely to be put in a similar chokehold again.[2]

Instead, to redress harms already inflicted—like when people are injured or property is damaged—the standard civil remedy is money damages. By compensating the victim (and perhaps punishing the perpetrator), damages can help provide justice and accountability. But existing federal law significantly constrains the ability of individuals to recover damages from federal officials who act unconstitutionally.

The landmark federal statute that individuals might turn to in, say, a typical police brutality case, is 42 U.S.C. § 1983. But it offers no relief for federal action; it provides a cause of action for damages against state and local actors, and there is no statutory analogue authorizing suits against *federal* officials. Recognizing that, the U.S. Supreme Court held over fifty years ago in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[3] that plaintiffs should nonetheless be able to sue for damages when federal officials commit constitutional violations. However, more recent precedent has largely closed the door on these so-called *Bivens* actions by limiting them to highly specific circumstances and repudiating *Bivens*'s core logic—making the remedy, in one scholar's recent assessment, "essentially nonexistent," especially when coupled with the Court's robust official immunity doctrine.[4]

Historically, plaintiffs were also able to use common-law tort suits available under state law to recover damages from federal officials whose actions transgressed statutory or constitutional bounds.[5] But today, such claims are largely preempted by the Federal Tort Claims Act, or FTCA, which establishes the exclusive remedy for victims to seek damages directly from the federal government for most state-law torts.[6] From a practical perspective, while the FTCA does sometimes provide an avenue for people to recover damages against the federal government

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[2] City of Los Angeles v. Lyons, 461 U.S. 95, 108–11 (1983).

[3] 403 U.S. 388 (1971).

[4] E. Garrett West, *Refining Constitutional Torts*, 134 Yale L.J. 858, 862–63 (2025).

[5] *See, e.g.*, Hernandez v. Mesa, 589 U.S. 93, 115–16 (2020) (Thomas, J., concurring) (explaining that "[f]rom the ratification of the Bill of Rights until 1971," when the Court established the *Bivens* cause of action, "[s]uits to recover such damages were generally brought under state tort law"); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 531 (2013) ("From the beginning of the nation's history, federal (and state) officials have been subject to common law suits as if they were private individuals, just as English officials were at the time of the Founding.").

[6] *See* 28 U.S.C. § 2671 *et seq*.

when federal employees commit torts[7]—and individuals might increasingly pursue FTCA suits[8]—it comes with "significant exceptions and limitations" that can make recovery difficult or impossible, even when federal officials have violated constitutional rights.[9]

Taking all of these hurdles together, the bottom line is that today's remedial landscape can leave injured individuals without meaningful recourse and federal actors without sufficient incentives to respect an individual's constitutional rights.[10] With no Section 1983 equivalent for federal actors, the rollback of *Bivens*, and the constraints of the FTCA, recovering damages from federal officials for unconstitutional acts may be more difficult today than at any time in the nation's history.

This is where "converse 1983" comes in. It offers a potential pathway for pursuing damages against federal officials who act unconstitutionally. In contrast to Section 1983, which is a federal cause of action for damages against state and local officials who violate federal constitutional rights, "converse 1983" is a state-created cause of action for damages against federal officials who violate federal constitutional rights.

A few states—including California, Maine, Massachusetts, and New Jersey—have long had laws on the books that, as written, appear to authorize damages actions against federal officials for federal constitutional violations. Illinois recently enacted a version, and in roughly a dozen more

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[7] *See, e.g.*, Martin v. United States, 145 S. Ct. 1689, 1695 (2025) (explaining that "[t]he FTCA allows those injured by federal employees to sue the United States for damages . . . by waiving . . . the federal government's sovereign immunity for certain torts committed by federal employees acting within the scope of their employment" (internal quotation marks omitted)).

[8] *See, e.g.*, Lauren Bonds, *When ICE Agents Break the Law, Can Victims Sue? The Supreme Court Hints Yes. Will the Eleventh Circuit Listen?*, Am. Const. Soc'y: Expert F. (July 8, 2025), https://www.acslaw.org/expertforum/when-ice-agents-break-the-law-can-victims-sue-the-supremecourt-hints-yes-will-the-eleventh-circuit-listen/ (anticipating that "the FTCA will be the litigation vehicle for people injured by ICE as well as the federal militarized response to protests opposing immigration raids"). In a high-profile example, Columbia University activist Mahmoud Khalil filed a notice of claim under the FTCA seeking $20 million in damages related to his immigration detention. *See* Ctr. for Const. Rights, *Notice of Claim for Damages Under the Federal Tort Claims Act* (July 10, 2025), https://ccrjustice.org/sites/default/files/attach/2025/06/7-10-25_Khalil%20FTCA_w.pdf.

[9] William Baude, Jack Goldsmith, John F. Manning, James E. Pfander & Amanda L. Tyler, Hart and Wechsler's The Federal Courts and the Federal System 1345 (8th ed. 2025). Among other things, the FTCA excludes relief for some types of intentional torts and for claims based on an officer's performance of a "discretionary function." *See, e.g.*, *Martin*, 145 S. Ct. at 1695–96 (describing these limitations). It also requires individuals to make a timely application for administrative settlement before suing, precludes punitive damages, and does not allow for jury trials.

[10] *See, e.g.*, James E. Pfander & Rex N. Alley, *Federal Tort Liability After* Egbert v. Boule*: The Case for Restoring the Officer Suit at Common Law*, 138 Harv. L. Rev. 985, 997 (2025) (noting broad scholarly agreement that the existing "body of remedial law . . . no longer offers effective remedies for many government wrongs").

states, legislation has been introduced that would do the same. It also may be possible for state courts, which have common-law authorities that federal courts lack, to recognize such actions judicially.

Part I of this Explainer offers more detail on existing and proposed state converse 1983 laws, and it identifies some considerations for states contemplating such laws. Part I also sketches out how converse 1983 litigation might proceed in practice. In particular, it notes that, while converse 1983 is a state-created cause of action, most converse 1983 lawsuits are likely to end up in federal rather than state court because federal law gives federal officers a right to remove lawsuits to a federal forum.

Any attempt to pursue converse 1983 lawsuits will likely be met with several types of counterarguments. Drawing from and building on existing legal scholarship, Parts II–IV identify and address these anticipated sources of pushback.

First, as Part II explains, defendants will likely contend that federal statutory law—in particular, the Westfall Act—preempts state-created converse 1983 actions. The Westfall Act does preclude litigants from bringing many common-law state tort claims against federal officials. But the Westfall Act includes a carveout for "a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States."[11] That plain text appears to leave the door open to converse 1983 claims. Nevertheless, one federal circuit court recently concluded (with limited analysis) that the Westfall Act preempted a converse 1983 claim brought under New Jersey law. Anyone who seeks to pursue converse 1983 suits in New Jersey (as well as Delaware and Pennsylvania) will have to overcome that adverse precedent.

Second, defendants may raise federal constitutional objections to converse 1983 actions, asserting that such state-created claims (or at least some such claims) run counter to principles of federal supremacy. Part III identifies potential variations of such an argument and sets out some of the strongest legal responses. Conceptually, converse 1983 actions do not seek to make state law supreme over federal law; instead, they *further* the federal Constitution by helping people vindicate their fundamental federal constitutional rights. Historically, there is a longstanding tradition of litigants using state-law causes of action to seek civil damages against wrongdoing federal officials. There is even a longstanding tradition of states enforcing their criminal laws against federal officials who overstep the bounds of their authority. And precedentially, converse 1983 actions fit comfortably within the bounds of existing Supreme Court case law on the Supremacy Clause.

Third, defendants will presumably contend that, even if converse 1983 actions are permissible, the doctrine of qualified immunity should provide at least a partial shield against liability. Part IV

[11] 28 U.S.C. § 2679(b)(2).

considers whether and how official immunity defenses might apply in converse 1983 cases. In Section 1983 and *Bivens* actions, government officials can indeed invoke qualified immunity, which bars plaintiffs from recovering damages unless the defendant's conduct violated "clearly established" law, such that any reasonable official would have known the unconstitutionality of their particular actions. This effectively allows for damages liability only in fairly egregious cases of official misconduct. Courts may well conclude that converse 1983 defendants should have the same opportunities as Section 1983 and *Bivens* defendants to assert qualified immunity defenses, but there are cogent arguments that the doctrinal rationales for qualified immunity in Section 1983 and *Bivens* cases do not carry over to converse 1983 cases. There are also questions about whether the analysis might change if a state's converse 1983 law expressly forecloses qualified immunity defenses.

In short, converse 1983 actions may have untapped potential to assure meaningful relief to those harmed by unconstitutional abuses of federal power. Although the permissibility of converse 1983 actions will no doubt be vigorously contested, forceful legal arguments can be made in their favor.

I. The Promise of Converse 1983

Nearly four decades ago, Professor Akhil Amar first proposed what he dubbed "Converse 1983" – a *state*-law damages remedy against federal officials for violating the federal constitution.[12] Numerous scholars and commentators have explored the idea since.[13] Today, converse 1983 could fill critical gaps, potentially offering recourse for a panoply of federal constitutional injuries committed by a range of federal actors.

