

No. 25A443

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, *et al.*, Applicants,

v.

ILLINOIS, *et al.*, Respondents.

BRIEF OF THE STEADY STATE AS *AMICUS CURIAE*
IN OPPOSITION TO APPLICATION FOR STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
A. Recent Events Have Accelerated and Amplified Authoritarianism Concerns	2
1. Recent Trump Administration Attempts to Unlawfully Redefine the Military	2
2. Recent Expansions of National Guard Deployments for Domestic Purposes	5
3. Recent Elimination of DOJ Guardrails & Potential Legal Mischief Inherent in Designation of Amorphous “Antifa” as a “Domestic Terrorist Organization”	14
4. Recent Acceleration of Executive Overreach and Growing Authoritarianism	17
B. Peacetime Attempts to Deploy the National Guard for Domestic Purposes, Especially Law Enforcement, is Appropriately Reviewed and Controlled	19
CONCLUSION	25

TABLE OF AUTHORITIES

	<u>Page</u>
 CASES	
<i>Newsom v. Trump</i> , No. 3:25-cv-04870-CRB (N.D. Cal. 2025), ECF #166-1	2
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18 U.S.C. § 2331(5)	16
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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*¹

The Steady State, an unincorporated association, is a non-profit advocacy organization comprised of more than 340 former senior U.S. government officials. The collective careers of *Amicus*' members span decades of service across Republican and Democratic administrations in all three branches of government – as senior Department of Defense officials, ambassadors, foreign service officers, intelligence officers, policy advisors, oversight officials, Congressional staffers, and prosecutors. We have dedicated our professional lives to defending American democratic values and the rule of law at home and promoting those values abroad, with extensive experience balancing national security imperatives against constitutional and legal frameworks that protect individual rights. Many of *Amicus*' members have spent our careers studying, reporting on, and confronting the rise of authoritarian regimes across the globe—in regimes that misuse military, paramilitary, and intelligence elements to violate the law, suppress lawful dissent, and consolidate power in a political leader. Other members have served in or worked with the very same military and security elements now being deployed in the United States by the current Administration. We understand how dangerous such institutions can be when not constrained by law and directed solely by the whim of a political leader. We believe our experience gives us a unique perspective into how perilous it can be to a democracy to allow its military to be used domestically, without meaningful accountability, for political purposes.

SUMMARY OF ARGUMENT

The Court should deny the Application because courts are not barred from evaluating 10 U.S.C. § 12406 compliance, and the District Court's factual findings were not clearly erroneous, especially given the larger risk inherent in the domestic National Guard deployment sought here.

¹ No counsel for any party has authored this brief in whole or part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

A. Recent Events Have Accelerated and Amplified Authoritarianism Concerns

The Steady State earlier filed an *amicus curiae* brief in a case challenging the deployment of National Guard troops in Los Angeles. See *Newsom v. Trump*, No. 3:25-cv-04870-CRB (N.D. Cal.), ECF #166-1. Since then, President Trump’s recent call-ups of the Guard in Chicago and several other urban centers portends a continuous, perhaps even indefinite militarization of our nation’s cities. Since that earlier filing, *Amicus* has also seen a number of unprecedented and disturbing events. The authoritarian risks America now faces appear exponentially greater than just two months ago. While the instant case involves only Chicago, this Court cannot fairly ignore the far-reaching consequences of this Application’s breathtaking demand that Presidential deployments of the National Guard, even for domestic purposes, all be declared “nonjusticiable.”

Taken together, recent events raise red flags and reveal ominous challenges our society will face if the various deployments commence, possibly even permanently if they are declared unreviewable, into cities and states for domestic purposes. The instant situation, especially when viewed in context, thus raises far larger issues than simply “preventing another Kent State.”

1. Recent Trump Administration Attempts to Unlawfully Redefine the Military

On September 5, 2025, Secretary of Defense Pete Hegseth stood before President Trump to announce a purported renaming of the Department of Defense as the “Department of War.”² More than a mere semantic change, Hegseth explained the new “War” Department would implement a fundamental change in focus to “lethality” – to a fighting group of “warriors” not tethered to constraints of “legality” he openly castigated as insufficiently “tepid”:

² An earlier “Department of War” had been renamed the Department of the Army and consolidated with the Departments of the Navy and Air Force in 1947; it was later renamed the Department of Defense in The National Security Act Amendments of 1949, Pub.L. 81-216, 63 Stat. 578. The Secretary of Defense actually lacks authority to overrule an Act of Congress, but this purported renaming reflects a pattern of ignoring federal statutory law.

At your direction, Mr. President, the War Department's going to ... go on offense, not just on defense. **Maximum lethality – not tepid legality.** Violent effect, not politically correct. We're gonna raise up warriors, not just defenders. So this War Department, Mr. President, just like America, is back.

(emphasis added).³ Around this time, the renamed “War Department” also announced the first of what would be several military strikes against small boats in international waters near Venezuela – killing all 13 civilians aboard. This order, apparently executed by the Navy,⁴ was premised on a theory the boat was smuggling drugs for a Venezuelan cartel known as Tren de Aragua (“TdA”), although those facts (as with the other military strikes) are unconfirmed. That extrajudicial killing obviously was not remotely acceptable under a “law enforcement” paradigm and was unprecedented. While combatting terrorism had expanded after 9/11/2001 from a law enforcement concern into a military endeavor when adjacent to Congress’ Authorization for Use of Military Force of 2001, Pub. L. 107-40, 115 Stat. 224 (“AUMF”), here the White House never asked Congress to declare war on Venezuela or TdA.⁵ Even John Yoo, a former DOJ official whose expansive views of Executive power led him to author OLC’s “enhanced interrogation techniques” memos under President George W. Bush, criticized these actions:

There has to be a line between crime and war.... We can’t just consider anything that harms the country to be a matter for the military. Because that could potentially include every crime.⁶

³ ABC News LIVE: *Pete Hegseth Speaks on ‘Department of War’* (YouTube 1:00) (Sept. 10, 2025).

⁴ As Sen. Jack Reed noted on the Senate floor on Sept. 9, 2025, “the U.S. military simply does not have the authority to use lethal force against a civilian vessel unless acting in self-defense.” Of the service branches, only the U.S. Coast Guard, which is part of DHS and not DoD, has law enforcement authorities. See 46 U.S.C. § 552(a).

