

CAN STATES FORCE ICE TO TAKE OFF THE MASKS?

NOAH C. CHAUVIN*

ABSTRACT

No. But that does not mean they are entirely powerless to combat the practice.

INTRODUCTION

As the federal government has pursued President Donald Trump's aggressive immigration policy, images of masked Immigration and Customs Enforcement agents seizing people off of the streets have become a potent symbol of the administration's disregard for democratic and legal norms. While government officials claim that ICE agents must mask to protect themselves from violence and harassment,¹ critics maintain that the practice helps immigration officials dodge accountability and actually makes them less safe.² Responding to these concerns, lawmakers across the country have introduced legislation intended to prevent ICE agents from covering their faces while on duty.

* Associate Professor of Law, University of Oklahoma College of Law. I am grateful to Kit Johnson and the participants in the University of Oklahoma College of Law Junior Faculty Workshop for their comments on an earlier draft of this paper and to the *Southern California Law Review Postscript* team for their careful editing.

1. Michael Sainato, *ICE Chief Says He Will Continue to Allow Agents to Wear Masks During Arrest Raids*, THE GUARDIAN (July 20, 2025), <https://www.theguardian.com/us-news/2025/jul/20/ice-agents-masks> [https://perma.cc/9FEV-DXHS].

2. NOTUS, *Democrats Say Masked ICE Agents Could Create Bigger Safety Issues*, SAN JOSÉ SPOTLIGHT (July 15, 2025), <https://sanjosespotlight.com/democrats-say-masked-ice-agents-could-create-bigger-safety-issues> [https://perma.cc/V774-JSY7]; Walter Olson, *ICE Agents Routinely Mask Up When Seizing People—That's Wrong*, CATO INST. (May 12, 2025), <https://www.cato.org/blog/ice-agents-seizing-people-now-routinely-wear-masks-thats-wrong> [https://perma.cc/X6J8-49SQ].

Four of these bills, introduced by congressional Democrats,³ are unlikely to advance through a Republican-controlled Congress. Indeed, some congressional Republicans are attempting to provide ICE agents with greater anonymity.⁴ Legislative efforts in several Democrat-controlled states and localities, however, are much more likely to bear fruit (one such bill has already been signed into law⁵)—but could be quickly struck down by the courts as violations of the Constitution’s Supremacy Clause.⁶ But that does not mean that states are entirely powerless to confront this problem.

This essay proceeds in four parts. Part I provides a brief summary of the Supremacy Clause and the ways in which it has been used to strike down state laws purporting to regulate federal activity. Next, Part II details the efforts by state lawmakers to prohibit federal law enforcement officers from masking and explains why those bills, if enacted, would be unconstitutional. Part III outlines five alternative steps state and local officials can take to discourage ICE from masking. Finally, Part IV provides best practices for state and local lawmakers seeking to legislate in this area.

I. FEDERAL SUPREMACY

When the Federal Constitution took effect in 1788, it made significant changes to the form of American government. One such change was the introduction of the supremacy of federal law. The Constitution’s Supremacy Clause provides that:

[The] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.⁷

This marked a significant departure from the previous national constitution, the Articles of Confederation, under which federal law did not supplant state laws on the same subject.⁸

3. Immigration Enforcement Identification Safety Act of 2025, S. 2594, 119th Cong. (2025); VISIBLE Act, S. 2212, 119th Cong. (2025); No Secret Police Act of 2025, H.R. 4176, 119th Cong. (2025); No Anonymity in Immigration Enforcement Act of 2025, H.R. 4004, 119th Cong. (2025).

4. *See* Protecting Law Enforcement from Doxxing Act, S. 1952, 119th Cong. § 2 (2025) (making it a felony to share the name of an ICE agent with the intent of obstructing an immigration enforcement operation). For a discussion of why the Protecting Law Enforcement from Doxxing Act would violate the First Amendment, *see* Noah C. Chauvin, *The Unconstitutional Attempt to Criminalize Naming ICE Agents*, 73 UCLA L. REV. DISCOURSE (forthcoming 2026) (manuscript at 5–11) (on file with author).

5. Soumya Karlamangla, *California Bars ICE Agents From Wearing Masks in the State*, N.Y. TIMES (Sep. 20, 2025), <https://www.nytimes.com/2025/09/20/us/california-ice-agents-masks-law.html> [<https://perma.cc/3FG8-L64B>].

6. U.S. CONST. art. VI, cl. 2.

7. *Id.*

8. *E.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 251 (2000).

In the early years of the Republic, states repeatedly challenged federal supremacy. For example, in the landmark case of *McCulloch v. Maryland*, the Supreme Court struck down a Maryland law imposing a tax on the Baltimore branch of the National Bank.⁹ Writing for a unanimous Court, Chief Justice John Marshall explained that the tax violated the Supremacy Clause because it was an exercise of a power that was “in its nature incompatible with, and repugnant to, the constitutional laws of the Union.”¹⁰ Because “the power to tax involves the power to destroy,” the Court ruled that allowing the Maryland tax would essentially give a veto over a lawful exercise of federal power—something the Constitution could not tolerate.¹¹

As the scope and responsibilities of the federal government expanded, a new threat to federal supremacy arose: state and local prosecutions of federal employees for actions those employees took in the course of their duties. When such prosecutions reached the Supreme Court, it made clear that the Supremacy Clause forbade state prosecutions where federal employees were “acting[] within the scope of their authority.”¹²