How exactly does converse 1983 work? It provides a private right of action—that is, authorization to sue—against federal officials (and anyone else) for violating someone's federal constitutional rights, making clear that damages are available as a remedy. A few states already have such laws, and converse 1983 bills have recently been introduced in roughly a dozen state legislatures. While the language of these laws and bills differs somewhat, they all share common elements. Namely, they (1) explicitly empower any person to; (2) bring a civil damages claim against; (3) government

[12] Amar first coined the term in *Of Sovereignty and Federalism*, *supra* note 1. He then developed the concept further in several companion pieces. *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) [hereinafter Amar, *Questions and Answers*]; Akhil Reed Amar, *Five Views of Federalism: Converse1983 in Context,* 47 Vand. L. Rev. 1229, 1230 (1994).

[13] See Thomas A. Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights*, 75 Cath. U. L. Rev. (forthcoming 2025); Vázquez & Vladeck, *supra* note 5, at 537; John F. Preis, *The False Promise of the Converse-1983 Action*, 87 Ind. L.J. 1697 (2012); Vikram D. Amar, *Converse § 1983 Suits in Which States Police Federal Agents*, 69 Brook. L. Rev. 1369 (2004); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195 (2003).

actors at any level (and sometimes nongovernmental actors) who; (4) have violated or interfered with their federal constitutional rights.

By way of illustration, California's Tom Bane Civil Rights Act (colloquially known as the Bane Act) has long allowed "any individual" to sue another person for interfering, or attempting to interfere, with their rights by threat, intimidation, or coercion.[14] Massachusetts[15] and Maine[16] have similar provisions to California's existing law on the books. The New Jersey Civil Rights Act is also a

[14] *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"). Litigants have sometimes tried to fold Bane Act claims into suits against the United States under the Federal Tort Claims Act. District courts have generally rejected such attempts, concluding that the FTCA's waiver of the government's sovereign immunity does not extend to asserted violations of federal constitutional rights. *See, e.g.*, Romero v. United States, 771 F. Supp. 3d 1137, 1144 (S.D. Cal. 2025). Those rulings, however, do not call into question the distinct approach of using the Bane Act as a converse 1983 cause of action: In a converse 1983 suit, the plaintiffs do not sue the United States itself (which can pose sovereign immunity problems). Instead, as in *Bivens* actions and conventional Section 1983 actions, the plaintiffs sue government officials for damages in their individual capacities (which does not similarly implicate sovereign immunity).

[15] *See* 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").

[16] *See* Me. Stat. tit. 5, § 4682.1-A ("A person whose exercise or enjoyment of the rights secured by the United States Constitution or the laws of the United States or of the rights secured by the Constitution of Maine or the laws of the State has been interfered with, or attempted to be interfered with, may institute and prosecute in that person's own name and on that person's own behalf a civil action for legal or equitable relief whenever any person, whether or not acting under color of law.").

potential model for other states.[17] And, recently, Illinois enacted a version as part of a larger package related to immigration policy.[18]

Numerous states are currently considering additional converse 1983 mechanisms. In New York, for example, a pending bill provides:

> **Any person** who, under color of any law, statute, ordinance, regulation, custom, or usage, **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 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 . . . .[19]

Virginia, too, has introduced a converse 1983 proposal. That law would provide that:

> **Any individual** who has been deprived of **any rights**, privileges, or immunities granted to such individual under the **constitutions or laws of the United States** and the Commonwealth by a person acting under color

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[17] *See* N.J. Stat. Ann. § 10:6-2(c) ("Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief."). As explained below, Third Circuit precedent currently poses an obstacle to pursuing converse 1983 claims through the New Jersey Civil Rights Act. *See infra* Part II. No other federal circuit court has endorsed that conclusion, however.

[18] Ill. Public Act 104-0440, formerly H.B. 1312. The federal government has sued to enjoin Illinois's law, though did not seek any preliminary relief. *See* Press Release, U.S. Dep't of Just., *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-bivens-act. As a result, at the time of writing, Illinois's cause of action remains fully in effect.

[19] S.B. 8500A, 2025–26 Leg., Reg. Sess. (N.Y. 2025) (emphasis added). Several similar bills have also been introduced in New York. *See* S.B. 3280, 2025–26 Leg., Reg. Sess. (N.Y. 2025) ("Any person who, under the color of law, subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the federal or state constitution or laws, or whose exercise or enjoyment of those rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under the color of law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."); S.B. 176, 2025– 26 Leg., Reg. Sess. (N.Y. 2025) ("A person or public entity acting under color of law that subjects or causes to be subjected any other person to the deprivation of any rights, privileges, or immunities secured by the federal or state Constitution or laws, is liable to the injured party for legal or equitable relief or any other appropriate relief.").

> of law has a **civil cause of action** against such person for compensatory damages, punitive damages, and equitable relief.[20]

Likewise, although California already has the Bane Act on the books, pending legislation would authorize actions without the hurdle of demonstrating a threat, intimidation, or coercion. The new language would state:

> **Every person** who, under color of **any law**, statute, ordinance, regulation, custom, or usage, subjects, or causes to be subjected, any citizen of this state or **any person** within the jurisdiction thereof to the deprivation of **any rights**, privileges, or immunities **secured by the United States Constitution**, shall be liable to the party injured in an action at law . . . .[21]

Other states including Colorado,[22] Lawmakers in Hawai'i,[23] Maryland,[24] Rhode Island,[25] Washington,[26] and Wisconsin[27] have also introduced legislation to provide a state damages remedy that would cover federal officials who violate constitutional rights.

In other states, like Arkansas or New Mexico, existing statutes that provide private rights of action could easily be amended to add federal officials and/or violations of the federal Constitution.[28] For states looking to introduce legislation on a blank slate, the organization "Protect Democracy" has proposed a model bill.[29] Alexander Reinert, Joanna C. Schwartz, and James E. Pfander have also drafted a comprehensive model state statute creating a cause of action for constitutional

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[20] H.B. 1314, 2026 Leg., Reg. Sess. (Va. 2026) (emphasis added).

[21] S.B. 747, 2025-26 Leg., Reg. Sess. (Cal. 2025) (emphasis added). An action at "law," as opposed to "equity," typically means an entitlement to damages. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998) ("We have recognized the 'general rule' that monetary relief is legal . . . ." (quoting Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558, 570 (1990)).

[22] *See* S.B. 26-005, 75th Gen. Ass., Second Reg. Sess. (Colo. 2026).

[23] *See* S.B. 2438, 2026 Leg., Reg. Sess. (Haw. 2026).

[24] S.B. 346, 2026 Leg., Reg. Sess. (Md. 2026).

[25] H. 7202, 2026 Gen. Ass., Reg. Sess. (R.I. 2026).

[26] *See* H.B. 2597, 69th Leg., Reg. Sess. (Wash. 2026).

[27] *See* A.B. 331, 2025–26 Gen. Assem., 107th Sess. (Wis. 2025).

[28] *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) (listing states with statutory causes of action, and noting that Arkansas and New Mexico, among others, are limited to either specific state actors or violations of state constitutional rights).

[29] *See* Protect Democracy, *The Universal Constitutional Remedies Act, explained* (Jan. 6, 2026), https://protectdemocracy.org/work/universal-constitutional-remedies-act-explained/.

violations; although their template is directed at state actors, it could cover federal officials with only a minor tweak.[30]

There are some meaningful differences between states' approaches, especially when considering how courts have interpreted and applied existing provisions. For example, courts have concluded that qualified immunity is available to defendants under Maine's[31] and Massachusetts's[32] statutes; conversely, qualified immunity is no defense to Bane Act suits in California.[33] Courts in California and Massachusetts have also diverged on how to read statutory language requiring constitutional violations to involve "threat, intimidation, or coercion." California courts, for example, have given that requirement a loose reading, concluding that the mere "[u]se of law enforcement authority to effectuate a stop, detention (including use of handcuffs), and search can constitute interference by 'threat[ ], intimidation, or coercion' if the officer lacks probable cause to initiate the stop, maintain the detention, and continue a search."[34] In contrast, Massachusetts requires threat, coercion, or intimidation as a separate element for liability—even in cases where officers *actually* violate someone's constitutional rights.[35] (To be clear, converse 1983 laws need not use

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[30] *See* Reinert, Schwartz, & Pfander, *supra* note 28, app. B at 814–16. A converse 1983 version simply supplement section a.1 by adding: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of the [State, County, or City] of [], **or of the United States…**"

[31] *See* Clifford v. Maine General Med. Ctr., 91 A.3d 567, 583 n.17 (Me. 2014) ("Claims of qualified immunity raised under the MCRA are analyzed similarly to qualified immunity claims raised in federal civil rights actions."); Brown v. Dickey, 117 F.4th 1, 3 n.1 (1st Cir. 2024) ("[T]he protections provided by the Maine Civil Rights Act, including immunities, are coextensive with those afforded by 42 U.S.C. § 1983." (citation omitted)).