⁵ Even if the underlying facts asserted as the basis for this strike had been proven – and they have not yet been – drug smuggling is not even a crime eligible for capital punishment in the U.S. While previous frameworks were developed under the AUMF by the Obama Administration for drone strikes against al Qaeda and ISIS, those required consideration of whether capture was feasible before resorting to deadly force. Here, there was apparently none. Harold Koh, former Principal Legal Advisor at State, says, “This is so beyond anything that the most lawless administration ever did before that to treat it as somehow continuous is a real disservice to thoughtful people.” See *Former GOP Officials Fear US Strikes on Alleged Drug Smugglers Aren’t Legal*, Politico, Sept. 16, 2025.

⁶ *Id.*

When some legal scholars suggested the extrajudicial killings might even rise to the level of “war crimes,” Vice President Vance essentially laughed off such legal concerns, posting on X, “I don’t give a shit what you call it.” Despite a notice sent to Congress two days *after* the first strike, calling TdA a “designated terrorist organization” threatening America, Harold Koh, now Yale Law School Dean, called the foreign terrorist organization (“FTO”) designation inadequate:

Where is the declaration of war against Venezuela? There is none.... FTO designation is what you use when you’re trying to freeze their bank accounts. It’s not a death warrant.⁷

Brian Finucane, also a former State Department attorney, similarly noted:

What separates the U.S. military from a death squad is the law.... I’m very concerned that the American public does not grasp the stakes here: The President is asserting a license to kill without due process and outside the context of armed conflict.⁸

Less than a month later, on September 30, 2025, the Administration called an unprecedented mandatory in-person meeting of all 800 senior military officials from around the world to Quantico, where Hegseth and Trump spoke to them directly. Hegseth explained this new “warrior ethos” meant “the liberation of America’s warriors, in name, in deed and in authorities. You kill people and break things for a living. You are not politically correct and don’t necessarily belong always in polite society.” He said “we also don’t fight with stupid rules of engagement. We untie the hands of our warfighters to intimidate, demoralize, hunt and kill the enemies of our country.”⁹ President Trump then gave a longer, partisan speech, claiming the U.S. has domestic enemies and “insurrectionists” “paid by the radical left,” and that U.S. cities:

are run by the radical-left Democrats ... they’re very unsafe places, and ***we’re going to straighten them out one by one. And this is***

⁷ *Id.*

⁸ *Id.* (former Deputy Assistant AG Ed Whelan: “There is a line between legitimate acts of war (or of self-defense) and murder. It would be good for government officials to care about staying on the right side of that line.”).

⁹ U.S. Department of War, *Transcript: Secretary of War Pete Hegseth Addresses Generals and Flag Officers at Quantico, Virginia* (Sept. 30, 2025).

going to be a major part for some of the people in this room. That's a war too. It's a war from within.... And I told Pete we should use some of these dangerous cities as training grounds for our military – National Guard but military – because we're going into Chicago very soon.¹⁰

(emphasis added). Trump told senior officials “our inner cities” are “a big part of war now.”¹¹

Risks of turning over domestic law enforcement to a now-untethered War Department “liberated” from “legality” and focused on “lethality,” are magnified further, given this Administration’s earlier firing of the DoD’s Inspector General and all senior JAG officers, plus new restrictions that have dramatically limited press access at the Pentagon. Placing thousands of “warriors” into our cities, particularly at a time of substantially limited oversight, plainly risks producing another Kent State tragedy – or even far worse, given this Administration’s apparent penchant for never admitting mistakes and doubling down whenever criticized.

2. Recent Expansions of National Guard Deployments for Domestic Purposes

Simultaneously with this asserted diminishment of the law’s ability to constrain the military’s own actions has been the vast expansion of Trump’s expressed plans to mobilize National Guard forces for domestic purposes, openly targeting states and cities known to be less politically supportive of his policies. These actions are without precedent in our history.

While temporarily delivering relief and maintaining order in times of great need are established parts of the National Guard’s mission, using the Guard for generalized deployment and law enforcement is not. There is no requirement, preference or need for crime control resources to be provided by military personnel. *Amicus* members have studied how the presence of military personnel – armed, uniformed, and trained for combat – transforms the psychology of

¹⁰ CBS News, *Watch: Trump gives lengthy address to senior military leaders at Quantico*, (YouTube 41:27), (Sept. 30, 2025).

¹¹ *Id.* at 12:05.

civilians. Unlike local police, military forces are trained to confront external enemies with whatever force is necessary to subdue or extinguish a threat, not to engage in proportionate, community-based responses to domestic unrest. Such deployments cause fear, escalate tensions, and often provoke further unrest. Their appearance on city streets signals that political dissent is an existential threat to the state, not a protected right of the people, and is a clear warning sign that the true intent of the government's actions is to threaten force as a means of eliminating political opposition. It emphasizes that conformity and silence are essential to living without harm. The purpose of their presence, when imposed without local invitation, is to instill fear in civilians not supporting the federal administration. *Amicus* members personally recall vividly how militarized public spaces in Latin America in the 1970s helped consolidate military juntas, how tanks in Tiananmen Square in 1989 ended a vibrant student protest movement, and how soldiers in public squares in Egypt during the Arab Spring cast a pall over growing efforts at democratic reform, which then died.

When soldiers arrive at the request of a local official to restore order or provide essential services after a hurricane, wildfire or highly destructive riot, the population naturally sees them as supportive, nonpartisan helpers. But when heavily armed military personnel arrive uninvited in moments of social unrest – particularly if the protests involve criticism of federal policy or federal officials – the public perception is unmistakably different: evoking fear, not reassurance.

