

No. 25A443

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, President of the United States, *et al.*,

Applicants,

v.

STATE OF ILLINOIS, *et al.*,

Respondents.

**On Application for Stay of the Temporary Restraining Order Issued by The
United States District Court for The Northern District of Illinois**

**BRIEF *AMICUS CURIAE* OF THE SOCIETY FOR THE RULE OF LAW
INSTITUTE IN SUPPORT OF RESPONDENTS**

November 10, 2025

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INTEREST OF *AMICUS CURIAE*

Amicus The Society for the Rule of Law Institute (“SRLI”) is a non-profit, non-partisan organization dedicated to defending the conservative legal principles of the rule of law, separation of powers, federalism, and government by the people.¹ SRLI has an interest in seeing that these principles are not violated by the misuse of federalized National Guard units as an end-run around the restrictions that the Constitution and Congress have placed on any Administration’s insertion of America’s cherished military—including federalized National Guard units—into our nation’s domestic life.

INTRODUCTION AND SUMMARY OF ARGUMENT

Part I of this brief shows that “the regular forces” in 10 U.S.C. § 12406(3) refers to the regular military forces of the United States. As shown by the prior amicus brief by Professor Lederman, over 100 years of statutes, case law, and Executive Branch statements establish that “the regular forces” are the regular military. But there is more. If, as the federal Government contends, “the regular forces” refer to the law enforcement personnel at civilian federal agencies, then federalized National Guard units can be drawn into executing federal laws when federal statutes have *forbidden* using regular military units. This violates the canon that laws *in pari materia* be read harmoniously. The congressional bars that restrain use of the military to execute the law apply to *all* of “the Army” and “the

¹*Amicus* states that no counsel for any party authored this brief in whole or in part and that no entity, aside from *amicus* and its counsel, made any monetary contribution toward the preparation or submission of this brief.

Air Force.” 18 U.S.C. § 1385, 10 U.S.C § 275. In turn, 10 U.S.C. §§ 10106 and 10112 make every federalized National Guard unit a “component of the Army” or “the Air Force.” Most important, 10 U.S.C. § 12405 makes all federalized National Guard units “subject to the laws and regulations governing the Army or the Air Force.” It is nonsensical to read § 12406(3) to allow National Guard units to be federalized to do something that § 12405 would prevent all federalized National Guard units from doing.

Part II shows that the way § 12406(3) properly operates does not automatically force a President to use the regular military when the federalized National Guard is better suited to a task that the regular military is authorized by law to do. Federalizing a National Guard unit requires satisfying two conditions. First, “the regular forces”—the regular military—must have legal authority to do what the National Guard unit is to be federalized to do. Without such authority, “the regular forces” are statutorily barred, rather than factually “unable.” Second, factual reasons of comparative capabilities between military units, proximity, or numbers must support that the regular military by itself would be factually “unable” to accomplish the task adequately. This second condition would be satisfied, for instance, where a President’s reasonable assessment of comparative capabilities between military units was that deploying a federalized National Guard unit, rather than a regular military unit, would decrease the likelihood of violent local opposition to the peaceful execution of federal law. An example that

illustrates when both conditions are satisfied is federalizing National Guard units to ensure school desegregation against unconstitutional resistance by state officials.

ARGUMENT

I. IN 10 U.S.C. § 12406(3), “THE REGULAR FORCES” REFERS TO THE REGULAR FORCES OF THE UNITED STATES MILITARY.

The federal Government argues that “the regular forces” refer to the “federal law enforcement personnel” of every agency of the federal government and not instead to the regular military. Appl. 30 n. 4. The District Court’s opinion showed that “the regular forces” refer to the regular military, carefully analyzing the statutory language and its history as well as historical constraints going back to the Founding on using either the militia—now called the National Guard—or the regular military to execute federal laws domestically. Appx. 48a-50a, 68a-71a. As the federal Government has not even argued that the National Guard should be federalized because the regular military is unable to execute federal laws in Illinois, this provides one sufficient basis by itself to deny a stay.²

