
In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

STATE OF ILLINOIS AND CITY OF CHICAGO,
Respondents.

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

**SUPPLEMENTAL BRIEF OF PROFESSOR MARTIN S. LEDERMAN
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS¹

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court may only grant the application for a stay of the district court’s temporary restraining order (TRO) if, at a minimum, the Applicants make “‘a strong showing that [they are] likely to succeed on the merits.’” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); accord *Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025). In order to make that strong showing here, the Applicants would have to demonstrate that the President “is unable with the regular forces to execute the laws of the United States” in the Chicago area, which is a prerequisite to the President’s use of the federalized National Guard to execute the laws in Illinois pursuant to 10 U.S.C. § 12406(3).²

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution to its preparation or submission.

² Amicus notes that the TRO the Applicants asked this Court to stay was set to expire on October 23, 2025, but the Applicants themselves (the Defendants) proposed that the district court extend the TRO *until a final judgment on the merits*, so that they can “allocat[e] their legal resources most effectively given pending litigation in other venues.” D. Ct. Doc. 98, at 1 (Oct. 23, 2025). The district court granted the Defendants’ proposal, *id.* at 2, which means that, by virtue of their own initiative, the TRO will be in effect for many weeks or months. It is difficult to imagine how the Applicants can, under these circumstances, demonstrate that they will be irreparably injured absent a stay of the TRO that they themselves proposed, *see Nken*, 556 U.S. at 434. Amicus assumes, however, that the parties will address that aspect of the Government’s

The parties and the lower courts in this litigation have focused on the question of whether and to what extent the President has been unable to execute federal laws in the Chicago area, including immigration laws, using *civilian* law enforcement personnel, viz., officers and employees of the Immigration and Customs Enforcement (ICE) and Federal Protective Service (FPS) components of the Department of Homeland Security (DHS). *See* App. at 30 n.4 (asserting that “the regular forces” refers to “federal law enforcement personnel”). As explained in amicus’ initial brief on October 21, 2025, however, that focus has been misplaced because the term “the regular forces” in § 12406(3) refers to the “standing” armed forces, i.e., the professional *military* personnel serving in the United States Armed Services. Lederman Br. 8-19. And, even assuming *arguendo* that the President has the legal authority to deploy those regular military forces to help execute federal laws in Illinois—a question this Court need not and should not address, *see id.* 19-24—the President has not found, nor would there be any basis for him to conclude, that he would be “unable” to enforce federal laws in Illinois with the assistance of those military forces if it were legal for him to direct such a deployment. Accordingly, the President has not satisfied, and cannot satisfy, a necessary precondition for his deployment of the National Guard to help execute federal law in Illinois pursuant to § 12406(3).³

application; accordingly, this brief is devoted to the merits question concerning the meaning of the term “the regular forces” in § 12406(3).

³ The Solicitor General argues in the alternative (App. 31-34) that, regardless of whether the President had authority under § 12406(3) to use the National Guard to execute the law in Illinois, the adjacent subsection, 10 U.S.C. § 12406(2), authorized him to do so because the private violence in the Chicago area established a “rebellion or danger of a rebellion against the authority of the Government of the United States” and the President could have determined that it is “necessary” to use the National Guard to “suppress” that rebellion. As amicus has explained, however (Lederman Br. 6), the President has not purported to find that there was a rebellion, or the threat thereof, in the Chicago area, and therefore he did not determine the “numbers” of National Guard units or members, if any, that would be “necessary” to suppress a rebellion, as § 12406(2) requires. Moreover, as Respondents and amicus have previously

On October 29, 2025, this Court directed the parties to file supplemental letter briefs addressing the questions raised in amicus’ previous brief—namely, “[w]hether the term ‘[the] regular forces’ refers to the regular forces of the United States military, and, if so, how that interpretation affects the operation of 10 U. S. C. § 12406(3)”—and invited amici to file briefs addressing those same questions.

Part A of the Argument below briefly explains why the use of term “the regular forces” in § 12406(3) is most naturally read—in contrast to quite different formulation contained in earlier “calling forth” statutes—to refer to the members of the standing (i.e., the full-time) Armed Forces. Part B introduces a couple of noteworthy historical examples to the overwhelming evidence canvassed in amicus’ earlier brief reflecting the consensus understanding of the term “the regular forces” (and similar terms, such as “Regulars”) both before and after Congress added those words to the statute in 1908. Part C describes several instances in which Executive Branch actors *since* 1908 have assumed that the President can only make use of the National Guard pursuant to § 12406(3) if he is unable to execute federal laws using the regular Army and other full-time Armed Forces.

When amicus filed his initial brief, the Applicants had not yet provided any substantive defense of their alternative reading of “the regular forces” in this litigation or in similar cases pending in California and Oregon. Three days after this Court issued its order, however—on November 1, 2025—the Department of Justice filed a brief on behalf of the President and other defendants in a related case in Oregon in which it offered several arguments in favor of its alternative interpretation. *See Oregon v. Trump*, No. 25-1756 (D. Or.), Doc. 131, at 5-9.

explained, any such determination that there was a rebellion, or the threat thereof, in Illinois would be implausible. *See* Respondents Br. 33-37; Lederman Br. 6-7.

Accordingly, Part D of the Argument below addresses the Government’s arguments in the *Oregon* case. Those arguments offer nothing to contradict or overcome the overwhelming evidence that “the regular forces” refers to members of the standing Armed Forces.

