



Explainer: Can States Prohibit Federal Law Enforcement from Masking on the Job?

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Introduction

As the federal government ramps up immigration enforcement under President Trump's second administration, federal agents sometimes conduct operations while wearing masks or other face coverings to disguise their identities.¹ In March 2025, for example, six ICE agents in street clothes and masks arrested a Tufts graduate student and put her in an unmarked vehicle.² Masked agents have also arrested parents in daycare parking lots³ and shot into civilian cars.⁴

Members of Congress have introduced federal legislation to prohibit this practice,⁵ but the odds of enactment appear low. A growing number of states and localities have responded by

¹ See, e.g., Allie Preston, *Masked and Unidentifiable: The Risks of Federal Law Enforcement Operating Without Identification*, Ctr. for Am. Progress (Aug. 28, 2025), <https://www.americanprogress.org/article/masked-and-unidentifiable-the-risks-of-federal-law-enforcement-operating-without-identification/>.

² Martin Kaste, *Masked officers in Tufts student arrest raise fears among immigrants and bystanders*, NPR (Mar. 28, 2025, at 16:52 ET), <https://www.npr.org/2025/03/28/nx-s1-5342428/tufts-student-arrest-raises-questions-about-masked-ice-agents>.

³ Cecilia Nowell, *'Daddy, police!': new video shows ICE arresting Oregon father at preschool*, The Guardian (July 22, 2025, at 22:06 BST), <https://www.theguardian.com/us-news/2025/jul/22/ice-arrest-video-preschool-oregon>.

⁴ Amber Frias & Helen Jeong, *Federal agents open fire at family truck in San Bernadino. But 2 different accounts describe what caused shooting*, NBC Los Angeles (Aug. 16, 2025), <https://www.nbclosangeles.com/news/local/san-bernardino-family-claims-federal-agents-shot-at-truck-shattered-windows/3765321/>.

⁵ No Secret Police Act of 2025, H.R. 4176, 119th Cong. (2025), <https://www.congress.gov/bill/119th-congress/house-bill/4176>; see Letter from Letitia James, N.Y. Atty. Gen., et al., to Congress (July 15,

considering and beginning to adopt their own laws to restrict masking by law enforcement. As shorthand, this explainer refers to those measures as “mask bans.”⁶

These state and local efforts—which have yet to be tested in court—have prompted questions and commentary regarding states’ power to regulate federal actors.⁷ In particular, can state and local mask bans bind federal law enforcement without running afoul of the U.S. Constitution’s Supremacy Clause?⁸ This explainer begins in Part I by describing the recently enacted mask ban in California, and proposed laws elsewhere, including in Massachusetts, New York, Illinois, Tennessee, and Michigan. Part II analyzes the constitutionality of these state efforts. It concludes that, under existing precedent, mask bans are neither clearly prohibited nor clearly permissible. Because the legal doctrine is murky, it is difficult to predict how legal challenges to mask bans might play out. While opponents can plausibly analogize mask bans to other state and local policies that courts have held cannot apply to federal actors, proponents can reasonably distinguish those precedents and analogize to cases upholding application of state and local policies to federal actors. Finally, Part III of the explainer provides an overview of other options states may have to address masking by federal law enforcement.

2025), <https://ag.ny.gov/sites/default/files/letters/letter-to-congress-on-ice-mask-legislation-letter-2025.pdf>.

⁶ This explainer focuses on laws that prohibit law enforcement officers from wearing masks or otherwise concealing their identities while interacting with the public in the performance of their official duties. It does not discuss the different context of mask bans applied to the general population, which implicate different considerations—most notably, First Amendment protections. Others have written on those questions in depth. See generally Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 Ga. L. Rev. 819 (1991); Stephen J. Simoni, Note, *“Who Goes There?”—Proposing a Model Anti-Mask Act*, 61 Fordham L. Rev. 241 (1992); Carolina V. Lawrence & the COVID-Dynamic Team, *Masking Up: A COVID-19 Face-Off Between Anti-Mask Laws and Mandatory Mask Orders for Black Americans*, 11 Calif. L. Rev. Online 479 (2020); Nicholas Doherty, *Anti-Masking Statutes and Anonymous Protest in the Age of Surveillance*, 18 Seattle J. for Soc. Just. 275 (2020); Rob Kahn, *“My Face, My Choice?”—Mask Mandates, Bans, and Burqas in the COVID Age*, 14 N.Y.U. J. L. & Liberty 651 (2021); Deborah R. Gerhardt, *Masking Identity at Public Protests*, 31 Wm. & Mary J. Race, Gender & Soc. Just. 93 (2024).

⁷ See, e.g., Noah Chauvin, *Can States Force ICE to Take Off the Masks?*, 99 S. Cal. L. Rev. Postscript (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5392425; Erwin Chemerinsky, *Opinion: California Law Targets ICE Agents’ Use of Masks. Is the Practice Constitutional?*, The Sacramento Bee (July 23, 2025, at 14:16 CT), <https://www.sacbee.com/opinion/op-ed/article311087665.html>; Vikram David Amar, *Absent Federal Consent California Cannot Regulate ICE’s Use of Masks*, Verdict (Sep. 24, 2025), <https://verdict.justia.com/2025/09/24/absent-federal-consent-california-cannot-regulate-ices-use-of-masks>.

⁸ U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

I. State efforts to prohibit law enforcement from masking

As of September 2025, lawmakers in at least six states have proposed legislation to prohibit law enforcement from masking.

In September 2025, California became the first (and so far only) state to enact a mask ban when Governor Newsom signed into law Senate Bill 627.⁹ The law makes it a crime (either an infraction or a misdemeanor) for law enforcement to “wear a facial covering that conceals or obscures their facial identity in the performance of their duties.”¹⁰ There are certain delineated exceptions to this rule: it does not apply to SWAT (Special Weapons and Tactics) team units, officers wearing medical masks to prevent the spread of disease or infection, or the use of masks to protect against “any toxin, gas, smoke, inclement weather, or any other hazardous or harmful environmental condition,” for example.¹¹ Notably, the law applies to law enforcement officers at all levels—local, state, and federal.¹² The law is set to go into effect on January 1, 2026.

⁹ S.B. 627, 2025 Assemb., Reg. Sess. (Cal. 2025), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202520260SB627 (hereinafter “Cal. S.B. 627”); Press Release, Gov. Gavin Newsom, Governor Newsom signs laws to protect school children and hospital patients, and limit fear tactics used by Trump’s secret police force to terrorize communities (Sep. 20, 2025), <https://www.gov.ca.gov/2025/09/20/governor-newsom-signs-laws-to-protect-school-children-and-hospital-patients-and-limit-fear-tactics-used-by-trumps-secret-police-force-to-terrorize-communities>.

¹⁰ Cal. S.B. 627, §3. The bill also requires law enforcement agencies to “maintain and publicly post a written policy regarding the use of facial coverings” that includes a “requirement that all sworn personnel not use a facial covering when performing their duties” subject to a “list of narrowly tailored exemptions.” *Id.* § 2.

¹¹ *Id.* § 3.

¹² *Id.* In addition to these criminal penalties, California’s bill also has a civil component. It provides that “any person who is found to have committed an assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, while wearing a facial covering in a knowing and willful violation of this section shall not be entitled to assert any privilege or immunity for their tortious conduct against a claim of civil liability, and shall be liable to that individual for the greater of actual damages or statutory damages of not less than ten thousand dollars (\$10,000), whichever is greater.” *Id.* This provision and its validity are discussed in Part III of this explainer.