The Court clarified this standard in the seminal case of *In re Neagle*, in which the Court considered whether California could pursue a murder case against David Neagle, a deputy U.S. marshal who killed a man while protecting Supreme Court Justice Steven J. Field.¹³ The state argued that because there was no federal statute authorizing U.S. marshals to protect federal judges, it could prosecute Neagle consistent with the Supremacy Clause.¹⁴ The Court rejected this reasoning, explaining that there was both inherent constitutional power and affirmative statutory authority for “the United States to protect its officers from violence.”¹⁵ Accordingly, the Court explained that Neagle was entitled to Supremacy Clause immunity because (1) he performed “an act which he was authorized to do by the law of the United States,” and (2) “in doing that act he did no more than what was necessary and proper for him to do.”¹⁶

9. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436–37 (1819).

10. *Id.* at 425.

11. *Id.* at 431–32. For other early examples of the Court striking down state laws that conflicted with federal law, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 234 (1824) (holding that states could not enact schemes for licensing boats when Congress had enacted a federal scheme), and *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 277 (1796) (opinion of Iredell, J.) (striking down a Virginia state law that conflicted with a federal treaty).

12. *Tennessee v. Davis*, 100 U.S. 257, 258 (1880).

13. *In re Neagle*, 135 U.S. 1, 53–54 (1889).

14. *Id.* at 58.

15. *Id.* at 67–68, 72.

16. *Id.* at 75; see also *Ohio v. Thomas*, 173 U.S. 276, 284 (1899) (holding that state prosecution was prohibited where “the act complained of was performed as part of the duty of . . . a Federal officer in and by virtue of valid Federal authority”).

The Court further refined these rules in *Johnson v. Maryland*, a case involving a postal worker who challenged the state's ability to fine him for driving without a license.¹⁷ The Court clarified that federal employees acting in their official capacity were not immune from "general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets."¹⁸ But what states could not do was "require[] qualifications in addition to those that the [federal] Government . . . pronounced sufficient."¹⁹ In other words, it was for the federal government, not the states, to determine if its employees had the necessary skills, such as the ability to drive a postal truck, to perform their duties.²⁰

Occasionally, courts have had the opportunity to apply these general principles to state laws ostensibly regulating the conduct of federal law enforcement. Almost universally, courts have found that even generally applicable state laws cannot be applied to federal agents if doing so would prevent those agents from performing their duties or would allow the state to hinder federal decision-making.²¹ Accordingly, courts have deemed unconstitutional state attempts to:

- Charge federal officials who kill people in the course of their duties with murder;²²
- Charge federal officials who exceed the scope of a search warrant with robbery;²³
- Charge federal officials who engage in bribery as part of an authorized corruption investigation;²⁴

17. *Johnson v. Maryland*, 254 U.S. 51, 55 (1920).

18. *Id.* at 56.

19. *Id.* at 57.

20. Today, the U.S. Postal Service does require postal workers to have a driver's license. *See How to Become a Postal Service Worker*, U.S. BUREAU LAB. STATS., <https://www.bls.gov/ooh/office-and-administrative-support/postal-service-workers.htm#tab-4> [https://perma.cc/GL23-VEPH].

21. A notable exception is *Texas v. United States Department of Homeland Security*, in which the U.S. Court of Appeals for the Fifth Circuit found that a lawsuit filed by Texas to stop Customs and Border Patrol agents from cutting concertina wire the state had installed along the Rio Grande river did not violate the Supremacy Clause because the state was acting as a property owner, not seeking to control the federal government. *Texas v. U.S. Dep't of Homeland Sec.*, 123 F.4th 186, 205–09 (5th Cir. 2024).

22. *In re Neagle*, 135 U.S. 1, 69–70 (1890); *Clifton v. Cox*, 549 F.2d 722, 729–30 (9th Cir. 1977); *Brown v. Cain*, 56 F. Supp. 56, 59–60 (E.D. Pa. 1944); *Ex parte Dickson*, 14 F.2d 609, 612–13 (N.D.N.Y. 1926); *In re Fair*, 100 F. 149, 155–59 (D. Neb. 1900); *see also New York v. Tanella*, 374 F.3d 141, 152 (2d Cir. 2004) (holding that a federal agent could not be tried for manslaughter when he killed a man while reasonably acting within the scope of his duties); *Reed v. Madden*, 87 F.2d 846, 853 (8th Cir. 1937) (same); *Texas v. Kleinert*, 855 F.3d 305, 309, 320 (5th Cir. 2017) (same for local law enforcement officer deputized as a federal task force officer).

23. *In re Lewis*, 83 F. 159, 161–62 (D. Wash. 1897).

24. *Baucom v. Martin*, 677 F.2d 1346, 1351 (11th Cir. 1982).