ARGUMENT

Because “the Regular Forces” in 10 U.S.C. § 12406(3) Refers to Military Personnel Serving in the United States Armed Forces, the President Has Not Satisfied, and Cannot Satisfy, the Precondition to the Exercise of Authority Pursuant to Section 12406(3) to Use the National Guard to Help Execute Federal Law in the Chicago Area

Section 12406(3) of Title 10 of the United States Code provides in pertinent part that “[w]henver ... the President is unable with the regular forces to execute the laws of the United States ... the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to ... execute those laws.” In his Memorandum of October 4, 2025, the President asserted that “the regular forces of the United States are not sufficient to ensure the laws of the United States are faithfully executed, including in Chicago.” Presidential Memorandum at 1, reprinted as Exhibit C in D. Ct. Doc. 62-1, at 16. In his application to this Court, the Solicitor General confirmed (App. at 30 n.4) that the “regular forces” to which the President referred are “federal law enforcement personnel,” that is, personnel working within *civilian* federal law enforcement components of DHS, including ICE and FPS. Based upon his finding that those civilian personnel were unable to ensure faithful execution of federal laws in and around Chicago, the President called into federal service at least 300 members of the Illinois National Guard and directed them to “protect ICE, FPS, and other United States Government personnel who are executing Federal law in the State of Illinois, and

Federal property in the State of Illinois.” Presidential Memorandum at 2, reprinted as Exhibit C in D. Ct. Doc. 62-1, at 17.⁴

The President, however, considered the wrong question—and therefore he failed to make the proper determination that is required before he can use § 12406(3) to deploy parts of the National Guard to help execute federal law. The term “the regular forces” does not refer to all *civilian* law enforcement personnel in the Executive Branch (or some subset thereof). It refers,

⁴ The next day, the Secretary of Defense asserted that the President had further “authorized” him to mobilize up to 400 members of the *Texas* National Guard to “perform federal protection missions where needed,” including in Chicago. *See* Memorandum for the Adjutant General, Texas National Guard (Oct. 5, 2025), reprinted as Exhibit G to D. Ct. Doc. 62-1, at 26. Although it appears that the President did not reduce to writing this authorization concerning the Texas National Guard, amicus will assume that it, too, was based upon the President’s finding that DHS personnel were unable to execute federal laws in the Chicago area.

Although the President’s October 4 Memorandum expressly directed the federalized National Guard to “protect” federal personnel and property, the President’s invocation of § 12406(3), which authorizes him to call the National Guard into Federal service “to ... *execute* [the] laws [of the United States],” properly reflects an understanding that, in order to perform that protective function, members of the National Guard would likely themselves “execute” federal law—including, presumably, by employing coercive force against private parties who interfere with ICE’s functions. *See Effect of Posse Comitatus Act on Proposed Detail of Civilian Emp. to the Nat’l Infrastructure Prot. Ctr.*, 22 Op. O.L.C. 103, 104-05 (1998) (“Relevant caselaw and opinions of this Office reflect the view that the [Posse Comitatus Act (PCA)], which generally prohibits the use of “any part of the Army or the Air Force ... to execute the laws”] is intended to prohibit military personnel from *directly coercing, threatening to coerce*, or otherwise regulating civilians in the execution of criminal or civil laws. ... [T]he PCA prohibits military authorities from subjecting civilians to military regulations, proscriptions, *or compulsions*.”) (emphasis added); *see also, e.g., United States v. Dreyer*, 804 F.3d 1266, 1275 (9th Cir. 2015) (en banc) (noting that the PCA prohibits subjecting civilians to the use of military power that is “compulsory”) (citations omitted). The President was warranted in assuming that the military forces would “execute” federal laws by compelling civilians to act or not act in a certain way. *See* Hearings Before the Special Subcomm. to Inquire into the Capability of the National Guard to Cope with Civil Disturbances of the House Comm. on Armed Servs., 90th Cong. 1st Sess. 5830 (1967) (testimony of Martin F. Richman, First Assistant, Office of Legal Counsel, Department of Justice) (explaining that when federal military forces are deployed to carry out a military operation to restore law and order—as they had done in July 1967 during the riots in Detroit—“[t]hey are carrying on a police operation” that includes “going from block to block and stopping the shooting, stopping the looting, [and] arresting people”).

instead, to the regular *military* forces who are part of the “standing” Army and the other full-time Armed Forces within the Department of Defense.

That reading is compelled not only by the text of § 12406(3) and by the statutory context in which that provision appears, but also by the overwhelming, common understanding of the meaning of “the regular forces” and similar terms (including “the Regulars”) both before and after Congress first enacted and amended the statute in 1903 and 1908, and by the way in which many Executive Branch actors have understood the proper operation of § 12406(3) in the decades since Congress enacted it and amended it to refer to “the regular forces.” Furthermore, the Government’s new argument that “[t]he natural reading of ‘regular forces’ in this statutory context [of § 12406(3)] is the forces that regularly execute the federal laws at issue, not all civilian law enforcement officers across the Executive Branch, much less all active military servicemembers,” *Oregon v. Trump*, No. 25-1756 (D. Or.), Doc. 131, at 5, is untenable.

A. Text

Even if one were to assume for the sake of argument that civilian law enforcement personnel could, in some colloquial sense, be considered “forces,” that is not a term that federal law ordinarily uses to describe the DHS personnel in question. More importantly, in contrast to early “calling forth” statutes Congress enacted shortly after the Constitution was ratified, § 12406(3) does not refer to federal law enforcement personnel or, in particular, to the U.S. Marshals Service, which was the principal Executive Branch civilian law enforcement entity when Congress enacted the first versions of § 12406(3) in 1903 and 1908. *See, e.g., In re Neagle*, 135 U.S. 1, 47-52 (1890) (describing how the Attorney General had directed the U.S. Marshal for the Northern District of California to employ special deputy marshals to protect Supreme Court Justice Field from threatened violence while the Justice rode circuit in

California). *Compare* Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (authorizing the President to call forth the militia of a state if and when a federal judge agreed with the President that the execution of federal laws was obstructed by “combinations too powerful to be suppressed by the ordinary course of judicial proceedings, *or by the powers vested in the marshals by this act*” (emphasis added); Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, 424 (likewise referring to combinations “too powerful to be suppressed by ... the powers vested in the marshals by this act”).