[32] *See* Duarte v. Healy, 537 N.E.2d 1230, 1232 (Mass. 1989) ("We presume that the Legislature was aware of [qualified immunity] case law when it chose to pattern the Massachusetts Civil Rights Act after § 1983.")

[33] *See* Venegas v. Cnty. of Los Angeles, 63 Cal. Rptr. 3d 741, 753 (Ct. App. 2007) ("[Q]ualified immunity of the kind applied to actions brought under 42 United States Code Section 1983 does not apply to actions brought under section 52.1."). That said, to prevail on a Bane Act claim, plaintiffs typically must show that the defendant acted with specific intent, which may be functionally similar to overcoming qualified immunity. Specifically, Bane Act plaintiffs are expected to establish that (1) "the right at issue [was] clearly delineated and plainly applicable under the circumstances of the case," and (2) the defendant acted "with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that right." Sandoval v. Cnty. of Sonoma, 912 F.3d 509, 520 (9th Cir. 2018) (quoting Cornell v. City & Cnty. of San Francisco, 225 Cal. Rptr. 3d 356, 386 (Ct. App. 2017)). This standard can be met when a defendant "acted in 'reckless disregard' of the constitutional right," "even if the defendant did not in fact recognize the unlawfulness of his act." *Id.* (quoting *Cornell*, 225 Cal. Rptr. 3d at 386).

[34] Cole v. Doe 1 Thru 2 Officers of City of Emeryville Police Dep't, 387 F. Supp. 2d 1084, 1103 (N.D. Cal. 2005) (citing California cases).

[35] *See* Longval v. Comm'r of Corr., 535 N.E.2d 588, 593 (Mass. 1989) ("A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion and thus does not implicate the [MCRA]."). As one commentator has observed, this means that, paradoxically, "[s]omeone victimized by police misconduct will have a viable MCRA claim if the officer *threatened* to use excessive force, but not if the

concepts like intimidation, coercion, or threats, and most of the pending bills—including California's proposed Bane Act revision—do not).

There are also differences in whether and when prevailing plaintiffs are entitled to attorneys' fees[36] and what sorts of damages are available.[37] Recent converse 1983 proposals also diverge on the scope of their coverage. Illinois' recently enacted statute, for example, provides a cause of action against "any person who, **while conducting civil immigration enforcement**," violates constitutional rights.[38] Colorado[39] and Washington[40] have introduced similar bills that cabin the cause of action to injuries sustained during "civil immigration enforcement." A bill in Rhode Island, meanwhile, applies only to federal actors, unlike proposals elsewhere that also cover state and local actors.[41] Proposals also diverge on whether to abrogate or retain immunity,[42] and the timing of any covered injury—California's proposed statute, for instance, would apply retroactively to March 2025.[43] These are all important details for policymakers to consider as they seek to strike what they regard as an appropriate balance of fee-incentives, immunities, and defenses—and as they evaluate the litigation risk to enacting a statute that may treat federal officials differently from other actors.[44]

State legislation is just one of multiple pathways for establishing a converse 1983 cause of action.[45] A state could create a damages remedy through an initiative, referendum, or other

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officer simply hauled off and *used* excessive force without threatening to do so beforehand." Matthew R. Segal, *The Promise and Perils of State Civil Rights Legislation*, 54 N.M. L. Rev. 355, 359 (2024).

[36] Massachusetts's statute, for example, provides that courts "shall" award attorneys' fees; New Jersey's says courts "may." *Compare* Mass. Gen. Laws ch. 12, § 11I *with* N.J. Stat. Ann. § 10:6-2(f).

[37] For example, "[Bane Act] damages include actual damages, treble damages and exemplary damages." Bolbol v. City of Daly City, 754 F. Supp. 2d 1095, 1117 (N.D. Cal. 2010)) (internal quotations omitted). The New Jersey Civil Rights Act, in contrast, does not expressly authorize treble damages—even though other New Jersey statutes do. *See, e.g.*, N.J. Stat. Ann. § 56:9-12 (authorizing a "[t]reble damages suit" for anticompetitive practices). Virginia's recent proposal expressly authorizes punitive damages. *See* H.B. 1314, 2026 Leg., Reg. Sess. (Va. 2026).

[38] Ill. Public Act 104-0440, formerly H.B. 1312.

[39] *See* S.B. 26-005, 75th Gen. Ass., Second Reg. Sess. (Colo. 2026).

[40] *See* H.B. 2597, 69th Leg., Reg. Sess. (Wash. 2026).

[41] H. 7202, 2026 Gen. Ass., Reg. Sess. (R.I. 2026).

[42] *Compare, e.g.,* S.B. 747, 2025-26 Leg., Reg. Sess. (Cal. 2025) (providing qualified immunity commensurate with federal Section 1983) *with* H. 7202, 2026 Gen. Ass., Reg. Sess. (R.I. 2026) ("As far as permissible under the Federal Constitution, any existing immunity provided against liability, damages, or attorneys' fees under federal law shall not apply.").

[43] S.B. 747, 2025-26 Leg., Reg. Sess. (Cal. 2025).

[44] *See infra* Part III (discussing intergovernmental immunity).

[45] Amar, *Questions and Answers*, *supra* note 12, at 161–62. Any converse 1983 remedy, through any mechanism, would fill an existing gap in the remedial landscape. There are reasons to suspect, however, that a legislatively created regime may raise fewer eyebrows with the U.S. Supreme Court than a judicially created remedy. The U.S. Supreme Court has repeatedly emphasized that "creating a cause of action is a

popular lawmaking mechanism. Alternatively, state courts could fashion a remedy using their common-law power. The authority of state courts to create remedies is deeply rooted; numerous state courts have established a damages remedy for *state* constitutional violations.[46] At least in theory, they could similarly recognize a cause of action for violations of the federal Constitution.

Regardless of how states create converse 1983 causes of actions, two practical aspects of converse 1983 litigation bear noting. First, most converse 1983 suits against federal officials would proceed in federal court, even if initially filed in state court. A federal statute, 28 U.S.C. § 1442, allows federal officers acting in the course of their employment to remove actions from state to federal court, so long as they can assert a "colorable federal defense."[47] As explained in more detail below, there are a number of defenses or immunities that federal officials could potentially assert; while none would necessarily succeed, they will often be "colorable." If they choose, converse 1983 plaintiffs might also be able to initiate their suits in federal court, rather than state court. Although converse 1983 is a state cause of action, it may qualify for federal question jurisdiction since it requires a federal constitutional violation.[48]

Second, although converse 1983 suits would be brought against federal officers in their individual capacities, those officers would likely be defended by government attorneys and indemnified by the government such that they would not personally pay any damages award. Depending on the circumstances, the government could conceivably disclaim any responsibility to represent or indemnify the defendant, but in the related context of *Bivens* litigation, that happens only rarely.[49]

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legislative endeavor." *Egbert v. Boule,* 596 U.S. 482, 491 (2022). Of course, state courts differ from their Article III counterparts: Their authority to craft common law is deeply rooted and the elected nature of many state judges cut against any democratic accountability concerns animating the Supreme Court's hostility to *Bivens*. But the U.S. Supreme Court appears to view the exercise of remedy-creation as one uniquely suited to legislative balancing. *See, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 133–34, 136 (2017) (emphasizing "economic and governmental concerns," "administrative costs," and the "impact on governmental operations systemwide"). A precisely crafted statutory converse 1983 regime, backed by legislative factfinding, might therefore carry more presumptive legitimacy with the current Court.

[46] *See, e.g.*, Strauss v. State, 330 A.2d. 646 (N.J. Super. Ct. Law Div. 1974); Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921 (Md. 1984); Brown v. State, 674 N.E.2d 1129 (N.Y. 1996); Binette v. Sabo, 710 A.2d 688 (Conn. 1998); Dorwart v. Caraway, 58 P.3d 128 (Mont. 2002); Zullo v. State, 205 A.3d 466 (Vt. 2019); Mack v. Williams, 522 P.3d 434 (Nev. 2022).

[47] Mesa v. California, 489 U.S. 121, 129 (1989).

[48] See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) (explaining that federal jurisdiction is proper where a "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities").

[49] *See, e.g.*, James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561, 566 (2020) (finding that the government paid damages awards in more than 95 percent of *Bivens* cases brought against Federal Bureau of Prisons employees).

II. Addressing Likely Federal Statutory Objections: the FTCA and Westfall Act

Because there are few real-world examples of individuals using converse 1983 statutes to sue federal officials for violations of their federal constitutional rights, it is uncertain how litigation might unfold. However, the federal government would likely contest strenuously the validity of state-created damages actions against federal officials. An initial objection will likely be statutory—namely, that the Federal Tort Claims Act (FTCA) and the Westfall Act preempt state damages actions against federal officials. Converse 1983 proponents, however, have strong arguments that even if Congress has preempted most *common-law torts* against federal officials, states remain able to provide *constitutional* tort remedies.