As Maj. Gen. Randy E. Manner, former acting vice chief of the National Guard Bureau has noted, deploying the Guard into American cities can be seen as an attempt to “intimidate the local population,” while politicizing the force and misusing its limited resources.”¹² The National Guard's own internal documents, measuring public sentiment about the federal takeover

¹² *Trump is Expanding the National Guard's Role. Some Former Generals Worry*, New York Times, Sept. 21, 2025 (using the military to police American citizens “is the beginning of a divide between our military and our citizens”).

of policing in Washington, D.C., confirm public views of this mission as about “leveraging fear” and driving a “wedge between citizens and the military,” even promoting a sense of “shame” among some troops and veterans – as domestic mobilizations rooted in politics risk damaging Americans’ confidence in the longstanding precedent of an apolitical military.¹³

Beyond diminishment of the military’s own prestige domestically when placed into the middle of political disputes is the potential harm to our national security generally. As Maj. Gen. Manner notes, such deployments necessarily divert from “another part of their mission: serving as a reserve force to support the active-duty U.S. military abroad,” and can also become “disincentives for retention, for morale, for recruiting.”¹⁴ Mobilized Guard members are called away from higher-paying jobs and families, and as Gen. William Enyart noted:

It’s one thing when you’re out there sandbagging to prevent the Mississippi River from washing the town away. It’s another thing when you’re fulfilling a president’s political desires.¹⁵

America’s foreign prestige is also at risk. *Amicus* members have long advanced values of liberty and self-governance in their diplomatic, defense and intelligence careers. We are gravely concerned that use of U.S. military forces against Americans is now undermining America’s credibility in advancing its interests overseas, including the championing of democracy. Authoritarian governments around the world have already begun pointing to the United States’ domestic deployments of the military to justify their own crackdowns. When our country fails to uphold democratic norms at home, it loses both moral authority and strategic influence abroad.

In *Amicus* members’ experience as former national security, foreign policy and homeland security officials examining other countries, we were taught and trained to look for “indicators of

¹³ *National Guard Documents Show Public “Fear,” Veterans’ “Shame” Over D.C. Presence*, Washington Post, Sept. 10, 2025.

¹⁴ See note 12, *supra*.

¹⁵ *Id.*

autocracy.” Such recognized indicators of illegitimate uses of power included situations such as leaders searching for reasons to stretch interpretations of the law, and the magnification or exaggeration of events to justify an overreach of power – the very same types of indicators we are now similarly witnessing within our own country today. *Amicus*’ members have directly observed this phenomenon and its negative aftermath in a variety of countries, including:

- Russia, where military-style police suppress political protests under the guise of national security;
- China, where the Peoples’ Liberation Army has historically been deployed against student demonstrators, most notably during the crackdown at the Tiananmen Square massacre;
- Taiwan, where minor incidents of violence led to a state-run suppression of anti-government protests and became a pretense for decades of martial law, from 1949-87;
- Turkey, where domestic military deployments have been used to crush opposition following mass protests;
- South Africa, where apartheid security forces previously repressed political opponents; after the end of the apartheid government, post-apartheid reform emphasized oversight to prevent military use for partisan political agendas;
- The Philippines, where armed forces are employed in campaigns against civil society actors under the pretext of anti-drug or anti-terror operations; and
- El Salvador, where US-trained military death squads terrorized the population during the civil war of the 1970s and 1980s. For the past several years, under the current Bukele administration, the security forces have been re-politicized and used to support human rights abuses against the general population.

In each of these examples, authoritarian leaders justified their actions as necessary for public safety, while, in fact, using military force to erode political freedoms and dismantle or corrode institutional checks on executive power. *Amicus* members have witnessed the slippery slope from such conduct to repressive rule, when the powers of an executive were not timely or adequately checked, allowing authoritarianism and a loss of rights to then become difficult or even impossible to reclaim, as a country eventually reaches a point of no return as it slides into

autocracy. *Amicus* members further emphasize that in the authoritarian regimes we have studied—whether in Moscow, Beijing, Ankara, or Manila—the pattern is typically not one of local leaders requesting help, but of central governments deploying military forces to override regional or municipal authority. Where a country’s institutions can hold firm, however, the results can be dramatically different. In South Korea in December 2024, for example, President Yoon Suk Yeol declared martial law to counter exaggerated accounts of anti-state activities and threats to national security – but in that case, the legislature was quick to respond by lifting martial law, even impeaching and removing the president from office to protect its democracy.¹⁶

The global attempts at authoritarianism *Amicus* members have experienced echo loudly in President Trump’s recent deployment of the military, in contravention of municipal leaders’ assessments of need. President Trump’s claim of a “crime emergency” to justify unprecedented deployment of the military to urban centers is a well-worn justification *Amicus* members often saw employed by repressive regimes worldwide when seeking to expand their own powers. And here, the claim is also belied by the Administration’s own crime figures. Crime rates are down in Chicago overall, and as for the Solicitor General’s claims of disruption at the Broadview ICE facility – ostensibly the basis for Trump’s call-up of the Guard – the Application’s “parade of horrors” often cites to factual allegations specifically rejected by the District Court as “not reliable.” App. at 44a. Moreover, as that Opinion notes, the typical number of protesters is “fewer than fifty” and had “never exceeded 300.” *Id.* 36a. There is “no evidence” the limited violent activity has been linked to a common organization, *Id.* 42a, and “[t]he ICE Processing Center has continuously remained open and operational throughout the protest activity.” *Id.*

¹⁶ Hyung-Jin Kim and Kim Tong-Hyung, *Yoon Suk Yeol removed as South Korea’s president over short-lived martial law*, Associated Press, Updated 3:03 AM EDT, April 5, 2025, available at <https://apnews.com/article/south-korea-martial-law-yoon-constitutional-court-8cdcf4944c2e3cd9edf723bc29ba51ff>.

For *this* the President *needs to call in the National Guard*? These claims are pretextual, like claiming need for a sledgehammer to swat a fly. In D.C., President Trump has extended Guard deployment even after bragging violent crime had been eliminated.¹⁷ There, as here, no showing was ever made – none – that these same crime control functions could not have been performed just as well – or better – by other civilian law enforcement investments. In the instant case, the District Court even invited that: “Defendants remain free to deploy as many federal law enforcement officers as they believe appropriate to advance their mission.” App. at 83a. It is absurd for our federal government, with all its resources, to tell this Court the only way to ensure the safety of Chicago’s ICE officers against 50-300 protesters is to approve a military surge.

The larger issue here is also not whether deployment of military forces might reduce crime. It likely does in current North Korea, and it likely did in Nazi Germany and in the novel “1984.” The question instead is whether the law condones normalization of the militarization of our streets and related military control of residents, despite our Founder’s warnings against standing armies, and the statutory limits of the Posse Comitatus Act. It does not.