Lawmakers in Massachusetts,¹³ New York,¹⁴ Illinois,¹⁵ Michigan,¹⁶ and Tennessee¹⁷ have introduced similar bills. Bill HD.4886 in Massachusetts would make it a misdemeanor for any local, state, or federal law enforcement officer to “wear any mask or personal disguise while interacting with the public in the performance of their duties,” with exceptions for SWAT team officers and masks to protect against disease, smoke, or toxins.¹⁸ The proposed bills in New York (S08462 and A08908), Illinois (HB4086), Michigan (HB4760), and Tennessee (HB1442) are similar, although each also includes a requirement that law enforcement officers must clearly display their name or badge number on their uniforms.¹⁹

Some localities have also considered ways to discourage federal officials from concealing their identities through masks. Chicago Mayor Brandon Johnson, for example, signed an executive order in August 2025 that “urge[s]” federal officers operating in Chicago to follow Chicago Police Department policy and operational standards, which prevent officers from concealing their identities.²⁰ Similarly, Albuquerque Mayor Timothy Keller signed an executive order that states that ICE agents “should demonstrate behavior that promotes the highest levels of integrity and professionalism, which should include clear communication and clear and consistent identification as ICE agents.”²¹ Neither of these executive orders purports to ban federal law enforcement from masking, but it is possible that localities may consider stronger measures. Any local laws or ordinances that prohibited masking would generally be analyzed the same as state

¹³ H.D. 4886, 194th Gen. Ct. (Mass. 2025), <https://malegislature.gov/Bills/194/HD4886/Bills> (hereinafter “Mass. H.D. 4886”).

¹⁴ S.O. 8462, 2025 St. Assemb., Reg. Sess. (N.Y. 2025), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S08462&term=2025&Summary=Y&Actions=Y&Text=Y (same as A.O. 8908) (hereinafter “N.Y. S.O. 8462”).

¹⁵ H.B. 4086, 104th Gen. Assemb. (Ill. 2025), <https://www.ilga.gov/Legislation/BillStatus/FullText?GAID=18&DocNum=4086&DocTypeID=HB&LegId=164007&SessionID=114> (hereinafter “Ill. H.B. 4086”).

¹⁶ H.B. 4760, 2025 Leg. (Mich. 2025), <https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4760> (hereinafter “Mich. H.B. 4760”).

¹⁷ H.B. 1442, 2025 Gen. Assemb. (Tenn. 2025), <https://www.capitol.tn.gov/Bills/114/Bill/HB1442.pdf> (hereinafter “Tenn. H.B. 1442”); see also H.B. 1442, Tenn. Gen. Assemb., <https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1442&GA=114> (last visited Sep. 23, 2025).

¹⁸ Mass. H.D. 4886.

¹⁹ N.Y. S.O. 8462; Ill. H.B. 4086; Mich. H.B. 4760; Tenn. H.B. 1442.

²⁰ Chicago Exec. Order No. 2025-6 (Aug. 30, 2025), https://chicityclerk.s3.us-west-2.amazonaws.com/s3fs-public-1/reports/EXECUTIVE%20ORDER%202025-6_0.pdf?VersionId=AcXfAhKkTWUaG9pc80.pAwo5rv4n6CAN.

²¹ Albuquerque Exec. Order (July 21, 2025), https://www.cabq.gov/connect-abq/documents/eo_signed_7-21-25-1.pdf.



laws for purposes of Supremacy Clause immunities, so the considerations discussed in Part II apply equally to localities hoping to limit masking.²²

It remains to be seen whether other states will pass their own bills, or if other localities will take stronger actions. But the federal government has indicated clearly that it does not intend to abide by California's law. Acting U.S. Attorney Bill Essayli posted on the social media platform X that "[t]he State of California has no jurisdiction over the federal government," and that he has directed federal agencies that California's law "has no effect" on the federal government's operations.²³ If California attempts to prosecute federal officials under the law, these issues will almost certainly play out in court.

II. Does the Supremacy Clause prohibit state mask bans?

Politicians and commentators have debated whether state mask bans comport with the Supremacy Clause of the U.S. Constitution.²⁴ Under the Supremacy Clause, the federal government and its agents have certain protections from state law actions that would interfere with federal operations. Specifically, the doctrines of Supremacy Clause Immunity and Intergovernmental Immunity both pose potential hurdles for state mask bans.

Both doctrines stem from the Supremacy Clause and the basic idea that states cannot "interfer[e] with or control[] the operations of the Federal Government."²⁵ This "foundational"

²² See *Hillsborough Cnty. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 713 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."); e.g., *United States v. City of Arcata*, 629 F.3d 986 (9th Cir. 2010) (intergovernmental immunity analysis applied to city ordinances).

²³ Acting U.S. Attorney Bill Essayli (@USAttyEssayli), X (Sep. 20, 2025, at 15:40 CT), <https://x.com/USAttyEssayli/status/1969502049709736116>. In a memorandum sent to "Federal Law Enforcement Agency Heads in Central District of California," he offered an analysis as to why California's law is unconstitutional, which is discussed further in Part II of this explainer. Acting U.S. Attorney Bill Essayli (@USAttyEssayli), X (Sep. 26, 2025, at 12:18 CT), <https://x.com/USAttyEssayli/status/197162533072219843>.

²⁴ See, e.g., Chauvin, *supra* note 7; Amar, *supra* note 7; Acting U.S. Attorney Bill Essayli, *supra* note 23.

²⁵ *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022); e.g., *Kentucky v. Long*, 837 F.2d 727, 749 (6th Cir. 1988) ("Under principles announced long ago in *McCulloch v. Maryland*, the national government cannot be made to tolerate undue interference from the states in the enforcement of federal law."); *CoreCivic, Inc. v. Gov. of N.J.*, 145 F.4th 315, 323 (3d Cir. 2025) (state laws violate intergovernmental immunity if the burden placed on the federal government is "tantamount to an interference with the performance of its functions" (citation modified)); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2237 (2003) (supremacy clause immunity analysis "examines whether the state law at issue threatens to interfere with

concept “traces its origin to *McCulloch v. Maryland*,”²⁶ in which Chief Justice John Marshall wrote that “the states have no power” 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.”²⁷ At the same time, however, states have their own constitutionally grounded powers and interests, including interests in safeguarding the wellbeing of their residents and preventing federal overreach.²⁸ The focus of the Supremacy Clause doctrines, then, “is the delicate balance between federal and state law enforcement powers.”²⁹ “[T]he national government cannot be made to tolerate undue interference from the states in the enforcement of federal law.”³⁰ “But neither should any state be made to tolerate unwarranted interference with its duty to protect the health and welfare of its citizens.”³¹

As the following sections explain, the constitutionality of applying mask bans to federal officers thus turns in large part on whether states’ attempts to protect their residents interfere with the execution of legitimate federal objectives. Under both Supremacy Clause Immunity and Intergovernmental Immunity, a central issue is whether preventing federal law enforcement from masking unduly interferes with the federal government’s operations.

With this central question in mind, the next parts of this section provide a brief overview of each type of immunity before analyzing how they might apply to state mask bans. Thoughtful commentators have reached different conclusions about the constitutionality of applying mask bans to federal actors, which underscores the unsettled nature of these questions.³² Based on the relevant precedents and likely arguments available to each side, this explainer concludes that mask ban proponents can reasonably defend their constitutionality, although it is by no means assured that they will prevail in court.

the federal government’s inherent interest in the effective implementation of federal policy through its agents”).

²⁶ *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 754 (9th Cir. 2022) (en banc) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

²⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

²⁸ See, e.g., U.S. Const. amend. X.

²⁹ *Kentucky v. Long*, 837 F.2d at 749.

³⁰ *Id.* (citing *McCulloch*, 17 U.S. (4 Wheat.) 316).

³¹ *Id.*

³² Compare Chemerinsky, *supra* note 7 (arguing that California’s mask ban is constitutional), with Amar, *supra* note 7 (disagreeing with Dean Chemerinsky and arguing that state mask bans, including California’s, are unconstitutional), and Chauvin, *supra* note 7 (arguing that state mask bans are unconstitutional).