- Punish a federal official for assault when he hit a man with a night stick while attempting to effectuate an arrest;²⁵
- Charge a federal official with breach of the peace for using tear gas to disperse a crowd of pro-segregation protestors;²⁶
- Charge federal officials who accidentally entered private property while performing tasks related to a wolf reintroduction program with trespass and littering;²⁷ and
- Impose licensing requirements on independent contractors hired as investigators by the FBI.²⁸

Courts have also struck down state laws that purport to invalidate federal law even where the effect of the state law is to produce an otherwise constitutionally permissible outcome. For instance, in *United States v. Missouri*, the U.S. Court of Appeals for the Eighth Circuit invalidated a Missouri law that declared federal firearms laws unconstitutional and on that basis prohibited state and local law enforcement from enforcing them.²⁹ The court explained that while Missouri could lawfully, “as a matter of policy . . . discontinue assistance with the enforcement of *valid* federal firearms laws,” it could not achieve the same end by declaring those laws invalid.³⁰

From these and similar cases, a clear set of rules known as the doctrine of intergovernmental immunity has emerged:

- States may not enact laws that would function as a “veto” on a lawful federal policy choice.³¹
- States may not directly regulate the conduct of federal employees engaged in their official duties or single them out for unfavorable treatment.³²
- States may indirectly regulate the conduct of federal employees engaged in their official duties through generally applicable rules.³³

25. *Lima v. Lawler*, 63 F. Supp. 446, 452 (E.D. Va. 1945).

26. *In re McShane*, 235 F. Supp. 262, 275 (N.D. Miss. 1964).

27. *Wyoming v. Livingston*, 443 F.3d 1211, 1230 (10th Cir. 2006).

28. *United States v. Virginia*, 139 F.3d 984, 988–90 (4th Cir. 1998).

29. *United States v. Missouri*, 114 F.4th 980, 986 (8th Cir. 2024).

30. *Id.*

31. *E.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431–32 (1819).

32. *See United States v. Washington*, 142 S. Ct. 1976, 1986–87 (2022).

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

- States may not enact laws that purport to invalidate lawful federal policy choices, even if the effect of the laws would be otherwise constitutional.³⁴

States seeking to restrict ICE use of masks may only do so if they follow these rules.

II. PROPOSED UNMASKING LAWS

At time of publication, legislators in six states have introduced laws that would prohibit ICE agents from wearing masks. Governor Gavin Newsom signed the California bill into law on September 20, 2025; the other four bills remain pending.³⁵ Similarly, Connecticut Supreme Court Justice Raheem Mullins recently enacted a policy that prohibits law enforcement officers from wearing face coverings in state courts.³⁶ Lawmakers in Maine, Pennsylvania, Oregon, Utah, Los Angeles County, San Jose, and Seattle, meanwhile, have indicated that they intend to introduce similar legislation.³⁷ Every one of the introduced bills (and the Connecticut Rule), which are detailed in Table One, violates the Supremacy Clause.

34. *E.g.*, *United States v. Missouri*, 114 F.4th at 986.

35. See *Karlamangla*, *supra* note 5.

36. *Judicial Branch Policy Regarding Law Enforcement Activity in Courthouses*, STATE OF CONN. JUD. BRANCH (Sep. 16, 2025), <https://www.documentcloud.org/documents/26098755-ct-judicial-branch-policy-on-ice-arrests-in-courthouses> [<https://perma.cc/R332-FZDN>].

37. J. Craig Anderson, *Does Maine Have a Law Banning Masks for Law Enforcement Officers?*, PORTLAND PRESS HERALD (Oct. 8, 2025), <https://www.pressherald.com/2025/10/08/does-maine-have-a-law-banning-masks-for-law-enforcement-officers> [<https://perma.cc/T5EK-PATE>]; Carmen Russell-Sluchansky, *Pennsylvania Legislators Propose Bill to Prohibit Law Enforcement from Using Masks to Hide Their Identities*, WHYY (July 25, 2025), <https://whyy.org/articles/pennsylvania-legislation-masks-law-enforcement-ice> [<https://perma.cc/8WWJ-S89Q>]; Shaanth Nanguneri, ‘*We’ll Have to Litigate*’: *Oregon Bipartisan Duo Seek Novel Ban on Law Enforcement Masking*, OR. CAP. CHRON. (Sep. 2, 2025), <https://oregoncapitalchronicle.com/2025/09/02/well-have-to-litigate-oregon-bipartisan-duo-seek-novel-ban-on-law-enforcement-masking> [<https://web.archive.org/web/20250905133331/https://oregoncapitalchronicle.com/2025/09/02/well-have-to-litigate-oregon-bipartisan-duo-seek-novel-ban-on-law-enforcement-masking>]; Annie Knox, *A Utah Lawmaker’s Long-Shot Proposal to Ban ICE Agents from Wearing Masks*, UTAH NEWS DISPATCH (Nov. 10, 2025), <https://utahnewsdispatch.com/2025/11/10/uta-h-lawmaker-proposal-ban-ice-agents-from-wearing-masks> (on file with the Southern California Law Review); *LA County Supervisors Move Toward Banning Law-Enforcement Officers from Wearing Masks*, ABC7 (July 30, 2025), <https://abc7.com/post/amid-ice-raids-la-county-consider-ordinance-banning-law-enforcement-officers-concealing-identities/17349576> [<https://perma.cc/EW7Q-ZEJS>]; Dustin Dorsey, *San Jose Leaders Push to Require ICE to Not Conceal Identity During Operations in City*, ABC7 (Sep. 5, 2025), <https://abc7news.com/post/san-jose-leaders-push-require-ice-not-conceal-identity-during-operations-city/17751440> [<https://perma.cc/C872-M486>]; Helen Smith, *Seattle Working Toward Banning ICE Agents from Wearing Face Masks*, K5 (Oct. 8, 2025), <https://www.king5.com/article/news/local/seattle/harrell-to-sign-two-executive-orders-national-guard-seattle-ice-enforcement-action/281-dd81f2b6-b91a-401e-8649-eafc0eb21692> [<https://perma.cc/VS8W-YKAQ>].

