

No. 25-6268

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

STATE OF OREGON, et al.,  
*Plaintiffs-Appellees,*

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*, et al.,  
*Defendants-Appellants.*

On Appeal from the United States District Court  
for the District of Oregon

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY  
PENDING APPEAL BY OCTOBER 10 AND AN IMMEDIATE  
ADMINISTRATIVE STAY BY OCTOBER 6**

BRETT A. SHUMATE  
*Assistant Attorney General*

ERIC D. McARTHUR  
*Deputy Assistant Attorney General*

MARK R. FREEMAN  
SHARON SWINGLE  
J. KAIN DAY  
*Attorneys, Appellate Staff  
Civil Division, Room 7517  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530  
(202) 353-2689*

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## INTRODUCTION

The district court has entered an extraordinary order countermanding the President's decision to call forth the National Guard to protect federal officers in Portland from violent attacks and to protect federal property from further damage. This Court should stay the order pending appeal, and should also grant an immediate administrative stay, as the Court has twice done recently for injunctions against the federalization and deployment of National Guard members in Los Angeles.

Under 10 U.S.C. § 12406, the President is authorized to federalize the National Guard when he “is unable with the regular forces to execute the laws of the United States” or “there is a rebellion or danger of a rebellion against the authority of the Government of the United States.” Both conditions apply in Portland. Over the past several months, agitators have assaulted federal officers with rocks, bricks, pepper spray, and incendiary devices and threatened federal personnel at their work. They have followed federal officers to their homes, doxed them online, and threatened to kill them on social media. They have also seriously damaged a federal building, breaking windows and security equipment and blockading the building's entrance. These violent actions, which local law-enforcement officials have been unwilling or unable to control, impede the ability of Immigration Customs and Enforcement (ICE) and other federal officials to enforce federal law and constitute a rebellion against federal authority. Although the violence has somewhat abated in the past month, that

is only because of an intensive deployment of federal police forces, which has become unsustainable.

In concluding that Section 12406's conditions were not satisfied, the district court impermissibly second-guessed the Commander in Chief's military judgments—something district courts lack the authority and competence to do. Nearly 200 years ago, the Supreme Court made clear that these judgment calls are for the President to make—not a Governor, and certainly not a federal court. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827). At a minimum, as a stay panel of this Court explained, courts must “give a great level of deference to the President's determination that [one of Section 12406's] predicate condition[s] exists.” *Newsom v. Trump*, 141 F.4th 1032, 1048 (9th Cir. 2025). And the President here had more than ample grounds to determine that regular forces were “unable” to sufficiently protect federal personnel and property and that the conditions in Portland at least rose to the level of a “danger” of rebellion. Where ongoing violence, threats of violence, and harassment aimed at interfering with the enforcement of federal immigration laws have stretched the regular forces beyond their capacity and left them unable to adequately enforce the laws, the President can call up the Guard in response to the most acute dangers and the most significant drain on federal enforcement resources.

The district court's order improperly impinges on the Commander in Chief's supervision of military operations, countermands a military directive to officers in the field, and endangers federal personnel and property. The balancing of harms thus

weighs strongly in favor of interim relief pending appeal so that the National Guard may protect federal personnel and property while this appeal is pending, and this Court should also grant an immediate administrative stay pending consideration of that request for relief. Defendants-appellants respectfully request an administrative stay no later than October 6, 2025, and a stay pending appeal no later than October 10, 2025.

Plaintiffs state that they oppose this motion and intend to file an immediate response.

## STATEMENT

### A. Legal Background

1. The Constitution authorizes Congress to raise and support a national Army and to organize “the Militia.” *See* U.S. Const. art. I, § 8, cl. 15. Exercising that authority, Congress has “created the National Guard of the United States, a federal organization comprised of state national guard units and their members.” *Perpich v. Department of Def.*, 496 U.S. 334, 338 (1990) (quotation marks omitted). The National Guard is composed of both the State National Guard, under the command of the several States, and the National Guard of the United States, a federal entity under the federal chain of command, *see* 10 U.S.C. § 10101. Once called into federal service, “members of the National Guard . . . lose their status as members of the state militia during their period of active duty,” *Perpich*, 496 U.S. at 347, become federal soldiers,