A. Supremacy Clause Immunity

The state mask bans discussed in Part I all impose criminal penalties, and the doctrine of Supremacy Clause Immunity³³ sets parameters for whether and when federal actors can be subject to state criminal prosecution.³⁴ A separate explainer offers a deep dive into Supremacy Clause Immunity and discusses past instances in which states have sought to prosecute federal officers.³⁵ Broadly speaking, Supremacy Clause Immunity, which derives from the Supremacy Clause (article VI, clause 2) of the U.S. Constitution, prohibits states from undermining federal law by criminally charging officials who are properly carrying out their lawful federal duties.³⁶ While the Supreme Court has not squarely addressed the contours of Supremacy Clause Immunity for more than a century,³⁷ lower courts have generally used a two-part test to assess whether a federal actor is shielded from state criminal prosecution: (1) Was the official doing something authorized by federal law?, and (2) were the official's actions "necessary and proper" to fulfill their federal responsibilities?³⁸ If the answer to either of these questions is no, the prosecution can move forward, although as scholars have noted, "[t]his test is much easier to recite than to apply."³⁹ By way of example, the U.S. Court of Appeals for the Fourth Circuit held that a marine who fatally hit a pedestrian after failing to yield to the right of way could be prosecuted for vehicular homicide under state law even though he was driving a military convoy.⁴⁰

³³ Also referred to sometimes as "federal immunity." *E.g.*, *Colorado v. Nord*, 377 F. Supp. 2d 945, 948 (D. Colo. 2005).

³⁴ The U.S. Supreme Court has only ever applied Supremacy Clause Immunity to shield federal officers from state criminal prosecution, not state tort liability. *Martin v. United States*, 145 S. Ct. 1689, 1702 n.2 (2025).

³⁵ Bryna Godar, State Democracy Rsch. Initiative, Explainer: Can States Prosecute Federal Officials? (2025), <https://statedemocracy.law.wisc.edu/wp-content/uploads/sites/1683/2025/07/State-Enforcement-Explainer-Formatted-7.17.25.pdf>.

³⁶ The foundational case on Supremacy Clause Immunity is *In re Neagle*, 135 U.S. 1 (1890). In *Neagle*, a U.S. Marshal assigned to protect a U.S. Supreme Court justice shot and killed someone who tried to attack the justice. 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.

For a more thorough discussion of *Neagle* and Supremacy Clause Immunity, see generally: Godar, *supra* note 35; Waxman & Morrison, *supra* note 25; James Wallace, Note, *Supremacy Clause Immunity: Deriving a Willfulness Standard from Sovereign Immunity*, 41 Am. Crim. L. Rev. 1499 (2004); Judge Leslie A. Gardner & Justin C. Van Orsdol, *Solidifying Supremacy Clause Immunity*, 30 Wm. & Mary Bill Rts. J. 567 (2022).

³⁷ See *Johnson v. Maryland*, 254 U.S. 51 (1920).

³⁸ See Waxman & Morrison, *supra* note 25, at 2237; Rebecca E. Hatch, *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).

³⁹ See Waxman & Morrison, *supra* note 25, at 2237.

⁴⁰ *North Carolina v. Ivory*, 906 F.2d 999 (4th Cir. 1990).

In contrast, a federal official who violates state speeding laws while pursuing a fleeing suspect is likely immune from prosecution where that violation was necessary to the performance of a federal duty, so long as he acts with reasonable care and prudence given the circumstances.⁴¹

Applying this framework here, whether a state can constitutionally enforce a mask ban against federal agents likely hinges on (1) whether the agents' actions are authorized by federal law and (2) whether masking is necessary and proper to fulfill federal duties. The next subsections discuss each consideration in turn.

Federal Authorization

When considering legal authorization, courts typically look to whether the federal officer's conduct falls within the scope of the officer's federal duties, rather than requiring explicit authority to perform the specific act in question.⁴² At least two commentators have suggested that because ICE agents mask on the job, masking falls within the general scope of their federal duties and is authorized.⁴³ As these commentators point out, the question of federal authorization is often not seriously contested in litigation involving assertions of Supremacy Clause Immunity.⁴⁴

That said, the Supreme Court has made clear that "an employee of the United States does not secure a general immunity from state law while acting in the course of his employment."⁴⁵ In other words, the mere fact that an officer does something while on the job does not mean it is within the scope of his lawful duties.⁴⁶ "[T]he Supremacy Clause was not intended to be a shield for

⁴¹ *Lilly v. West Virginia*, 29 F.2d 61, 64 (4th Cir. 1928).

⁴² *E.g.*, *Baucom v. Martin*, 677 F.2d 1346, 1348–49 (11th Cir. 1982); *Connecticut v. Marra*, 528 F. Supp. 381, 385–86 (1981); *Idaho v. Horiuchi*, 215 F.3d 986, 992–93 (9th Cir. 2000), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) ; *cf.* *Wyoming v. Livingston*, 443 F.3d 1211, 1227 (10th Cir. 2006) ("Supremacy Clause immunity does not require that federal law explicitly authorize a violation of state law.").

⁴³ See Chauvin, *supra* note 7, at 9; Amar, *supra* note 7.

⁴⁴ Chauvin, *supra* note 7, at 7; see Gardner & Van Orsdol, *supra* note 36, at 598; *e.g.*, *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004) (noting that "[n]o one disputes" that the defendant "was acting in his capacity as a federal DEA Agent when he shot" the victim and focusing solely on "the second prong" of the analysis); *Horiuchi*, 215 F.3d at 993 (noting that the state "does not dispute" that the defendant "was acting within the scope of his duties" during the relevant incident).

⁴⁵ *Johnson v. Maryland*, 254 U.S. 51, 56 (1920).

⁴⁶ See *Baucom v. Martin*, 677 F.3d 1346, 1350 (11th Cir. 1982) ("It is clear that a federal official does not enjoy absolute state immunity simply because of his office and his purpose."); *New York v. Trump*, 683 F. Supp. 3d 334, 346 (S.D.N.Y. 2023) ("Immunity does not attach merely because state criminal prosecutions are based upon acts that happen during the scope of a federal officer's employment, and not everything a [federal official] does is in the context of the discharge of his federal duties." (citation modified)); Battle

'anything goes' conduct by federal law enforcement officers,"⁴⁷ and officers cannot deliberately violate state laws to make their job "more convenient."⁴⁸

Where is the line drawn? "Courts determining whether a federal officer has acted within the scope of his federal authority" often "focus on the intent of the officer."⁴⁹ If the officer's intent was to do his job, and he reasonably believes that federal law authorized his actions, he will likely meet this first element of the Supremacy Clause Immunity defense.

How does this play out in the masking context? There are colorable arguments on both sides. On one hand, there is no dispute that the Department of Homeland Security (DHS) is *allowing* its agents to wear masks, which may be enough to convince a court that such masking falls within the general scope of the agents' duties. DHS Secretary Kristi Noem, for example, said at a press conference that DHS leaves it up to individual agents to decide whether they should mask.⁵⁰ Todd Lyon, the acting director of ICE, similarly stated that, while masking is "not mandatory" for ICE agents, he would "allow" agents to keep masking if they chose to.⁵¹

Consistent with these statements, no federal law categorically prohibits agents from masking. Instead, in the aftermath of unidentified troops responding to protests during summer 2020, Congress amended the National Defense Authorization Act to require federal law enforcement to "visibly display" their identity and the name of the federal agency they serve when responding "to a civil disturbance."⁵² While that law arguably bars masking in that specific circumstance, mask

v. State, 258 A.3d 1009, 1022–27 (Md. Ct. Spec. App. 2021) (even assuming federal official was "on duty" at time of incident, his actions did not have federal authority).

⁴⁷ Kentucky v. Long, 837 F.2d 727, 746 (6th Cir. 1988).

⁴⁸ Baucom, 677 F.3d at 1350.

⁴⁹ Colorado v. Nord, 377 F. Supp. 2d 945, 950 (D. Colo. 2005) (collecting cases); e.g., Long, 837 F.2d at 746; Whitehead v. Senkowski, 943 F.2d 230, 234 (2d Cir. 1991).

⁵⁰ Ben Szalinski, *DHS Secretary Kristi Noem Defends ICE Tactics in Second Illinois Visit*, St. Louis Pub. Radio (Aug. 8, 2025, at 16:12 CDT), <https://www.stlpr.org/government-politics-issues/2025-08-08/homeland-security-kristi-noem-ice-tactics-illinois>.

⁵¹ *Transcript: Acting ICE Director Todd Lyons on "Face the Nation with Margaret Brennan," July 20, 2025*, CBS News (July 21 2025, at 7:44 EDT), <https://www.cbsnews.com/news/todd-lyons-ice-director-face-the-nation-transcript-07-20-2025/>.