The Westfall Act was Congress's response to a 1988 Supreme Court decision, *Westfall v. Erwin*.[50] The *Westfall* plaintiffs brought a common-law state tort suit against a federal employee, and the Court rejected the government's argument that federal employees are absolutely immune from such actions.[51] *Westfall* essentially confirmed that individuals injured by federal employees had multiple potential ways to seek compensation: common-law state tort suits, FTCA suits, and *Bivens* actions. In response, through the Westfall Act, Congress effectively gave federal officials the shield from state tort liability that the government had unsuccessfully sought from the Supreme Court.[52]

The Westfall Act generally makes the FTCA the "exclusive" remedial option "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."[53] Under the Act, "any other civil action or proceeding for money damages" against the government employee "is precluded."[54]

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[50] 484 U.S. 292 (1988).

[51] The Court's decision in *Westfall* was in line with a long tradition of state common-claim damages actions against federal officials. As Justice Thomas has written, "[f]rom the ratification of the Bill of Rights until 1971," when the Court established the *Bivens* cause of action, "[s]uits to recover such damages were generally brought under state tort law." *Hernandez,* 589 U.S. at 115–16 (Thomas, J., concurring).

[52] Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100694, 102 Stat. 4563.

[53] 28 U.S.C. § 2679(b)(1).

[54] *Id.*; *see also Mesa*, 589 U.S. at 111 (explaining that the Westfall Act "makes the Federal Tort Claims Act (FTCA) 'the exclusive remedy for most claims against Government employees arising out of their official conduct'" (quoting *Hui v. Castaneda*, 559 U.S. 799, 806 (2010)). *But see* Pfander & Alley, *supra* note 10 (arguing that the Westfall Act allows for a wider range of common-law remedies than has typically understood).

The Westfall Act, however, includes an important carve out to its preemption provision: It "does not extend or apply to a civil action against an employee of the Government . . . brought for a violation of the Constitution of the United States."[55] There is some debate about the scope of this exception, but, as explained below and as several commentators have suggested, its plain text appears to allow converse 1983 suits since such suits seek relief for federal constitutional violations.

The government might argue that the Westfall Act's reference to actions "brought for a violation of the U.S. Constitution" should be narrowly construed to allow only for federal *Bivens* actions—that is, to the vanishingly narrow categories of constitutional damages suits against federal officials that the Supreme Court has itself recognized.[56] On several occasions, the Supreme Court has in fact referred to this statutory provision as a "*Bivens*" exception. Thus, in one case, the Court described the provision as "preserving employee liability for *Bivens* actions."[57] Similarly, in another, the Court referred to § 2679(b)(2)(A) as "[t]he Westfall Act's explicit exception for *Bivens* claims."[58] Lower courts and commentators have repeated similar language.[59] But none of these cases actually addressed whether the Westfall Act's text excepts *Bivens* actions alone. Only one federal appellate court, the Third Circuit, has directly rejected a converse 1983 claim on the grounds that "[t]he Westfall Act only offers two exceptions to its exclusivity—one for *Bivens* actions, and the other for actions under federal statutes."[60] The court offered little analysis beyond observing that the plaintiff had "offered no counterargument in her papers or at oral argument" regarding Westfall Act preemption.[61]

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[55] 28 U.S.C. § 2679(b)(2)(A).

[56] *See Egbert*, 596 U.S. at 491 (noting that *Bivens* actions are available for specific Fourth Amendment violations; "a former congressional staffer's Fifth Amendment sex-discrimination claim," and "a federal prisoner's inadequate-care claim under the Eighth Amendment"—but that any other scenario constitutes a new "context" where a damages remedy is disfavored).

[57] United States v. Smith, 499 U.S. 160, 173 (1991).

[58] Hui v. Castaneda, 559 U.S. 799, 807 (2010).

[59] *See, e.g.*, Meshal v. Higgenbotham, 804 F.3d 417, 428 (D.C. Cir. 2015); Vanderklok v. United States, 868 F.3d 189, 201 (3d Cir. 2017); Rodriguez v. Swartz, 899 F.3d 719, 740 (9th Cir. 2018); Koenig & Moore, *supra* note 13, at 46 n.362; *see also* Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019 Cato Sup. Ct. Rev. 263, 279 ("[C]ourts and commentators have generally assumed that this language only preserves *Bivens* suits . . . .").

[60] Henry v. Essex Cnty., 113 F.4th 355, 364 (3d Cir. 2024).

[61] *Id.* Nevertheless, this ruling stands as a barrier to any converse 1983 action brought in the Third Circuit (Delaware, New Jersey, and Pennsylvania) unless litigants can convince another panel to distinguish the case or the court agrees to take the question en banc. Notably, Judge Porter specifically declined to join this paragraph of the opinion. *See id.* at 364 n.7. In nonprecedential rulings, a few trial courts have similarly applied the Westfall Act, again with limited analysis. *See, e.g.*, Pearsons v. United States, 723 F. Supp. 3d

There are reasons to doubt this *Bivens*-only reading of the Westfall Act. While some Supreme Court cases have casually referred to § 2679(b)(2)(A) as a *Bivens* exception, the Court has elsewhere described the provision in more expansive terms. Recently, for example, the Court explained that "the Westfall Act foreclosed common-law claims for damages against federal officials, but it left open claims for constitutional violations."[62] Relying on the Westfall Act's plain language and legislative history, several commentators have contended that the Westfall Act indeed allows for state actions that seek relief for federal constitutional violations. As Judge Justin Walker of the U.S. Court of Appeals for the D.C. Circuit detailed in a comprehensive 2023 concurrence, "that reading finds support in the text of the statute" and "accords with Founding-era principles of officer accountability."[63]

In the most in-depth recent academic article on converse 1983, Thomas A. Koenig and Christopher D. Moore, too, have reached a similar conclusion.[64] They identify several supportive canons of statutory construction and explain that the legislative history likewise suggests that Congress did not seek to foreclose state causes of actions for constitutional violations.[65]

Professors Carlos M. Vázquez and Stephen I. Vladeck have made similar arguments. They note, for example, that the House Report accompanying the Westfall Act asserted that the bill "would not affect the ability of victims of constitutional torts to seek personal redress from Federal

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825, 832–33 (C.D. Cal. 2024); Quiñonez v. United States, No. 22-cv-03195, 2023 WL 5663156, at *2–3 (N.D. Cal. Aug. 30, 2023).

[62] Tanzin v. Tanvir, 592 U.S. 43, 49 (2020) (citation omitted). In an earlier case, *Wilkie v. Robbins*, 551 U.S. 537, 551 (2007), the Court rejected a *Bivens* claim in part because the Court observed that the victim ''had a civil remedy in damages for trespass'' under state law to address the violation––an observation that makes sense only if that state cause of action remained available. See Vázquez & Vladeck, *supra* note 5, at 570–71; *Buchanan v. Barr*, 71 F.4th 1003, 1017 n.5 (D.C. Cir. 2023) (Walker, J. concurring). *But see* James E. Pfander & David P. Baltmanis, *W(h)ither* Bivens*?*, 161 U. Pa. L. Rev. Online 231, 244 n.68 (2013) (suggesting that "the *Wilkie* Court simply misunderstood the statutory framework" and made a mistaken "assumption about the viability of state tort remedies").

[63] *Buchanan*, 71 F.4th at 1017 (Walker, J., concurring). In particular, pointing to "the ordinary meaning of the phrase 'brought for'" and explaining how "[c]ourts have long used it to describe the goal of a suit, not the cause of action," Judge Walker noted that "[i]f Congress had meant to limit that exception to *Bivens* suits, it might have said 'suits *arising under* the Constitution,' not suits '*brought for*' constitutional violations"––observing that the former tracks the Supreme Court's own description of *Bivens*. *Id.* at 1016–17 (Walker, J., concurring).

[64] See Koenig & Moore, *supra* note 13, at 30–47.

[65] *Id.* at 35–43. They note that lawmakers described the Westfall Act as "'a status quo ante bill' designed to bring the law back to where it was prior to *Westfall v. Erwin*," and that one of legislative leaders involved in the bill, Representative Barney Frank, insisted that the legislation had no impact on the viability of constitutional claims: "We make special provisions here to make clear that the more controversial issue of constitutional torts is not covered by this bill. If you are accused of having violated someone's constitutional rights, this bill does not affect it." *Id*. at 44 (quoting 134 Cong. Rec. 15963) (emphasis omitted).

employees who allegedly violate their Constitutional rights."[6654] Like Koenig and Moore, they conclude that the exemption broadly covers constitutional torts: "even under the narrowest plausible construction," they write, "a converse-1983 action of the sort advocated by Professor Amar would . . . survive."[67]

To be sure, not all scholars agree. In a response to Vázquez and Vladeck, Professors James E. Pfander and David P. Baltmanis have argued that "the only claims against federal officials saved by the Westfall Act were those based on federal rights of action, including constitutional tort claims under *Bivens* and federal statutory claims otherwise authorized."[68] But their discussion focuses overwhelmingly on Westfall Act's displacement of state *common law* causes of action and gives limited consideration of whether the Act allows a *constitutional* cause of action like converse 1983. Additionally, in more recent work, Professor Pfander has reconsidered some of his earlier analysis of the Westfall Act and suggested that "the Westfall Act's saving provision for suits against federal officers for violation of the Constitution" may indeed allow for "state enactment of converse-1983 statutes."[69]

The overall point is that any litigant suing a federal officer under an existing or future converse 1983 statute will likely confront the argument that the Westfall Act forecloses the claim. Although there is little judicial precedent squarely on point, it is notable that scholars and jurists with an array of jurisprudential views see no federal statutory barrier to converse 1983 actions.

