MEMORANDUM

To: **Representative Martin LaLonde**
From: **Rodney A. Smolla**[1]
Re: **Submission of Written Testimony on Anti-Masking Legislation**
Date: **May 8, 2026**

I. Introduction

This Memorandum is prepared as expert testimony for your consideration in assessing the constitutional issues surrounding Senate and House Bills 208. Please treat this as a submission to you and the Judiciary Committee to distribute and use as you may deem fit. I submit this as a constitutional law scholar, professor, and litigator with over 45 years of experience in the field.

As we discussed in our phone conversation, I fully support the policy considerations that drive legislative efforts to limit masking by law enforcement officials. I find the masking of law enforcement personnel of the sort that has gained particularly notoriety over the last year as practiced by federal immigration officials abhorrent and contrary to our democratic traditions. Similarly, the Vermont General Assembly should be lauded for taking steps to curb such practices at the state and local law enforcement level. Policies directed at state and local law enforcement officials pose no federal constitutional issues.

II. The Supremacy Clause

Proposals to require that *federal* officials refrain from wearing masks while engaging in federal enforcement activity within the State of Vermont, however, conflict with principles emanating from the Supremacy Clause of the Constitution of the United States. U.S. Const. Art. IV, § 2, cl 2. Two related constitutional law doctrines are implicated: (1) the "governmental immunity" doctrine; and (2) the "Supremacy Clause immunity" doctrine.

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III. The Intergovernmental Immunity Doctrine

A. The Contours of the Doctrine

The governmental immunity doctrine is derived from the Supremacy Clause. It prohibits states from directly regulating operations of the federal government. It is an ancient doctrine, dating back to the seminal opinion of Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819), declaring that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *Id.* at 436. The principle applies with special force when "the State places a prohibition on the Federal Government." *Hancock v. Train*, 426 U.S. 167, 180 (1976).

B. The Decision in *United States v. California*

In the first major judicial application of the governmental immunity doctrine to efforts by states to force federal officials to cease wearing masks, the United States Court of Appeals for the Ninth Circuit on April 22, 2026, issued an injunction prohibiting California from enforcing its anti-mask provisions against federal agencies. *United States v. California*, No. 26-926, 2026 WL 1088674, at (9th Cir. Apr. 22, 2026). The California statute at issue was in all material respects identical to the proposed Vermont ban. The Ninth Circuit observed that "[t]he Supremacy Clause prohibits States from enacting a law that directly regulates federal operations even if the law regulates state operations in the same manner." *Id.* at *5. Thus, the California statute was not saved by the fact that California was applying the prohibition to state and federal authorities alike.

While the California law was a criminal statute, and the proposed Vermont Bill provides only for "civil penalties" for violation of the anti-masking provisions, that distinction would not save the Vermont statute. For whether the sanction is a criminal sanction or a civil penalty, the law would operate as an attempt by Vermont to *directly* regulate a federal agency or its officials in the performance of their duties. Such regulations are squarely prohibited by the Supremacy Clause. *Id.*at *6 ("the Supremacy Clause does bar *direct* state regulation of the federal government.") (emphasis in original), *citing United States v. Washington*, 596 U.S. 832, 839 (2022).

IV. Supremacy Clause Immunity

The second constitutional law principle at issue is the known as "Supremacy Clause Immunity." It too has longstanding origins, dating back to a landmark 1890 Supreme Court decision, *In re Neagle*, 135 U.S. 1 (1890). The doctrine generally immunizes federal officials from criminal prosecutions by states when those officials are carrying out federal duties. As the United States Court of Appeals for the Second Circuit, which encompasses Vermont, has explained, "by providing immunity from suit rather than a mere shield against liability, the defense of federal immunity protects federal operations from the chilling effect of state prosecution." *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). In the Second Circuit the doctrine provides immunity so long as the official does "no more than was 'necessary and proper' to carry out his duty." *Id.* To meet this standard, two conditions must be satisfied: (1) the actor must subjectively believe that his action is justified; and (2) that belief must be objectively reasonable. *Id.* If a federal agency *orders* its law enforcement personnel to wear masks while engaging in their official duties, any individual federal officer who was subjected to prosecution and the prospect of civil penalties by Vermont would interpose the argument that in simply following the commands of the agency, the officer's actions were both subjectively and objectively reasonable in carrying out the official's assigned duties. And since, under the intergovernmental immunity doctrine previously discussed, Vermont could not *directly* regulate the actions of a federal agency itself, the prosecution against the individual federal officer would also fail.

V. Conclusion

In conclusion, while I fully support the public policy rationale animating efforts to restrict the wearing of masks by law enforcement officials, local, state, and federal, it remains my expert opinion that any attempt by Vermont to regulate the policies of federal law enforcement agencies or to prosecute individual federal officers who are following the masking instruction of their agencies would be adjudged by courts constitutionally impermissible.