⁵² 10 U.S.C. § 723(a). The law does not define civil disturbance. Cf. Josh Gehret, *The Case for Requiring Federal Law Enforcement Agents to Wear Identifying Insignias: Progress Made and Next Steps*, 51 U. Balt. L. Rev. 275 (2022).

ban opponents could contend that it implicitly gives federal agents discretion to mask at other times.⁵³

On the other hand, states can respond that a federal agency leadership's apparent tolerance or "allowance" of mask-wearing does not qualify as an affirmative federal authorization, especially since other laws and regulations set a baseline expectation that officers will be identifiable. For example, DHS regulations, promulgated through the agency's rulemaking authority, explicitly require ICE agents to identify themselves as immigration officers at the time of any arrest.⁵⁴ There is no federal statute, nor officially enacted policy or promulgated rule, explicitly authorizing or requiring masking.⁵⁵ In other words, masking is not an affirmative part of any federal duties, and it may instead be legally disfavored or prohibited in at least some contexts.

And then there is the issue of intent. The decision to mask appears to reflect a judgment by individual officers that concealment might help them minimize the risk of collateral consequences for their controversial work. While those concerns may inform the "necessary and proper" prong of the test, and are discussed more fully below, it is not clear that they alone establish that agents who mask "ha[ve] no motive other than to do [their] job."⁵⁶ Indeed, if a court were to focus on the intent of the officer,⁵⁷ the court could well conclude that, rather than wearing a mask to fulfill their federal duties, agents are making that choice primarily out of "personal interest."⁵⁸ If that is true, or if a court were to find that the officers' intent was for "any other reason" than to do their

⁵³ Agents might add that state mask bans themselves appear to presuppose the existence of authorization by stating, for example, that the laws apply only when law enforcement officers are "interacting with the public in the performance of their duties." See, e.g., N.Y. S.O. 8462.

⁵⁴ 8 C.F.R. §287.8(c)(2)(iii)(A) (2025).

⁵⁵ Findings of Fact and Rulings of Law, Pursuant to Fed. R. Civ. P. 52(A), *Am. Assoc. of Univ. Professors v. Rubio*, No. 25-CV-19685, Dkt. No. 261, at 73 (D. Mass. Sep. 30, 2025), <https://www.courtlistener.com/docket/69784731/261/american-association-of-university-professors-v-rubio/> (recounting testimony that DHS "had no policy on masks" and that masking is instead merely "a personal choice").

⁵⁶ *Kentucky v. Long*, 837 F.2d 727, 744 (6th Cir. 1988) (citing *In re McShane's Petition*, 235 F. Supp. 262 (N.D. Miss. 1964)).

⁵⁷ See *supra* note 49 and accompanying text.

⁵⁸ Szalinski, *supra* note 50 (DHS Secretary Noem stating that ICE agents "wear masks at times to protect their identities With the leadership teams, we leave that up to them to discern what's necessary"); *Transcript: Acting ICE Director Todd Lyons*, *supra* note 51 ("I'm not a proponent of the masks. However, if that's a tool that the men and women of ICE [use] to keep themselves and their family safe, then I will allow it.").

job,⁵⁹ that may be fatal to a claim of federal authorization.⁶⁰ Notably, while ruling on a different legal issue, a federal district court recently rejected the federal government's asserted reasons for masking "as disingenuous, squalid and dishonorable" and wrote that "ICE goes masked for a single reason—to terrorize Americans into quiescence."⁶¹

Necessary and Proper

Even if federal officials' actions are "authorized" by federal law, Supremacy Clause Immunity still would not apply unless courts determine that masking is "necessary and proper" for the officers to fulfill their federal responsibilities.

How do courts assess what is necessary and proper? Almost all lower courts have applied both a subjective and an objective analysis. For an act to be necessary and proper, then, the officer must have subjectively believed that it was necessary and proper to carry out his federal duties and that belief must be objectively reasonable.⁶² As detailed in a separate explainer,⁶³ the analysis can be complex and contested, and different courts vary somewhat in their approaches. Against the backdrop of this uncertain doctrinal terrain, mask ban proponents can credibly contend that masking is neither necessary nor proper to the fulfillment of federal duties and that bans can thus be enforced against federal agents.

Federal law enforcement has defended the use of masks for two distinct but related reasons: (1) to protect against assaults and (2) to protect against doxxing (the public revealing of personal information such as home addresses or family member identities). DHS Secretary Noem, for example, claimed at a press conference that federal agents have experienced a 1,000% increase in assaults this summer.⁶⁴ Accordingly, she said that DHS leaves it to individual agents to decide whether to wear a mask "to protect their identities from dangerous situations." Similarly, in response to questions about masking in July 2025, acting ICE Director Lyons brought up the

⁵⁹ *Baucom v. Martin*, 677 F.3d 1346, 1350 (11th Cir. 1982) (emphasis added); *Colorado v. Nord*, 377 F. Supp. 2d 945, 950 (D. Colo. 2005) (emphasis added).

⁶⁰ *Baucom*, 677 F.3d at 1350 (11th Cir. 1982); e.g., *Battle v. State*, 258 A.3d 1009, 1022–27 (Md. Spec. App. 2021).

⁶¹ Findings of Fact and Rulings of Law, Pursuant to Fed. R. Civ. P. 52(A), *Am. Assoc. of Univ. Professors v. Rubio*, No. 25-CV-19685, Dkt. No. 261, at 98 (D. Mass. Sep. 30, 2025), <https://www.courtlistener.com/docket/69784731/261/american-association-of-university-professors-v-rubio/>.

⁶² *Texas v. Kleinert*, 855 F.3d 305, 314–15 (5th Cir. 2017).

⁶³ *Godar*, *supra* note 35.

⁶⁴ Ben Szalinski, *supra* note 50; see also Secretary Kristi Noem (@Sec_Noem), X (Aug. 7, 2025, at 10:10 CT), https://x.com/Sec_Noem/status/1953473897623429213.



doxxing concerns and said that he would “allow” agents to keep masking if they chose to do so to “keep themselves and their family safe.”⁶⁵

Proponents of mask bans can respond that, for several reasons, such assault and doxxing concerns do not make masking “necessary” to the performance of an officer’s federal duties. First, and perhaps most obviously, defenders of mask bans can argue that masking cannot be necessary to ICE operations because agents have—for decades—carried out their duties without wearing masks, and many continue to do so. As Dean Erwin Chemerinsky pointed out in his defense of California’s mask ban, “ICE agents have never before worn masks when apprehending people, and that never has posed a problem. Nor have other officers of local, state and federal law enforcement faced dangers from the public because they don’t wear masks in the streets.”⁶⁶ Indeed, if the federal government thought that masking was necessary for ICE agents to perform their jobs, it could have made masking mandatory. Or it could have explicitly authorized such masking through a federal statute, regulation, or policy. It has not, which suggests that mask bans do not materially “interfere with federal policy and prerogatives.”⁶⁷

Second, a closer look at the relevant data calls these proposed justifications into question. Although the federal government has not publicly released statistics regarding agent assaults,⁶⁸ Fox News Journalist Bill Melugin stated on the social media platform X that he reviewed the “underlying raw data” from DHS.⁶⁹ That data purportedly showed a 690% increase in assaults—from 10 assaults between January 1 and June 30, 2024, to 79 assaults during the same period in 2025.⁷⁰ While that is certainly an increase, the number of ICE agents in the field and the volume

⁶⁵ *Transcript: Acting ICE Director Todd Lyons*, *supra* note 51.

⁶⁶ Chemerinsky, *supra* note 7.

⁶⁷ See Waxman & Morrison, *supra* note 25, at 2201.

⁶⁸ A June 2025 press release from DHS says that the agency “released new statistics” showing that ICE agents are “facing a 500% increase in assaults against them while carrying out immigration enforcement operations.” Press Release, Dep’t of Homeland Sec., ICYMI: ICE Agents Now Face a 500% Increase in Assaults Against Them (June 20, 2025), <https://www.dhs.gov/news/2025/06/20/icymi-ice-agents-now-face-500-increase-assaults-against-them>. The hyperlink for the statistics, however, leads to a Breitbart article, which explains that the data provided by DHS was “exclusively obtained by Breitbart News,” and is not available to the public. John Binder, *Exclusive: ICE Agents Now Face 500% Increase in Assaults While Trying to Arrest Illegal Aliens*, Breitbart (June 19, 2025), <https://www.breitbart.com/politics/2025/06/19/exclusive-ice-agents-face-500-increase-in-assaults-while-trying-to-arrest-illegal-aliens/>.