III. Federal Supremacy Objections

Defendants may also raise federal constitutional objections to converse 1983 actions, arguing that such remedies run counter to principles of federal supremacy. The Supremacy Clause, of

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[66] Vázquez & Vladeck, *supra* note 5, at 571 (quoting H.R. Rep. No. 100-700, at 6 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5950).

[67] *Id.* at 573. In fact, based on the rich common law history of officer suits pre-dating *Bivens* and the role the Constitution played as a federal *defense*—a history explored more fully below—Vázquez and Vladeck argue for an even more expansive reading of the exemption than Koenig and Moore, contending that § 2679(b)(2)(A) seems to "encompass common law claims in cases where the defendant has violated the Constitution," not simply constitutional causes of action. *Id.* at 572. *But see* Koenig & Moore, *supra* note 13, at 47. By expressly providing a cause of action for violations of the constitution, converse 1983 regimes need not test Vázquez and Vladeck's more expansive theory.

[68] Pfander & Baltmanis, *supra* note 62, at 233. Pfander and Baltmanis emphasized the interplay between the Westfall Act and the FTCA's exclusivity, substitution, and preclusion provisions, contending that "the constitutional tort exception was written into the preclusion language of the Westfall Act, but it was not written into the FTCA exclusivity provisions that transform state common law claims into suits against the government." *Id*. at 245. Accordingly, they argued, the "ultimate substitution of the federal government as a defendant" limits the ability of plaintiffs to pursue "state common law actions seeking to vindicate constitutional rights" against federal officials. *Id*. at 240.

[69] Pfander & Alley, *supra* note 10, at 1054; *see also id.* at 1038–39 n. 349.

course, dictates that, when in conflict, federal law wins out over state law. Arguments based on the Supremacy Clause may have some intuitive appeal—after all, can states *really* police the actions of federal actors? The simple answer is yes. Particularly given the long history of state common-law suits against federal officers (as well as state criminal prosecutions of such officers), there is no evident constitutional barrier to states creating a cause of action against federal officials for violating the Constitution.

Although Supremacy-based objections to converse 1983 actions could take multiple forms, the basic conceptual defense of such actions largely boils down to this: Converse 1983 does not seek to make state law supreme over federal law. Instead, it furthers the ultimate supremacy of the federal Constitution by helping people vindicate their fundamental federal constitutional rights. And because converse 1983 only targets unconstitutional action—which, by definition, doesn't further legitimate federal objectives—it does not impede the lawful functioning of the federal government.

As a matter of tradition and precedent, federal actors (except perhaps the President) have never enjoyed blanket immunity from state efforts to address federal wrongdoing.[70] To the contrary, a long line of cases establish that "[a]n employee of the United States does not secure a general immunity from state law while acting in the course of his employment."[71] Indeed, as noted earlier, for much of American history, state damages suits against federal officials were considered the norm.[72]

Although based in the common law, these traditional tort suits often included adjudication of constitutional rights.[73] As E. Garrett West summarizes: a plaintiff would allege "that the official violated some common-law duty he owed; the officer would respond that his actions were justified because of his official position or function; and the plaintiff would reply that the official's justification defense failed because the Constitution prohibited that defense."[74] As late as the 1960s, the Supreme Court observed that "[w]hen it comes to suits for damages for abuse of

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[70] *Cf.* Trump v. United States, 603 U.S. 593 (2024) (holding that the President enjoys absolute immunity from criminal prosecution at least with respect to core official acts).

[71] Johnson v. Maryland, 254 U.S. 51 (1920); *see also* Colorado v. Symes, 286 U.S. 510, 518 (1932) ("Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law.")

[72] *See supra* Part I; *see also* Vázquez & Vladeck, *supra* note 5, at 531.

[73] Individuals could also bring what was known as "action on the statute"—a challenge to the actions of a public official "resulting from activity in violation of a legislatively created duty or standard." Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. Pa. L. Rev. 1, 18 (1968); *see also* Vázquez and Vladeck, *supra* note 13, at 538–39.

[74] West, *supra* note 4, at 363.

power, federal officials are usually governed by local law. Federal law, however, supplies the defense."[75]

That unbroken practice was taken for granted as constitutionally unproblematic; at no point in U.S. history has the Supremacy Clause posed a barrier to state tort liability for federal officials.[76] Indeed, in *Bivens* itself, the majority, the dissent, and the U.S. Government all agreed that individuals had a valid remedy for unconstitutional federal actions through state tort law.[77] As the Supreme Court recounted in 2020, "we recognized the continuing viability of state-law tort suits against federal officials as recently as *Westfall v. Erwin* [in 1988]."[78] Moreover, as described in a companion publication, states have also long pursued *criminal* prosecutions of federal officials, and Supreme Court precedent indicates that there is no categorical constitutional barrier to such

[75] Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

[76] For prominent examples of common-law suits against federal officials, *see, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 176 (1804); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 115 (1804); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 150 (1836); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 128 (1851); Smith v. Shaw, 12 Johns. 257 (N.Y. 1815); *see also* Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1128 n.89 (1969) (collecting additional examples of common law actions encompassing constitutional torts); West, *supra* note 4, at 864 n.11 (same). As scholars have noted, "[p]erhaps because many of the cases in which officer liability was recognized were decided before *Erie*, the Court did not always expressly situate them in state law, referring to the officer as being liable in '"tort," or under the "general law" or "common law."'" Brief of Carlos M. Vázquez & Anya Bernstein as *Amici Curiae* in Support of Petitioners at 20 n.4, Hernandez v. Mesa, 589 U.S. 93 (2020) (No. 17-1678), 2019 WL 3854461, at *20 n.4 (quoting Hill, *supra*, at 1124); *see also* Ann Woolhandler and Michael G. Collins, *Was* Bivens *Necessary?*, 96 Notre Dame L. Rev. 1893, 1901 (2021) (describing some of these suits as "garden-variety common-law actions that could be traced to either general or state law"). In any event, these causes of action were decidedly not federal. *See* Koenig & Moore, *supra* note 13, at 7 n.28.

[77] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390 (1971) (observing that ordinarily a "petitioner may obtain money damages to redress [an] invasion of [constitutional] rights only by an action in tort, under state law, in the state courts."); *id.* at 429 (Black, J., dissenting) (arguing that "[t]he task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and *the legislatures of the States*" (emphasis added)); Brief for the Respondents at 10, 38, *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301), 1970 WL 122211, at *10, *38 (contending that a federal damages remedy was unnecessary because federal officials were "subject to the same common-law actions for damages as those applicable to private persons," and this "a body of state law" provided "substantial recovery" when a federal officer's actions violated the Fourth Amendment). Indeed, even after *Bivens* authorized plaintiffs to pursue claims against federal officials under the federal Constitution directly, state common-law claims also remained available, at least initially. Koenig & Moore, *supra* note 13, at 15–16.

[78] *Hernandez*, 589 U.S. at 110.

actions.[79] If the Constitution leaves the door open for states to prosecute federal officials, it is difficult to see how it closes the door to converse 1983 actions.

Some have suggested that federal courts might bar a state-created cause of action like converse 1983 through what is known as "Supremacy Clause immunity."[80] As our companion piece notes, Supremacy Clause immunity generally shields federal officials from state liability if (1) the federal official was doing something that was authorized by federal law, and (2) the official's actions were "necessary and proper" in fulfilling their federal duties.[81] For example, in the foundational case on Supremacy Clause immunity, *In re Neagle*, a U.S. Marshal assigned to protect a U.S. Supreme Court justice shot and killed an attacker in California.[82] The state charged the marshal with murder, but the U.S. Supreme Court concluded that the marshal could not be prosecuted because he was carrying out his official duties and was justified in killing the attacker as part of those duties.[83]

But Supremacy Clause immunity likely applies to criminal matters alone. Just this past term, the U.S. Supreme Court reversed a circuit court's extension of Supremacy Clause immunity to FTCA suits, explaining that, "[t]o date at least, this Court has also generally understood In re Neagle as providing federal officers a shield against only state criminal prosecution, not (as here) state tort liability."[84] The Court favorably quoted a nineteenth century case "holding that the defense would permit 'a civil action for damages,' even where it barred 'a criminal prosecution' because a damages action, unlike a prosecution, would not bring the 'federal and state governments into conflict.'"[85] Again, that conclusion makes sense given the history—Supremacy Clause immunity simply has not appeared in the myriad common-law suits against federal officials.[86]

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[79] See Bryna Godar, State Democracy Rsch. Initiative, Explainer: Can States Prosecute Federal Officials? (2025), https://statedemocracy.law.wisc.edu/featured/2025/explainer-can-states-prosecute-federalofficials/.