The Brief of Professor Martin S. Lederman as *Amicus Curiae* In Support of Respondents, at 8-18, filed Oct. 21, 2025 (“Lederman Br.”), already has demonstrated comprehensively that from 1776 through 1908—when the

² This Court should deny a stay based on the District Court’s correct interpretation of “the regular forces,” regardless of whether any party has supported that statutory interpretation. *See, e.g., Kamen v. Kemper Fin. Svcs.*, 500 U.S. 91, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”); *Dahda v. United States*, 584 U.S. 440, 450 (2018) (“we may affirm a lower court judgment on any ground permitted by the law and the record”) (internal quotations omitted); *cf. Greenlaw v. United States*, 554 U.S. 237, 250 & n.5 (2008) (Court may affirm based on a “novel” legal argument “presented for the first time in the brief amicus filed in this Court”).

predecessor of 10 U.S.C. §12406(3) was amended to add “the regular forces”—and beyond, “the regular forces” has meant the regular military in statutes, precedent, and Executive Branch statements. Critically, the addition of “the regular forces” in 1908 changed the statute. *Unlike in § 12406(3)*, Congress had expressly referred to civilian personnel, by referring to “marshals” and “the ordinary course of judicial proceedings,” in *prior* statutes in the 1790s, where Congress had wanted the militia to be a back-up to civilian personnel. *See id.* at 17 n.10 (discussing 1792 and 1795 militia statutes). That changed by 1908 when the statute removed references to civilian personnel and substituted “the regular forces,” which refers to the regular military.

This *amicus* brief will not replicate Professor Lederman’s demonstration. Rather, this brief shows that principles of textualism, statutory context, and *in pari materia* confirm that “the regular forces” refer only to the regular military.

To start, “the regular forces” is part of a statutory limitation on the power delegated by Congress to the Executive Branch. Clause 15 of § 8 of Article I of the Constitution assigns to Congress, *not* the President, the legislative power by statute to “call[] forth the Militia to execute the Laws of the Union.” In § 12406(3), Congress has delegated much less authority to the Executive Branch to federalize National Guard units. This statutory provision delegates authority to the President to federalize National Guard units *only if* “the regular forces” are “unable” to execute federal “laws,” and then only to the extent “necessary to . . . execute those laws.” Congress said “the regular forces,” *not* broader phrases such as “officers and

employees of the United States,” “the federal government,” “federal agencies,” “federal law enforcement personnel,” or the like.

The federal Government’s Application, at 30 n.4, cites the general rule that the regular military is *barred* by statute from “executing the laws.” *E.g.*, 18 U.S.C. § 1385; *see* 10 U.S.C. § 275. But there are a number of limited exceptions where statutes authorize the regular military to execute federal law or assist in executing federal law. *See, e.g.*, 10 U.S.C. §§ 252-53 (the “Insurrection Act”); 10 U.S.C. §§ 273-74, 282-84; Appx. 75a (cataloging other statutes).

The federal Government has stated that the regular military does not “regularly” execute federal laws. Appl. 30 n.4. This is true but it misses the point. As noted, there are limited exceptions where the regular military *does* execute federal law. The question is whether, *outside* those exceptions, does 10 U.S.C. § 12406(3) authorize federalizing National Guard units to do exactly what Congress by statute has forbidden using the regular military to. It does not.

A. FORBIDDEN BY STATUTE IS NOT “UNABLE.”

“[F]ederal law *forbids* [the regular military’s] deployment for the very mission at hand.” Amicus Brief of The American Center for Law and Justice in Support of Applicants (“ACLJ Br.”) at 2 (emphasis added). Legally forbidden, however does not satisfy “unable” in this statutory context. “[U]nable with the regular forces to execute the laws of the United States” in § 12406(3) means that, as a factual matter, “the regular forces” lack the capabilities, proximity, or numbers to execute those laws adequately, in a case where the regular forces are legally authorized to

do so. When the "the regular forces" are under a statutory bar, they are precluded or unauthorized, *not* factually unable.

