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CONFIDENTIAL
February 18, 2026

The Honorable Adrian Boafo
Maryland General Assembly
225 Lowe House Office Building
Annapolis, Maryland 21401
Via email

RE: ICE Breaker Act

Dear Delegate Boafo:

You have requested an analysis of the constitutionality of House Bill 832, entitled "Public Safety – State Law Enforcement Agencies – Hiring Restriction (ICE Breaker Act)." House Bill 832 prohibits State law enforcement agencies[1] from hiring for employment an individual who was hired as a sworn officer of United States Immigration and Customs Enforcement ("ICE") on or after January 20, 2025. In my view, the bill is not clearly unconstitutional, though its constitutionality might be challenged.[2]

SUMMARY

States have broad discretion in determining qualifications for state employment, subject to state and federal antidiscrimination laws and other constitutional protections. Here, House Bill 832 is most likely to be challenged under three constitutional provisions: (1) the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and similar protections under Article 24 of the Maryland Declaration of Rights; (2) the Supremacy Clause; and/or (3) the

[1] Under the bill, "State law enforcement agency" means "a governmental police force, security force, or law enforcement organization of the state that by statute, ordinance, or common law is authorized to enforce the general criminal laws of the State." Proposed Pub. Safety Art. § 3-535(a)(1).

[2] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

First Amendment implicit right to associate. In my view, the bill does not clearly violate any of these constitutional limitations.

First, if challenged under the Equal Protection Clause, the bill would be subject to rational basis review because there is no fundamental right to public employment, and the bill's prohibition on hiring based on past employment does not involve a suspect classification. This is a deferential standard that is relatively easy to meet. If the bill is challenged under the Maryland Constitution, it might receive *heightened* rational basis review, a slightly more strict form of review, since it contains a prohibition related to livelihood. If so, the bill's constitutionality would depend largely on the strength of the legislative record and whether that record shows a clear, rational basis for the restriction.

Second, the bill presents a minimal amount of risk under the Supremacy's Clause intergovernmental immunity doctrine, which prohibits states from discriminating against the federal government and its employees; however, I do not think a court would find a violation as the bill does not appear to burden federal operations.

Third, a court is likely to conclude that the bill's bar on employment does not implicate associational rights because employment by ICE is not an expressive activity. Still, there is some risk that if a court found the law was targeting former ICE agents based on their political or ideological beliefs, the bill would not survive heightened scrutiny.

I explain these conclusions in further detail below.

EQUAL PROTECTION

If HB 832 is challenged under the Equal Protection Clause or its State Constitution counterpart,[3] a reviewing court would first ask whether the law treats similar people differently, *e.g.*, ICE officers hired after January 20, 2025 versus those hired before that date. If the court finds unequal treatment, it decides what standard of scrutiny to apply. Strict scrutiny—the toughest standard—applies only if the law affects fundamental rights or targets a protected group. House Bill 832 does neither, so normally it would receive rational basis review, meaning the classification must rationally relate to a legitimate government interest.

However, under Maryland case law interpreting Article 24 of the Maryland Declaration of Rights, laws that *entirely* deny a class the ability to pursue their livelihood receive "heightened rational basis review." *Moore v. Maryland Hemp Coal.*, 267 Md. App. 169, 228 (2025). This means that courts "will only uphold a statute if it bears a real and substantial relation to the problem addressed by the statute." *Id*. (cleaned up). When analyzing the challenged law, courts will consider "only those purposes that are obvious from the text or legislative history of the enactment, those plausibly identified by the litigants, or those provided by some authoritative source." *Id*. (citation omitted).

[3] The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution forbids states from denying "any person" the "equal protection of the laws." U.S. Const., amend. XIV, § 1. Article 24 of the Maryland Declaration of Rights has an implicit equal protection component, as well. *Att'y Gen. of Maryland v. Waldron*, 289 Md. 683, 704 (1981).

Since House Bill 832 appears to leave open some opportunity for the covered former ICE officers to pursue law enforcement positions in *local* government, a court might not apply heightened rational basis review. *See id*. at 230 (declining to apply heightened rational basis review because the law did not impose a *blanket* ban on participating in the cannabis market). If heightened rational basis review was applied, then for House Bill 832 to survive, the legislative record would need to provide a clear, rational basis demonstrating why *all* sworn ICE officers hired after January 20, 2025 must be excluded from State law enforcement employment in any capacity, and why other, potentially similarly-situated individuals need not be included in the bill's scope to accomplish the bill's objective. This is not an impossible standard to meet, but the outcome would ultimately depend on the facts and evidence in the record before the court.

SUPREMACY CLAUSE

The Supremacy Clause states that "the Laws of the United States ... shall be the supreme Law of the Land ..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supremacy Clause "prohibit[s] States from interfering with or controlling the operations of the Federal Government." *United States v. Washington*, 596 U.S. 832, 838 (2022). One way courts apply the Supremacy Clause is through the intergovernmental immunity doctrine.

The intergovernmental immunity doctrine forbids states (1) from directly regulating the federal government, and (2) from discriminating against the federal government by treating it less favorably than a comparator. *United States v. Washington*, 596 U.S. 832, 838 (2022). House Bill 832 would control the hiring decisions of State law enforcement agencies only, so there is no direct federal regulation. A challenge to the bill, if passed, then would likely focus on federal discrimination, since the bill would apply to an individual based on past employment in a federal agency.