Despite the historical limits on using the Guard and even courtroom setbacks, President Trump has recently called for greater expansion of Guard deployments into many U.S. cities – now including not only Los Angeles and D.C., but also Portland, Chicago, Memphis, and others. Brig. Gen. David L. McGinnis, former Chief of Staff of the National Guard Association, described any move to deploy the Guard over governors’ wishes as firmly “outside of the constitutional box,”¹⁸ and initially, even President Trump appeared to realize calling up a state’s National Guard over its sitting Governor’s objection might be a legal bridge too far.¹⁹

¹⁷ *Trump says D.C. is Now “Crime Free.” What’s the Reality?* NPR Sept. 3, 2025.

¹⁸ See note 12, *supra*.

¹⁹ See *Trump prods at Chicago Takeover as legal, political challenges loom*, The Hill, Sept. 4, 2025 (Trump “appeared to acknowledge limits” on his ability to deploy the National Guard in Chicago). While Trump had earlier

But any modicum of self-restraint has now been abandoned. Hegseth ordered 200 members of the Oregon National Guard to enter Portland. Gov. Tina Kotec objected, telling Trump, “There is no insurrection, there is no threat to national security.” Trump’s original plan to send troops into Portland was announced September 5, a day after Fox News aired a “special report” about a protest in Portland on Labor Day, which misleadingly mixed in clips of 2020 protesters. Trump responded to Gov. Kotec, “[A]m I watching things on television that are different than what’s happening? My people tell me different.” Oregon sued, and on October 4, 2025, District Judge Karin J. Immergut issued a TRO blocking the 200 troops. She declared Trump had acted in a manner “untethered from the facts.” *Oregon v. Trump*, No. 3:25-cv-1756 (D. Ore.), ECF #56, at 23. *Id.* at 22 (“‘a great deal of deference’ is not equivalent to ignoring facts on the ground.”). *See id.* at 30 (“[T]his is a nation of Constitutional law, not martial law.”).

Rather than standing down after this ruling, White House Deputy Chief of Staff Stephen Miller only ramped up, remarkably accusing Judge Immergut on “X” of “legal insurrection.”²⁰ The Administration then tried to circumvent her ruling by trying to mobilize California and Texas National Guard troops for deployment into Portland, forcing the judge to issue another TRO.²¹ When asked if the Administration would comply, Stephen Miller then asserted that President Trump held “plenary” authority, thus rejecting any checks or balances.²²

Because Texas’ Governor had supported the Oregon effort, Hegseth then redirected the Texas National Guard troops to Chicago instead, where they arrived but now face this lawsuit.

threatened to deploy the National Guard there, even posting a meme of the 1979 Vietnam War movie *Apocalypse Now* with an image of the Chicago skyline, Gov. Pritzker pushed back, warning that such deployments “might be a dress rehearsal for using the military to manipulate the 2026 midterm congressional elections.” The Guard was then not initially mobilized; instead, on September 8, 2025, DHS announced a deportation crackdown in Chicago to be operated by ICE. *See Trump Administration says it launches ICE crackdown in Illinois*, Reuters, Sept. 9, 2025.

²⁰ Stephen Miller (@StephenM), *Legal Insurrection...*, X (Oct. 4, 2025, 9:26 PM EST).

²¹ *US judge blocks Trump from sending any National Guard troops to Portland for now*, Reuters, Oct. 6, 2025.

²² *Trump advisor Stephen Miller cites “plenary” authority. What does he mean?* Detroit Free Press, Oct. 8, 2025.

National Guard troops have also been called up in states with Republican Governors, for deployment into their own urban centers led by Democratic Mayors. The National Guard is now deployed over the Mayor's objections in Memphis, where more than a third of Tennessee's Black residents live, and where crime rates had also dropped.²³ Yet even in these states with Republican governors, the process was unprecedented. The Washington Post on September 13, 2025 reported on a draft memo from Hegseth to Attorney General Bondi and DHS Secretary Noem, calling for activation of 1,000 Louisiana National Guard troops for a law enforcement mission in that state's "urban centers," to last almost a year (until September 30, 2026).²⁴ While it was only a draft memo, it revealed a President "looking at states led by Republican governors who may be willing to accept troops in predominantly blue cities, such as Memphis and New Orleans – even if no event-driven emergency has occurred." While Governors do have authority to invoke Title 32 and request federal funds for mobilized National Guard troops, the memo's top-down focus troubled Gen. Randy Manner, former acting vice chief of the National Guard:

"The governor is supposed to request this, not the president or the secretary of defense," Manner said, calling the move "absolutely nothing more than a political grab of power" by Trump.... "I've never heard of this kind of thing happening before this administration – not in my 35 years" of military service.²⁵

Beyond the vast geographic expansion of such National Guard deployments is a systemic change also recently adopted for the scope of the Guard's deployments. Tucked in the Executive Order for deployment of the National Guard in D.C., President Trump also directed Hegseth to plan for his Department to take on a larger role in domestic law enforcement, including "quelling civil disturbances," by formalizing the creation of specially-trained National Guard units in the

²³ *Trump Signs Off on Sending the National Guard to Memphis*, New York Times, Sept. 15, 2025.

²⁴ *Pentagon Plan Envisions 1,000 Troops for Louisiana Policing Mission*, Washington Post, Sept. 13, 2025.

²⁵ *Id.* By the end of the month, Louisiana's Governor had requested deployment of these military troops. *Louisiana governor requests National Guard for New Orleans, Baton Rouge*, Washington Post, Sept. 30, 2025.

