

S.208 Analysis and Recommendations

The ACLU of Vermont writes today to share our continued support for advancing S.208, and to share our concerns with several proposed amendments that have been put in front of the committee.

Ninth Circuit Ruling on California Law

Before addressing the specific language of the bill, we want to address the Ninth Circuit's recent ruling on California's law addressing law enforcement identification. We understand that the recent order from the Court of Appeals for the Ninth Circuit enjoining the implementation of certain provisions of California's "No Secret Police Act" and "No Vigilantes Act" has created some uncertainty about the viability of S.208. We write to reassure the Committee that this non-final, non-controlling order from an out-of-circuit panel has not rendered S.208 unconstitutional. Instead, we urge the Committee not to abandon the important work it has undertaken thus far and to move forward with protecting the rights of all Vermonters.

In *United States v. California*, the federal government challenged two sections of the No Secret Police Act, which prohibited federal law enforcement specifically from wearing facial coverings in many circumstances, as well as two sections of the No Vigilantes Act, which required most non-uniformed law enforcement officers to display identification while performing their duties in California and their agencies to adopt a written policy on identification, subject to criminal prosecution by the state. Predictably, the district court enjoined only the masking prohibition as unlawfully discriminating against the federal government. Regarding the identification requirement, the district court ruled that the United States had not sufficiently shown that this provision would unlawfully interfere with or control federal law enforcement operations and was thus permissible under the Supremacy Clause.

At the United States' request, the Ninth Circuit temporarily enjoined the identification requirement as applied to federal officers. And on April 22, a three-judge panel comprised of two Trump-appointees issued an injunction pending appeal.

We remain confident that this decision has not undermined S.208 for several reasons.

As a preliminary matter, this order was issued by a three-judge panel from a different circuit, and as such, its analysis and conclusions are not binding on the Court of Appeals for the Second Circuit, the circuit that includes Vermont. The holdings of its sister circuits do not tie the Second Circuit's hands.

And not only is the order non-binding in Vermont, but there is also no guarantee that the Second Circuit would be persuaded by its cursory and questionable reasoning. In its strikingly short opinion, the Ninth Circuit panel failed to even



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attempt to square its logic with conflicting Supreme Court precedent. Although the panel tried to distinguish the state's ability to regulate the conduct that ordinary citizens could perform from federal government actions, none of the cases it relies upon in support actually make that distinction.

Furthermore, the panel's mischaracterization of the identification provision as a state law *directly* regulating the United States—ignoring the fact that the United States itself failed to show that that provision would interfere with federal functions—is a holding so overbroad, internally contradictory, and contrary to the fundamental principles of state police powers that its implications will give any thoughtful court pause.

Nor is this order the final word even on this particular law in California. As noted, this is an injunction pending an appeal, not a final decision on the merits. This means that California has the option of appealing the decision to the full court of appeals for a hearing en banc. Essentially, in the lifecycle of a lawsuit, this case is still in its infancy.

Finally, even if the identification provision is ultimately held to be unconstitutional as applied to *federal* law enforcement—which is by no means a foregone conclusion—laws like S.208 remain on firm constitutional footing as applied to *state and local* law enforcement. Masking and insufficient identification are not problems unique to federal agencies. As legislators heard repeatedly during the course of two hours of public testimony, there have been recent glaring examples of state and local police adopting the tactics of federal immigration enforcement to conceal their identities while performing their public duties. S.208 provides an opportunity to ensure that those upholding Vermont laws are doing so while exercising Vermont values.

Ultimately, the legal battle around mask bans and identification requirements is playing out exactly as we expected: the laws are being challenged, and there likely will be disagreement amongst the circuits. But we caution the legislature that preemptively capitulating while the law is still developing—with S.208 and other legislation— is, essentially, doing the Trump Administration's work for them. In S.208, this Committee has the attention and strong, ongoing support of the ACLU and the Vermont public.

Overview

S.208 is designed to ensure the health and safety of the general public and law enforcement by helping to promote government accountability and public trust in enforcement branch of our institutions—and is especially needed during this time when public trust in law enforcement, both federal and state, is dwindling rapidly. With this context in mind, we are generally concerned with the growing list of exceptions that have been added to S.208.