Nor does § 12406(3) refer to “forces” *simpliciter*, or even to “Federal forces.” Instead, the operative statutory term is “the regular forces.” Each of the first two words in that three-word term (“the” and “regular”) indicates that the reference is not simply to any and all law enforcement “forces,” or even to any and all forces that might in some sense be deemed “regular,” but instead to a particular group of persons known as “*the*” regular forces—namely, persons serving full-time in the federal Armed Forces. *See also* Black’s Law Dictionary 503 (1st ed. 1891) (defining “forces” as “[t]he military and naval power of the country”).⁵

⁵ The original versions of what is now § 12406(3) contained yet another indication, as well, that the term referred to standing military forces. The first two iterations of the law referred to forces “at [the President’s] command.” *See* Act of Jan. 21, 1903, ch. 196, § 4, 32 Stat. at 776; Act of May 27, 1908, ch. 204, § 3, 35 Stat. 399, 400. It would be unusual, to say the least, for Congress to refer to civilian law enforcement personnel, such as ICE and FPS, as being “at the President’s command.” Although the President might have sufficient authority to ensure, as a practical matter, that such personnel perform their statutory functions in ways he sees fit, they are subject to the direction of the heads of Departments, rather than to the direction or “command” of the President himself. The reference in the statute surely was, instead, to the President’s role as “Commander in Chief of the Army and Navy of the United States.” U.S. Const. Art. II, § 2. Congress omitted the “at his command” language in its comprehensive codification of statutes pertaining to the military in 1956. *See* Act of Aug. 10, 1956, 70A Stat. 199, 525 (reclassifying the provision in question as 10 U.S.C. §§ 3500 and 8500, applying to the Army National Guard and the Air Force National Guard, respectively). That deletion, however, was made only because the words “at his command” were deemed to be “superfluous.” H.R. Rep. 84-970, at 222, 605 (1955). The object of the 1956 codification was merely “to restate existing law, not to make new law.” *Id.* at 8.

B. Common understandings of “the regular forces”

As amicus explained in his previous brief, § 12406(3) derives from Section 4 of the Militia Act of 1903, commonly known as the Dick Act, *see* Act of Jan. 21, 1903, ch. 196, § 4, 32 Stat. 775, 776, and Congress added the specific reference to “the regular forces at his command” to Section 4 five years later, in 1908, *see* Act of May 27, 1908, ch. 204, § 3, 35 Stat. 399, 400. The congressional reports concerning the 1903 and 1908 legislation contain numerous references to “Regulars” and to “the Regular Army,” particularly in discussing the relationship between the professional, standing military and the militia (which were not “regular” in the sense that they were only called into federal service sporadically and temporarily). *See generally* H.R. Rep. 57-1094 (1902); S. Rep. 57-2129 (1902); H.R. Rep. 60-1067 (1908); S. Rep. 60-620 (1908). And such references to the U.S. military, especially the Army, as “Regulars” or “the Regular Army”—as well as the use of the term “the regular forces” itself to refer to those full-time military forces—were commonplace in federal law and, more broadly, in writings within all three branches concerning the militia and the Army, including in opinions of this Court.

Amicus’ initial brief canvassed a cross-section of examples of such usage throughout U.S. history, including in the years just before and after Congress acted in 1903 and 1908—in statutes enacted by Congress; in opinions of this Court (including *McClaghry v. Deming*, 186 U.S. 49 (1902), decided just one year before Congress enacted the Dick Act); in presidential speeches; and in the Secretary of War’s 1908 Annual Report and contemporaneous Army regulations. Lederman Br. 13-17. Amicus remains unaware of any counterexamples in which anyone referred to *civilian* law enforcement personnel (such as U.S. Marshals) as “the regular

forces,” let alone cases in which anyone might have suggested that that term did *not* encompass the standing Army, in particular. The evidence is—at best—overwhelmingly one-sided.⁶ For

⁶ See also, e.g., Annual Report of the Secretary of War for the Year 1903 (Dec. 7, 1903), in 1 Annual Reports of the War Department for the Fiscal Year Ended June 30, 1903, at 13-20, H.R. Doc. 58-2 (2d Sess.) (1903) (making frequent distinctions, just months after enactment of the Dick Act, between the newly federalized National Guard and “the Regular Army”); *id.* at 38 (table) (setting forth the expenditures in the fiscal year ending June 30, 1903 for salaries of the “regular force” and the “temporary force”).