⁶⁹ Bill Melugin (@BillMelugin_), X (July 1, 2025, at 8:58 CT), https://x.com/BillMelugin_/status/1940047247229792320.

⁷⁰ *Id.*

of immigration enforcement activities also rose significantly during that time.⁷¹ The assault figures, moreover, may reflect changes to how “assaults” are now defined and reported. Recently reported “assaults” have included “linking arms with a man” ICE is attempting to detain and asking to see their warrant,⁷² leaving garbage on an agent’s lawn, and creating a sign with profane language targeting an officer.⁷³ In other words, it is not apparent that ICE agents conducting immigration enforcement activities today in fact face a meaningfully higher risk of assault than agents who conducted such activities in the past. Given that ICE now has over 20,000 “law enforcement and support personnel,”⁷⁴ at least 6,500 of whom are deportation officers, and is actively growing,⁷⁵ it is certainly debatable that a few dozen reported assaults make masking necessary,⁷⁶ especially since it is not apparent how masking even reduces the likelihood of an assault.

Moreover, as Martin Kaste from NPR reported earlier this year, the government has not offered any public data that links assaults against officers “directly to doxing efforts.”⁷⁷ And it is easy to

⁷¹ Rebecca Santana, *What to Know: 4 Ways ICE is Training New Agents and Scaling Up*, AP News (Aug. 24, 2025, at 12:21 CT), <https://apnews.com/article/border-immigration-mass-deportation-ice-trump-2bb1cfbaf8c65d167c0c44ca5d7b43> (“ICE currently has about 6,500 deportation officers” and “wants to hire an additional 10,000 by year’s end”); Zolan Kanno-Youngs & Hamed Aleaziz, *ICE Set to Vastly Expand Its Reach With New Funds*, N.Y. Times (July 13, 2025), <https://www.nytimes.com/2025/07/13/us/politics/ice-expansion-concerns.html>; Press Release, Dep’t of Homeland Sec., New Milestone: Over 2 Million Illegal Aliens Out of the United States in Less Than 250 Days (Sept. 23, 2025), <https://www.dhs.gov/news/2025/09/23/new-milestone-over-2-million-illegal-aliens-out-united-states-less-250-days>; Immigration Quick Facts, Trace Reports, <https://tracreports.org/immigration/quickfacts/> (last visited Sep. 26, 2025).

⁷² New York City Comptroller Brad Lander was arrested for assault for doing just that. Chauvin, *supra* note 7, at 11; Ana Faguy, *Federal Agents Arrest NYC Mayoral Candidate at Immigration Court*, BBC News (June 17, 2025), <https://www.bbc.com/news/articles/cvg430dx702o>.

⁷³ Joseph Gedeon, *ICE Threatens Federal Assault Charges Against Anyone Who Attacks Its Officers*, The Guardian (Sep. 17, 2025, at 10:26 ET), <https://www.theguardian.com/us-news/2025/sep/16/assault-ice-officer-federal-crime>; Matthew Cunningham-Cook, *DHS Claims Videotaping ICE Raids Is ‘Violence’*, American Prospect (Sep. 9, 2025), <https://prospect.org/justice/2025-09-09-dhs-claims-videotaping-ice-raids-is-violence/>.

⁷⁴ *About*, U.S. Immigr. & Customs Enf’t, <https://www.ice.gov/about-ice> (last visited Sep. 24, 2025).

⁷⁵ Santana, *supra* note 71.

⁷⁶ For context, New York City police officers (who are required by law to identify themselves at the beginning of civilian interactions) experienced more than twelve times as many assaults during the first five months of 2025. See Tina Moore, *Assaults on NYPD Officers Surge 63% Over Six Years—and Experts Warn Troubling Trend Won’t End Soon*, N.Y. Post (May. 31, 2025, at 7:58 ET), <https://nypost.com/2025/05/31/us-news/assaults-on-nypd-officers-surge-63-over-six-years-data/>.

⁷⁷ Martin Kaste, *Lawmakers Seek to Ban Federal Agents From Wearing Masks*, NPR (July 25, 2025, at 16:20 ET), <https://www.npr.org/2025/07/25/nx-s1-5480219/lawmakers-ban-federal-immigration-agents->

imagine situations in which assaults are just as, if not more, likely to occur when agents wear masks. Targets of ICE enforcement, as well as observers of such enforcement activities, may well be more likely to resist both verbally and physically when agents' identities are concealed.⁷⁸

It is true, of course, that when officers are identifiable, it is easier for the public to figure out who they are and post identifying information online. The government, however, has not provided details on the extent to which ICE agents are in fact being subjected to doxing. Many critics of masking have asserted that the proffered doxing concern is merely pretext.⁷⁹ And others have suggested that doxing efforts may be increasing *because* agents are masking, which may lead some to see doxing as the only way to seek accountability when officers violate the law.⁸⁰ For example, two websites launched this summer "aimed at exposing federal immigration enforcement"—ICESpy.org and ICEList.is—were "created to restore transparency and accountability" in response to masked ICE agents "exacerb[at] panic and fear."⁸¹ Particularly given the lack of public data on this issue, it is difficult to evaluate the government's claims that concerns about doxing make masking "necessary" for ICE officials to fulfill their lawful federal duties.

Proponents of state mask bans appear to accept that there are some situations in which it is indeed "necessary" for law enforcement officers to wear masks on the job, and the enacted and proposed mask bans include exceptions for such circumstances.⁸² SWAT Officers, for example, often must wear masks and face coverings to protect themselves from debris and chemical agents. Officers may also need to wear masks to protect against smoke or other toxins, or in inclement weather. In those cases, wearing the mask is directly necessary to their job in the sense

[masked](#) (noting that "ICE claims assaults on its personnel have increased eight-fold this year" but "hasn't provided data to link those attacks directly to doxing efforts").

⁷⁸ Jenny Jarvie, *ICE Agents Wearing Masks Add New Levels of Intimidation, Confusion During L.A. Raids*, L.A. Times (July 7, 2025, at 13:53 PT), <https://www.latimes.com/california/story/2025-07-07/masking-of-federal-agents-very-dangerous-and-perfectly-legal>.

⁷⁹ See, e.g., Trevor Hughes, *Safety Measure? Or Intimidation Tactic? Masked ICE Agents Spark the Debate*, USA Today (July 23, 2025, at 17:35 ET), <https://www.usatoday.com/story/news/nation/2025/07/23/masked-ice-agents-dox-safety/85315776007/> (quoting retired California police supervisor Diane Goldstein as saying that "[t]he safety issue is just an excuse"); Chemerinsky, *supra* note 7 ("Safety of officers is a pretext to justify a practice that exists to intimidate.").

⁸⁰ Alfred Ng, *AI Is Unmasking ICE Officers. Can Washington Do Anything About It?*, POLITICO (Aug. 29, 2025, at 14:00 ET), <https://www.politico.com/news/2025/08/29/ai-unmasking-ice-officers-00519478>.

⁸¹ Pablo Manriquez, *Internet Sleuths Have Begun Mapping the Faces of ICE*, Migrant Insider (July 12, 2025), <https://migrantinsider.com/p/advocates-name-ice-agents>.

⁸² See *supra* Part I.

that not masking would plainly hinder the performance of lawful duties. Proponents would distinguish these as special circumstances for necessity.