TABLE 1. State bills prohibiting ICE use of masks

<i>Jurisdiction</i>	<i>Bill</i>	<i>Features</i>
California	No Secret Police Act, S.B. 627, 2025–2026, Reg. Sess. (Cal. 2025).	Law enforcement officers, including federal law enforcement officers, commit an infraction (subsequent violations could be a misdemeanor) if they wear a facial covering while on duty outside of a few limited exceptions.
Florida	S.B. 316, Reg. Sess. (Fla. 2026)	Law enforcement agencies, including federal law enforcement agencies, must inform local law enforcement if they plan operations that are likely to involve masking.

		Law enforcement officers, including federal law enforcement officers, commit a misdemeanor if they wear a mask on duty outside of a few limited exceptions.
Massachusetts	H.D. 4886, 194th Leg. (Mass. 2025).	Expresses the intent of the legislature that law enforcement officers, including federal law enforcement officers, should include identifying information on their uniforms.
Michigan	H.B. 4760, 103d Leg., Reg. Sess. (Mich. 2025).	Law enforcement officers, including federal law enforcement officers, commit a misdemeanor if they wear a mask on duty outside of a few limited exceptions.
New York	Mandating End of Lawless Tactics Act, S.B. S8462, 2025-2026 Reg. Sess. (N.Y. 2025).	Law enforcement officers, including federal law enforcement officers, commit a misdemeanor if they wear a mask on duty, outside of a few limited circumstances, or if they do not display identifying information on their uniforms.

Tennessee	Stop American Gestapo Act, H.B. 1442, 113th Gen. Assemb. (Tenn. 2025).	Law enforcement officers, including federal law enforcement officers, commit a misdemeanor if they wear a mask on duty, outside of a few limited circumstances, or if they do not display identifying information when interacting with the public while on duty.
Connecticut	Judicial Branch Policy Regarding Law Enforcement Activity in Courthouses ³⁸	Law enforcement officers, including federal law enforcement officers, are prohibited from wearing masks inside a courthouse unless they have a medical need for doing so and receive prior judicial approval.

To begin with the threshold issue, while it may be bad policy for ICE agents to wear masks, there is no serious question that federal law allows them to do so. The Constitution grants the federal government “broad, undoubted power over the subject of immigration and the status of aliens.”³⁹ Pursuant to that power, Congress has granted ICE significant authority to arrest and detain individuals believed to have committed immigration violations.⁴⁰ In performing those arrests, federal regulations merely require ICE agents to “identify [themselves] as an immigration officer who is authorized to execute an arrest” “[a]t the time of the arrest” or “as soon as it is practical and safe to do so.”⁴¹ Both ICE acting director Todd Lyons and Secretary of Homeland Security Kristi Noem have indicated that they support ICE agents wearing masks when the agents believe doing so is necessary for their safety.⁴²

38. State of Conn. Jud. Branch, *supra* note 36.

39. *Arizona v. United States*, 567 U.S. 387, 394 (2012).

40. HILLEL R. SMITH, CONG. RSCH. SERV., LSB10362, IMMIGRATION ARRESTS IN THE INTERIOR OF THE UNITED STATES: A PRIMER 1–2 (2025).

41. 8 C.F.R. § 287.8(c)(2)(iii)(2025).

42. Sainato, *supra* note 1; Ben Szalinski, *DHS Secretary Noem Defends ICE Tactics in Second Illinois Visit*, CAPITOL NEWS ILL. (Aug. 8, 2025), <https://capitolnewsillinois.com/news/dhs-secretary-noem-defends-ice-tactics-in-second-illinois-visit> [https://perma.cc/UG8H-X748].

Admittedly, the second Trump administration has frequently exceeded its lawful immigration authority.⁴³ But that alone is not enough to deny immigration officials' actions Supremacy Clause immunity. The rule courts have consistently applied since *In re Neagle* is straightforward: "a state court has no jurisdiction if (1) the federal agent was performing an act which he was authorized to do by the law of the United States and (2) in performing that authorized act, the federal agent did no more than what was necessary and proper for him to do."⁴⁴ Crucially, however, *post hoc* determinations of unlawfulness under either prong of the *Neagle* test do not vitiate immunity.

Regarding how the courts consider lawful authority under *Neagle*'s first prong, the U.S. Court of Appeals for the Eleventh Circuit's opinion in *Baucom v. Martin* is instructive.⁴⁵ That case involved an FBI agent who had been threatened with prosecution in state court for suborning the attempted bribery of a local prosecutor as part of a corruption investigation.⁴⁶ The state argued that the agent was not entitled to immunity because there was no legal authority for the agent to commit bribery, "even if the motive [was] to enforce federal criminal statutes," and that the agent therefore "was acting outside the scope of his federal authority" when he approved the scheme.⁴⁷ The court disagreed. Citing *Neagle*, it explained that even if there is no explicit legal authority justifying a particular course of action, "the necessary authority c[an] be derived from the general scope of the officer's duties."⁴⁸ The court emphasized that this was so "[e]ven if the officer makes an error in judgment in what the officer conceives to be his legal duty."⁴⁹ Particularly relevant to the court was that the agent had received approval from both his supervisor and the U.S. Attorney for the attempted bribe.⁵⁰

43. *E.g.*, A.A.R.P. v. Trump, 145 S. Ct. 1364, 1368 (2025); *see also* Katherine Yon Ebright & Elizabeth Goitein, *Trump Is Attempting to Use Wartime Powers in the United States*, THE ATLANTIC (Apr. 24, 2025), <https://www.theatlantic.com/ideas/archive/2025/04/alien-enemies-act-trump/682565> [<https://perma.cc/V274-XZKC>].

