No. 25A443

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Applicants,

v.

STATE OF ILLINOIS, *et al.*,

Respondents.

BRIEF OF THE STATES OF CALIFORNIA AND OREGON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

California and Oregon have challenged the federal government's reliance on Section 12406 to deploy members of the National Guard to the streets of their cities. *See, e.g.*, *Oregon v. Trump*, __ F.4th __, 2025 WL 3013134 (9th Cir. Oct. 28, 2025) (en banc); *Newsom v. Trump*, 141 F.4th 1032 (9th Cir. 2025). Those ongoing cases implicate many of the same legal questions addressed in the briefing before the Court here. In light of amici's profound interest in the proper resolution of those questions, they previously filed or joined amicus briefs in support of respondents in this proceeding.

As amici have explained, *see, e.g.*, Br. of State & Governor of California 20-24 (Br. of California), and as the Seventh Circuit provisionally recognized, *see* App'x 98a-100a, Section 12406 does not support the federal government's extraordinary attempt to deploy members of the military in Chicago. Congress enacted Section 12406 to address invasions, rebellions, and other "unusual and extreme exigencies." *Newsom*, 141 F.4th at 1051; *see also* Br. of Maryland, Washington, Oregon et al. 8-9. Nothing of the kind has occurred in Chicago—or anywhere else in the United States—over the past year. The federal government's attempt to call forth and deploy the military notwithstanding the absence of any such exigency threatens profound harm to our Nation's democratic traditions, as well as the balance of power among the States, Congress, and the Executive Branch. The Framers carefully designed our constitutional system to leave principal control over the militia—today, the

National Guard—at the state level, subject to federalization on narrow grounds authorized by Congress. *See, e.g.*, Br. of California 5-6.

In addressing the federal government's request for a stay, the Seventh Circuit identified two plausible interpretations of "the regular forces" in Section 12406(3): federal civilian officers and "the soldiers and officers serving in the regular armed forces." App'x 100a. In their prior briefing, amici generally focused on the first of these interpretations. *See, e.g.*, Br. of California 21. California and Oregon submit this brief to supplement that prior briefing and address the latter.

As a textual and historical matter, it is certainly reasonable to construe "regular forces" to refer to members of the regular military. Indeed, some experts in this area of law have raised powerful arguments that the term "can't possibly be" understood any other way.[1] To date, the federal government's principal response has been that the term "regular forces" "naturally refers to" civilian personnel because military forces "do not regularly 'execute the law.'" Appl. 30 n.4. That response is unpersuasive: the military *can* sometimes play a role in "executing the laws" during the types of unusual and extreme exigencies that Congress designed Section 12406 to address. Because no such exigencies exist in present-day Chicago, however, neither members of the

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[1] *E.g.*, Vladeck, *The State of Play in the National Guard Cases*, One First (Oct. 23, 2025), https://tinyurl.com/2erx5p5n.

National Guard nor any other military forces have a proper role to play in executing the laws there at this time.

ARGUMENT

1. Statutory interpretation begins "with the text of the statute." *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) (internal quotation marks omitted). As Professor Martin Lederman has explained, "the use of the term 'the regular forces' . . . to refer to military personnel . . . [was] commonplace in federal law and, more broadly, in writings within all three branches" in the early twentieth century when the relevant statutory text was enacted. Br. of Prof. Lederman 13; *see id.* at 8-19. For example, in *McClaughry v. Deming*, 186 U.S. 49, 56 (1902), this Court used the term "regular forces" to distinguish between "the Regular Army" or "regulars," on the one hand, and "the men composing the militia," on the other. The provision that comes directly before Section 12406 in Title 10 likewise uses the term "regular" in this way, referring to "members of the Regular Army or Regular Air Force." 10 U.S.C. § 12405. "[A] legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). And today, Title 10—where Section 12406 is codified—defines the term "regular" to mean "enlistment, appointment, grade, or office in a regular component of an armed forces." 10 U.S.C. § 101(b)(12); *see generally Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 160 (2018) ("'When a statute includes an explicit definition, we must follow that definition[.]'").