[80] Waxman and Morrison, *supra* note 13, at 2237; Preis, *supra* note 13, at 1713.

[81] Godar, *supra* note 79. In re Neagle, 135 U.S. 1 (1890); Waxman & Morrison, *supra* note 13, at 2237; Rebecca E. Hatch, Annotation, *Construction and Application of United States Supreme Court Decisions in* Cunningham v. Neagle, *135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890), Establishing Standard for Supremacy Clause Immunity as to Actions of Federal Officers or Agents Alleged to Be in Violation of State Law*, 53 A.L.R. Fed. 2d 269, 280–81 (2011).

[82] In re Neagle, 135 U.S. 1 (1890).

[83] *Id.* at 75–76.

[84] Martin v. United States, 145 S. Ct. 1689, 1702 n.2 (2025).

[85] *Id.* (quoting In re Waite, 81 F. 359, 363–64 (N.D. Iowa 1897)).

[86] See Koenig & Moore, *supra* note 13, at 53–54 (arguing, even before *Martin*, that "the history of common law suits brought against federal officials for actions taken in violation of federal constitutional rights further proves the irrelevance of Supremacy Clause immunity to converse-1983," since "[i]n the mine-run of cases, no Supremacy Clause immunity attached"). Even in criminal cases, moreover, the immunity is a layer of protection for officials, not a complete bar on state enforcement. As our companion piece explains, there

A defendant might also raise what is known as "intergovernmental immunity." This doctrine grows out of the famous case McCulloch v. Maryland, where the Supreme Court held that the Supremacy Clause prohibited Maryland's attempt to tax the Bank of the United States.[87] As Chief Justice John Marshall's opinion declared, the Supremacy Clause means that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[88] Today, the doctrine bars state laws that "*either* 'regulat[e] the United States directly *or* discriminat[e] against the Federal Government or those with whom it deals.'"[89]

But as others have argued, this principle should not prohibit a converse 1983 action—which, after all, furthers the federal Constitution.[90] Rather than imposing additional state-based obligations on federal officials, converse 1983 simply enforces the federal Constitution against individuals already duty-bound to follow it. In addition, Chief Justice Marshall refers to the operation of "*constitutional* laws." Unconstitutional actions, in contrast, cannot further the legitimate "powers vested in the general government," and providing a remedy when such actions occur thus does not impede lawful federal operations of the kind the Supremacy Clause protects.

Nor should most converse 1983 laws run afoul of the "anti-discrimination" principle of intergovernmental immunity. As noted, the Supremacy Clause bars states from singling out federal actors for special disfavored treatment. So, in an illustrative recent case, the Ninth Circuit struck down a County executive order that sought to bar local airfields from servicing ICE flights; as the panel explained, "[b]y burden[ing] federal operations, and *only* federal operations, the [County] Executive Order violates the anti-discrimination principle of the intergovernmental immunity doctrine."[91] But converse 1983 remedies need not—and probably should not—single out federal officials alone. As several of the laws discussed in Part I reflect, state remedies can address constitutional injuries perpetrated by any official, whether federal, state or local—or indeed "any person."[92] The Supreme Court has made clear that a state law does not implicate the Supremacy Clause "just because it indirectly increases costs for the Federal Government, so long as the law

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have been numerous state prosecutions of federal officials, including at least one successful conviction. *See* Godar, *supra* note 79.

[87] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[88] *Id.* at 436.

[89] United States v. Washington, 596 U.S. 832, 838 (2022) (quoting North Dakota v. United States, 495 U.S. 423, 435 (1990) (plurality opinion)).

[90] *See, e.g.*, Amar, *Questions and Answers*, *supra* note 12, at 170–71.

[91] United States v. King Cnty., Washington, 122 F.4th 740, 757 (9th Cir. 2024) (internal citations and quotations omitted).

[92] *See supra* Part I.

imposes those costs in a neutral, nondiscriminatory way."[93] Many converse 1983 regimes seem to do just that.

In this regard, it is difficult to predict how a court might approach recent proposals or enactments that limit liability to particular contexts like "civil immigration enforcement." The federal government has already sued Illinois over its converse 1983 approach, arguing that the statute violates the anti-discrimination principle of intergovernmental immunity since the Act "expressly singles out for disfavored treatment officers who conduct 'civil immigration enforcement,' an area of law enforcement largely reserved to federal officers."[94] States will no doubt respond that these laws apply to "any" person—not simply federal actors—and as such are facially neutral, even if they are limited to a particular context.[95] They may also argue that, especially when paired alongside liability for state and local officials under Section 1983, these laws do not expose federal actors to liability above and beyond what comparable state employees already face—and so simply implement parity between state and federal actors, not discriminatory differential treatment. That said, some federal courts have taken a more functional approach to the doctrine, invalidating policies that appear to single out "federal immigration operations, based on the [jurisdiction's] disagreement with federal policy."[96]

These kinds of intergovernmental immunity disputes will largely turn on specific drafting choices, and states may wish to sidestep these questions through more universal language. But—as a category—converse 1983 causes of action fit comfortably within a rich tradition of state suits against federal officials and—properly conceived—do not improperly target the lawful operations of the federal government. Accordingly, converse 1983 appears to be fully consistent with the Constitution's Supremacy Clause.

IV. What About Qualified Immunity?

Federal defendants will probably also contend that, even if converse 1983 causes of action are valid, the doctrine of qualified immunity should provide at least a partial shield against liability. After all, in Section 1983 and *Bivens* actions, government officials can invoke qualified immunity, which bars plaintiffs from recovering damages unless the defendant's conduct violated "clearly

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[93] *Washington*, 596 U.S. at 839.

[94] *See* Compl. ¶ 90, United States v. State of Illinois et al., 25-cv-2220 (S.D. Ill. Dec. 22, 2025).

[95] *See, e.g.*, McHenry Cnty. v. Kwame Raoul, 44 F.4th 581, 594 (7th Cir. 2022) ("The mere fact that the Act touches on an exclusively federal sphere is not enough to establish discrimination."); United States v. California, 921 F.3d 865, 881 (9th Cir. 2019) (explaining that intergovernmental immunity is "not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment.").

[96] *King Cnty., Washington*, 122 F.4th at 757–58.

established" law.[97] There are cogent reasons, however, to believe that qualified immunity should not automatically carry over to a converse 1983 cause of action. That is particularly true if a state statute expressly disclaims such immunity.

As an initial matter, it is not obvious where qualified immunity would "come from" in the context of converse 1983. In the *Bivens* context, the U.S. Supreme Court has suggested that qualified immunity––like the *Bivens* cause of action itself—originally arose "under general principles of federal jurisdiction."[98] More recently, however, the Court has rejected the premise that the power to create constitutional causes of action (and to define defenses to those actions) "is inherent in the grant of federal question jurisdiction."[99] Instead, the Court has said that establishing causes of action and immunities "is a legislative endeavor," rather than the job of the federal judiciary.[100] Consistent with these statements, a converse 1983 plaintiff could argue that federal courts lack the authority to extend qualified immunity to a state-created converse 1983 action. *Bivens* qualified immunity, moreover, is a federal judicial limitation on a federal judicial creation. As scholars have explained, "where the judiciary finds an implied right of action, as it did in *Bivens*, precedent says that the judiciary has greater discretion to create defenses to that cause of action."[101] The same is not true for state-created causes of action.

Similarly, the justifications for qualified immunity in the federal Section 1983 context also do not clearly carry over to converse 1983 actions. The availability of qualified immunity as a defense in Section 1983 actions follows from the Court's reading of the statute. According to the Court, when Congress originally enacted Section 1983, it meant to retain the common-law immunity defenses that existed at the time.[102] The same cannot necessarily be said of state-created

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[97] Per the Supreme Court's famous articulation of the qualified immunity standard in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Qualified immunity has generated substantial debate and criticism, which is largely beyond the scope of this explainer. *See, e.g.*, Joanna Schwartz, Shielded: How The Police Became Untouchable (2023); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 Mich. L. Rev. 1405, 1415–21 (2019) (surveying qualified immunity literature); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*?, 62 Fla. L. Rev. 851 (2010).

[98] *Hernandez*, 589 U.S. at 101. As noted, converse 1983 suits—being premised on federal constitutional violations—would likely qualify as federal questions for purposes of 28 U.S.C. § 1331. *See supra* Part I.

[99] *Hernandez*, 589 U.S. at 101.

[100] Egbert v. Boule, 596 U.S. 482, 491 (2022).

[101] Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1855 (2018); *see also id*. at 1863 n.68; *cf. Hernandez*, 589 U.S. at 101.

[102] *See* Pierson v. Ray, 386 U.S. 547, 554 (1967); Nielson & Walker, *supra* note 101, at 1862. For criticism of this account of the common law and the Court's conclusion regarding Congress's intent in passing Section 1983, *see, e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023);

converse 1983 laws. Of course, a court *could* reach the same conclusion when interpreting a particular state converse 1983 statute—as the Supreme Judicial Court of Massachusetts has with respect to its civil rights statute.[103] But any conclusions about legislative intent would depend on the context of the specific statute.