Let's *assume, for argument's sake*, that the federal Government is right that "the regular forces" refers to the "federal law enforcement personnel" at the pertinent federal civilian agencies. Appl. 30 n.4. Suppose Congress precluded all the "federal law enforcement personnel" at the pertinent non-military agencies from using federal funds to enforce particular laws—say marijuana possession laws or the TikTok ban—for two years. Those agencies remain able to execute those laws. They have the staff and the expertise. They are instead legally barred from doing so for a period. Surely, it would be unreasonable in such a case to read § 12406(3) as authorizing federalizing the National Guard to enforce the laws that Congress had prohibited the pertinent civilian agencies from enforcing. Thus, whether or not "federal law enforcement personnel" at civilian agencies are "the regular forces," § 12406(3) cannot have been intended by Congress to create an ever-ready federal police for any Administration's end-runs around statutory prohibitions enacted by Congress.

**B. NO ADMINISTRATION HAS STATUTORY AUTHORITY TO USE THE
FEDERALIZED NATIONAL GUARD WHEN A STATUTE FORBIDS
USING THE ARMY AND THE AIR FORCE TO EXECUTE FEDERAL
LAW.**

After this Court's October 29, 2025, Order in this case, the federal Government conceded in a brief in the District Court of Oregon that "regular forces" in other contexts can refer to the standing military." Defendants Post-Trial Memorandum, at 5, filed Nov. 1, 2025, in *State of Oregon v. Trump*, Case No. 3:25-

cv-01756-IM (D. Or.) (“DOJ Nov. 1 Brief”). The federal Government contended that 10 U.S.C. § 12406(3) was different, however, because an Administration should have authority to use the militia where a statute prohibits “use of the standing military as the regular forces for the execution of laws.” DOJ Nov. 1 Br. at 5-7. The federal Government’s proposed dichotomy between the authority to use the regular military and the authority to federalize National Guard units contradicts the plain text of Titles 10 and 18.

To start, when 10 U.S.C. § 12406(3) is properly used to federalize a National Guard unit, 10 U.S.C. §§ 10106 and 10112 make that federalized National Guard unit “a component of *the* Army” or “a component of *the* Air Force.” (Emphasis added.) When an Army National Guard unit is federalized, that literally means “you’re in the Army now.” In turn, the general prohibition in 18 U.S.C. § 1385 against “execut[ing] the laws” applies to using “*any part of the Army*, the Navy, the Marine Corps, *the Air Force*, or the Space Force.” (Emphasis added.) The restraints of 10 U.S.C. § 275 likewise apply to using any “member of the *Army*, Navy, *Air Force*, or Marine Corps.” (Emphasis added.)

Under the federal Government’s anti-textual dichotomy, every Administration could regularly make end-runs to evade the statutory bars against using any part and any member of the Army and Air Force in the domestic execution of federal law. Suppose there is a situation where 18 U.S.C. § 1385 or 10 U.S.C. § 275 barred using the Army and Air Force to execute federal laws, and there was no statutory exception. Under the federal Government’s argument, federalized

National Guard units—that are by statute “component[s] of the Army” and “the Air Force”—nonetheless could be used under § 12406(3) to do exactly what Congress by statute has barred using any part or any member of the Army and the Air Force to do. That contradicts the text of 10 U.S.C. §§ 10106, 10112, 18 U.S.C. § 1385, and 10 U.S.C. § 275. That contradiction is readily avoided by a proper construction of § 12406(3) under which “the regular forces” in § 12406(3) refer to the regular forces of the United States military. Under the proper construction, in this situation, the regular military is *forbidden* from executing the laws and, as shown above in Part I.A, forbidden is not “unable.” In turn, the requirement of § 12406(3) that “the regular forces” be “unable” is not satisfied.