Building on their account of why masking is often not “necessary,” proponents of mask bans can also contend that it is not “proper.” First and foremost, they can make a strong case that masked law enforcement is antithetical to deeply rooted commitments to democracy and government transparency. With exceptions for undercover work, law enforcement agents at every level are generally expected to be identifiable when dealing with the public and making arrests.⁸³ As the U.S. Supreme Court recognized in 1971 while discussing a federal statute that bars anyone from “go[ing] in disguise” for purpose of violating civil rights, those are the tactics of “private marauders,” not government officials.⁸⁴ More recently, a federal district court observed that “[i]n all our history” as a country “we have never tolerated an armed masked secret police.”⁸⁵ And as noted above, ICE agents specifically are required by law to identify themselves as immigration officers at the time of an arrest.⁸⁶

Second, proponents can explain that masking by law enforcement can pose significant safety issues for both the general public and officers themselves that states may wish to minimize. When a masked individual in plain clothes approaches someone and tries to put them in an unmarked vehicle, there is no way for the public to know if it is a law enforcement operation or a kidnapping.⁸⁷ Several commentators have written about how such interactions may place both

⁸³ *Doornbos v. City of Chicago*, 868 F.3d 572, 583 (7th Cir. 2017) (“Although some unusual circumstances may justify an officer’s failure to identify himself in rare cases, it is generally not reasonable for a plainclothes officer to fail to identify himself when conducting a stop.”); *cf.* Findings of Fact and Rulings of Law, Pursuant to Fed. R. Civ. P. 52(A), *Am. Assoc. of Univ. Professors v. Rubio*, No. 25-CV-19685, Dkt. No. 261, at 98 (D. Mass. Sep. 30, 2025), <https://www.courtlistener.com/docket/69784731/261/american-association-of-university-professors-v-rubio/>.

⁸⁴ *Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971); see also *Wong Sun v. United States*, 371 U.S. 471, 482 (1963) (flight from plain clothes unidentifiable agent pretending to be looking for laundry services was reasonable and not indicative of guilt).

⁸⁵ Findings of Fact and Rulings of Law, Pursuant to Fed. R. Civ. P. 52(A), *Am. Assoc. of Univ. Professors v. Rubio*, No. 25-CV-19685, Dkt. No. 261, at 98 (D. Mass. Sep. 30, 2025), <https://www.courtlistener.com/docket/69784731/261/american-association-of-university-professors-v-rubio/>. The court added that “masks are associated with cowardly desperados and the despised Ku Klux Klan.” *Id.*

⁸⁶ 8 C.F.R. §287.8(c)(2)(iii)(A) (2025).

⁸⁷ *Libor Jany, Kidnappers or ICE Agents? LAPD Grapples With Surge In Calls From Concerned Citizens*, Citrus Cnty. Chron. (Aug. 8, 2025), https://www.chronicleonline.com/news/kidnappers-or-ice-agents-lapd-grapples-with-surge-in-calls-from-concerned-citizens/article_dc54c332-a862-52b1-82c0-caab323bf4d9.html (reporting that “a witness called 911 to report a kidnapping” when “a group of armed, masked men,” later identified as ICE agents, “was spotted dragging a woman into an SUV”); see also Philip Bump, *Is That Guy With a Gun an ICE Officer—or Just a Guy With a Gun?*, Wash. Post. (May 12, 2025),

parties at risk. The targeted individual may react with alarm—potentially through self-defense.⁸⁸ Or armed bystanders may feel compelled “to intervene because they think it’s an illegal act happening.”⁸⁹ Given that there have been multiple reported instances of individuals impersonating ICE agents and then kidnapping or otherwise assaulting victims,⁹⁰ states may have strong arguments that masking is not only improper, but also actively harmful to public safety.

Finally, as they seek to establish that masking is neither necessary nor proper, proponents of mask bans may find at least some support in Fourth Amendment case law. While federal case law allows agents to be undercover and even conceal their identity in some circumstances, courts have also sometimes identified masking as one factor that can make law enforcement searches and seizures “unreasonable” and thus unconstitutional.⁹¹ Indeed, if masking is at least sometimes disfavored as a Fourth Amendment matter, that would seem not only to raise doubts about its necessity and propriety, but also about whether it should be treated as legally authorized, at least

<https://www.washingtonpost.com/opinions/2025/05/12/ice-masked-federal-agents-accountability-ozturk/>; Emily Kennard, *Democrats Say Masked ICE Agents Could Create Bigger Safety Issues*, San Jose Spotlight (July 15, 2025), <https://sanjosespotlight.com/democrats-say-masked-ice-agents-could-create-bigger-safety-issues/>.

⁸⁸ See, e.g., Leila Fadel et al., *Masked Immigration Agents Are Spurring Fear and Confusion Across the U.S.*, NPR (July 10, 2025), <https://www.npr.org/2025/07/09/nx-s1-5440311/ice-raids-masked-agents> (noting that state laws that allow individuals to carry guns and stand their ground when approached by “threatening strangers” may lead to violence against ICE officers).

⁸⁹ Kennard, *supra* note 87; see Jany, *supra* note 87.

⁹⁰ Lisa Desjardins & Andrew Corkery, *Rise of ICE Agents Wearing Masks Creates Opportunity for Imposters to Conduct Crimes*, PBS News (July 27, 2025, at 17:35 ET), <https://www.pbs.org/newshour/show/rise-of-ice-agents-wearing-masks-creates-opportunity-for-imposters-to-conduct-crimes>; Artemis Moshtaghian, Gloria Pazmino & Nick Valencia, *Multiple ICE Impersonation Arrests Made During Nationwide Immigration Crackdown*, CNN (Feb. 5, 2025), <https://www.cnn.com/2025/02/04/us/ice-impersonators-on-the-rise-arrests-made-as-authorities-issue-national-warning>.

⁹¹ E.g., *United States v. Cantu*, 230 F.3d 148, 153 (5th Cir. 2000) (“Furthermore, the fact that the officers wore ski masks to execute the warrant reinforces the fact that the officers wanted to conceal their identity. Such law enforcement practices are clearly unacceptable. Therefore, without any articulation of reasonable suspicion that announcing their presence would be dangerous, futile, or would result in the destruction of evidence, the officers’ initial attempt to forcibly enter [the] home was unreasonable.”); *Perez v. Borough of Berwick*, 507 F. App’x 186, 191 (3d Cir. 2012) (“In the instant case, there is a genuine issue of material fact as to whether or not Berwick’s entry was unconstitutional, given the time the entry occurred, the length of the search that allegedly ensued, the fact that at least some officers . . . wore masks and drew weapons on the family, and the alleged failure of the officers to knock and announce their presence.”); *WBY, Inc. v. DeKalb Cnty.*, 766 F. App’x 852, 853 (11th Cir. 2019) (per curiam) (“The jury found that the inspection, which involved a total of thirty-six officials, some dressed in army fatigues or masks, violated Follies’s Fourth Amendment right to be free from unreasonable searches and seizures. The district court then denied the County’s motions for judgment as a matter of law and a new trial, finding that sufficient evidence supported the verdict and that the trial errors asserted by the County did not warrant a new trial. After careful review, we affirm.”).

absent express federal statutory or regulatory approval (which, as discussed in the prior subsection, does not currently exist).⁹²

Ultimately, much of the Supremacy Clause Immunity analysis will turn on exactly how the court frames the doctrinal inquiry and the level of granularity it applies when assessing whether masking is both legally authorized and necessary and proper. Mask ban proponents can reasonably contend that masking itself is neither authorized by federal law nor necessary or proper for the performance of official duties, but without additional guidance from the Supreme Court, lower courts could well diverge on these questions.

B. Intergovernmental Immunity

A second form of immunity that federal officers could attempt to invoke to neutralize state mask bans is Intergovernmental Immunity, which is also rooted in the U.S. Constitution's Supremacy Clause.⁹³ The doctrine bars state and local laws that "*either* regulate the United States directly or discriminate against the Federal Government or those with whom it deals."⁹⁴

Although there is substantially more legal authority on Intergovernmental Immunity than Supremacy Clause Immunity, there remain unanswered questions about how the doctrine applies to mask bans. As with Supremacy Clause Immunity, much will turn on how a court conceptualizes the role of masking in undertaking the federal law enforcement functions. But again, proponents have several arguments that well-drafted mask bans apply neutrally and fall sufficiently far from the heartland of the federal function so as not to violate the Supremacy Clause.

