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LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

Why the Trump Administration's Most Recent Legal Attempts to Pressure California Election Officials Concerning Alleged Noncitizen Voting Are Likely to Fail

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Last week the federal government sued California in federal court seeking an emergency injunction to prevent state election officials from including in the state's ultimate tallies

federal ballots that may be cast next month by about 20,000 individuals whom the United States suspects are not U.S. citizens. The lawsuit is one of many actions the Trump administration has taken over the last several months to interject itself into how states will administer the upcoming midterm elections. Like earlier, similar efforts, including the executive order—directing the U.S. Postal Service to refrain from processing mail-in ballots of suspected noncitizens—whose implementing Postal Service rule was blocked by the federal courts and found likely to be unlawful by the U.S. Supreme Court, this most recent gambit by the administration has little chance of success.

To see why, we must first understand the gist of the federal government's lawsuit. As the Complaint filed in federal court in the Central District of California explains, "[f]ederal law prohibits noncitizens from voting in federal elections. See 18 U.S.C. § 611(a)." So far, so good. But the next assertion by the United States in its Complaint is legally dubious: "That law is an exercise of Congress's clear constitutional power to regulate the domestic conduct of noncitizens *and to regulate the manner of federal elections*" (emphasis added). As I have explained in a previous column, the federal law prohibiting noncitizens from voting (in federal elections) *might* be a permissible exercise of Congress' power to regulate

immigration and naturalization (although, as I pointed out, if that is the constitutional basis for the statute, it is somewhat odd that the consequences of violation go beyond deportation and involve prison time). But in no event can section 611(a) be justified as a permissible exercise of Congress' power under the so-called Elections Clause (Article I, section 4), which allows Congress to "make or alter" regulations of the "times, places and manner" of congressional elections, because the prohibition on noncitizen voting involves not a "when, where or how" matter but instead a "who" matter. And as to *who* may vote in congressional elections, Article I, section 2 gives *that* decision to states, and not the federal government.

The fact that section 611(a) is justifiable (if at all) only on the basis of Congress' immigration/naturalization power (and not election-regulation authority) is important, because (as I noted in my earlier column) immigration/naturalization power (unlike Elections Clause power) is limited by the so-called anti-commandeering principle, associated most prominently with the *New York v. United States* and *Printz v. United States* Supreme Court cases. Under that principle and those cases, the federal government cannot require states to use their executive personnel to implement or enforce federal law. So while the federal government may be able, through federal investigators and prosecutors, to punish noncitizens

who fill out and submit federal ballots, it cannot force state regulators to investigate and enforce the federal prohibition. And yet that is what the federal government has been demanding that California do. Per the Complaint:

> Days ago, the Federal Government…sent relevant California officials a list of over 20,000 names of people the Federal Government believes are likely noncitizens who were sent a vote-by-mail ballot from California to participate in the federal election [and directed] California to review the list and, in partnership with federal agencies, to determine whether citizens were listed…. If California was unable to independently confirm the citizenship of people on that list, the Federal Government [sought to have] California set aside ballots received from them until the person's citizenship was confirmed.

This kind of command to states—to investigate individuals, confirm facts and act regulatorily on those facts—seems directly forbidden by *Printz*. Just as state police cannot (as in *Printz* itself) be required to conduct federally mandated background checks prior to the sale of firearms, and state police and prisons cannot be told to use their investigative and detention resources to identify or hold suspected

noncitizens so that the federal Immigration and Customs Enforcement agency might more easily be able to arrest and deport such individuals, so too states can't be required to make an eleventh-hour, all-hands-on-deck investigative effort to identify and segregate noncitizens who might seek to vote.

The United States attempts to avoid the commandeering problem by characterizing this case as one of federal preemption. Again, per the Complaint:

> California's actions here—sending vote-by-mail ballots and tabulating them without verifying citizenship in collaboration with the Federal Government after being told of likely noncitizen voters—are preempted, as applied, insofar that California will count vote-by-mail ballots of likely noncitizen voters violates 18 U.S.C. § 611 [sic]. See *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("It is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.").

But this attempted recharacterization is unpersuasive. For a state to be found to be violating federal law, state

"inducement, encouragement or promotion" has to involve more than a state's decision not to investigate and regulate; that is one teaching of *Murphy v. NCAA*, where the Court made clear that a state could not be held to be violating federal law for impermissibly "authorizing" sports gambling simply because the state had chosen not to prohibit the practice. Although some of the reasoning of the *Murphy* ruling, not relevant here, is open to serious question, the lesson that a state is not impermissibly authorizing something simply by not prohibiting or investigating it remains quite valid.