The proper construction of § 12406(3) is confirmed by the “Related-Statutes Canon,” which is: “Statutes *in pari materia* are to be interpreted together, as though they were one law.” A. Scalia & B. Garner, *Reading Law* 252 (2012); *see, e.g., United States v. Stewart*, 311 U.S. 60, 64 (1940). 10 U.S.C. § 12406(3) is *in pari materia* with 10 U.S.C. §§ 10106, 10112, and 12405 as they all address the status of and authority to use federalized National Guard units. In particular, 10 U.S.C. § 12405 provides that when National Guard units are federalized, those units are “subject to the laws and regulations governing the Army or the Air Force.” Accordingly, federalized National Guard units cannot be used to execute statutes that “the laws . . . governing the Army or the Air Force” have not authorized the use of the Army or Air Force to execute.

Because “the body of the law should make sense,” *Reading Law* 252, related statutes such as 10 U.S.C. §§ 10106, 10112, 12405, and 12406(3) should be read together to be coherent and consistent with one another. *See id.* at 252; *see also United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (because “statutory construction . . . is a holistic endeavor,” the Court should adopt the “permissible meaning[] [that] produces a substantive effect that is compatible with the rest of the law”). It is nonsensical that § 12406(3) would allow federalizing a National Guard unit to execute federal laws that § 12405 forbids using any federalized National Guard unit to execute, because a statute bars using the Army and the Air Force to execute those laws. Federalizing National Guard units cannot be a vehicle for evading prohibitions imposed by statute on using any part of the Army and Air Force—including federalized National Guard units. Put another way, it cannot be “necessary” under § 12406(3) to federalize National Guard units to “execute those laws” in any situation where § 12405 simultaneously bars using federalized National Guard units to execute those laws.

Pursuant to a statute enacted by Congress, any interpretation *or* use of § 12406(3) must be consistent with § 12405. The predecessor of what is now 10 U.S.C. § 12406(3) was first amended to include the term “the regular forces” by § 3 of the Act of May 27, 1908. 35 Stat. 399, 400 (the “1908 Act”).³ In the National Defense Act of 1916 (the “1916 Act”), however, § 101 enacted a restriction that had

³ Section 3 of the 1908 Act said “the regular forces at his command.” 35 Stat. at 400. In the 1956 recodification of Title 10, “at his command” was “omitted as surplusage.” 10 U.S.C. §3500 Historical And Revision Notes (1958).

not been as broad in prior law: "The National Guard when called as such into the service of the United States shall . . . be subject to the laws and regulations governing the Regular Army, . . . " 39 Stat. 166, 208 (1916).⁴ This restriction subjecting federalized National Guard units to "the laws and regulations governing the Regular Army" included subjecting federalized National Guard units to the prohibition that 18 U.S.C. § 1385 imposed on using the Regular Army and to the limits on the authority given by the Insurrection Act for using the Regular Army.

Critically, § 128 of the 1916 Act provides: "All laws and parts of laws *in so far as they are inconsistent* with this Act are hereby repealed." 39 Stat. at 217 (emphasis added). Even if § 3 of the 1908 Act— "the regular forces" provision—was ambiguous in 1908, "the meaning of an ambiguous provision may change in light of a subsequent enactment." *Reading Law*, at 254-55; *see also id.* at 330 (when statutes are *in pari materia*, "a later enactment . . . will often change the meaning that would otherwise be given to an earlier provision that is ambiguous"). Thus, § 3 of the 1908 Act, to the maximum extent possible, must be read and applied in a manner consistent with the restriction in § 101 of the 1916 Act.