District of Columbia and all 50 states that can be mobilized quickly for ensuring the public safety and order,” with tasks to include “quelling civil disturbances.” As one critic noted:

Having soldiers police protests, as this order envisions, threatens fundamental liberties and public safety, and it violates a centuries-old principle against involving the military in domestic law enforcement.²⁶

Moreover, the same Executive Order directs the creation of “a standing National Guard ‘quick reaction force’ that would be available for rapid deployment anywhere in the country.”²⁷ It “also directs a new task force, to be led by White House advisor Stephen Miller, to create an online portal for ‘Americans with law enforcement or other relevant backgrounds and experience’ to apply to join federal agents in enforcing Mr. Trump’s ‘crime emergency’ order in the District of Columbia.” This “specialized force proposed for the Guard in D.C. would be deputized to enforce federal law according to the executive order.”²⁸

Risks of overaggressive domestic deployment of firepower are apparent. Already, on October 1, 2025, Chicago saw “shock and awe” ICE raid as Black Hawk helicopters flew over a South Shore apartment complex in the middle of the night, jolting people from their beds as armed agents repelled down and detained 300 residents, including U.S. citizens, with toddlers put in zip ties, before arresting 37. DHS said it was targeting TdA.²⁹ If a “warrior” military group had actively been a part of that raid, might it have gone even further? If our “War”

²⁶ *Trump Orders Expansion of National Guard’s Role in Law Enforcement*, New York Times, Aug. 25, 2025.

²⁷ *Id.* (citing White House Executive Order entitled, *Additional Measures to Address the Crime Emergency in the District of Columbia*, issued August 25, 2025).

²⁸ Given the breadth of the stated criteria, it seems apparent that many January 6 Defendants who had stormed the Capitol and were even convicted before being pardoned would likely now qualify for this new “specialized” force.

²⁹ *37 Arrested in South Shore ICE Raid, DHS Claims it Was Targeting Tren De Aragua Gang Members*, CBS News Oct. 1, 2025. See Foy, *We Found That More than 170 U.S. Citizens Have been Held by Immigration Agents. They’ve Been Kicked, Dragged and Detained for Days*, Pro Publica Oct. 16, 2025. (“They’ve had their necks kneeled on. They’ve been held outside in the rain while in underwear. At least three citizens were pregnant.... One of those women had already had the door of her home blown off while [DHS] Secretary Kristi Noem watched.”).

Department believes it can legally execute suspected TdA gang members in waters based on a “War on Drugs” threat still thousands of miles away, why not also on the streets of Chicago?

3. Recent Elimination of DOJ Guardrails, and Potential Legal Mischief Inherent in Designation of an Amorphous “Antifa” as a “Domestic Terrorist Organization”

Beyond these concerns of the National Guard expansively engaging directly in law enforcement is the Trump Administration’s recent overriding of DOJ’s longstanding tradition of independence, and its attempt to designate so-called “Antifa” as a “domestic terrorist organization.” Given these events, the risks to our constitutional order have become grave.

President Trump recently directed that federal criminal charges be filed against former FBI Director James Comey. A federal indictment was hastily returned in the Eastern District of Virginia, after newly-appointed Acting U.S. Attorney Lindsey Halligan (Trump’s former personal lawyer with no prosecutorial experience), replaced fired U.S. Attorney Erik Siebert, after his office had declined to file charges after deeming them unwarranted.³⁰ It then happened again. Halligan indicted New York’s Attorney General after Siebert had demurred.³¹

This idea of a President installing and directly ordering a loyalist to prosecute his political enemies is unprecedented. But it is also just the latest example of political interference in DOJ’s independence. This second term (even beyond Trump’s unusually sweeping exercise of clemency powers on Day 1) has seen directed dismissals of federal criminal charges against NYC Mayor Eric Adams and others with whom Trump is politically aligned, leading to resignations by career prosecutors, while DOJ employees who merely did their jobs (prosecuting January 6 defendants) or exercising free speech (FBI Agents taking a knee after George Floyd’s

³⁰ The docket indicates the indictment was presented in court by Halligan alone, leading to speculation that all other lawyers in that office perhaps boycotted participation due to ethical concerns. *Judge Who Reviewed James Comey’s Indictment Was Confused by Prosecutor’s Handling of Case, Transcript Shows*, CBS News, Sept. 26, 2025.

³¹ *A Closer Look at the Counts in the Letitia James Indictment*, New York Times, Oct. 9, 2025.

murder) were purged. New DOJ hires are reportedly now asked in interviews if Trump won the 2020 election, revealing a goal of filling DOJ with loyalists. None of this comports with the historic independence of DOJ or the presumption of regularity that justifies judicial deference.

Compounding these concerns is President Trump's recent Executive Order issued September 22, 2025, purporting to designate a mere ideology, "Antifa," as a "domestic terrorist organization." The amorphous nature of this designation is by design. "Antifa," short for "anti-fascism," a belief likely shared by many if not most Americans since World War II, is not an organization.³² Despite the Executive Order's description of Antifa as "a militarist, anarchist enterprise that calls for the overthrow of the U.S. government," no such "enterprise" with leaders or assets exists. Instead, the Executive Order announcing this description merely catalogues supposed Antifa incidents – the doxing of officers in Portland, an assault on a journalist, and violence at a march in Pacific Beach – meaning almost any protest that later results in a physical confrontation, or even flag burning, may then get classified as "incitement" by "Antifa."

Nor is the term "domestic terrorist organizations" a recognized category. The Foreign Terrorist Organization (FTO) list under 8 U.S.C. § 1189 and the Specially Designated Global Terrorist (SDGT) program under Executive Order 13224, exercised under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*, are both regimes built for foreign threats. The FTO applies only to "foreign organizations" and the IEEPA requires a threat from a source "in whole or substantial part outside the United States," with EO 13224 relying on that foreign nexus. Likewise, the criminal "material support" offense that attaches to such designations, 18 U.S.C. § 2339B, makes it a crime to knowingly provide material support to a

³² *You Can't Designate "Antifa." Banks and Platforms Will Act Like You Did Anyway*, Lawfare, Oct. 1, 2025 ("As then-FBI Director Christopher Wray told Congress in 2020, 'Antifa' is 'more of an ideology or a movement than an organization.'").

designated FTO, meaning it is pegged to the FTO list, not domestic entities. This Court's leading case on "material support" also confirms this foreign/domestic line. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), § 2339B was upheld only after the Court emphasized Congress's special prerogatives in foreign affairs and national security. Chief Justice Roberts cautioned the decision did not suggest Congress could impose the same ban on coordinated advocacy by domestic groups, where First Amendment protections are at an apex.³³