This understanding is further confirmed by the U.S. Army Center of Military History’s comprehensive, three-volume history of the use of federal military forces in domestic disorders. See Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* (1988); Clayton D. Laurie & Ronald H. Cole, *The Role of Military Forces in Domestic Disorders, 1877-1945* (1997); Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945-1992* (2005). (All three volumes are available online at <https://history.army.mil/Publications/Publications-Catalog/Role-of-Federal-Military-Forces-in-Domestic-Disorders-Collection/>.) Those volumes are replete with references to the professional, standing Army and other permanent military forces as “Regulars,” “the Regular Army” and, not infrequently, “the regular forces,” including in many instances where the authors contrast those “regular” forces with the militia, including the federalized National Guard. A few (of many) representative examples include: Coakley at 41 (“[A] personal letter from William Bradford to the president urg[ed] immediate measures to suppress the rebellion, including the assembly of a regular force to aid the militia since the latter, particularly in Pennsylvania, could not be counted on”); *id.* at 228 (“Of incidental notice was the fact that [an 1861 federal statute] incorporated the provisions of the Act of 1807 authorizing the use of regular forces as well as militia and extended the president’s authority to territories as well as states.”); Laurie & Cole at 18 (“In 1807 the executive was empowered to use U.S. regular forces for similar ends [for which the 1792 and 1795 statutes had authorized use of the militia], subject to the same restrictions.”); *id.* at 209 (President Wilson “continued the trend, in effect since the Civil War, of relying on the more disciplined regular forces in domestic disorders, rather than state forces of unknown quality.”); Scheips at 4 (“A law of 29 July 1861, designed to deal with the rebellion in the South, drew not only from the 1795 Calling Forth Act, but also from the 1807 act authorizing the use of regular forces. In forthright language it provided that the president could use both the militia and regular forces to put down ‘unlawful obstructions, combinations . . . assemblages . . . or rebellion’ against the Union, if necessary, in his judgment.”); *id.* at 5 (“Under [the Ku Klux Act of 1871] it was not only ‘lawful for the president’ but was his ‘duty’ to use either the militia or regular forces, or both, whenever there were obstructions to execution of the laws that deprived ‘any portion or class of the people’ of any state ‘the equal protection of the laws.’”); *id.* at 9 (“[S]tate-federal operational comparisons are important to this narrative, given the Guard’s close relationship with the regular forces and the federal government’s almost total financial responsibility for the Guard”); *id.* at 41 (“Still to be worked out was a plan for calling the Arkansas National Guard into federal service [in Little Rock in 1957]. There were two methods for doing so. Under the first, the president could *call* the Guard to repel invasion, suppress

purposes of this supplemental brief, amicus limits the focus in this section to two further, historical examples of particular salience—one that occurred during the War of 1812, and the other in a report of Secretary of War Elihu Root that led to Congress’s enactment of the Dick Act itself at the turn of the twentieth century.

The 1814 Battle of Chippawa: “Those are regulars, by God!”

This past July 5 marked the 211th anniversary of a turning point in the War of 1812—the Battle of Chippawa. The historical legacy of that battle turns on a renowned distinction between the militia and “the Regulars,” and the opposing commander’s failure to distinguish between the two.

In his recent official statement commemorating the Battle of Chippawa, this is how President Trump himself set the stage for the dramatic events:

When the first shots of the War of 1812 were fired, the United States Army was outmatched and underprepared to fight the then-greatest power in the world, Great Britain. To reform our Nation’s military, Secretary of War John Armstrong Jr. established “Camps of Instruction” in New York to instill readiness and discipline in his troops. Guided by strong military leadership and rigorous training from the likes of General Winfield Scott and General Jacob Brown, the United States Army was transformed from ragtag regiments into a finely-honed professional force—changing the course of the war and paving the path to unrivaled American military dominance.

Presidential Message on the 211th Anniversary of the Battle of Chippawa (July 5, 2025),

<https://www.whitehouse.gov/briefings-statements/2025/07/presidential-message-on-the-211th-anniversary-of-the-battle-of-chippawa/>.

rebellion, or execute the laws of the Union when he could not do so with regular forces. Under the second, he might *order* the Guard into federal service if Congress had either declared a national emergency or authorized the use of land forces in addition to Regular Army troops.”); *id.* at 68 (“Among the new approaches introduced by President Eisenhower’s intervention were the use of a mixed force of National Guard and regular forces”); *id.* at 446 (“As had been the case in past civil disorders, the arrival of regular forces and the federalization of the National Guard [in the wake of the brutal Rodney King beating in 1992] produced an immediate, sharp decrease in the levels of violence in Los Angeles.”).

As recounted by the Chief Historian of the Army Historical Foundation, at no other time in its history has the United States entered a war less prepared than it was at the outset of the War of 1812. See Matthew Seelinger, *The Battle of Chippewa, 5 July 1814*, <https://armyhistory.org/the-battle-of-chippewa-5-july-1814/>. Because the Army “was plagued with inept leadership and poor logistics,” the Nation had to resort to “untested and largely ineffective militia troops.” As a result, “British regulars, Canadian militia forces, and hostile Indians dealt American forces a number of disastrous defeats and thwarted American efforts to invade and secure Canada.” *Id.* Moreover, after the Napoleonic Wars ended in early 1814, the British Army ordered sixteen regiments of regulars to Canada and another six to conduct raids along the eastern and southern coasts of the United States. *Id.*

Meanwhile, however, the U.S. War Department had made great strides to improve the strength the U.S. Army. In particular, Brigadier General Winfield Scott had transformed the Army of the North, which protected the New York-Canadian frontier, into a disciplined and proficient fighting force, thereby alleviating the need to rely so heavily on untrained militia. In July 1814, the Army readied plans for the newly strengthened Army to invade Canada and try to secure a stunning victory over the British troops stationed there.

General Phineas Riall, commander of the British forces along the Niagara frontier, had a very low opinion of American troops—which until then had consisted primarily of ineffective militia volunteers—and he “believed that his forces could defeat this latest incursion with little difficulty.” *Id.* On July 5, Riall began moving his forces across the Chippawa River with an eye to easily routing the American forces. The U.S. forces wore “militia gray” uniforms due to of a shortage of the standard Army blue uniforms. When General Riall saw the U.S. troops clad in gray, he is said to have exclaimed “It is nothing but a body of Buffalo militia!” *Memoirs of*

Lieut.-General [Winfield] Scott, L.L.D. at 128-29 (1864). Yet despite the British Army's heavy and constant artillery fire, Scott's brigade of Army regulars "steadily continued forward, never wavering as they marched towards the British," Seelinger, *The Battle of Chippewa, supra*, at which point Riall realized his grave mistake in having assumed the U.S. troops were mere militia. As President Trump recounted just this past July, the shocked Riall then "famously cried out, 'Those are regulars, by God!'" Presidential Message on the 211th Anniversary of the Battle of Chippawa (July 5, 2025).⁷

What followed was a stunning turnabout. Although the Battle of Chippawa lasted just over a half-hour, the British suffered staggering casualties: 148 killed, 221 wounded, and 46 captured or missing. Seelinger, *The Battle of Chippewa, supra*. The U.S. triumph at Chippawa proved that U.S. Army soldiers could hold their own against well-trained British regulars. It was "a great psychological victory that inspired the Army and the entire nation." *Id.* As President Trump recently summarized the success of the "Regulars," "[o]n July 5, 1814, on the plains of Chippawa, near the shores of Lake Ontario, the United States left its adolescence as a nation, and took its place among the great powers of the world, with a stirring victory over the British Army." Presidential Message on the 211th Anniversary of the Battle of Chippawa, *supra*.