The history and context of Section 12406 provide further support for defining "regular forces" to mean the regular military. When Congress enacted the first version of Section 12406 in 1903, it referred to "the other forces at [the President's] command," rather than "regular forces." 32 Stat. 775, 776. "Forces" and "command" are generally military terms. *See, e.g.*, Dep't of Defense, Dictionary of Military and Associated Terms 34, 68 (2025). In common parlance, "forces at [the President's] command" would not be the most natural way to refer to civilian personnel. And there is no indication that Congress intended to refer to nonmilitary forces when it replaced "forces at his command" with "regular forces" in 1908. *See* 35 Stat. 399, 400. To the contrary, the Secretary of War explained that the amendments were designed to ensure that "the organized militia [could] be called into . . . service" when "the *military needs* of the Federal Government . . . can not be met by the regular forces." App'x 55a (quoting H.R. Rep. No. 60-1067, at 6 (1908)).

Although the Ninth Circuit appeared to assume "regular forces" means civilian personnel, *see Newsom*, 141 F.4th at 1052, it did not reach any definitive conclusion to that effect. The court addressed justiciability at some length, *see id.* at 1045-1046, as well as the standard for applying the statute to the facts at hand, *see id.* at 1046-1051, but it said relatively little about how to construe the plain terms of Section 12406(3). That approach may have been influenced by the highly expedited timeline for issuing a decision, *see id.* at 1042-1043, as well as the shifting nature of the federal government's position

on Section 12406. The federal government originally defended its federalization under Section 12406(2) alone, *see Newsom v. Trump*, No. 25-3727 (9th Cir.), C.A. Dkt. 57.1 at ER-190; then invoked Section 12406(3) and took the view that "regular forces" refers to "everything other than the State National Guard," including "the Marines" and "local police," *Newsom v. Trump*, No. 25-cv-4870 (N.D. Cal.), D.Ct. Dkt. 63 at 24; and then switched gears and argued that the "regular forces" refers only to civilian agents, *see Newsom v. Trump*, No. 25-3727 (9th Cir.), C.A. Dkt. 23.1 at 5.

As the case proceeds beyond the preliminary stage, the Ninth Circuit may revisit its tentative understanding of "regular forces." Indeed, one member of the panel considering the merits of the case recently observed that the court's stay-stage opinion was "somewhat ambiguous" about the requirements of Section 12406(3). Argument at 14:27-28, *Newsom v. Trump*, No. 25-3727 (9th Cir. Oct. 22, 2025) (Miller, J.), https://tinyurl.com/a99x3bjf. The same member of the court also questioned the federal government about an interpretation of Section 12406(3) quite similar to the one addressed in this Court's recent supplemental-briefing order. *Id.* at 18:26-18:44; *see* Br. of Historian Mark Graber, *Newsom v. Trump*, No. 25-3727 (9th Cir.), C.A. Dkt. 76.1 at 26 (arguing

that Section 12406(3) applies only in extreme exigent circumstances, not when "civil law is operative and courts are functioning").[2]

2. The federal government's principal response has been that the term "regular forces" "naturally refers to" civilian personnel because military forces "do not regularly 'execute the law.'" Appl. 30 n.4. As the federal government points out, *see id.*, the Posse Comitatus Act generally forbids members of the military from engaging in civilian law-enforcement activities, *see generally United States v. Dreyer*, 804 F.3d 1266, 1275 (9th Cir. 2015) (en banc). The Act's prohibition is not categorical, however. It leaves two narrow paths for the military to lawfully execute the laws in certain circumstances.

The first is where a statutory exception applies. The Posse Comitatus Act allows the military to engage in otherwise prohibited forms of law enforcement when "expressly authorized [to do so] by . . . Act of Congress." 18 U.S.C. § 1385. One of more than two dozen statutory exceptions is "the Insurrection Act," the collective name for several provisions that appear at 10 U.S.C. §§ 251-255. *See* App'x 75a (collecting examples). The requirements for invoking the

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[2] In the *Newsom* litigation, California has generally proceeded to date on the assumption that "regular forces" refers to civilian personnel. *See, e.g.*, *Newsom v. Trump*, No. 25-3727 (9th Cir.), C.A. Dkt. 63.1 at 22-28. But the State has also explained that it would be reasonable as a textual and historical matter to construe "regular forces" to mean members of the regular military. *See Newsom v. Trump*, No. 25-3727 (9th Cir.), C.A. Dkt. 130.1 at 1-2. California and Oregon recently took the same position in a joint filing in ongoing proceedings before the U.S. District Court for the District of Oregon. *See Oregon v. Trump*, No. 25-cv-1756 (D. Or.), D.Ct. Dkt. 130 at 5-8.

