VERDICT

LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

Absent Federal Consent California Cannot Regulate ICE's Use of Masks

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Late last week, California Governor Gavin Newsom signed into law a package of bills, including one (SB 627) that seeks to presumptively prohibit all law enforcement officers—both federal and state—operating in the state from covering their faces (i.e., wearing masks) when engaging with members of the public. The measure contains various exceptions, including clear plastic shields, medical masks, and various types of protective eyewear. Violations of the law would be punished as misdemeanors. In the space below, I explain why SB 627 (and most of the other bills Governor Newsom signed that implicate similar analyses and are likely to suffer a similar fate) would at this time seem to be constitutionally dead on arrival.

Clearly California has authority to regulate the law enforcement practices of

state and local police (just as Congress could enact such a law regulating masking practices of federal employees—indeed there are bills to that effect that have been introduced in Congress but that are unlikely to go anywhere). But can California, consistent with the Supremacy Clause of the Constitution, tell officers of Immigration and Customs Enforcement (ICE), whose recent track record undoubtedly prompted SB 627, how they must discharge their jobs?

Supporters of SB 627, including California's Democratic Governor, do acknowledge that there are constitutional questions raised by the measure, but seem to be taking the position that the law's applicability to state as well as federal officers insulates the law from invalidation, unless ICE can establish to the satisfaction of a court that the use of masks substantially aids ICE in performing its duties. Consider the following excerpts from a public commentary on the bill from law professor (and Dean) Erwin Chemerinsky from the UC Berkeley Law School:

> [T]he constitutionality of California regulating federal law enforcement is more uncertain [than Congress's powers to do so]. It is crucial that SB 627 does not regulate only federal agents, but rather applies to those engaged in policing at all levels of government. A state cannot directly regulate the federal government. State and local governments, however, can require that federal employees comply with general laws unless doing so would significantly interfere with the performance of their duties. . . . Wearing masks is not necessary for ICE to perform its functions. Law enforcement, including ICE, has long operated without their agents wearing masks.
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> Acting ICE Director Todd Lyons said that he [is allowing] the practice of wearing masks to continue because of concerns about his officers' safety, claiming that officers will be targeted if their identity is known. But no evidence whatsoever has been provided to support this fear. . . . [Wearing masks] serves no law enforcement purpose. It is unclear, though, whether courts will uphold SB 627 if it is enacted by the

California legislature. The relevant Supreme Court case is from 1890, In re Neagle. After Supreme Court Justice Stephen J. Field received a death threat, David Neagle, a deputy U.S. marshal, was assigned to protect him. A man named David Terry assaulted Field while the justice was in California, and Neagle shot and killed Terry. Neagle was arrested by police in California and charged with murder. The U.S. Supreme Court unanimously held that the supremacy of federal law and the federal government prevented prosecuting a federal officer for actions taken while performing his duties. "In taking the life of Terry, under the circumstances, (Neagle) was acting under the authority of the law of the United States, and was justified in so doing," the court concluded. "He is not liable to answer in the courts of California on account of his part in that transaction."

There are few cases applying the Supreme Court's decision in Neagle, but the issue arose when Idaho attempted to prosecute federal officers after a standoff at Ruby Ridge turned violent and people were killed. In Idaho v. Horiuchi, in 2000, the United States Court of Appeals for the Ninth Circuit refused to dismiss Idaho's prosecution of the federal officers, saying that more evidence of what occurred was needed, and summarized the law: "In keeping with the constitutional allocation of powers between the federal government and the states, federal agents enjoy immunity from state criminal prosecution. That immunity has limits. When an agent acts in an objectively unreasonable manner, those limits are exceeded, and a state may bring a criminal prosecution."

Thus, the issue of whether ICE agents can be prosecuted under state law for wearing masks while apprehending people turns on the question of whether it is reasonable for them to do so. If SB 627 is enacted, courts should uphold it and conclude that there is no reasonable need for ICE agents to be wearing masks. . . .