⁷ In his memoirs, Winfield Scott described Riall's exclamation somewhat more euphemistically, presumably in order to avoid reciting a blasphemy: "But when the bridge was passed [by the U.S. Army] in fine style, under his heavy fire of artillery, [Riall] added with an oath: 'Why, these are regulars!'" *Memoirs of Lieut.-General Scott, L.L.D.* at 129 (1864).

Secretary of War Root's Annual Report for the Fiscal Year 1901:
Prelude to the Dick Act

In his first annual message to Congress, on December 3, 1901, President Theodore Roosevelt specifically referred to the U.S. Army as “the regular forces” in the course of urging Congress to establish a newly strengthened militia that would be prepared for federalization. The organization and armament of the new National Guard, said Roosevelt, should “be made identical with those provided *for the regular forces.*” *Perpich v. Department of Defense*, 496 U.S. 334, 341 n.10 (1990) (quoting Roosevelt’s speech; emphasis added).

Roosevelt’s speech reflected the view he had received six days earlier from his Secretary of War, Elihu Root. In his Annual Report to the President, which Congress also received, Root used the term “the regular ... forces” to refer to the standing military forces in the context of his recommendation that the militia consisting of the state “national guards” be better organized and fortified for purposes of possible federalization: “The organization and armament of the national guards of the several states,” Root wrote, “which are treated as militia in the appropriations made by Congress, should be made the same as those provided by Congress for the regular and volunteer forces.” Annual Report of the Secretary of War for the Year 1901 (Nov. 27, 1901), in 1 Annual Reports of the War Department for the Fiscal Year Ended June 30, 1901, at 26, H.R. Doc. 57-2 (1st Sess.) (1901). Root’s reference to appropriations for “the regular ... forces” plainly was *not* about Congress’s spending on civilian law enforcement personnel.

Root then proceeded to specifically propose that Congress enact a law to establish the new National Guard as “a first reserve” to the “Regular” forces in situations where the President would have to use military forces to ensure faithful execution of federal laws: “I recommend that the War Department be authorized to arm the National Guard with the present service small arms used by the Regular Army, Navy, and Marine Corps, that the National Guard of the several

States be treated as a first reserve, to be called into the service of the United States to execute the laws of the Union, suppress insurrections, and repel invasions, the term of service under any call to be limited to nine months.” *Id.* at 26-27.

“The result of [Root’s] recommendation was the act of January 21, 1903,” also known as the Dick Act. Frederick T. Wilson, *Federal Aid in Domestic Disturbances, 1787-1903*, S. Doc. 57-209, at 255 (2d Sess.) (1903). Section 4 of the 1903 Act, reflecting Root’s suggestion, provided that the President could call into federal service the new National Guard to help execute federal laws if and when he “is unable, with the other forces at his command, to execute the laws of the Union in any part thereof.” 32 Stat. at 776.

C. Executive Branch understandings of the reference to “the regular forces” in (what is now) § 12406(3)

Five years after enacting the Dick Act, Congress amended Section 4 to specify that the President may call forth National Guard units when he “is unable *with the regular forces at his command* to execute the laws of the Union in any part thereof.” Act of May 27, 1908, ch. 204, § 3, 35 Stat. 399, 400 (emphasis added). That 1908 enactment also added a proviso to Section 5 of the Dick Act stating that “when the needs of the Federal Government arising from the necessity to execute the laws of the Union, suppress insurrection, or repel invasion can not be met by the regular forces, the organized militia shall be called into the service of the United States in advance of any volunteer force which it may be determined to raise.” *Id.* § 4, 35 Stat. at 400-401. The effect of these two amendments was to ensure that in cases where the use of “the regular forces” was inadequate to execute federal laws, the President would have to call upon the National Guard as the initial supplement to the standing army before deploying any volunteer units. Accordingly, as the Senate Committee on Military Affairs described it less than two years

later, the 1908 amendment “constitutes the militia the second line of defense,” S. Rep. 61-216, at 1 (1910)—“second,” that is, behind the regular military forces.

As far as amicus is aware, until this past summer no President had *ever* used Section 4 of the Dick Act—i.e., § 12406(3)—as authority for deploying the federalized National Guard to help execute federal laws.⁸ Therefore there is no established Executive Branch practice that might reflect an understanding of the meaning of “the regular forces” in that statute.

Even so, in at least a half-dozen instances, Executive Branch actors have signaled their concurrence with the view of the 1910 Senate report that the National Guard is to be “the second line of defense,” after the regular armed forces, if and when the President uses § 12406(3) to execute federal law.

1. Writing shortly after Congress enacted the Dick Act, Frederick Wilson, a Chief of Division in the Adjutant-General’s Office, wrote in a report to Congress that “the policy of the Government had been “to regard the militia as a posse comitatus, to be ‘called out’ and armed and equipped whenever the Regular Army is inadequate ‘to suppress insurrection, repel invasion, and to execute the laws of the Union.’” Frederick T. Wilson, *Federal Aid in Domestic Disturbances, 1787-1903*, S. Doc. No. 57-209, at 240 (2d Sess.) (1903).