Insurrection Act are demanding. *See, e.g.*, Use of Marshals, Troops, and Other Federal Personnel for Law Enforcement in Mississippi, 1 Supp. Op. O.L.C. 493, 496 (1964). Presidents throughout our history have invoked it only when necessary to confront "situations where state and local law enforcement have completely broken down." *Id.*; *see, e.g.*, Br. of Former U.S. Army & Navy Secretaries & Retired Four-Star Admirals & Generals 22-23; *cf.* Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 Temp. L. Rev. 391, 432-434 (2007) (examining whether the Insurrection Act authorizes "martial law," *i.e.*, the temporary and extraordinary imposition of military control during a crisis in which civilian authorities fail).[3]

The second way for the military to lawfully execute the laws is to undertake activities that do not fall within the Posse Comitatus Act's prohibitions in the first place. By its terms, the statute bars the "use[] [of] any part of the [Armed Forces] as a posse comitatus or otherwise to execute the

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[3] As a matter of first principles, it is debatable whether the Insurrection Act "*expressly* authorize[s]" the activities prohibited by the Posse Comitatus Act. 18 U.S.C. § 1385 (emphasis added). But soon after the Act was passed, the federal government took the position that the Insurrection Act operates as an exception. *See*, *e.g.*, Dep't of War Gen. Order 49 (July 7, 1878), *reproduced at* https://tinyurl.com/4mwavjcs. The federal government has consistently adhered to that view, *see, e.g.*, Dep't of Def. Directive 5525.5, Encl. 4 (Jan. 15, 1986), https://tinyurl.com/mr4dzhvk, and Congress has never abrogated it in the many amendments of the Posse Comitatus Act and Insurrection Act. It is thus reasonable to presume that Congress was "aware of [this] . . . interpretation" and intended "to adopt [it]." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). By contrast, until earlier this year, the federal government had never taken the position that Section 12406(3) operates as an exception to the Posse Comitatus Act. *See Newsom v. Trump*, __ F. Supp. 3d __, 2025 WL 2501619, at *15 (N.D. Cal. Sept. 2, 2025).

laws." 18 U.S.C. § 1385. While the phrase "otherwise . . . execute the laws" may "seem[] sweeping" in isolation, Elsea, Cong. Rsch. Serv., R42659, *The Posse Comitatus Act & Related Matters* 56 (2018), courts typically avoid "untethering an 'otherwise' provision from the rest of a criminal statute," *Fischer v. United States*, 603 U.S. 480, 488 (2024). "Execute the laws" thus refers to law-enforcement activities akin to those historically performed "as a posse comitatus": the forms of assistance historically provided to local sheriffs to prevent civil disorder. *See Dreyer*, 804 F.3d at 1272. Consistent with that view, Congress has long understood the Posse Comitatus Act to cover "search, seizure, arrest, or other similar activity." *Dreyer*, 804 F.3d at 1275 (quoting 10 U.S.C. § 375).[4] On that understanding, the military may lawfully engage in a narrow range of domestic activities without implicating the Posse Comitatus Act, such as mail delivery during a postal strike, *see, e.g.*, Rubio, *Undelivered: From the Great Postal Strike of 1970 to the Manufactured Crisis of the U.S. Postal Service* 97-111 (2020), or distribution of food and medicine following a natural disaster, *see, e.g.*, McGrane, *Katrina, Federalism, and Military Law Enforcement*, 108 Mich. L. Rev. 1309, 1317-1318 (2010).

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[4] *See also* Dep't of Def. Instr. 3025.21, Encl. 3 § 1.c(1) (Feb. 27, 2013), https://tinyurl.com/46mszeur (memorializing Defense Department's longstanding views about the types of law-enforcement activities barred by the Posse Comitatus Act); *cf.* Kealy, *Reexamining the Posse Comitatus Act*, 21 Yale L. & Pol'y Rev. 383, 404 (2003) ("[T]he closer the role of the military personnel comes to that of a police officer on the beat, the greater the likelihood that the Act is being violated.") (internal quotation marks omitted).