To establish discrimination in violation of the Supremacy Clause, however, the federal government would also have to show that the bill imposes a burden, no matter how minimal, on the federal government. The intergovernmental immunity doctrine is "not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment." *United States v. California*, 921 F.3d 865, 881 (9th Cir. 2019). "[S]imply put, intergovernmental immunity attaches only to state laws that discriminate against the federal government *and burden it in some way*." *Id*. at 880 (emphasis added); *see also United States v. New York*, --- F. Supp. 3d ----, 2025 WL 3205011, *18 (N.D.N.Y. 2025) (finding complaint did not plead discrimination in violation of intergovernmental immunity doctrine where it failed to allege the challenged executive orders "impose a burden on the federal government in a way the intergovernmental immunity doctrine considers problematic").

For example, in *United States v. Washington*, the Supreme Court considered a state workers compensation law that applied only to persons "engaged in the performance of work, either directly or indirectly, for the United States." 596 U.S. at 836. The law made it easier for former federal (but not state) contractors to succeed in workers' compensation claims, costing the federal government more money. In finding that the law violated the discrimination component of the intergovernmental immunity doctrine, the Supreme Court emphasized that the law increased the

federal government's costs. *Id*. at 839 ("The law thereby explicitly treats federal workers differently than state or private workers. … And, in doing so, the law imposes upon the Federal Government costs that state or private entities do not bear."). The law's selective application *in conjunction with* the increased costs was the problem.

Here, I think it would be difficult for the federal government to establish that HB 832 burdens the federal government's lawful operations. The bill would have no direct effect on the actions of any current federal employee or contractor, nor would it increase the federal government's costs. Proving this bill causes any burden would be difficult, as any potential effects would be attenuated.

Moreover, the bill applies only to a subset of former federal employees, and the federal government might find it difficult to identify a similarly situated state comparator that has received more favorable treatment. For all of these reasons, it is unlikely a court would find the bill violates the Supremacy Clause.

FIRST AMENDMENT

Last, HB 832 might be challenged on various First Amendment grounds. The First Amendment implicitly guarantees the right to associate with others to pursue a variety of political, social, economic, educational, religious, and cultural ends. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). This right extends only "to associations 'engage[d] in expressive activity that could be impaired' by government action." *Santopietro v. Howell*, 73 F.4th 1016, 1025 (9th Cir. 2023) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000)).

Laws that prohibit public employment based on membership in a particular group can implicate the First Amendment freedom to associate. For example, the Supreme Court has recognized that the government cannot:

- ban any member of a "Communist-action organization" from employment in defense facilities, regardless of the quality or degree of membership, *United States v. Robel*, 389 U.S. 258, 261 (1967);

- bar from public school employment members of the Communist Party absent a requirement that the member have a specific intent to further the unlawful aims of an organization, *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 606-08 (1967); or

- deny employment because of membership in a particular political party, *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961).

"A statute touching those protected [First Amendment] rights must be narrowly drawn to define and punish specific conduct at constituting a clear and present danger to a substantial interest of the State." *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966) (internal citation omitted). A theory of "guilt by association" is not enough; a person's specific knowledge of, intent to pursue, and active

participation in a group's harmful or unlawful activities is often required. *Keyishian*, 385 U.S. at 607.

In my view, it is unlikely that a court would conclude that HB 832 infringes on the freedom of association. The bill is based on past employment by ICE, a government law enforcement agency, not a political party or other entity primarily engaged in expressive activities. I found no case law equating rank-and-file employment in a law enforcement agency with expressive activity. House Bill 832's prohibition is based on former employment and the professional conduct or misconduct of ICE officers during a time when the agency and its practices and training have come under legal scrutiny—not on a potential applicant's personal beliefs or expressive activities, or even their speech as citizens.

Also, there is a difference between *employment* with a certain organization and *association* with the organization. *E.g.*, *United States v. Lahey*, 967 F. Supp. 2d 731, 748-49 (S.D.N.Y. 2013) (upholding criminal statute against First Amendment challenge where elements required employment by Pagan motorcycle gang, rather than mere association). Employment can imply active involvement and knowledge of an organization's activities.

If, however, the bill were seen as implicating association rights, a court would likely focus on whether the bill was sufficiently tailored to accomplish the State's interest in controlling who is employed as a State law enforcement officer. House Bill 832 applies only to former "sworn officers," meaning those who held law enforcement (not civilian) positions in ICE, and were hired during a recent hiring campaign under certain criteria who, presumably, may have assented to engaging in legally dubious enforcement activities or may have received inadequate training. If the evidence and legislative records verifies this reasoning, then I think it is likely that the bill could survive such a challenge.

In addition, if a court views the bill's selective application as a proxy for political beliefs or affiliation with the current Trump administration, there is a significant risk that it would be found to violate expressive association rights and/or be unconstitutional viewpoint discrimination. As stated above, the bill's language focuses on employment, not any officer's political views. The strength or weakness of a case like this would depend on the legislative record and other evidence before the court, so I cannot give a conclusive determination on this issue.

I hope this letter is responsive. Please let me know if you have any additional questions.

Sincerely,

Natalie Bilbrough

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