⁸ Indeed, from 1794 until the summer of 2025, Presidents virtually always declined to use the National Guard alone in response to domestic disturbances—that is, to the exclusion of the standing Army—pursuant to *any* statutory authority, including the provisions of the so-called “Insurrection Act,” which, unlike § 12406(3), afford the President a choice to use the regular forces, the militia, or both in the first instance. See 10 U.S.C. §§ 251-253. The only counterexamples of which amicus is aware occurred in Alabama in June and September 1963, when President Kennedy deployed the (federalized) Alabama National Guard to help ensure compliance with courts’ school desegregation orders. In those cases, Army troops were stationed nearby in case they were needed, but Governor Wallace and others resisting the judicial orders stood down before there was a need for the Kennedy Administration to use those regular forces. See Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945-1992*, at 148-52 (2005) (describing June events at the University of Alabama in Tuscaloosa); *id.* at 159-61 (describing September events in Birmingham and Tuscaloosa).

2. As noted in amicus' initial brief (Lederman Br. 18), in 1917 the Army Judge Advocate General (JAG) concluded that the amended Dick Act authorized the President "to call forth such number of the militia as he may deem necessary to execute the laws, *subject only to the condition that the available regular forces be employed for this purpose before recourse is had to the militia.*" JAG Op. 58-100 (Mar. 12, 1917), as summarized in Digest of Opinions of the Judge Advocate General of the Army, 1912-1930, at 14-15 (1932) (emphasis added); *accord* A Digest of Opinions of the Judge Advocate General, et al., from July 1, 1912 to April 1, 1917, at 676 (1917). (It is virtually certain from the context (and the author) that the JAG must have been referring there to regular *army* forces.)⁹

3. After the President sent military forces to quell the riots in Detroit in July 1967, a representative of the Department of Justice's Office of Legal Counsel (OLC), First Assistant Martin F. Richman, testified before a House subcommittee concerning the use of the National Guard in domestic disturbances. The vast majority of his testimony concerned situations, such as that in Detroit, in which the President sends military forces at the request of a governor to help with the enforcement of state and local law, pursuant to the section of the Insurrection Act currently found at 10 U.S.C. § 251. One House member, however, asked Richman about the predecessor version of what is now § 12406(3). The DOJ attorney's answer reflected the view that the "unable with the regular forces" precondition referred to the standing armed forces rather than to civilian law enforcement personnel: The use of the word "unable," Richman surmised, cannot be read to require the President to "exhaust every soldier, marine, airman, and sailor that

⁹ Because of the federal government shutdown, amicus has been unable to find an original copy of the March 1917 JAG opinion in the National Archives or other government libraries. The summaries thereof in the 1917 and 1932 Digests, however, indicate that the JAG opinion expressly explained that the President must employ "the available regular forces ... before recourse is had to the militia."

he has in the Armed Forces throughout the world before he can call a single National Guardsman to assist in executing the laws of the United States,” including units of the Armed Forces “which may be at a distance or overseas.” Hearings Before the Special Subcomm. to Inquire into the Capability of the National Guard to Cope with Civil Disturbances of the House Comm. on Armed Servs., 90th Cong. 1st Sess. 5821 (1967) (testimony of Martin F. Richman).

4. Two years later, in 1969, a longtime staff member (and future Deputy Chief) of the Army Center for Military History published an historical essay in which he explained that the “unable with the regular forces” “phraseology” in the 1908 amendment to Section 4 of the Dick Act “completed the reversal of the philosophy of 1792 that only militia should be used in domestic disturbances, and *clearly gave the first place to the use of regular troops.*” Robert W. Coakley, “Federal Use of Militia and the National Guard in Civil Disturbances: The Whiskey Rebellion to Little Rock,” in *Bayonets in the Streets: The Use of Troops in Civil Disturbances*, at 17, 28 (R. Higham, ed. 1969) (emphasis added).

5. As noted in *Lederman Br.* at 18-19 n.11, President Nixon used the National Guard, along with regular military forces, to help sort the mail during a postal strike in 1970. Notably, the Secretary of Defense did not invoke the authority in what is now § 12406(3) when he directed the Guard members to perform that function—instead, he relied upon the President’s additional declaration, pursuant to a different statute, of a purported state of national emergency. President Nixon did, however, issue an Executive Order that authorized the Secretary to call forth National Guard units to execute the postal laws pursuant to the iteration of § 12406(3) then in force (10 U.S.C. §§ 3500 and 8500 (1970), which applied to the Army and the Air Force National Guards, respectively). So as to afford the Secretary the option of using the Dick Act provision—which the Secretary ultimately declined to do—the President “determined that I am

unable solely with the regular forces to cause the aforesaid [postal] laws to be executed.”

Executive Order 11519, Preamble (Mar. 23, 1970), 35 Fed. Reg. 5003 (1970). Nixon obviously was referring there to an inability to execute the postal laws solely with the regular *military* forces—which made sense given that he had decided to use both regular armed forces and National Guard units. Surely Nixon was not referring to ordinary postal workers as “the regular forces”—nomenclature that would have struck virtually any reader as misplaced.

6. In the second volume of the U.S. Army Center of Military History’s comprehensive history of the use of federal military forces in domestic disorders, the authors wrote that the effect of Section 4 of the Dick Act, as amended in 1908, was that “the National Guard remained under state control until such time as it was needed and federalized by the president for cases in which Regular troops were unable to meet an emergency alone.” Clayton D. Laurie & Ronald H. Cole, *The Role of Military Forces in Domestic Disorders, 1877-1945*, at 187 (1997).