10 U.S.C. § 10106, and serve under the President as Commander in Chief, *see* U.S. Const. art. II, § 2, cl. 1.

2. Congress has granted the President authorities under which he may call forth the National Guard, including 10 U.S.C. § 12406. Section 12406 authorizes the President to call the National Guard into federal service if certain conditions are met. As relevant here, the second and third condition provide:

Whenever . . . (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or (3) 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 . . . suppress the rebellion, or execute those laws.” *Id.*

## **B. Factual Background**

1. Throughout the summer, ICE has seen a sharp and violent increase in protests and attempts to impede its duties of enforcing the Nation’s immigration laws. *See* A83. In Los Angeles, violent mobs attacked federal officers with concrete chunks, commercial-grade fireworks, and rocks and used dumpsters as battering rams to breach federal buildings. Last week, a man opened fire on an ICE field office in Dallas, killing two detainees and injuring another. Dep’t of Homeland Security, *DHS Issues Statement on Targeted Attack on Dallas ICE Facility* (Sept. 24, 2025), <https://www.dhs.gov/news/2025/09/24/dhs-issues-statement-targeted-attack-dallas-ice-facility>. The shooter’s shell casings bore anti-ICE messages. *Id.*

ICE's facility located in downtown Portland, known as the Lindquist Federal Building, has also experienced significant unrest targeting both the facility itself and those who work in it. A82.

Officers have feared for their safety. In one of the most significant incidents, agitators marched on the Portland ICE Office, lobbing rocks and sticks at federal personnel, and one protestor even wielded a firearm. A82-83. At the same time, they launched M80 fireworks and mortars at Federal Protective Services (FPS) officers. A82-83. To ensure their safety, FPS officers were forced to barricade themselves inside the ICE facility. A82-83. Those officers were able to escape only after special tactical units were deployed—making use of armored vehicles. A82-83. Several officers suffered injuries during this incident of mob violence. A82-83.

This incident is far from isolated. Officers have been bitten, kicked, shot with paintball guns, threatened with a machete and knife, and assaulted with potentially blinding lasers. A83; A66-67. Protestors have assembled a mock guillotine in front of the Portland ICE office and have directly threatened officers' lives. A71-72. Officers' personally identifiable information has been gathered and publicly released—a tactic call “doxing”—often with an accompanying death threat. A83 & n.1; A71. And it has become commonplace for officers to be followed after leaving work at the Portland ICE Office. A83. Indeed, officers are regularly trapped in their cars when entering and leaving federal property. A84. On multiple occasions, FPS had to use

pepper spray to disperse crowds, including at least one crowd that was holding a car hostage. A84.

Federal property is also under attack. Protestors repeatedly tried to burn down the Portland ICE Office, endangering federal property, personnel, and the public in general. A67-68. In one incident, a protester lit a flare and set fire to materials piled against the office. A67-68. The mob then piled on additional tinder, attempting to stoke the flames. A67-68. In another incident, protestors burned the American Flag on the ICE Office's driveway and lit an incendiary device next to that building's guard shack, again threatening to start a fire that would destroy federal property and endanger lives. A67-68. Separately, protestors have thrown rocks at the building and have damaged the main gate, proximity card readers, and security cameras in an attempt to breach the facility, causing significant security risks. A68-69; A83.

Damage to the card readers has rendered access to the building significantly more difficult: now employees must call ahead to be individually admitted. A68-69.

Protestors have also poured motor oil over the building entrance, creating both a fire risk and a direct threat to human safety. A73. As a result of damage and threats to the building, the Department of Homeland Security (DHS) was required to close the Portland ICE facility for more than three weeks, and even now that the facility has reopened, it must be boarded up to prevent further damage. A70.