With all appropriate respect to my long-time friend and colleague, Professor

Chemerinsky identifies the wrong doctrinal test, and therefore is mistaken in suggesting (at least on basis of the arguments made so far) that this is a close case, i.e., one that California would or should have a meaningful chance of winning. Even assuming that the inclusion of state and local enforcement officers in SB 627 makes it "non-discriminatory" (an interesting question given California's likely motives for enacting the law), such inclusion doesn't dissolve the constitutional problem. Professor Chemerinsky's confusion in this respect becomes apparent when we compare two of his assertions: on the one hand he (rightly) asserts that "a state cannot directly regulate the federal government." At the same time, he says that "it is crucial [for upholding the bill] that SB 627 does not regulate only federal agents, but rather applies to those engaged in policing at all levels of government." He thus apparently, though erroneously, believes that a law that regulates the federal government alongside state governments is not a law that "directly regulate[s]" the federal government. But this is simply a clear category mistake. A direct regulation of the federal government can be discriminatory, or it can apply to others besides the federal government. *But the question of directness is distinct from the question of discrimination.* The Supreme Court made that point super explicit just two years ago, in *United States v. Washington*, where the Court observed that, notwithstanding some fuzziness in earlier cases, the Court has come "to understand the doctrine [concerning state regulations that impact the federal government] . . . as prohibiting state laws that *either* "regulat[e] the United States directly *or* discriminat[e] against the Federal Government or those with whom it deals" (e.g., contractors)" (emphasis in original). The Court's italicization of "either" and "or" highlights that direct regulation and discriminatory regulation are two separate categories of (at least presumptively) prohibited state laws. If a state law applies directly against the federal government yet doesn't discriminate against the feds, it is nonetheless invalid—unless there is a clear indication from Congress that federal officials are subject to state law.

There may be in some cases a tough question of whether a state law that affects the federal government does so indirectly rather than directly regulating it.

Broadly speaking, indirect regulations are state laws that regulate individuals in their personal capacities or (in the case of government contractors) in all their professional activities, rather than in their on-the-job capacity as federal employees. For example, a law requiring *everyone* to hold a driver's license to operate a motor vehicle on the roadways might *indirectly* impair federal efficiency to the extent that some federal employees or contractors have to take a bus rather than drive (which otherwise would be easier for them) when commuting to and from home and a federal worksite. But a law that tells a mail carrier he has to have a driver's license *even while performing the federal job of delivering the mail* is a *direct* regulation of federal operations, and is invalid (as the Supreme Court has held) unless Congress has chosen to subject mail carriers to state law (which it likely would for speeding and red-light laws). And that is true without the federal government having to show that the state-law licensing requirement imposes a substantial burden on mail-delivery efficiency. In cases of *indirect* effect, courts often do inquire, in the absence of affirmative congressional preemption, about the extent to which important federal objectives are actually impeded before they strike state laws down. But where regulation is direct, the question is not about substantial effect; it is instead about whether Congress has chosen to subject federal employees to state regulation.

In the case of SB 627, there is no doubt that a law that tells ICE officers (even among others) how they must do their jobs is a law that is directly regulating federal instrumentalities; the state here is *regulating how the feds do their job*, not regulating in their private capacity individuals who happen to work for or with the federal government. Just as Maryland could not require that U.S. Postal carriers pay for and obtain a state driver's license to drive on state roads to deliver the mail, so too California cannot tell federal law enforcement officials the details of how to do their jobs. At least absent congressional assent.