* * * *

Amicus does not mean to suggest that any of these Executive Branch statements was authoritative on the question of which “forces” are “the regular forces” for purposes of the Dick Act provision now codified as § 12406(3). Because no one ever suggested, until this past summer, that the term might mean anything *other than* the regular, full-time forces of the U.S. Armed Services, the Solicitor General’s current view was almost certainly not a reading that would have occurred to any of the actors in question. Even so, the consistent assumption on the part of these Executive representatives that the President must find that he is “unable” to execute federal laws with the assistance of regular military forces before he may direct National Guard units to assist in that function certainly tends to confirm that the virtually universal understanding of “the regular armed forces” is the proper interpretation of that statutory term.

D. The flaws in the Government’s alternative reading

On November 1, 2025, the Department of Justice filed a brief in a related case in Oregon in which it offered an alternative interpretation of the contested statutory term. *See Oregon v. Trump*, No. 25-1756 (D. Or.), Doc. 131, at 5-9. Although the Government concedes that “‘regular forces’ in other contexts can refer to the standing military,” it contends that “[t]he natural reading of ‘regular forces’ in this statutory context [of § 12406(3)] is the forces that regularly execute the federal laws at issue, not all civilian law enforcement officers across the Executive Branch, much less all active military servicemembers.” *Id.* at 5.

It is telling that the Government does not offer a single example of anyone, before or after 1908, referring to civilian personnel in the Executive Branch as “the regular forces”; nor does the Government offer any evidence that Congress intended such a counterintuitive meaning, when it had the option of referring (as it had in earlier such statutes) to the U.S. Marshals or to, e.g., “Executive officials and employees,” or many other terms that would have more naturally described the civilian personnel who ordinarily execute federal laws.

The Government resorts instead to an array of contextual and historical arguments in support of its alternative reading in the Oregon case. Those arguments, however, provide no basis for disregarding the overwhelming evidence that the term “the regular forces” in § 12406(3) refers to members of the “standing” U.S. Armed Forces.

1. The Government’s principal argument in the *Oregon* litigation is that interpreting “the regular forces” to refer to the full-time armed forces cannot be right in light of “a strong historical norm that domestic use of the full-time military is the last resort, and that the use of the militia is preferable.” *Id.*

The Government is correct that in the early years of the Republic “sentiment ... strongly disfavored standing armies; [and] the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.” *United States v. Miller*, 307 U.S. 174, 179 (1939). That explains why the first two “calling forth” statutes Congress enacted, in 1792 and 1795, only authorized the President to use the militia (under certain conditions) to help execute the laws, and did not mention the standing armed forces. *See* Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264; Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, 424.

By 1807, however, sentiments had changed significantly, and Congress enacted a law giving the President the option of using parts of the land or naval forces, as well. *See* Insurrection Act of 1807, ch. 39, 2 Stat. 443. “Thus died, by legislative enactment, the original conception that only the militia should be employed by the Federal Government in controlling domestic disturbances. Henceforth, Presidents would have a choice.” Coakley, *supra*, in *The Use of Troops in Civil Disturbances* at 24.

The Government contends that Presidents thereafter typically chose the militia when using military forces to help execute federal law: “The preference to use the militia or National Guard instead of standing military forces has generally persisted in American history even where the President could, statutorily, use the standing military.” *Oregon v. Trump*, Doc. 131, at 6. Yet nothing could be further from the truth. For almost a century, from 1867 to 1957, Presidents virtually never used the militia for such purposes under any of the “Insurrection Act” authorities, consistently preferring instead to use regular forces; and Presidents never used the militia exclusively for such law-execution purposes, *without* the regular armed forces, in the long period from 1794 to 1963. *See* Coakley, *supra*, in *The Use of Troops in Civil Disturbances* at 22-28.

In the decades immediately preceding the Dick Act, National Guard forces “came to be regarded by decision makers on the federal level (and sometimes at the state level) as inefficient, ill led, ill equipped, and undisciplined. Invariably when the guard was called to quell a disturbance, bloodshed and casualties resulted.” Laurie & Cole, *supra*, at 16. By contrast, “Regular Army units were believed inherently nonpartisan, more reliable, and more efficient,” and “[p]erhaps the primary reason the Army became the first recourse of successive presidents in cases of civil disorder is that this force was always under the direct control of the federal executive and his delegated representatives.” *Id.* at 16-17.

The priority for regular armed forces that Congress codified in Section 4 of the Dick Act was thus fully consonant with historical developments—indeed, the “unable with the regular forces” “phraseology” in the 1908 amendment to Section 4 “completed the reversal of the philosophy of 1792 that only militia should be used in domestic disturbances, and clearly gave the first place to the use of regular troops.” Coakley, *supra*, in *The Use of Troops in Civil Disturbances* at 28.

Because Congress chose, for whatever reasons, to employ a common term that had developed a universal meaning, it ultimately does not matter whether the order of operations prescribed in Section 4—now appearing in § 12406(3)—reflected public preferences at the time of the Framing, or today. That said, it is not difficult to imagine why Congress might have chosen to require the President to consider whether the regular Armed Forces would be able to help execute federal law before turning to the state militia. For one thing, making the National Guard a “first reserve” in such cases was what the esteemed Secretary of War—who was instrumental in drafting the statute—had recommended. *See supra* at 13-14. Moreover, presumably Congress—like Presidents themselves for many years preceding the Dick Act—

believed that the regular forces were far more efficient, disciplined, and reliable than militia, and would remain so even if the reforms of the Dick Act were realized. Congress also might have believed that when it came to using military forces for the enforcement of *federal* law, it would make much more sense to require the President in the first instance to use the troops over which he, the Commander in Chief of the Army and Navy, had had longstanding and close control, before resorting to militia that had been subject to the command of various state governors.¹⁰

2. The Government next contends that “because the Posse Comitatus Act restricts the circumstances under which the standing military can execute the laws domestically, it would be strange if Congress had intended to include the standing military within the ‘regular forces’” in § 12406(3). *Oregon v. Trump*, Doc. 131, at 8. There is nothing strange about that at all, however. The Posse Comitatus Act (PCA), 18 U.S.C. § 1385, which prohibits anyone from willfully using any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force “to execute the laws,” applies both to the standing military *and* to state National Guard units when they are federalized, because in the latter situation the Guard units in question are *components* of the Army or the Air Force, *see* 10 U.S.C. §§ 10106, 10112, and in that capacity they are “subject to the laws and regulations governing the Army or the Air Force,” *id.* § 12405.