44. *Kentucky v. Long*, 837 F.2d 727, 744 (6th Cir. 1988); *see also* *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (10th Cir. 2006) ("[A] federal officer is not entitled to Supremacy Clause immunity unless, in the course of performing an act which he is authorized to do under federal law, the agent had an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties.").

45. *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

46. *Id.* at 1347–48.

47. *Id.* at 1348.

48. *Id.* at 1350.

49. *Id.* Mistakes that go beyond mere errors in judgment, on the other hand, are not protected by Supremacy Clause immunity. *E.g.*, *New Jersey v. Bazin*, 912 F. Supp. 106, 116 (D.N.J. 1995) (postal inspector was not immune from prosecution for an assault perpetrated after the conclusion of an interrogation that he "could not have reasonably believed . . . [was] within the scope of his duties in investigating mail fraud").

50. *Baucom*, 677 F.2d at 1350. Courts addressing the first prong of the *Neagle* test generally do so in a relatively cursory manner that is highly deferential to claims of executive power and appears to presume good faith on the part of federal employees claiming legal authority for their actions. Future scholarship should consider the extent to which the courts have struck the appropriate balance in their

Of course, that federal law enforcement is empowered to perform a specific action does not mean that every instance of them doing so is lawful. Under the second prong of the *Neagle* standard, however, courts have exempted unlawful but reasonable exercises of federal authority from state prosecution.⁵¹ In *In re Lewis*, for example, federal agents exceeded their authority under a search warrant. But because they were authorized by federal law to obtain and execute the warrant, the court ruled that they could not be prosecuted for robbery under state law.⁵² Nor is immunity restricted to circumstances in which a violation has relatively minor consequences. For instance, in *Clifton v. Cox*, the U.S. Court of Appeals for the Ninth Circuit ruled that a federal counternarcotics agent who reasonably but erroneously believed his partner had been shot during a raid could not be prosecuted for fatally shooting a fleeing suspect.⁵³

These same principles apply to ICE agents performing immigration arrests. Although many of the second Trump administration's aggressive interpretations of its legal authority may ultimately be rejected by the courts, ICE agents may reasonably rely on the conclusions of government attorneys that their operations are lawful. Likewise, states may not punish immigration officials for acts performed pursuant to their lawful authority, broadly construed, even if a particular act exceeds that authority.

Because ICE agents are acting within their authority when they wear masks while performing immigration operations, states may not prohibit them from doing so. As Seth Waxman and Trevor Morrison put it in a related context, “the principle, implicit in the constitutional order itself, of state noninterference with federal institutions and prerogatives” means that states may not “regulate the federal government or its agents directly.”⁵⁴ Attempts to directly regulate the manner in which federal law enforcement, including

approach to *Neagle*'s first prong. The degree of deference shown to the federal government under this prong is questionable given the “delicate balance between federal and state law enforcement powers” courts must maintain when conducting a Supremacy Clause immunity analysis, *Kentucky v. Long*, 837 F.2d 727, 749 (6th Cir. 1988), and given the reality of an administration that has an apparent disregard for the legal limits on its powers. See Devlin Barrett, *Justice Dept. Whistle-Blower Warns of Trump Administration's Assault on the Law*, N.Y. TIMES (July 10, 2025), <https://www.nytimes.com/2025/07/10/us/politics/trump-bove-reuveni-whistleblower-doj-deportations.html> [https://web.archive.org/web/20250917161056/https://www.nytimes.com/2025/07/10/us/politics/trump-bove-reuveni-whistleblower-doj-deportations.html].

51. Unreasonable exercises of authority, by contrast, are not privileged. See *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906); *Ex parte Hutson*, 282 F. 723, 725 (S.D. Fla. 1922); *Battle v. State*, 258 A.3d 1009, 1027 (Md. Ct. Spec. App. 2021).

52. *In re Lewis*, 83 F. 159, 161–62 (D. Wash. 1897).

53. *Clifton v. Cox*, 549 F.2d 722, 729–30 (9th Cir. 1977); see also *Brown v. Cain*, 56 F. Supp. 56, 58, 60 (E.D. Pa. 1944) (finding that a member of Coast Guard who shot and killed a man he suspected of starting a riot was entitled to Supremacy Clause immunity because “[w]hether he was right or wrong . . . he did not act wantonly nor with criminal intent”).

54. Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2221 (2003).

ICE, operates—which each of the six state de-masking bills (and the Connecticut rule) does—fly in the face of this principle. Accordingly, these bills and the rule violate the Supremacy Clause.