To head off questions about whether they meant to allow for a qualified immunity defense, one option for states is to make their intent clear by expressly disclaiming such immunity. For example, Koenig and Moore suggest the following language: "As far as permissible under the federal Constitution, this statute abrogates any and all immunities otherwise available."[104] Rhode Island's H. 7202 contains similar language,[105] and Colorado's bill likewise disclaims immunity.[106]

It is difficult to predict exactly how a federal court might respond to such a statutory disclaimer. Although the legal basis for disregarding it is not apparent, a court might be uncomfortable denying an official a qualified immunity defense in a converse 1983 suit given the longstanding availability of that defense in *Bivens* and Section 1983 actions.

Some have suggested that the Supreme Court might feel compelled to recognize a new federal common law of officer liability that would extend an immunity shield to converse 1983 actions. Perhaps the closest analogy on this score is the 1988 case *Boyle v. United Technologies Corporation*.[107] There, the parent of a deceased army helicopter pilot sued the contractor that manufactured the helicopter, alleging negligent design under Viriginia tort law. Even though the suit was not an FTCA action, the Court looked to the FTCA's protection of government employees, and observed that "state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption."[108] According to the Court, a context "of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal

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see also James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. Online 148 (2021); Baude, *Is Qualified Immunity Unlawful?*, *supra* note 97; William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115 (2022).

[103] *See Duarte*, 537 N.E.2d at 1232. If a converse 1983 action is heard in federal court and a question arises as to whether the state law is best read to incorporate an immunity defense, the federal court could potentially certify that question to the state supreme court for a definitive interpretation of state law.

[104] Koening & Moore, *supra* note 13, at 47–48.

[105] *See* H. 7202, 2026 Gen. Ass., Reg. Sess. (R.I. 2026) ("As far as permissible under the Federal Constitution, any existing immunity provided against liability, damages, or attorneys' fees under federal law shall not apply.").

[106] *See* S.B. 26-005, 75th Gen. Ass., Second Reg. Sess. (Colo. 2026) ("To the maximum extent permissible under the United States Constitution, a grant of immunity to a defendant, including, but not limited to, sovereign immunity; official immunity; intergovernmental immunity; qualified immunity; supremacy clause immunity; statutory immunity, including the 'Colorado Governmental Immunity Act', Article 10 of Title 24; or common law immunity, does not apply in an action brought pursuant to this section.")

[107] 487 U.S. 500 (1988).

[108] *Id.* at 511.

officials for actions taken in the course of their duty."[109] Thus, the Court reasoned, "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."[110] One scholar, John F. Preis, reads *Boyle* as demonstrating "that converse-1983 actions will be subject to revision by a Court that sees itself as having wide-ranging common law powers in the field of federal officer liability."[111]

Such arguments, however, are in considerable tension with recent Supreme Court pronouncements on common lawmaking. The Court has declared that "[t]he cases in which federal courts may engage in common lawmaking are few and far between," going so far as to note that they granted *certiorari* in a case "only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking."[112] The Court may therefore be disinclined to expand on *Boyle*'s line of reasoning. Relatedly, the Court's recent criticism of *Bivens* is grounded in the idea that "the Judiciary is comparatively ill suited to decide whether a damages remedy against any [federal] agent is appropriate"[113] and that "absent utmost deference to Congress' preeminent authority in this area, the courts 'arrogat[e] legislative power.'"[114] Thus, even if the Court were skeptical of a state creating a cause of action for damages against federal officials, the Court should, in theory, be reluctant to craft a new federal common law defense and instead leave the matter to Congress.[115]

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[109] *Id.* at 505.

[110] *Id.* at 512.

[111] Preis, *supra* note 13, at 1715. While not relying on *Boyle*, Seth P. Waxman & Trevor W. Morrison relatedly suggest a uniform standard for adjudicating the civil and criminal liability of federal officials that would effectively encompass both Supremacy Clause immunity and qualified immunity and provide protection for "good-faith, discretionary decisions . . . ma[d]e in the course of enforcing federal law." Waxman & Morrison, *supra* note 13, at 2249.

[112] Rodriguez v. FDIC, 589 U.S. 132, 133, 138 (2020).

[113] *Boule*, 596 U.S. at 495.

[114] *Id.* at 492 (quoting Hernandez v. Mesa, 589 U.S. 93, 100 (2020)).

[115] Congress plainly has authority to legislate on matters of federal officer liability and immunity if it chooses to do so. *See* Amar, *Of Sovereignty and Federalism*, *supra* note 1, at 1518; Koenig & Moore, *supra* note 13, at 61–63; Preis, *supra* note 13, at 1721–25; Waxman & Morrison, *supra* note 13, at 2248–49. Professor Amar, however, has suggested that "if Congress seeks to oust state law here, Congress must itself provide a federal remedy at least as generous as the most generous state remedy Congress seeks to preempt." Amar, *Questions and Answers*, *supra* note 12, at 179. Most other commentators disagree. *See* Waxman & Morrison, *supra* note 13, at 2248 (arguing that "a State that decides to enact a converse-1983 statute without providing for qualified immunity does not implement a constitutional requirement"—it is instead a "policy preference, not constitutional command"); Preis, *supra* note 13, at 1721–25; Koenig & Moore, *supra* note 13, at 61–63 (reaching similar conclusions).

It is of course entirely possible that federal courts would ultimately choose to apply qualified immunity in converse 1983 actions even over a state's express objection. But such a move is by no means required by current doctrine and is, in fact, in some tension with recent jurisprudential trends. It also bears noting that, even if federal officials can assert qualified immunity in converse 1983 actions, plaintiffs should still be able to prevail and recover damages at least in cases of egregious misconduct.

Conclusion

Over the past several decades, statutory and doctrinal changes at the federal level have increasingly left individuals unable to obtain meaningful relief when federal officials violate their constitutional rights.

States can offer an option to help fill this void. Under our federal system, states and the federal government *both* are responsible for ensuring the supremacy of federal law and the federal Constitution. For much of American history, states played a central role in helping individuals obtain redress when federal actors violated their rights, and states retain authority to do so today. A state-law damages remedy against federal officials for violating the federal Constitution—converse 1983—offers a pathway to check federal overreach.

Professor David Schultz
Hamline University

Testimony in Favor of HF3477

February 24, 2026

Dear Committee Members:

Introduction
My name is David Schultz and I am a distinguished university professor of political science and legal studies at Hamline University where I have taught classes in constitutional law, state and local government, and American government for more than 25 years. I am also a professor of law at the University of St. Thomas since 2002 where I have taught constitutional law and state constitutional law. I am also a professor at the Lithuanian Military Academy in Vilnius, Lithuania and I have previously worked with the US Departments of Defense and State.

I am the author of 50 books and 200+ articles on American politics and law, including now my third edition of my constitutional law casebook. I have a Ph.D. in political science and a JD and LLM in law.

I am submitting this testimony on my own behalf because I am unable to attend the hearing.

My views do not necessarily reflect the views of my employer.

The Founding Imperative: No One Is Above the Law
If there is any guiding principle of American law, it is that no person, office, agency, department, or level of government is above the law. We fought an American revolution with the belief that no one can violate the Constitution or act with impunity or beyond the ropes of accountability. Everyone, whether high and mighty or a petty official, must follow the law.

The Founders of this republic were not naive. They had lived under the rule of a government that claimed authority beyond accountability, and they resolved that the new nation they were building would be different. The Declaration of Independence did not merely announce a separation from Britain, it articulated a philosophy of government rooted in the consent of the governed and the recognition that when government systematically violates the rights of the people, the people have not only the right but the duty to seek redress.

Thomas Jefferson's words were not abstract poetry. They were a charter of accountability, grounded in the natural rights tradition and directed squarely at the problem of unchecked power.

The Constitution that followed was designed with the same fear in mind. The Framers, Madison, Hamilton, and their colleagues, devoted enormous energy to designing a system that would prevent any person, office, or level of government from acting with impunity. Separation of powers, the Bill of Rights, federalism itself: all were instruments of accountability. The Framers understood

that tyranny does not always arrive in dramatic form. It arrives incrementally, in the form of officials who believe they are exempt from the rules they enforce on others.

It is in this spirit, faithful to the Founders, faithful to the Declaration, faithful to the Constitution's deepest purpose, that I urge this committee to support HF3477. This bill asks one simple thing: obey the law and the Constitution. There is nothing to fear here if one has not violated the law.

Why We Need This Legislation Now

For many, the killings of Renee Good and Alex Pretti by federal ICE agents have raised urgent legal questions about accountability. At the center of the debate is a basic issue: how to hold all government officers and persons, including federal officers, responsible for alleged constitutional violations, including those that may be criminal.

The perceived lack of effective remedies has become a political flashpoint. The proposal in this Bill is ambitious, legally novel, and constitutionally necessary.

The starting point for understanding the issue is simple. The Constitution is supposed to bind all government officials. It is the supreme law of the land, and public officials are expected to conform their conduct to it. Yet the existence of a constitutional right does not always mean there is a clear remedy when that right is violated. In practice, the availability of lawsuits depends heavily on who committed the alleged wrongdoing.