As 10 U.S.C. § 12405 is the amended version of § 101 of the 1916 Act,⁵ and 10 U.S.C. § 12406(3) is the amended version § 3 of the 1908 Act, the scope and use of §

⁴ Prior to the 1916 Act, the requirement read more narrowly: "The militia, when called into the actual service of the United States, shall be subject to the same Rules and Articles of War as the regular troops of the United States." Act of Jan. 21, 1903, § 9, 32 Stat. 775, 776 (1903).

⁵ The current terms of 10 U.S.C. § 12405 were codified by 1956 in 10 USC §§ 3499 and 8499, except that the 1956 version of title 10 had substantively identical restrictions for the Army National Guard and Air Force National Guard in two provisions. Pub. L. No. 1028, 84th Cong., 2d Sess., 70A Stat. 199,

12406(3) cannot exceed the restriction in § 12405. This provides another reason that § 12406(3) cannot be construed or used to allow the National Guard to be federalized to execute the laws of the United States in any circumstances where it has not been shown that there is legal authority to use the Army or the Air Force to execute those laws.

The government misplaces reliance on the portion of 18 U.S.C. § 1385 that permits using the military to execute the laws “in cases and under circumstances expressly authorized by the Constitution or [different] Acts of Congress.” *See* DOJ Nov. 1 Br. at 8. The issue here is the extent to which the terms of those other “Acts of Congress” —10 U.S.C. §§ 10106, 10112, 12405, and 12406(3)—expressly authorize, or instead limit the authority for, using federalized National Guard units to execute federal laws. Moreover, 18 U.S.C. § 1385 was first enacted in 1878. 10 U.S.C. § 12405, which is the amended version of § 101 of the 1916 Act, limits the authority to use federalized National Guard units to the same authority to use Army and Air Force units under “the laws and regulations governing the Army or the Air Force.” And § 128 of the 1916 Act repealed “[a]ll laws and parts of laws in so far as they are inconsistent with” § 101 of the 1916 Act. Thus, 18 U.S.C. § 1385 cannot be read to contradict 10 U.S.C. § 12405 by creating a dichotomy that authorizes using a federalized National Guard unit where a statute forbids using the rest of the Army and Air Force.

525 (1956). The subsequent and current codification of 10 U.S.C. § 12405 combines the same restrictions in one section applicable to both Guards.

Likewise, the ACLJ misplaces reliance on the uses of the militia in the 1790s. *See* ACLJ Br. at 8-12. Those uses are irrelevant because they occurred under defunct statutes that were very different from Section 12406(3) and other statutes that have governed since 1908. First, the 1792 and 1795 statutes expressly permitted using the militia as a back-up to federal civilian law enforcement, including "the marshals." 1 Stat. 264 (1792); 1 Stat. 424 (1795). That changed by 1908 for what is now Section 12406(3) with the removal of references to civilian law enforcement and substitution of the condition that "the regular forces" were "unable . . . to execute the laws." 35 Stat. at 400. And, as Professor Lederman has shown and ACLJ effectively concedes, by 1908, "the regular forces" was the term used for the regular military. *See* ACLJ Br. at 6. Second, statutes enacted after the 1790s—a 10 U.S.C. §§ 10106, 10122, and 12405 – expressly make a federalized National Guard unit part of the Army or the Air Force and subject to the laws governing the Army or the Air Force. Thus, the proposed dichotomy between the supposed authority to use the federalized National Guard units of the Army and the Air Force to execute the laws and the forbidden use of the regular units of the Army and the Air Force in the same circumstances, *see* ACLJ Br. at 2, 6, is a non-starter under these statutes.

In this case, the federal Government has never invoked the Insurrection Act, or any other statute authorizing the use of the Army or the Air Force to execute federal law, much less claimed that the statutory conditions for execution of federal laws by the Army or the Air Force have been satisfied. Thus, the federal

Government has not attempted to make the necessary showing under § 12406(3) that “the regular forces” are unable to execute federal laws here, rather than being forbidden by statute from doing so.