Nor can the proposed laws be saved as generally applicable rules that only incidentally burden federal law enforcement, akin to *Johnson v. Maryland*'s “statute or ordinance regulating the mode of turning at the corners of streets.”⁵⁵ The courts have repeatedly rejected states’ efforts to subject federal officials or contractors to requirements that could lawfully be applied to others. In *United States v. Virginia*, for instance, the U.S. Court of Appeals for the Fourth Circuit ruled that the Supremacy Clause prevented the Virginia Criminal Justice Services Board from requiring independent contractors hired by the FBI and working in the state to be licensed as private investigators.⁵⁶ To rule otherwise, the court explained, would allow Virginia to “second-guess” the federal government’s hiring decisions, a constitutionally impermissible outcome.⁵⁷

The same principles prevent states and localities from second-guessing the federal government’s policy of allowing ICE agents to decide when to mask. Because ICE officials may lawfully choose to mask when performing immigration detentions, Supremacy Clause immunity prevents states from making that choice a crime.⁵⁸

III. WHAT STATES CAN DO

The Supremacy Clause prevents states and localities from regulating the conduct of federal immigration enforcement. States that attempt to do so invite conflict with the federal government and legal challenges that, for the reasons discussed in Part II, they will almost certainly lose.⁵⁹ Nevertheless, there are good reasons to want to limit the circumstances in which

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

56. *United States v. Virginia*, 139 F.3d 984, 989–90 (4th Cir. 1998).

57. *Id.* at 989.

58. This conclusion applies doubly if one considers the legislative history of these provisions and not merely their text, which is typically facially neutral. In advocating for their bills, state legislators have been clear that they are motivated by a desire to regulate ICE. *E.g.*, Press Release, Scott Wiener, Landmark Bill To Ban Extreme Masking By Local & Federal Law Enforcement Heads To The Governor (Sep. 11, 2025), <https://sd11.senate.ca.gov/news/landmark-bill-ban-extreme-masking-local-federal-law-enforcement-heads-governor> [https://perma.cc/SWH4-25QT]. *But see* Erwin Chemerinsky, *California Law Targets ICE Agents’ Use of Masks? Is the Practice Constitutional?*, SACRAMENTO BEE (July 23, 2025), <https://www.sacbee.com/opinion/op-ed/article311087665.html> [https://perma.cc/UZ3M-N3EX] (arguing that courts should find that California’s No Secret Police Act does not violate the Supremacy Clause).

59. For example, federal officials have indicated that ICE will not comply with California’s No Secret Police Act. Billal Rahman, *ICE Vows to Ignore Gavin Newsom Mask Ban*, NEWSWEEK (Sep. 23, 2025), <https://www.newsweek.com/ice-masks-gavin-newsom-california-2134014> [https://perma.cc/VY4S-SNN3].

immigration officials wear face coverings while on duty, a practice that is intimidating, creates safety concerns for both law enforcement and the public, and runs contrary to the American tradition and legal norm of accountable law enforcement.⁶⁰ Fortunately, state and local governments are not powerless to discourage ICE agents from masking—and to establish the bona fides of those who do. Five strategies have particular promise.

First, nothing prevents state and local law enforcement (of their own accord or if directed to do so by lawmakers) from verifying the identity of purported ICE agents operating in their jurisdictions. Following a series of high-profile crimes committed by individuals impersonating police officers and ICE agents,⁶¹ 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.⁶² They can and should be dispatched to the scenes of immigration arrests being performed by masked agents to verify that those agents are who they say they are. The No Vigilantes Act, introduced by California state Senators Renée Pérez and Scott Wiener, provides a model for legislators seeking to enact legislation to this effect.⁶³ It authorizes California police 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.”⁶⁴

Second, state and local law enforcement have access to significant resources—including internal databases, local knowledge, and personnel—

60. See Chauvin, *supra* note 4 (manuscript at 11–12).

61. See, e.g., Nicholas Bogel-Burroughs, *Minnesota Assassin Posed as Police Officer to Carry Out Shootings*, N.Y. TIMES (June 16, 2025), <https://www.nytimes.com/2025/06/16/us/police-impersonation.html> [https://perma.cc/NK7N-6T2K]; Tom Ignudo, *Philadelphia Man Charged with Impersonating ICE Agent During Robbery in Northeast Philly, DA Says*, CBS NEWS (June 23, 2025), <https://www.cbsnews.com/philadelphia/news/ice-agent-impersonator-philadelphia-robert-rosado> [https://perma.cc/3NJH-RMFW]; Olivia Lloyd, *Woman Poses as ICE Agent to Kidnap Ex-Boyfriend's Wife at Work, Florida Cops Say*, MIA. HERALD (Apr. 21, 2025), <https://www.miamiherald.com/news/state/florida/article304699521.html> [https://perma.cc/MDW7-8D25].

62. Indeed, the FBI has reportedly urged immigration and law enforcement officials “to coordinate to ‘verify legitimate versus non-legitimate operations’ attributed to ICE” because of an increasing trend of criminals posing as ICE agents. Dell Cameron & Caroline Haskins, *FBI Warns of Criminals Posing as ICE, Urges Agents to ID Themselves*, WIRED (Nov. 4, 2025), <https://www.wired.com/story/fbi-warns-of-criminals-posing-as-ice-urges-agents-to-id-themselves> [https://perma.cc/5QTV-9Z4P].

63. No Vigilantes Act, S.B. 805 § 9, Reg. Sess. (Ca. 2025). The City of Riverside, California, passed a resolution that similarly directs the local police to “monitor any suspected federal enforcement activity in the City and, when legally permissible, confirm the identity of immigration enforcement personnel conducting enforcement operations within the City.” RIVERSIDE, CA., RES. NO. 24310 (Oct. 14, 2025) <https://aquarius.riversideca.gov/clerkdb/0/doc/375010/Page1.aspx> [https://perma.cc/Z36AZL8S].