When state or local officials violate constitutional rights, the primary legal tool is a lawsuit under 42 U.S.C. § 1983. This statute dates to Reconstruction. Congress enacted it in 1871 as part of the Ku Klux Klan Act, responding to widespread violence and civil rights abuses in the post–Civil War South. State governments were often unwilling or unable to protect newly freed Black citizens, and Congress created a federal cause of action allowing individuals to sue state officials who violated federal constitutional rights. Today, § 1983 remains the backbone of civil rights litigation, with thousands of cases filed annually.

To succeed under § 1983, a plaintiff must demonstrate that a federal constitutional or statutory right was violated and that the defendant acted under color of state law while exercising official authority. Courts also require that the harm be sufficiently serious to rise to a constitutional level rather than a mere policy violation.

In excessive force cases involving police or law enforcement officers, the governing standard comes from the Fourth Amendment. The Supreme Court established in *Graham v. Connor*, 490 U.S. 386 (1989), that such claims must be evaluated under an objective reasonableness test. Other constitutional provisions may also apply, including the First Amendment when individuals are targeted for speech or recording government activity, and the Eighth Amendment when incarcerated individuals face cruel or deliberately indifferent treatment.

Even when these elements are established, plaintiffs face a major barrier: qualified immunity. This doctrine shields government officials from liability unless they violated clearly established law that a reasonable officer would have known. The modern formulation comes from *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), and in practice it often leads courts to dismiss cases before trial because prior precedent does not precisely match the alleged conduct.

The Broken Federal Framework for Federal Actors

The legal situation becomes significantly more difficult when federal officials are involved. Section 1983 does not apply to federal actors, which means plaintiffs must rely on what are known as *Bivens* claims. These lawsuits originate from *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in which the Supreme Court recognized a damages remedy directly under the Fourth Amendment against federal narcotics agents who conducted an unlawful search. Initially, Bivens appeared to provide a federal counterpart to § 1983, but the Supreme Court has steadily narrowed its scope.

Today, the Court recognizes only a handful of established contexts for *Bivens* actions. The modern retrenchment is particularly clear in *Ziglar v. Abbasi*, 582 U.S. 120 (2017), where the Court emphasized that expanding *Bivens* is now a "disfavored judicial activity," and in *Egbert v. Boule*, 596 U.S. 482 (2022), where the Court stressed that creating new remedies against federal officers is primarily a task for Congress rather than the judiciary. As a result, many constitutional claims against federal officials are dismissed at early stages, even when serious misconduct is alleged.

Additional barriers exist. *Bivens* suits must be brought against officers personally rather than against the federal government itself, making collection of damages difficult. Qualified immunity applies to federal officials as well. Claims against the United States government must instead proceed under the Federal Tort Claims Act, which imposes strict procedural requirements and often limits the available relief.

In practical terms, this means that when a federal officer kills an unarmed person in violation of the Fourth Amendment, or violate other constitutional rights, the surviving family may have no meaningful legal recourse. This is precisely the condition the Founders feared: governmental power exercised without accountability, shielded by procedural barriers that make justice unreachable.

The Declaration of Independence condemned a King who had made his officers "free from punishment for any Murders which they should commit on the Inhabitants" of these colonies. We should not allow a similar condition to take root in Minnesota.

The Case for a State Cause of Action

It is against this legal backdrop that Minnesota lawmakers should explore a new approach. It is an approach born of necessity and reluctance, much in the same way the Founders of this country reached their conclusion to declare independence from England.

HF3477 would create a state cause of action allowing individuals to sue government officials, including federal officers, for constitutional violations in state courts. Such a law would effectively create a state analogue to § 1983, and it would be consistent with the deepest principles of American constitutionalism.

The principle of federalism that the Founders enshrined is not a one-way ratchet that only empowers the federal government. The states have always possessed concurrent authority to

protect the rights of their citizens. Indeed, it was the states, and the pressure of state ratifying conventions, which produced the Bill of Rights in the first place.

When federal mechanisms fail to deliver accountability, the principle of popular sovereignty does not evaporate. The people of Minnesota retain the sovereign interest in ensuring that those who exercise power within their borders do so lawfully.

Moreover, the Framers explicitly understood that multiple layers of accountability, including overlapping jurisdictions, competing sovereigns, were a feature, not a bug, of the constitutional design. As Madison wrote in Federalist No. 51, the constitutional system relies on "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."

A state legislature that acts to protect its residents from federal constitutional violations is acting in exactly this spirit. It is providing one more check, one more layer of accountability, in a system whose genius lies precisely in the multiplication of checks.

Any legislation to this effect would need to apply broadly to all individuals and officials, state, local, federal, or private, acting under color of law, rather than targeting federal actors alone. Drafted in this manner, such a statute gives full effect to the proposition that the Constitution binds everyone equally, which is not a partisan claim but a founding one.

Acknowledging the Legal Challenges

Candor before this committee requires that I acknowledge the significant legal obstacles this legislation would face. The most immediate issue involves the Supremacy Clause, which establishes that federal law overrides conflicting state law. Courts would need to determine whether Congress has already occupied the field of remedies against federal officials, which could preempt state legislation. Even if such a law were enacted, lawsuits against federal officers would almost certainly be removed quickly to federal court, where federal judges would decide these constitutional questions.

Further complications arise regarding the nature of liability. If federal officials are sued individually, qualified immunity remains a significant obstacle. If they are sued in their official capacity, the lawsuit may effectively become one against the United States, triggering sovereign immunity concerns. The Supreme Court has consistently signaled reluctance to expand remedies against federal officials, and survival of such a statute in federal court is uncertain.

Enforcement challenges would also remain even if these obstacles were addressed. Individual plaintiffs often lack the financial resources to pursue complex constitutional litigation, which makes fee-shifting provisions, class actions, and public enforcement mechanisms critical to the effectiveness of any such statute. The legislature should build these tools into the law from the outset, so that the rights created are not merely nominal.

More specifically, the legislation should make clear the following:

- The law would allow any person acting under the color of the law to be sued for federal constitutional violations in state court.
- The law should make it clear that individuals have a private cause of action to bring suits on their own behalf in state court.
- The legislation should make it possible for class action law suits in state court.
- The legislation should make it possible for the Attorney General of Minnesota to bring lawsuits in state court on behalf of individuals alleging violations of the US constitutional rights.
- The legislation should make clear that individuals who successfully prevail should be entitled to recovery for attorney's fees and reasonable expenses.

I would also suggest the following additions to strengthen the bill.

- Change "knew or should have known" standard rather than the "clearly established law" when it comes to determination of level of culpability for a violation of federal constitutional rights.
- The state legislation should adopt a generous limitations period and include a discovery tolling provision for cases where the government conceals evidence of misconduct — a common pattern in excessive force cases.
- Create a mechanism for appointing an independent special prosecutor when the AG has a conflict of interest or declines to act, thereby ensuring political considerations do not block enforcement.
- Explicitly authorize injunctive relief, orders requiring agencies to change practices, and declaratory judgments, giving courts tools to address systemic violations, not just individual ones.
- The legislation could attempt to create vicarious liability for the employing agency or unit when officers act within the scope of their duties, making institutional actors financially responsible for the conduct of their personnel. One of the weaknesses of both Bivens and § 1983 is that liability is largely individual.
- The legislation should establish minimum statutory damages (even in cases where actual damages are hard to quantify) and allow fee multipliers in cases involving egregious misconduct, similar to civil rights fee-shifting under 42 U.S.C. § 1988.
- The legislation should allow for double or treble damages for repeated violations by the same actor.
- The legislation should offer officers and bystanders who report constitutional violations or cooperate with state proceedings should be explicitly protected from retaliation and allow them private causes of action against those who retaliate against them.

These are real concerns, and they deserve legislative attention. They argue for careful, well-drafted legislation, not for abandoning the effort. The fact that a legal avenue is difficult does not mean it is wrong. The civil rights attorneys who brought the first §1983 cases after Reconstruction, the advocates who challenged qualified immunity, the litigants who insisted that constitutional rights must carry remedies: all of them faced dismissals, setbacks, and skeptical courts. They pressed on, because the principle mattered.

Conclusion
The Framers of our Constitution feared unchecked power more than anything else. They designed a republic in which the law would reign supreme, in which every official, no matter how high, would answer for violations of the rights of the people. That vision is being tested today. Existing federal remedies have proved inadequate to ensure accountability when federal officers commit serious constitutional violations on Minnesota soil.

Much in the same way that abuses of power and changing circumstances necessitated our Framers eventually to seek independence, necessity demands HF3477.

HF3477 is an effort to restore the promise of the Declaration of Independence and the Constitution to the people of this state. It is ambitious. It is legally novel. It may face hard fights in federal court. But it is grounded in the oldest and most fundamental principle of American law: no one is above it. I urge this committee to support the bill.

Rights without a remedy for wrongs are merely words on paper. Please support this bill with the recommendations I suggest in order to vindicate the idea that no one should be allowed to act above the law and violate the constitutional rights our framers fought for.

Thank you.

Respectfully submitted,
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