The federal Government’s attempted misuse of the National Guard has no limits. It would turn National Guard units into components of the Army or Air Force—carrying military weapons and wearing military uniforms—to be used as a roving domestic Army whenever any President finds that the law enforcement personnel of any federal agency charged with executing federal laws need assistance, *including* even when a statute bars using the Army and Air Force to provide that assistance. The breadth of the federal Government’s argument is shown by the federal Government’s reliance on President Nixon’s use of the National Guard to sort the mail during a postal strike. *See* Appl. 29; *but cf.* Lederman Br. at 18-19 n.11. So, for example, on the federal Government’s theory, any President could federalize the National Guard if there is, in that President’s view, a shortage of tax collectors or investigators at the IRS. *See* DOJ Nov. 1 Br. at 8-9 (arguing that § 12406(3) would apply “if tax collectors went on strike”). And so on to SEC, CFTC, FTC, EPA investigators and enforcement personnel, etc., as they, like tax collectors, execute various federal laws.

This violates the canon of *noscitur a sociis*. Under this canon, 10 U.S.C. § 12406(3) should not be given “a meaning so broad that it is inconsistent with the company it keeps.” *Fischer v. United States*, 603 U.S. 480, 487 (2024) (internal quotations omitted). 10 U.S.C. § 12406(1) and (2) save federalizing our treasured

National Guard for rare, monumental threats: invasion, “danger of invasion,” “rebellion or danger of rebellion.” An interpretation of § 12406(3) that extends so far into domestic affairs as to encompass federalizing the National Guard for everyday matters such as tax collection, SEC, CFTC, FTC, and EPA enforcement matters, and so on, cannot be squared with *noscitur a sociis*.

This Court has ruled over and over again that no federal statute hides an elephant in a mousehole. *See, e.g., Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001). To quote Justice Gorsuch, this Court should not create a major addition to the “one-way ratchet toward the gradual but continual accretion of power in the executive branch and away from the people’s elected representatives” in Congress. *Learning Resources, Inc. v. Trump*, No. 24-1287, Oral Arg. Tr, at 74 (U.S. Nov. 5, 2025). Federalizing the National Guard to be the roving domestic Army for assisting all civilian federal law enforcement personnel is a big elephant. So is federalizing National Guard units to execute federal laws that the regular military is barred from executing. This Court should not squeeze either elephant—much less both—into the mousehole that is 10 U.S.C. § 12406(3). The District Court’s statutory interpretation was right.

Finally, the use of a federalized National Guard unit must comply with § 12405 regardless of how this Court interprets § 12406(3). *See supra*, at 8-11. For example, *assume, for argument’s sake*, that this Court were to grant a stay, in whole or part. This Court should use its authority, under principles of equity and the *Nken* factors of protecting other interested persons and the public interest, to

instruct Applicants that pursuant to 10 U.S.C. § 12405, in Illinois they cannot use any member of any federalized National Guard unit to engage in any activity where Applicants lack statutory authority to use a member of a regular unit of the Army or the Air Force. *See Nken v. Holder*, 556 U.S. 418, 426-27 (2009) (this Court has “authority . . . to act responsibly”). The Court should expressly instruct that in Illinois, Applicants must not (a) use any member of a federalized National Guard unit to execute federal laws in circumstances that do not satisfy the Insurrection Act or (b) order any member of a federalized National Guard unit to participate “in a search, seizure, arrest, or other similar activity,” 10 U.S.C. § 275, except in circumstances where there is statutory authority to order a member of a regular unit of the Army or the Air Force to do so. Protecting both the members of our prized National Guard and our citizens requires no less.