64. *Id.* § 9. 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, are unconstitutional for the reasons discussed in this essay.

that ICE often lacks.⁶⁵ Moreover, partnership between state and local law enforcement and ICE can help legitimate immigration enforcement operations in the relevant jurisdiction. This puts states and localities in a strong position to negotiate with ICE over how the federal agency conducts operations within their jurisdiction. So-called “sanctuary” jurisdictions that withhold cooperation from federal immigration enforcement as a matter of course could premise some limited cooperation on ICE not wearing masks in their territory. Jurisdictions that do cooperate with immigration authorities could threaten to limit or cease working with ICE unless it changes its operational practices.

Third, states and localities can consider imposing restrictions on police forces that choose to participate in ICE’s 287(g) program, which allows ICE to delegate immigration enforcement authority to state and local law enforcement officers.⁶⁶ For example, under a bill that New Hampshire state representative Alexis Simpson intends to introduce, police officers in the state who participate in the 287(g) program “would be required to identify themselves and would be prohibited from wearing masks.”⁶⁷ Proposals such as Simpson’s raise substantially fewer Supremacy Clause concerns than laws that would directly regulate ICE, because while police officers participating in the 287(g) program are “subject to the direction and supervision” of the federal government, their participation must be “consistent with State and local law” and their “specific powers and duties” must be agreed upon by ICE and the relevant state or locality.⁶⁸ While state and local governments may not directly regulate the conduct of federal functions, they have substantially more authority to condition the participation of their employees in the performance of those functions.⁶⁹

65. As ICE and other federal law enforcement entities obtain increasing volumes of information from data brokers, *see* KIT JOHNSON, CRIMMIGRATION LAW: AN OPEN CASEBOOK 365–66 (2d ed. 2025), they will become less reliant on cooperation from states and localities.

66. 8 U.S.C. § 1357(g)(1).

67. Rick Green, *NH Legislation Would Prohibit Masked Police During ICE Raids*, VALLEY NEWS (Oct. 21, 2025), <https://vnews.com/2025/10/21/police-mask-ban-new-hampshire> [https://perma.cc/KSG2-JWCJ].

68. 8 U.S.C. § 1357(g)(1), (3).

69. In *Texas v. Kleinert*, the U.S. Court of Appeals for the Fifth Circuit held that a local police officer working as an FBI task force officer was entitled to Supremacy Clause immunity from state prosecution for accidentally killing a man while attempting to arrest him. *Texas v. Kleinert*, 855 F.3d 305, 320 (5th Cir. 2017). However, *Kleinert*’s logic does not limit proposals such as Simpson’s for two reasons. The officer in *Kleinert* “worked full-time for the FBI” and “[n]othing in the record indicate[d] that [his] federal assignment was merely temporary or otherwise limited in scope.” *Id.* at 312. In contrast, under the 287(g) program, state and local police officers traditionally (though not universally) perform federal functions only part-time. *See Huyen Pham, 287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1263–64 (2018). Second, because 287(g) agreements must be “consistent with State and local law” and are subject to negotiation between the federal and state or local government, 8 U.S.C. § 1357(g)(1), (5), states and localities are explicitly authorized to place limits on the work their officers do on behalf of federal immigration authorities.

Fourth, states can encourage de-masking by taking ICE's concerns seriously. ICE officials claim that agents need to obscure their identities to protect themselves from retaliatory violence and harassment. According to DHS, assaults on ICE officials in the first six months of 2025 were up 830% compared to the same period in 2024.⁷⁰ There is reason to doubt these claims. Skeptics note that while the overall percentage of assaults has dramatically increased, the total number (seventy-nine) remains low and comes at a time of increased interaction between ICE agents and the public—and increasingly aggressive tactics from ICE.⁷¹ Too, there is reason to be skeptical of some claims of assault. For example, New York City Comptroller Brad Lander was arrested (though not charged) for assaulting ICE agents after he linked arms with a man the agents were attempting to detain and demanded to see their warrant.⁷²

Regardless, it is true that ICE agents have occasionally been victims of harassment, intimidation, and violence because of their work.⁷³ While state and local officials must take care not to chill constitutionally protected speech,⁷⁴ they should seek to apprehend and prosecute those perpetrating crimes targeting ICE. Demonstrating a commitment to ICE agents' safety on and off the clock will encourage those agents not to obscure their identities during normal operations.

Finally, state and local lawmakers should continue to use the bully pulpit to advocate against ICE agents masking. Elected officials have already made substantial efforts to oppose the practice. For example, in June 2025, members of the Twelfth District Police Council in Chicago wrote a letter to Chicago Mayor Brandon Johnson and Police Superintendent Larry Snelling calling on them to take action against aggressive ICE tactics, including

70. *DHS Announces ICE Law Enforcement Are Now Facing an 830 Percent Increase in Assaults*, HOMELAND SEC. (July 15, 2025), <https://www.dhs.gov/news/2025/07/15/dhs-announces-ice-law-enforcement-are-now-facing-830-percent-increase-assaults> [https://perma.cc/UM4X-6RFZ].

71. Robert McCoy, *ICE Finally Admits Truth About Dramatic Spike in Assaults of Agents*, NEW REPUBLIC (July 1, 2025), <https://newrepublic.com/post/197476/ice-truth-data-increase-assaults-agents> [https://perma.cc/CWU8-8GCF].