Conflating National Guard deployments with domestic law enforcement, however, may blur that line, as domestic law enforcement that becomes a regular part of military operations might then be classified as a part of "national security." The Trump Administration is aware of the broad deference courts show to an Executive Branch exercising national security powers, and if its "Antifa" designation is upheld on this basis, its malleable definition may morph to mean any group opposing "MAGA," and infuse the designation with massive punitive consequences, at a time when opposition funding entities are already being named and targeted for investigation as alleged funders of "agitation."³⁴ Already MAGA supporters are calling "Black Lives Matter" and "No Kings" parts of "Antifa," and the Democratic Party itself³⁵ may even be next, as a step

³³ No federal authority presently exists to designate purely domestic groups as "terrorist organizations." While Congress has defined the general term "domestic terrorism" in 18 U.S.C. § 2331(5), that provision is definitional only; it creates no designation authority, imposes no listing structure for entities or organizations, and adds no standalone criminal penalties. Put simply, no statute authorizes the federal government to designate a domestic organization as a terrorist entity with the legal consequences that attach to FTOs and SDGTs. Political violence can still be prosecuted, but the government in those cases must use ordinary criminal laws such as conspiracy, assault, arson, or weapons offenses if it seeks to punish such criminal activities.

³⁴ *White House Plans Broad Crackdown on Liberal Groups*, New York Times, Sept. 15, 2025 (after Charlie Kirk's death, Trump admits to talking to the attorney general and others about bringing charges under the Racketeer Influenced and Corrupt Organizations Act against "some of the people that you've been reading about that have been putting up millions and millions of dollars for agitation.").

³⁵ *Kristi Noem Repeatedly Refuses to Say if She Thinks Democrats Should be Considered Terrorists*, The Independent, Sept. 25, 2025 (pressed on if she agreed with Stephen Miller's comment after Charlie Kirk's death that "The Democrat Party is not a political party. It is a domestic extremist organization," Noem would not give a direct answer). More recently, President Trump told Navy sailors October 5 that "We have to take care of this little gnat that's on our shoulder called the Democrats," three days after he had described the Democratic Party on Truth Social as "The Party of Hate, Evil and Satan." *Trump Calls Democrats the Party of 'Satan,'* Vanity Fair, Oct. 7, 2025.

to move America to one-party rule.³⁶ At an October 8 “roundtable,” Trump officials pledged to destroy “Antifa,” which Noem called “just as dangerous” as MS-13, TdA, ISIS, Hamas and Hezbollah,³⁷ and Trump has said Illinois’ Governor and Chicago’s Mayor “should be in jail.”³⁸

At Charlie Kirk’s memorial service, Stephen Miller told political opponents “the power of law enforcement under President Trump’s leadership will be used to find you, will be used to take away your money, take away your power, and if you have broken the law, to take away your freedom.”³⁹ Harvard’s Theda Skocpol says Trump allies are “trying to provoke protests and demonstrations that they can then call ‘violent’ even if there are fewer destructive elements than after the usual big football victory or loss.”⁴⁰ Dartmouth political scientist Sean Westwood notes:

Polarization feels almost quaint relative to the profound stress the Trump administration is imposing on our democracy.... What we are witnessing is not yet a war, but it is far more than mere political division. It is a systematic terror campaign on institutional legitimacy.... While political violence and polarization remain serious concerns, our primary focus must shift to countering the deliberate democratic degradation unfolding before us. The conflict is no longer defined by the distance between the left and right, but by the state-sanctioned assault on the norms, laws and institutions that guarantee a liberal society.⁴¹

4. Recent Acceleration of Executive Overreach and Growing Authoritarianism

Given the rollout of these developments on many levels, and at such breathtaking speed, America is now approaching a tipping point.⁴² The Steady State agrees with *The Atlantic* writer

³⁶ *Amicus* members’ experience is one-party countries inevitably fail to adequately protect liberty or provide justice.

³⁷ *Trump takes aim at Antifa – and the Press – in White House roundtable*, CNN, Oct. 8, 2025.

³⁸ *Trump says Gov. JB Pritzker and Chicago Mayor Brandon Johnson “should be in jail,”* NBC News, Oct. 8, 2025.

³⁹ *Trump is Not Afraid of Civil War. Neither is Stephen Miller*, New York Times, Oct. 7, 2025 (Harvard political scientist Ryan Enos: “There is no doubt about what Trump is doing in the wake of Kirk’s killing. His attacks on his political opponents are purely authoritarian, and he sees the killing of Kirk as an opportunity to accomplish what he has been talking about since he entered politics: using the power of the state to punish those who defy him.”).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See Bravo to the judges standing up to Trump in Chicago and Portland*, The Guardian, Oct. 19, 2025 (“The conservative justices seem blind to the reality that Trump is the most authoritarian-minded president in US history.”). He is no longer even being subtle – asserting “some people want” a dictator, placing giant photos of himself on federal buildings akin to what we have seen in authoritarian countries, authorizing his face to be used on

Garry Kasparov, who as a former world chess champion personally witnessed Vladimir Putin’s rise to power in Russia before moving to America, that “beneath the breaking-news barrage, we can trace the thread of advancing authoritarianism.... Although Trump himself may operate on instinct, his more disciplined advisors are masterminding a steady accumulation of power.”⁴³

Last week, Trump signed an order to send the National Guard into Memphis as part of his administration’s campaign to normalize the militarization of cities and states run by the opposing party. The move is straight from Vladimir Putin’s playbook. But because America’s institutions are stronger and more resilient than those of post-Soviet Russia, the Trump Administration has to act quickly if it wants to undermine them. Otherwise, there is a chance it could be stopped.⁴⁴

Against that backdrop, it is vital for this Court to do its duty, by standing in the breach to assert its proper authority as the arm of a co-equal branch of our federal government, defending the constitution. “[E]very time a check on executive power is curbed, it becomes easier to remove the next safeguard, and the next.”⁴⁵ Polls also confirm strongly that most Americans do not support deployment of troops domestically for law enforcement purposes.⁴⁶

The fact that President Trump was duly elected is no answer – “so were Putin, Recep Tayyip Erdogan and Viktor Orban. There are plenty of examples of elected leaders who have subverted the democratic system that brought them to power.... Trump has already tried to overthrow an election, and he has demonstrated this term that he stops only when the courts or lawmakers make it impossible to go on.”⁴⁷

a U.S.-minted coin despite a federal law barring that for living presidents, and even posting on the official White House social media account an AI-generated video of himself placing a crown on his head and draping a royal robe, as Nancy Pelosi and Chuck Schumer are shown kneeling and then bowing before him. (Trump also posted on his own account an AI video of him flying a “KING TRUMP” fighter jet to dump excrement on urban protesters).