II. HOW 10 U.S.C. § 12406(3) PROPERLY OPERATES IN PRACTICE.

Contrary to the DOJ Nov. 1 Br. at 9, properly construing the “the regular forces” in § 12406(3) to refer to the regular military does not automatically force the President to use the regular military, where it has authority to execute the law, in preference to the federalized National Guard. Federalization of a National Guard unit under § 12406(3) is proper when two conditions are both satisfied. The first condition is that statutory authority exists to use the regular military to execute the federal laws in the situation presented. That statutory interpretation presents a legal issue subject to *de novo* review. If this first condition is not satisfied, that is the end of the inquiry. This is because when there is no authority to use the regular

military to execute federal laws, then there is no authority to federalize a National Guard unit under either 10 U.S.C. § 12406(3) or § 12405, much less under the combination when both are read *in pari materia*. *See supra*, at 5-15.

If there is authority to use the regular military, the second condition is that, in the reasonable assessment of a President, a factual matter of comparative capabilities between military units, proximity, or numbers supports using the federalized National Guard to execute federal laws adequately, instead of or in addition to the regular military. *See* Appl. 31 (suggesting standard of “adequate federal forces”); Lederman Br. at 18-19 n. 11 (explaining that President Nixon used the National Guard in 1970 because the Vietnam War left the regular military with insufficient numbers to help sort the mail during the postal strike). This *amicus* brief does *not* argue that a President may make these factual inadequacy assessments only after first deploying the regular military. A President would receive some deference from the courts on the factual assessments of the second condition—the comparative capabilities, proximity, and numbers of the National Guard units and the regular military units.

In this case, however, the federal Government has not even asserted that either the first or second condition is satisfied. It cannot do so for the first time as a part of a stay application. *See* Sup. Ct. R. 23.3.

The following example illustrates a proper use of § 12406(3). Suppose state officials are blocking the schoolhouse door to black students, in violation of the Fourteenth Amendment and court orders. Because of that improper state action,

the Insurrection Act would authorize the President's sending in the regular military—as it did in Little Rock in 1957. *See* Lederman Br. at 21-22 & n. 15 (discussing 1964 Katzenbach opinion). So, the threshold first condition is satisfied. The President also concludes that using the regular military would be an inadequate way to execute federal law because doing so would increase the likelihood of violent opposition by the local population to the peaceful execution of federal law. In comparison, federalizing the state's National Guard, the President reasonably concludes, decreases the likelihood of violent opposition by the local population and increases the likelihood of local compliance with federal law. *Cf.* DOJ Nov. 1 Br. at 9 (ignoring the requirement that the regular military must have authority, while arguing “unable” is satisfied where regular military is “less well-suited” because of “the calming effect that the presence of the National Guard has in its deployments”). This satisfies the second condition as the President has reasonably concluded that the better capabilities of the National Guard unit would be necessary to execute federal law adequately. Thus, this example is a proper federalization under 10 U.S.C. § 12406(3).

The proper interpretation of 10 U.S.C. § 12406(3) gives that provision a meaningful function. To start, statutes such as 10 U.S.C. § 253 and 22 U.S.C. § 461 allow the President only to “us[e] the militia” but not to federalize it. Federalizing a National Guard unit has the advantage of making that unit subject to federal civilian and uniformed commanders, not to state commanders only. The members of a federalized National Guard unit are also subject to court martial. Moreover,

there are a number of other statutory provisions that allow the President, the Secretary of Defense, or the Secretary of the Army to use the regular military to execute certain federal laws, or assist in their execution, but these statutory provisions themselves do not mention the militia or the National Guard. *See, e.g.*, 10 U.S.C. §§ 273-74, 282-283, 284(b)(3)-(4), (6)-(7), & (c); 16 U.S.C. § 23; 16 U.S.C. § 78; 18 U.S.C. § 351(g); 18 U.S.C. § 831(e), (f); 22 U.S.C. § 408; 25 U.S.C. § 180. For these kinds of statutes, 10 U.S.C. § 12406(3) enables the President to federalize National Guard units instead or in addition to the regular military, when the regular military is (a) legally authorized but (b) nonetheless unable to adequately execute these statutes for factual reasons of comparative capabilities between military units, proximity, or numbers.

CONCLUSION

The Court should deny the application.

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