Direct Regulation

Do state mask bans directly regulate the federal government? The federal government would very likely argue that they do because they "constrain[] the conduct of federal agents and employees" in the scope of their federal employment.⁹⁵ For example, in 2010 the Ninth Circuit struck down two city ordinances that prohibited federal military recruiters from recruiting or attempting to recruit minors in California on the grounds that the state was directly interfering

⁹² Cf. *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906) (if soldiers acted unlawfully, state could prosecute them for murder); *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001) ("[A] state may prosecute federal agents if they have acted unlawfully in carrying out their duties.").

⁹³ A separate explainer discusses Intergovernmental Immunity in the context of state-created damages actions against federal officials. See Harrison Stark, State Democracy Rsch. Initiative, *Explainer: State-Created Damages Remedies Against Federal Officials* (2025), <https://statedemocracy.law.wisc.edu/wp-content/uploads/sites/1683/2025/08/Converse-1983-Explainer-Formatted-Final-8-1-25.pdf>.

⁹⁴ *United States v. Washington*, 596 U.S. 832, 838–39 (2022) (quotation modified).

⁹⁵ *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010).

with how federal actors performed their federal function.⁹⁶ The federal government would presumably contend that state mask bans similarly constrain the conduct of ICE and other federal agents in the performance of their federal duties. Several commentators, including Professors Noah Chauvin and Vikram Amar, have offered arguments along these lines, suggesting that mask bans like California's amount to the sort of direct regulation of federal government actors that the Intergovernmental Immunity doctrine forbids.⁹⁷

While it is true that state governments cannot directly regulate federal officials' conduct, it is also true that not every state law constraint on federal agents violates Intergovernmental Immunity. The canonical (albeit somewhat cryptic) Supreme Court case illustrating this divide is *Johnson v. Maryland*, where a federal Post Office employee was convicted under Maryland law of driving a vehicle without a state-issued driver's license.⁹⁸ The Supreme Court overturned the conviction under the Supremacy Clause. The Court observed that "an employee of the United States" is not generally immune "from state law while acting in the course of his employment," while simultaneously explaining that "even the most unquestionable and most universally applicable of state laws . . . will not be allowed to control the conduct of [an agent] of the United States acting under and in pursuance of the laws of the United States."⁹⁹ Specifically, the Court indicated that where "the United States has not spoken," state law can validly apply, even if it "affect[s] incidentally the mode of carrying out the [federal] employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets."¹⁰⁰ In contrast, the Supremacy Clause forbids a state from "requir[ing] that [federal officials] desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of [their federal duties] and pay a fee."¹⁰¹ The Court concluded that Maryland's driver license requirement did "not merely touch the Government servants remotely by a general rule of conduct" but "la[id] hold of them in their specific attempt to obey orders and require[d] qualifications in addition to those that the Government ha[d] pronounced sufficient."¹⁰² It was therefore unconstitutional.

Under *Johnson*, then, one way to think about whether mask bans regulate the federal government directly is to ask whether they are like traffic laws that "affect incidentally the mode of carrying out [federal agents'] employment" or whether they are more akin to a driver's license requirement that "lays hold of [officials] in their specific attempt to obey orders" or requires that

⁹⁶ *Id.*

⁹⁷ See Chauvin, *supra* note 7, at 9; Amar, *supra* note 7.

⁹⁸ 254 U.S. 51, 56 (1920).

⁹⁹ *Id.* at 56–57.

¹⁰⁰ *Id.* at 56.

¹⁰¹ *Id.* at 57.

¹⁰² *Id.*



they “desist from performance until they satisfy a state” requirement.¹⁰³ To be sure, courts could conclude—as Professors Chauvin and Amar suggest—that a state policy dictating when federal officials may conceal their identities “directly” regulates how they perform a federal function, similar to the driver’s license requirement in *Johnson*. States, however, can credibly analogize mask bans to traffic or other laws that only “affect incidentally the mode of carrying out” federal immigration enforcement. As described above in Section II.A, no federal statute or regulation expressly addresses masking in these circumstances, which suggests that this is a matter on which “the United States has not spoken,” and that mask bans do not impede any “attempt to obey orders.”¹⁰⁴ Likewise, states are not attempting here to determine whether federal actors are “competent” to perform their duties, and there are also strong arguments, discussed above, that masking is neither necessary nor proper for achieving the bona fide objectives of federal immigration enforcement.¹⁰⁵ Although the federal government will no doubt urge substantial judicial deference when it comes to defining what is or is not necessary to achieve federal objectives, a court could conclude that, at least where the state law does not diverge from any on-the-books federal policy, the state law does not directly regulate federal actors in the same way the Supreme Court found impermissible in *Johnson*.

A recent Fifth Circuit decision provides an example. Last year the Fifth Circuit denied the federal government’s invocation of Intergovernmental Immunity when Texas brought common-law conversion and trespass claims against federal Border Patrol agents.¹⁰⁶ The agents had cut a concertina wire fence that the State had placed along part of its border with Mexico. The federal government argued that removing the wire was “sometimes necessary to fulfill [the Border Patrol’s] statutory duty of ‘patrolling the border to prevent the illegal entry of aliens into the United States,’”¹⁰⁷ and that Texas’s lawsuit was thus invalid under Intergovernmental Immunity because it sought to “directly regulate the federal government’s operations.”¹⁰⁸

The Fifth Circuit disagreed. The court explained that “the key question” on the regulation prong “is whether state law seeks to improperly ‘control’ the employee’s federal duties, or whether the law only ‘might affect incidentally the mode of carrying out the employment.’”¹⁰⁹ Even though Texas’s suit impacted how the federal agents carried out their duties, and even though it

¹⁰³ *Id.* at 56–57

¹⁰⁴ *Id.*

¹⁰⁵ *Supra* Section II.A.2.

¹⁰⁶ *Texas v. DHS*, 123 F.4th 185, 193–94 (5th Cir. 2024).

¹⁰⁷ *Id.* at 192 (citing 8 U.S.C. § 1357(a)(3)).

¹⁰⁸ *Id.* at 205.

¹⁰⁹ *Id.* at 206 (citing *Johnson v. Maryland*, 254 U.S. 51, 56–57 (1920)).

“impose[d] a burden on agents,” Intergovernmental Immunity was not implicated because the impact and burden were only incidental to achieving the federal policy.¹¹⁰

Such reasoning could apply to state mask bans as well. Proponents of these laws may cast them as laws only “incidentally” affecting “the mode of carrying out” an agent’s duties without “prohibit[ing] the federal government from enforcing immigration law,” or otherwise interfering with authorized federal duties.¹¹¹

Overall, it is difficult to predict how a court might evaluate these arguments. The federal government will no doubt argue vigorously that any attempt to enforce a state mask ban against federal agents amounts to impermissible direct regulation of federal affairs in violation of Intergovernmental Immunity. But states will be able to counter with arguments and precedents that their laws do not directly regulate federal actors in ways the doctrine forbids.

Discrimination

On the second prong of the Intergovernmental Immunity analysis—whether the state law discriminates against the federal government—there are again persuasive arguments on both sides. As a threshold matter, any mask ban that applied *only* to federal law enforcement officers would almost certainly be unconstitutional under this prong.¹¹² State governments cannot single out federal agents for differential treatment without running afoul of Intergovernmental Immunity. But the adopted and proposed mask bans discussed previously in Part I apply to law enforcement officers at all levels of government—local, state, and federal. So, at least on their face, they do not overtly discriminate against the federal government.

But the absence of overt discrimination is not the end of the analysis. From the federal government’s perspective, mask bans are targeting and discriminating against federal agents because they aim to hamper ICE’s current ways of operating. Statements from some state officials seem to acknowledge such motivations.¹¹³ Governor Newsom’s press release on California’s mask bans, for example, states that the law is part of the state’s efforts “to protect residents from tactics being employed by President Trump and Stephen Miller’s secret police.”¹¹⁴

¹¹⁰ *Id.* at 207.

¹¹¹ *Id.* at 206.

¹¹² See *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (citing *North Dakota v. United States*, 495 U.S. 423, 435 (1990)).

¹¹³ *E.g.*, *Co-Sponsorship Memo Details: No Secret Police: Unmask ICE*, Pa. State Senate (July 24, 2025), <https://www.palegis.us/senate/co-sponsorship/memo?memoID=47146>.