72. Meredith Deliso, *Brad Lander, New York City Comptroller and Mayoral Candidate, Not Charged Following Arrest at Immigration Court*, ABC NEWS (June 17, 2025), <https://abcnews.go.com/Politics/brad-lander-new-york-detained-ice/story?id=122937246> [https://perma.cc/L9LR-8KVX].

73. *Anarchists and Rioters in Portland Illegally Dox ICE Officers and Federal Law Enforcement*, HOMELAND SEC. (July 11, 2025), <https://www.dhs.gov/news/2025/07/11/anarchists-and-rioters-portland-illegally-dox-ice-officers-and-federal-law> [https://perma.cc/5NXK-DUM9]. On two recent occasions, ICE facilities have been targeted by snipers. *See Live Updates: Detainee Killed and 2 Others Wounded in Dallas ICE Office Shooting*, N.Y. TIMES (Sep. 24, 2025), <https://www.nytimes.com/live/2025/09/24/us/dallas-ice-shooting#01a8ddc8-b831-5b50-87b8-3fec0903a110> [https://perma.cc/EM62-YSVU]. However, because these attacks appeared to target ICE facilities as ICE facilities, rather than particular agents, they raise different safety concerns than those agents are apparently seeking to address by wearing masks on duty.

74. Chauvin, *supra* note 4 (manuscript at 5–11).

masking.⁷⁵ Johnson responded by issuing an executive order prohibiting Chicago police from wearing face coverings on duty and urging (but not requiring) federal law enforcement not to do so.⁷⁶ In July 2025, twenty-one state attorneys general sent a letter to members of Congress, urging them “to consider and advance legislation that would generally prohibit federal immigration agents from wearing masks that conceal their identity and require them to show their identification and agency-identifying insignia.”⁷⁷ And in early August 2025, state lawmakers from Massachusetts, New York, and Pennsylvania came together to lead a rally against ICE masking.⁷⁸ These and similar tactics are an effective means of pressuring immigration agents to take off the masks.

IV. BEST PRACTICES

In summary, state and local lawmakers considering legislation intended to limit ICE-agent masking in their jurisdictions should employ these best practices:

Focus on state and local law enforcement. If legislators do seek to enact legislation preventing law enforcement from masking, they should make clear that it applies only to officers they have the authority to regulate. Lawmakers should take care to ensure that federal law enforcement is not covered under any such bill.

Consider opportunities for cooperation. If politically palatable, legislators could consider opportunities to condition cooperation with federal immigration authorities on certain conditions being met, such as ICE officers not wearing masks and wearing sufficient identification while performing immigration enforcement operations.

Focus on policy. Relatedly, to the extent that legislators seek to limit cooperation between state or local law enforcement and ICE, they should make clear (through formal legislative findings or similar mechanisms) that the decision was made for policy reasons, and not because the immigration

75. 12th Police District Council (@12thdistrictcouncil), INSTAGRAM (June 24, 2025), https://www.instagram.com/p/DLSzyQ4P2X7/?hl=fr&img_index=1 [https://perma.cc/SAU2-FACT].

76. Exec. Order No. 2025-6 § 4 (Chi. 2025).

77. Letter from Letitia James, Att'y Gen. of N.Y., et al., to Members of Congress, at 1 (July 15, 2025), <https://oag.ca.gov/system/files/attachments/press-docs/Letter%20re%20ICE%20Mask%20Legislation.pdf>. The City Council in Evanston, Illinois, has similarly urged state and federal lawmakers to prohibit ICE agents from wearing face coverings while on duty. Richard Requena, *Evanston City Council Looks to Ban Masks on ICE, Other Law Enforcement Agents*, CHI. TRIB. (Sep. 3, 2025), <https://www.chicagotribune.com/2025/09/03/evanston-ban-masks-on-ice-agents> [https://web.archive.org/web/20250915021304/https://www.chicagotribune.com/2025/09/03/evanston-ban-masks-on-ice-agents].

78. NBC 10 NEWS, *State Lawmakers Call for ICE Agents to Take Off Their Masks*, WJAR (Aug. 6, 2025), <https://turnto10.com/news/local/state-lawmakers-call-for-ice-agents-to-take-off-their-masks-massachusetts-new-york-and-pennsylvania-aug-6-2025> [https://perma.cc/GSC9-7FMT].

laws are constitutionally invalid. (On the other hand, states may constitutionally stop cooperating with ICE for other reasons. For instance, if a state determines that ICE is enforcing the immigration laws in a cavalier manner that could expose state or local law enforcement to liability to, for example, civil rights violations if they cooperate with the federal government, that would be a constitutionally valid reason to withdraw cooperation.)

Include a severability clause. To the extent that a provision prohibiting federal agents from masking is included in a broader bill, lawmakers should include a severability clause indicating that if any provision of the bill is found invalid, the remainder of the bill remains in force. Doing so will help protect the entire bill from being voided if only a portion of it violates the Constitution.

Together, these practices will help lawmakers craft legislation that can withstand constitutional scrutiny.

CONCLUSION

The specter of masked agents of the state seizing people off the street should trouble us all. State and local legislators are right to decry the practice and to do all in their power to limit it. But their powers are not boundless, and they should not seek to end an anti-constitutional practice by enacting unconstitutional laws.