None of this is to say the true generality of state law is completely irrelevant to the proper federalism analysis. Again, state laws that directly or discriminatorily regulate the federal government can still survive constitutional

challenge if, but only if, there is a clear indication from the federal government itself that it wants its personnel to abide by the law. (Even in the seminal *McCulloch v. Maryland* case, the federal government could have chosen to submit to the Maryland tax, and that outcome would have been constitutionally permissible.) If the ultimate question is whether the federal government chooses to subject its employees to direct state regulation, rather than whether the state has the *power* to force the federal employees to submit, then Professor Chemerinsky's framing—that federal employees *must* comply with non-discriminatory state regulations unless doing so would demonstrably interfere with federal objectives—is flatly wrong. But whether a state law is truly general, that is, applicable to all persons (government employees, state employees and private employees) might bear on how likely is it that Congress would want federal employees to comply. After all, if a state is telling all employers or all polluters or drivers (including those within the federal government) how to employ, pollute or drive responsibly, rather than telling the federal government (albeit alongside state and local governments) how to responsibly discharge *sovereign* powers, that would, as a general matter, seem less problematic from Congress's point of view. In the same vein, the federal law at issue in *Garcia v. San Antonio Metropolitan Transit Authority* (telling all employers how to be employers) was less troublesome than was the law in *New York v. United States* (telling states how to discharge sovereign powers) from a state's perspective. Even as to truly generally applicable laws, though, the choice is always up to Congress whether to submit to state regulation (Congress can always preempt any state regulation of federal activities), but the background assumption/presumption/default about how much evidence we might need before concluding that Congress has chosen to permit direct regulation of federal employees might vary.

Another relevant factor in determining the likelihood the federal government has chosen to subject its personnel to state regulation is whether the state law is civil or criminal. In *Naegle*, the case cited by Professor Chemerinsky, it was undoubtedly relevant that the California law in question imposed harsh criminal penalties. (Such penalties also implicate the separate question of

whether federal employees are on sufficiently adequate notice that they must comply with state law.) So too, it might be relevant, in deciding whether the federal government could be said to permit state law to apply to its employees while they are on the job, whether the federal employees are themselves violating federal law in doing whatever it is the state seeks to regulate. Of course, the substance of and remedies for federal violations is for Congress to decide (and Congress could, in many instances, choose *not* to subject its employees to state liability even when they violate federal law), but, again, we might have different assessments of what Congress likely prefers when federal law is itself not being respected. And when, as in *Neagle* and the Ruby Ridge episode (the two examples Professor Chemerinsky gives) there are allegations of violations by federal employees of the *U.S. Constitution* (excessive force in violation of the Fourth and Fourteenth Amendments) then state law may very well apply of its own force, and a federal desire to immunize federal employees who have acted unconstitutionally may not be necessary and proper to overcome state-imposed liability.

Note, in these respects, that the one lower court case Professor Chemerinsky cites, the Ruby Ridge case, is inapposite for two reasons. First, the case was vacated by the Ninth Circuit and thus should not be invoked for any authoritative purposes. Second, as noted above, the state of Idaho alleged that the defendant had acted outside the bounds of the Constitution, and that moves the case into a different category.

Assuming that there are no claims that ICE's use of masks is unconstitutional (and the supporters of California's enactment don't seem to be making any—Professor Chemerinsky never asserts ICE itself is acting in violation of the Tenth Amendment or any other part of the Constitution), the question of whether a federal employee acted reasonably or whether there was a demonstrated need for him to do whatever state law forbids (the two questions Professor Chemerinsky asks) are simply the wrong questions. Instead, the question is whether the federal government has subjected its employees to state regulation. If so, state law can apply. But if not, state law cannot. The questions Professor Chemerinsky focuses on *may,* in some settings, inform our

instincts about what Congress intends, but the ultimate question is what the federal government wants, not what a federal court finds necessary for effective enforcement. Another (doctrinal) way of putting the point is this: if in the absence of state law a particular federal enforcement policy would not be invalidated under the Tenth Amendment as beyond federal power (a test that is generous and that does not require the federal government to prove actual necessity but instead asks only whether the policy is rationally related to a legitimate federal objective), then state law simply cannot apply, absent a finding of federal consent.

And no one has established (or even alleged) anything indicating Congress wants ICE members to be subject to a patchwork of state regulations of enforcement practices. Until that changes, the (im)permissibility of California's law doesn't seem like a difficult question at all.

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