¹¹⁴ Press Release, Gov. Gavin Newsom, Governor Newsom signs laws to protect school children and hospital patients, and limit fear tactics used by Trump’s secret police force to terrorize communities (Sep. 20,

At least some courts, however, have disclaimed the relevance of such statements, explaining that “the intergovernmental immunity analysis is not concerned with the potential ‘nefarious motive’ behind the challenged law.”¹¹⁵ Instead, courts typically focus on the text of the law and its practical effects. Proponents of mask bans thus have a strong argument that facially neutral laws that apply to all levels of law enforcement survive the Intergovernmental Immunity challenge. As the Supreme Court has written, “the State does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them.”¹¹⁶

* * *

In many respects, the central inquiry under both the Supremacy Clause Immunity and Intergovernmental Immunity doctrines discussed above will look similar and turn on similar arguments. At the core of both doctrines is the central question discussed at the beginning of this part: Do state laws that limit masking by law enforcement interfere with the federal government’s operations in a way that offends the Supremacy Clause? While mask ban opponents will insist that they do, proponents have credible and potentially persuasive arguments that states in our federalist system may constitutionally apply these laws to federal agents.

III. Other Options for States

Whether or not state mask bans are ultimately upheld in court, they are not the only tool at states’ disposal for limiting or discouraging law enforcement masking. There are several other approaches states can take.

First, states can potentially incorporate anti-masking provisions into civil laws that impose liability for intentional state torts. The Federal Tort Claims Act (FTCA) contains a proviso waiving federal

2025), <https://www.gov.ca.gov/2025/09/20/governor-newsom-signs-laws-to-protect-school-children-and-hospital-patients-and-limit-fear-tactics-used-by-trumps-secret-police-force-to-terrorize-communities>.

¹¹⁵ *GEO Grp., Inc. v. City of Tacoma*, No. 3:18-CV-05233, 2019 WL 5963112, at *6 n.2 (W.D. Wash. Nov. 13, 2019); see also *USPS v. City of Berkeley*, 288 F. Supp. 3d 963, 968–69 (N.D. Cal. 2017) (noting that “supposed nefarious motive[s]” by those who passed the challenged law were “irrelevant” and “allegations of legislative motive behind the [challenged law’s] passage would not suffice to establish unconstitutionality”).

¹¹⁶ *North Dakota*, 495 U.S. at 438 (quoting *Washington v. United States*, 460 U.S. 536, 544–45 (1983)). Selective prosecution of the mask bans solely against federal officials could change this analysis, as the practical effects would then be discriminatory towards the federal government.



sovereign immunity for claims of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution against any federal investigative or law enforcement officer.¹¹⁷ In other words, through the mechanisms of the FTCA, individuals may bring claims against federal law enforcement agents for those specific torts. States may seek to make these tort claims more powerful by providing for additional liability when the tort is committed by an officer wearing a mask. For example, S.B. 627 in California, discussed in Part I, includes a provision that “any person who is found to have committed an assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, while wearing a facial covering in a knowing and willful violation of this section shall not be entitled to assert any privilege or immunity for their tortious conduct against a claim of civil liability, and shall be liable to that individual for the greater of actual damages or statutory damages of not less than ten thousand dollars, whichever is greater.”¹¹⁸ The application of this provision has not been tested in courts, but on its face it discourages mask wearing by subjecting federal officers to increased state tort liability for torts committed while masked. Long-term, this legal change could curb mask wearing in states that adopt it.

Second, at least one commentator has suggested that states or localities could affirmatively authorize or even require their law enforcement officers to “verify[] the identity of purported ICE agents operating in their jurisdictions.”¹¹⁹ Even without such direct authorization, officers can likely request such verification as part of their ordinary duties. Given the rise of “high-profile crimes committed by individuals impersonating police officers and ICE agents, state and local police are under no obligation to take it on faith that masked men seizing people off of the streets have lawful authority to do so.”¹²⁰ For example, the No Vigilantes Act in California would authorize state officers to “request an alleged law enforcement officer to present identification when there is probable cause or reasonable suspicion to believe the alleged law enforcement officer has committed a crime, including, but not limited to, impersonating a peace officer.”¹²¹

Third, state and local governments can take various measures designed to encourage federal agents to unmask. For example, states and localities are “in a strong position to negotiate with ICE over how the federal agency conducts operations within their jurisdiction” because they

¹¹⁷ 28 U.S.C. §2680(h).

¹¹⁸ Cal. S.B. 627.

¹¹⁹ Chauvin, *supra* note 7, at 10.

¹²⁰ *Id.* (footnote omitted).

¹²¹ No Vigilantes Act, S.B. 805 § 9, 2025 Assemb., Reg. Sess. (Cal. 2025), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202520260SB805. Other portions of the Act, such as the provision making it a misdemeanor for federal law enforcement officers not to wear identifying information, *id.* § 10, may or may not be unconstitutional for the reasons discussed in this explainer.



“have access to significant resources—including internal databases, local knowledge, and manpower—that ICE often lacks.”¹²² States or localities could withhold cooperation with ICE unless and until it changes its operational policies, including on masking. Additionally, local officials may discourage masking through executive orders, like the ones discussed in Part I.¹²³ And at least one commentator has suggested that, if state or local governments made it a priority to “apprehend and prosecute those perpetrating crimes targeting ICE,” agents may be less likely to mask.¹²⁴

Fourth, state courts can take action to prohibit masking in their facilities. For example, in September 2025, Connecticut Supreme Court Chief Justice Raheem Mullins issued a new policy that prohibits law enforcement agents from wearing face coverings in court facilities unless they have a medical need or prior approval from the judiciary.¹²⁵

Finally, many states and some localities have existing mask bans that are generally applicable to the public that could potentially be used against federal officials in some ways.¹²⁶ For example, Florida has laws, which were originally aimed at the Ku Klux Klan, that prohibit people above the age of 16 from wearing a mask, hood, or other facial disguise in specified places when the wearer intends to interfere with the exercise of a person’s legal rights, to deprive any person of equal protection, or “intimidate, threaten, abuse, or harass.”¹²⁷

Could such mask bans be used to prosecute masked federal agents? Maybe.¹²⁸ If the law’s predicates are met (e.g., that the perpetrator acted “with the intent to intimidate, threaten, abuse, or harass” or to violate someone’s civil rights), agents could have difficulty invoking the protections of either Supremacy Clause Immunity or Intergovernmental Immunity. These laws may thus allow state officials to prosecute masked federal law enforcement in at least some circumstances without having to enact new legislation.

¹²² Chauvin, *supra* note 7, at 11.

¹²³ See *supra* notes 20–22 and accompanying text.

¹²⁴ Chauvin, *supra* note 7, at 11–12

¹²⁵ Maysoon Khan, *Connecticut Official Bans Masked ICE Agents, Warrantless Arrests in State Courts*, Conn. Public Radio (Sep. 16, 2025, at 16:07 ET) <https://www.ctpublic.org/news/investigative/2025-09-16/connecticut-court-bans-ice-arrests-face-masks>.

¹²⁶ Simoni, *supra* note 6, at 241 n.6 (collecting anti-mask laws in fifteen states, D.C., and a handful of localities).

¹²⁷ See Fla. Stat. §§ 876.12–15 & 876.155; see also *Robinson v. State*, 393 So.2d 1076 (Fla. 1980); *Nicol v. State*, 939 So. 2d 231, 234 n.2 (Fla. Dist. Ct. App. 2006); see generally Allen, *supra* note 6.

¹²⁸ Note, however, that Florida’s mask ban exempts people engaged in “employment where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or profession.” Fla. Stat. § 876.16.

Conclusion

Courts and commentators have long pondered and debated the question of when and how state and local governments can regulate federal officers. Current state efforts to prohibit law enforcement from masking while performing their official duties highlight unanswered questions in the Supremacy Clause and Intergovernmental Immunity doctrines. How should courts determine what actions are “authorized” by federal law? When is something necessary and proper to the fulfillment of federal duties? Where is the line between state laws that incidentally burden the federal government and those that directly regulate it? These are the questions that will be sorted out in court if the application of these state mask bans to federal agents is challenged. While existing doctrine gives opponents of these laws ample grounds to challenge them, it also offers proponents a variety of cogent defenses.