The Complaint filed by the United States goes on, in a related vein, to say:

> If California passed a law that allowed noncitizens to vote for a candidate who is running for a seat in the U.S. Senate or the U.S. House of Representatives, that state law would conflict with federal law, see 18 U.S.C. § 611(a), and would violate the Supremacy Clause.... Because California cannot pass a statute allowing noncitizens to vote in a federal election, it also cannot induce, encourage, promote, or knowingly facilitate noncitizen voting for a candidate who is running for a seat in the U.S. Senate or the

U.S. House of Representatives.

Perhaps that is so (I'd need to give the matter more thought and know more about what "allow" means), but, again, a law affirmatively encouraging people to do something is not the same as a state's decision not to weigh in either way. In *Printz*, Montana's and Arizona's laws that allowed firearms to be sold in those states without background checks having been performed weren't preempted simply on the ground that the states "facilitated" the sale of firearms in contravention of federal law insofar as those states' laws themselves did not require the background checks provided for under federal statute. And in any event, in the present setting, California ***does*** limit voting in federal and statewide elections to citizens only; the dispute here is whether California can be required by the federal government to *enforce* state (or federal) law in ways that the federal government wants but that the state seems disinclined to do, especially at this late date.

To be sure, states and their agents cannot aid or abet persons who are attempting to violate federal law. (That is why, as I have explained, former Wisconsin state court judge Hannah Dugan could be held accountable for knowingly trying to obstruct ICE's efforts to arrest a person outside her courtroom.) And the Complaint filed last week (along with

saber-rattling public threats since then) drives home this specter. Per the Complaint: "A noncitizen who violates the voting ban may be fined or imprisoned. *Id*. § 611(b). Persons also can be in violation of federal law for aiding and abetting, or otherwise facilitating, the federal crime of noncitizen voting. *See* 18 U.S.C. § 2."

But liability under federal aiding-and-abetting principles requires specific knowledge by the alleged aider or abettor concerning the principal violator's actions and intentions. In the present case, California and its officials are not, based on the facts alleged, knowingly abetting any federal violations. Even the federal government doesn't purport to know how many and which individual noncitizens are registered to vote in California and are planning to violate section 611(a). And the federal government's fantastic claims about the number of noncitizen registered voters have been debunked in many other instances. Indeed, the number of suspected noncitizen registered voters in California was pegged by the Trump administration in July at about 190,000, more than nine times higher than the 20,000 figure mentioned in the Complaint filed in California last week. (And in Nevada, the federal government first claimed, a few months ago, that 16,000 noncitizens were on the voting rolls and later reduced that number to 185, every one of whom Nevada officials

subsequently determined was in fact a citizen.) It is precisely because the United States does not know which noncitizens are registered and planning to vote that it seeks to force California to assist it in identifying and segregating the votes of such individuals. And the fact that the federal government is telling states that some people within these states may be seeking to use state-run elections to violate section 611(a) might, at the very most, make some states (depending on when they get that information and how much time and energy would be required to look into it) negligent or reckless, but certainly not knowing abettors of any particular individuals.

None of this means that Congress lacks tools to induce states to assist the federal government in identifying and deterring noncitizen voters. As the Court recognized in *New York* and *Printz*, Congress can condition federal funding on specified state cooperation, and can also threaten to preempt state laws absent state assistance. So, for instance, Congress could require states to examine their rolls and expunge noncitizens in exchange for the receipt of federal monies for election administration. Or Congress could tell states that, unless they undertake specified acts to purge noncitizens from the voting rolls, Congress will exercise its power to prescribe the manner of voting (e.g., in-person voting only with voter-ID

requirements) in federal elections under the Elections Clause, so as to make federal detection and punishment of noncitizen voters easier. But in both of these hypotheticals, Congress needs to specify with clarity and in advance the conditions imposed on states (something Congress has not done). And states must formally be given a choice. That is what distinguishes permissible conditional spending and conditional preemption from impermissible commandeering. The federal government's argument that section 611(a), standing alone, displaces state law and forces states to affirmatively and involuntarily assist federal officials fails because such a reading of federal statutes amounts to impermissible commandeering.

All of the foregoing concerns the (un)likelihood that the federal government's arguments on the merits will succeed, a key factor informing the availability of emergency injunctive relief in federal court. This is to say nothing of the so-called equitable principles, including the doctrine known as the *Purcell* principle, which also counsel strongly against federal judicial interference with state election administration so close in time to an election. Given all this, the federal government faces an extremely uphill climb in its efforts to obtain judicial relief.

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