As the list expands, so too does the risk of exploitation without a meaningful way to distinguish between the legitimate exercise of police duties versus bad actors



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exploiting the exceptions to conceal their identities and erode trust with the community.

In that light, we have three proposed changes to the newly added list of exceptions found in draft 1.1 as well as some proposals to strengthen the remedies section.

Identification Requirements (c)(3)(C)

Under section 2373 (c)(3)(D) on page 3 of 6 lines 7-9, it states that an officer is not required to be clearly identified when “responding to exigent circumstances, either on or off duty, *including* situations involving imminent danger to persons or property, escape of a perpetrator, or destruction of evidence;” We recommend changing the language to “responding to exigent circumstances *involving* imminent danger to persons or property, escape of a perpetrator, or destruction of evidence.” Changing the language from “including” to “involving” removes any ambiguity regarding what constitutes an “exigent circumstance,” providing essential clarification for law enforcement in performance of their duties.

Identification Requirements (c)(3)(D)

Under Section 2373 (c)(3)(E) on page 3 of 6 lines 10-11, it states that an officer is not required to be clearly identified when “performing tactical team responsibilities when assigned to a tactical team unit.” This exception appears overly broad and could undermine the law’s effectiveness, especially when applied to federal agents who could apply their own definitions of what agents are members of a tactical team and claim that all activities undertaken by their agents, such as immigration enforcement, constitute tactical team responsibilities.

This exception also raises concerns about tactics of state and local law enforcement in situations like what happened in South Burlington on March 11th. One of the concerns this committee heard from people present that day was that they experienced excessive use of force from members of state law enforcement who they were unable to identify because they were masked without identification. Instead of addressing this issue, this exception appears to sanction it. To that end, we ask the committee to strike Section 2373 (c)(3)(E).

Masking Exceptions (d)(2)(G)

Section 2373 (d)(2)(G) on page 4 of 6 lines 16-17 states that an officer may wear a mask, garment, or disguise that conceals their facial identity if that facial covering is “designed to protect tactical unit members from physical harm.” Similar to our concerns above, this provision is overly broad and could severely undermine the law’s effectiveness, especially as applied to federal agents.

If this law was to be enforced against a masked federal agent, the agent could easily sidestep accountability and contend that the mask was one designed to



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protect tactical unit officers from physical harm. It does not require that the officer wearing the mask be a member of a tactical unit, nor does it put parameters around the type of physical harm the mask might be protecting against. Federal officers have repeatedly claimed that masks are necessary to conduct their operations because they could encounter physical harm if they were identified. Further, under the previous exceptions, the bill already sufficiently enumerates specific examples of protection from physical harm already exempted that make this provision unnecessary. For these reasons, we would ask the committee to strike this section from the bill.



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Penalty (g) Inseverability

Section (f)(g) on page 5 of 7 lines 15-18 states that if any provision of this bill is held to be unconstitutional or its applicability to any person or circumstance is invalid, then the rest of the provisions of this bill will also be rendered invalid. There is no legal benefit or policy justification for including this clause. As noted previously, even if the identification provision is ultimately held to be unconstitutional as applied to *federal* law enforcement, S.208 remains on firm constitutional footing as applied to *state and local* law enforcement. Therefore, we recommend that this committee strike this section from the bill.

(f) Penalty – Further Recommendations

We recommend that the following provisions be included to strengthen the penalty section in the event of a violation of S.208.

- We recommend that the Attorney General's office be given enforcement authority to issue citations against law enforcement officers in violation of S.208.
- We recommend creating a civil right of action, with attorney fees included, to ensure that every Vermonter has their day in court if they are deprived of liberty in a manner that violated S.208.
- We also recommend that, if a law enforcement officer arrests an individual while the officer is violating S.208, the officer may be held liable for false imprisonment, a similar provision found in S.209.

Conclusion:

We want to thank the committee for working on S.208 as diligently as it has. During a time of great harm and fear within our communities, this is a crucial step forward in promoting government accountability and ensuring public safety. We hope that this committee will make these recommended changes to the bill and continue to advance S.208 through the legislature.