¹⁰ Moreover, as Secretary Root explained, the Dick Act “had its origin in an agreement between the Regular Army, represented by the War Department, and the National Guards of the States, represented by a convention which met in Washington in January, 1902” Report of the Secretary of War for the Year 1903 (Dec. 7, 1903), in 1 Annual Reports of the War Department for the Fiscal Year Ended June 30, 1903, at 13, H.R. Doc. 58-2 (2d Sess.) (1903). The bill Congress enacted was “the result of extensive and painstaking conference among representatives of all the classes of citizens especially interested in the subject and especially qualified to express opinions upon it.” Therefore, it “d[id] not represent fully any one’s view, but it contains many important provisions upon which a general agreement has been reached.” Report of the Secretary of War for the Year 1902 (Dec. 1, 1902), in 1 Annual Reports of the War Department for the Fiscal Year Ended June 30, 1902, at 36, H.R. Doc. 57-2 (2d Sess.) (1903). As with any such legislation, it might well have been necessary to include certain provisions in order to prevent the risk of upsetting the fragile compromise.

To be sure, the PCA’s prohibition by its terms does not apply “in cases and under circumstances” where an Act of Congress “expressly authorize[s]” such military execution of the law.

Therefore, for example, if the situation at hand is one in which the Army or another component of the Armed Forces is statutorily authorized to enforce federal laws in the limited circumstances (almost certainly not present here) covered by 10 U.S.C. § 253(2), *see* Lederman Br. 20-23, then the President may also use the National Guard to perform those same functions. He may only use the Guard pursuant to § 12406(3), however—as opposed to § 253(2) itself, which permits the President to use “the militia or the armed forces, or both” where the preconditions of that provision are satisfied—if the regular armed forces are expressly authorized to perform such functions yet the President is unable to execute federal laws solely with the use of those regular forces. *See* Lederman Br. 23-24.¹¹

3. The Government’s next argument in the *Oregon* case is that construing “the regular forces” to mean the regular armed forces for purposes of § 12406(3) would create an anomaly because the other two provisions of § 12406, which authorize the President to use the National Guard to repel an invasion of the United States (§ 12406(1)) or to suppress a rebellion “against the authority of the Government of the United States” (§ 12406(2)), do not require that the President be “unable” to achieve such ends “with the regular forces.” “If ‘regular forces’ includes the standing military,” according to the Government, “that distinction makes little sense” because it is “completely backwards to require the President to exhaust the standing military before turning to the militia when dealing with a problem with civil law enforcement,

¹¹ If, however, the regular armed forces are *not* statutorily authorized to help execute the law in the Chicago area—as appears likely to be the case—and directing them to do so would therefore violate the Posse Comitatus Act, then that legal disability would not satisfy the precondition in § 12406(3) that the President be “unable” to execute federal laws using “the regular forces.” *See* Lederman Br. 23-24.

but to allow the President to use the militia instead of the standing military when dealing with an invasion or rebellion.” *Oregon v. Trump*, Doc. 131, at 8.

Even if this distinction among the three subsections of § 12406 would create an inexplicable anomaly, it would not change the fact that Congress chose to use a term in § 12406(3) that was universally understood to refer to forces within the Army and other standing Armed Forces. In any event, there is no such anomaly. It is very unlikely that a President would ever call forth the National Guard but *not* the regular armed forces to repel an invasion or to suppress an actual rebellion. And it would be quite reasonable for Congress to have assumed that in such dire exigent circumstances the President should be able to use both types of armed forces in the first instance, without first waiting to see whether the insurrection could be suppressed, or the rebellion repelled, by the regular forces alone.

4. Finally, the Government argues in the alternative that if the term “the regular forces” *does* refer to the standing Armed Forces, then courts must presume that President Trump in fact “considered the standing military” when he concluded, on October 4, that “the regular forces of the United States are not sufficient to ensure the laws of the United States are faithfully executed, including in Chicago,” and courts should also assume that the President determined, in particular, “that using the standing military rather than the National Guard would ... significantly impede the safe and effective execution of the laws, and that he therefore would be unable to execute the laws within the meaning of § 12406(3) without the National Guard.” *Oregon v. Trump*, Doc. 131, at 9.

Both parts of this argument are plainly mistaken. First, there is no conceivable reason for courts to assume the President considered whether the standing Army would be “able” to ensure execution of federal laws in the Chicago area. After all, the position of his own Department of

Justice, including in the very Application now before the Court, has been that the statutory term does *not* require such an assessment. Moreover, if the President *were* to now make a purported “finding” that whereas the National Guard—including militia *from Texas*—is capable of ensuring the execution of federal law in Chicago but the U.S. Armed Forces are “unable” to do so because “using the standing military rather than the National Guard *would ... significantly impede the safe and effective execution of the laws,*” *id.* at 9 (emphasis added), such an implausible determination would not be worthy of any deference.

* * * *

For these reasons, together with those discussed in amicus’ previous brief, it is difficult to see how the Applicants could make ““a strong showing that [they are] likely to succeed on the merits.”” *Nken*, 556 U.S. at 434 (internal citations omitted).

CONCLUSION

For the foregoing reasons, the Court should deny the stay application.

Respectfully submitted,

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