⁴³ *The Race to Save America’s Democracy*, The Atlantic, Sept. 28, 2025.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Most Americans don’t want troops deployed without an external threat, Reuters/Ipsos poll finds*, Reuters, Oct. 8, 2025.

⁴⁷ See note 43, *supra* (“Aspiring authoritarians never ask for permission; they see what they can get away with.”).

It is no longer a dystopian fantasy to imagine, as Gov. Pritzker warns, that urban voters may be forced to walk past rows of machine gun-bearing soldiers to cast ballots. Nor can we be confident DOJ and our military will avoid political pressures and resist further depletion of the guardrails that have traditionally rendered court review of their activities unnecessary.⁴⁸

The Constitution is a piece of paper. It is a remarkable and world-changing piece of paper, but its power has endured only because Americans have historically been willing to fight and die for the principles it codifies. Assumptions about the fortitude of America's democracy ignore the uncomfortable truth that democracy is an *active* process, one that requires constant commitment to its preservation.⁴⁹

B. Peacetime Attempts to Deploy the National Guard for Domestic Purposes, Especially Law Enforcement, Is Appropriately Reviewed and Controlled

Relying on *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), the Government here claims a President's decision to call up and deploy the National Guard is unreviewable. Not so, and especially since the Government has not fully ruled out potential arrests by the Guard. *See* App. at 47a (Guard objectives include "stop[ping] crime"; no meaningful limits placed on scope).

Contrary to Administration claims, this is not a matter committed to the President's discretion alone. Textually, 10 U.S.C. § 12406 "permits the President to federalize the National Guard '[w]henever' one of the three enumerated conditions are met, not whenever he determines that one of them is met." App. at 59a. And *Martin* does not require abstention. *Martin* involved a call-up of Mott to serve during an invasion (the War of 1812), not to "execute the laws of the United States."⁵⁰ *Martin's* expansive dicta, rejecting Mott's right to question his call-up because of the unhesitating obedience a President must receive from military subordinates, is distinct

⁴⁸ *See, e.g., The Civil-Military Crisis is Here*, The Atlantic, Oct. 7, 2025 ("the U.S. armed forces are still led by generals and admirals whose oath is to the Constitution, not the commander in chief. But for how long?").

⁴⁹ *See* note 43, *supra*.

⁵⁰ That language did not exist in the 1795 Militia Act in *Martin*; thus, *Martin's* statements represent *dicta* here.

from a State’s right to protect its own sovereignty if federalized militia deploys within that State. In that context, § 12406 conflicts with other laws, including the State’s police powers reserved in the Tenth Amendment, and the Posse Comitatus Act, 18 U.S.C. § 1385; it thus cannot be read in isolation but must be read in concert with these other laws. Nor can *Martin* itself be read in isolation; the ensuing 198 years have seen a “political question” doctrine develop, and as the District Court noted, *Martin*’s expansive dicta also is countered by this Court’s equally sweeping (more recent) language in *Laird v. Tatum*, 408 U.S. 1, 15-16 (1972), quoted App. 61a at n.11. See also Brief of Constitutional Accountability Center as *Amicus Curiae*, No. 25-2798 (7th Cir.).

The President also complains of the lower courts’ binary choice in saying he is “unable” to execute federal laws under § 12406(3) only if “incapable” of executing the law via regular forces. But the alternative is worse. Should *any partial* impediment to execution of *any* federal law allow a President to cast aside civilian law enforcement whenever he deems it convenient?

What courts face in this and other related cases, as Georgetown Professor Stephen Vladeck has noted, is properly “a factual dispute more than a legal one.” As he explains, courts have substantial experience performing such analyses, and “the question is going to be whether the president can use a contrived crisis as a justification for sending troops into our cities.”⁵¹

Such judicial review of the legality of a President’s use of the military domestically is entirely consistent with Justice Jackson’s pivotal separation of powers analysis in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring). That opinion was no ordinary concurrence. Unanimous opinions such as *United States v. Nixon*, 418 U.S. 683 (1974) and *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) later

⁵¹ *No, Trump Can’t Deploy Troops to Wherever He Wants*, New York Times Oct. 7, 2025.

embraced this *Youngstown* concurrence, and it was declared authoritative in Chief Justice Rehnquist opinion in *Dames & Moore v. Regan*, 453 U.S. 654, 661-62 (1981).

“Justice Jackson’s 1952 concurrence in *Youngstown* ... is [now considered] the founding constitutional text for separation of powers between Congress and the president,” Magliocca, *The Untold Story of Robert H. Jackson’s Youngstown Concurrence*, 50 J. of S. Ct. Hist. No. 1 at 8 (2025). Chief Justice Rehnquist, who himself had clerked for Justice Jackson when the *Youngstown* concurrence was written, later called the opinion “[a] ‘state paper’ of the same order as the best of the Federalist Papers, or of John Marshall’s opinions for the Court.” Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 Albany L. Rev. 539 (1980).

The Steady State’s members’ collective experiences, studying and spending time in a variety of environments over many decades, reveal that authoritarian regimes historically do not rise so often in sudden bursts, but more typically through incremental changes and erosions of democratic protections. In our experience, such losses of civil rights and liberties increasingly become difficult to reverse and eventually reach a point of no return. Thus, courts must focus not only on immediate risks, but also on the means utilized – as Justice Jackson’s *Youngstown* opinion confirms. See 343 U.S. at 653 (“I am not alarmed that it would plunge us straightaway into dictatorship, but it is at least a step in that wrong direction.”) (Jackson, J., concurring).

The strength of Justice Jackson’s separation-of-powers analysis in *Youngstown* drew not merely from his unique service as U.S. Solicitor General, and U.S. Attorney General, but equally from his post-World War II role as U.S. Chief Prosecutor at the Nuremberg Trials. There, Justice Jackson confronted, face-to-face in open court, the inner machinery of a regime that had weaponized its military and security apparatus in an advanced society to crush lawful dissent, dismantle institutional constraints, and concentrate power in the hands of a single leader.