Contrary to the federal government's suggestion, *see Oregon v. Trump*, No. 25-cv-1756 (D. Or.), D.Ct. Dkt. 131 at 8, it would not have been "strange" for Congress to contemplate the circumstances discussed above when crafting Section 12406(3). Statutory terms are "known by the company [they] keep[]." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Given that Sections 12406(1)-(2) address "unusual and extreme exigencies," *Newsom*, 141 F.4th at 1051, it is logical to think Congress had in mind circumstances akin to invasions and rebellions when drafting Section 12406(3). And as evidenced by the examples discussed above, *see supra* pp. 7-8, the situations in which the military can lawfully execute the laws tend to be large-scale disasters, crises, and other emergencies.

The federal government has also suggested that construing "regular forces" to mean regular military forces would be inconsistent with "a strong historical norm" that favors reliance on the militia before calling on "the full-time standing military." *Oregon v. Trump*, No. 25-cv-1756 (D. Or.), D.Ct. Dkt. 131 at 5. In making that argument, the federal government principally relies on preferences expressed "[a]t the founding"—not prevailing views in the early twentieth century when Congress enacted Section 12406(3). *Id.* at 5-6 (citing, *e.g.*, Federalist No. 29 (Alexander Hamilton)). At the founding, there was a "widespread fear [of] a national standing Army." *Perpich v. Dep't of Def.*, 496 U.S. 334, 340 (1990). Our Nation's early leaders hoped that a "Uniform Militia throughout the United States" would be able to provide for an adequate

national defense. *Id.* at 341. But that effort "failed to provide for a capable military force," Leider, *Deciphering the "Armed Forces of the United States,"* 57 Wake Forest L. Rev. 1195, 1225 (2022), and "the federal government increasingly relied on the regular army," *id.* at 1225—including in the rare circumstances in which the military was deployed domestically, *see id.* at 1225-1226. By 1903, "the militia proved to be . . . decidedly unreliable[.]" *Perpich*, 496 U.S. at 340; *see* Leider, *supra*, at 1227-1228. In light of that history, it is not at all surprising that Congress viewed the National Guard as a backup option to the regular military, not a first-line response force.

Nor, finally, would it hamper federal law-enforcement operations to construe "regular forces" to mean regular military forces. *Cf.* Appl. 36-40. Section 12406 has been invoked—at most—only one time since its 1903 enactment. *See, e.g.*, Br. of California 4 & n.2; Br. of Prof. Lederman 18 & n.11. With that single exception, in the rare instances during the twentieth century when the President has deployed the National Guard or regular military domestically, he has relied on other statutory authorities—in particular, the Insurrection Act. *See, e.g.*, Br. of Former U.S. Army & Navy Secretaries & Retired Four-Star Admirals & Generals 22-23. If there is a need for additional authority to federalize the National Guard, Congress can provide it. *Cf. Nat'l Fed. Independent Bus. v. OSHA*, 595 U.S. 109, 118 (2022) (refusing to "significantly expand [an executive agency's] authority without clear congressional authorization"). The Framers entrusted Congress, not the

President, to determine when federalization is appropriate. *See* U.S. Const. art. I, § 8, cls. 15-16.

* * *

The federal government's attempt to invoke Section 12406(3) in this case calls to mind concerns raised by skeptics and opponents of our new constitutional charter during debates over ratification. Patrick Henry, for example, warned that the President could call forth state militias "to enforce every execution [of the laws] indiscriminately." App'x 49a (quoting 3 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 412 (1836)). Madison and Hamilton responded forcefully to refute those suggestions and reassure doubters that the President would be unable to wield that far-reaching authority. *See, e.g.*, *id.* at 48a-49a.

Since the Founding, Congress and the Judiciary have honored the Framers' vision, taking steps necessary to ensure that our Nation does not take even one step down the road of unnecessary military intrusion into civilian affairs. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586-589 (1952); *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946); *Ex Parte Milligan*, 71 U.S. 2, 121 (1866). As Justice Murphy once reminded us, "[t]hose who founded this nation" "shed their blood to win independence from a ruler who they alleged was attempting to render the 'military independent of and superior to the civil power[.]'" *Duncan*, 327 U.S. at 325 (Murphy, J., concurring). Similarly, Justice Scalia explained that "[a] view of the

Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust [of British rule] that engendered" our constitutional order. *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting). "[S]upremacy of the civil over the military is one of our great heritages." *Duncan*, 327 U.S. at 325 (Murphy, J., concurring). This case poses a profound test of our commitment to that longstanding principle, which has guided our democracy for generations and has "made possible the attainment of a high degree of liberty regulated by law rather than by caprice." *Id.*

CONCLUSION

The application for a stay should be denied.

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