Exploring the legal aftermath of such authoritarian rule imbued his *Youngstown* concurrence with a moral clarity few judicial writings match. His warning that “comprehensive and undefined presidential powers” carry “grave dangers for the country” was informed by hard proofs seen at Nuremberg – that such powers, unchecked, can destroy a constitutional democracy from within. See *Youngstown*, 343 U.S. at 634 (1952) (Jackson, J., concurring).

The Steady State’s members have, in our own way, also seen these same truths. Serving in the national security and intelligence community created by the National Security Act of 1947, ch. 343, 61 Stat. 495 (codified as amended in sections of 50 U.S.C.) – an architecture designed in the shadow of World War II and tempered by the Cold War – we have worked in many of the same institutions whose integrity is essential to preserving democratic governance. Like Justice Jackson, our professional lives have brought us into direct contact with regimes that may deploy military and security forces to entrench political power, silence dissent, and bypass the rule of law. In his opinion, Justice Jackson emphasized “the Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.” *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). This principle – grounded in the lessons of Nuremberg and codified in America’s postwar national security structure – remains a vital safeguard against the misuse of military and security institutions for domestic political purposes.

As Justice Jackson cogently noted, “[t]he purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.” *Id.* at 640 (Jackson, J., concurring). Justice Jackson went out of his way to stress the special risks of a President using military powers for domestic policies: “Congress has forbidden him to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress.” *Id.* at 644-45 (Jackson, J., concurring). While noting how “I should indulge the widest latitude of

interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society, ... when it is turned inward, not because of rebellion ... it should have no such indulgence.” *Id.* at 645. And he made clear that it is ultimately up to the Judicial Branch to preserve this distinction. *Id.* at 642 (Jackson, J., concurring) (warning “no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled ... [that he] can vastly enlarge his mastery over the internal affairs of the country”).

Jackson’s *Youngstown* opinion specifically cited Weimar Germany, the French Republic, and World War II-era Great Britain. In France and Britain, he said, emergency powers given to the Executive in wartime had maintained legislative controls and “parliamentary control made emergency powers compatible with freedom.” *Id.* at 652. In Germany, by contrast, despite a new Weimar Constitution “designed to secure her liberties in the Western tradition, ... the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered.” *Id.* at 651 (Jackson, J., concurring). Those temporal limits proved utterly inadequate: “This proved a temptation to every government ... and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenburg to suspend all such rights, and they were never restored.” *Id.* at 651 (Jackson, J., concurring).

Recent events have shown similar creep. Use of ostensibly temporary National Guard forces in D.C. for 30 days has been extended, with no end now in sight. The Steady State’s members’ own experiences strongly confirm Justice Jackson’s view that “emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.” *Id.* at 652 (Jackson, J., concurring).

Justice Jackson stressed “the Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.” *Id.* at 644 (Jackson, J., concurring). Declaring Presidential federalization of the Guard “nonjusticiable” would not only end judicial review, but also effectively Congressional checks. If Congress later narrowed categories of deployment, a President could still simply declare those parameters met and then claim review is impossible.⁵² Trump *already* is trying to deploy one state’s militia into another state – despite James Madison calling that an “absurdity,” App. 35a at n.1 – yet here we are. Future Congressional limits on domestic deployments could similarly be blown through by a President expansively asserting – as another *amicus curiae* has already done here – that even a domestic deployment inside our heartland affects the “‘territorial integrity’ of the United States” and “national security ... in spades.” Brief of *Amicus Curiae* First Legal Foundation at 9-10.

The Administration’s remarkably aggressive demand to avoid any judicial review only heightens the concerns of The Steady State’s members. If Congress’ limits on executive power could be unilaterally declared satisfied and unreviewable based only on a President’s linguistic choices, this Court will abdicate its proper role and essentially create the very Weimar standard Justice Jackson decried. The security challenges Justice Jackson’s Greatest Generation faced were existential, likely far exceeding our own, yet he still warned courts to reject any paradigm in which an Executive can claim “necessity knows no law.” *Youngstown*, 343 U.S. at 646.

Amicus members’ experiences, around the world and in the Executive Branch serving at some of the very institutions most subject to abuse (“security” institutions like Justice Jackson confronted at Nuremberg), lead us to concur with his conclusion that “men have discovered no

⁵² See Q&A: *A look at the National Guard’s role as Trump seeks to deploy troops in Oregon and Chicago*, Associated Press, Oct. 7, 2025 (Villanova law professor Brenner Fissell: “If the president on his own, unreviewably, could determine when any of these prongs exist, then there is effectively no judicial protection against a military coup in this country.”).

technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.” *Id.* at 655 (Jackson, J., concurring).

In the Nuremberg trials Justice Jackson attended, a recurring theme involved recognition of the German bar and judiciary’s failures as they compromised the rule of law as Hitler’s fascist excesses in tearing down institutional limits were tolerated and then grew beyond any control. In *Youngstown*, Jackson warned present and future jurists confronted with such challenges that no matter what, and even if “[s]uch institutions may be destined to pass away ... it is the duty of the Court to be last, not first, to give them up.” 343 U.S. at 655 (Jackson, J. concurring).

CONCLUSION

The courts below found none of the conditions of 10 U.S.C. § 12406 met. No stay is warranted, including an administrative stay – which would not preserve the status quo at all, but instead immediately deploy hundreds of troops (including Texas’) into Chicago’s ICE protests,⁵³ with no exploration of other enforcement options.⁵⁴ *Amicus* urges the Court to fulfill its duty and retain America’s steady state by denying the emergency stay the Administration requests.

This 20th day of October 2025.

Respectfully submitted,

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⁵³ National Guard troops are not bound by the Chicago Police’s 2021 consent decree for First Amendment-protected protests. *Will the Supreme Court Stand Up to Trump if He Sends Troops to Chicago?*, Politico, Sept. 4, 2025.

⁵⁴ The existing partial stay is balanced and appropriate. That stay allowed the immediate *federalization* of National Guard troops, consistent with article 1, section 8[15]’s “calling forth” clause, which reserves no rights to the States. But it temporarily blocked their *deployment* for now, consistent with separate article 1 Section 8[16]’s clear reservation of certain State rights when a Militia actually gets “employed in the Service of the United States.”