FPS, which is charged with protecting the Linquist Building, is stretched to the point of collapse. The sustained violence and security risks have required FPS to

provide 24/7 protection for the building, a task it is simply not resourced to accomplish. A86. To date, 115 FPS officers have deployed to Portland in order to maintain this operational tempo. A86. DHS has been forced to reassign members of Homeland Security Investigations (HSI) Portland's Special Response Team (SRT) to support FPS, significantly impeding HSI's ability to accomplish the missions with which SRT is tasked. A76-77; A85. And while FPS has repeatedly attempted to contact the Portland Police Bureau (PPB) for assistance, the PPB has often failed to respond to calls for assistance, and even when they have responded, their response has been delayed. A84-85. These delays and failures to respond exacerbate tensions and leave FPS personnel and civilians in vulnerable positions. A84-85. In fact, instead of assisting in the protection of the Linquist Building, plaintiff City of Portland issued a Notice of Zoning Violation on September 18, 2025, requiring DHS to remove the protective boarding over its windows, exposing the building to further risk of damage and incursion. A78-79.

Plaintiffs' own declarations show the dire situation in Portland on the eve of the President's decision to federalize the Oregon National Guard. Throughout September 2025, ICE officials and property have been the subject of regular, often-violent protests. *See* A92-104. Large groups have gathered outside the ICE office, wielding sticks and harassing officers. *E.g.*, A95-97. Regularly, protesters interfere with cars seeking to enter or exit federal property, and within the last few weeks, several protesters have been arrested. *E.g.*, A95-97, A103-04. During one protest,

PPB concluded that it “would not be able to address [a] call” for assistance “with the resources [it] [had].” A104.

2. Based on the ongoing violence, harassment, and threats targeting the ICE facility in Portland, on September 26, DHS transmitted a memorandum to the Department of War (DoW) requesting “immediate and sustained assistance . . . in order to safeguard federal personnel, facilities, and operations in the State of Oregon.” A52. The memorandum explained that “Federal facilities, including those directly supporting Immigration and Customs Enforcement (ICE) and the Federal Protective Service (FPS), have come under coordinated assault by violent groups intent on obstructing lawful federal enforcement actions.” A52. Based on the need to “ensure the continued protection of federal facilities in Oregon[,]” DHS requested 200 DoW personnel to “direct[ly] support [] federal facility protection, access control, and crowd control measures.” A52.

On the morning of September 27, the President cited the DHS request in directing the Secretary of War to coordinate the deployment of forces to Portland to protect ICE personnel and facilities. @realDonaldTrump, Truth Social (Sept. 27, 2025 10:19 a.m.), <https://truthsocial.com/@realDonaldTrump/posts/115276694936263266>. Pursuant to that direction, the DoW first contacted the Oregon Adjutant General, who serves as Chief of Staff to the Governor of Oregon, Director of the Oregon Military Department, and Commander of the Oregon National Guard, to see if Oregon would assist in supplying National Guard members

in a non-federalized status. *See* A47; Or. Rev. Stat. § 396.160. The Oregon Adjutant General rejected that request, informing DoW that Oregon was unwilling to lend its voluntary support. A48.

The President accordingly judged that the conditions in Portland satisfied the requirements of Section 12406 and federalized Oregon National Guard members. The President explained: “As I determined on September 27th, when I activated and called into service the National Guard in Oregon, conditions continue to deteriorate into lawless mayhem.” @realDonaldTrump, Truth Social (Oct. 1, 2025 1:36 p.m.), <https://truthsocial.com/@realDonaldTrump/posts/115300118756896774> (Oct. 1 Truth). “Our GREAT Federal Law Enforcement Officers have not been able to enforce the Laws in Oregon.” *Id.* “ANTIFA and Radical Left Anarchists have been viciously attacking our Federal Law Enforcement Officers, men and women who are simply doing their job, protecting Federal Property, and enforcing Federal Immigration Laws and the Rule of Law.” *Id.*

Those conclusions were consistent with assessments the President made earlier in the summer when federalizing National Guard members to temporarily protect ICE and other federal officials from the mob violence in Los Angeles. Specifically, in a June 7 memorandum, the President found that “[n]umerous incidents of violence and disorder have recently occurred and threaten to continue” in response to ICE and other government officials’ enforcement of federal law and that “violent protests threaten the security of and significant damage to Federal immigration detention

facilities and other Federal property.” A61. “To the extent that protests or acts of violence directly inhibit the execution of the laws,” the President explained, “they constitute a form of rebellion against the authority of the Government of the United States.” A61. In a published opinion, a unanimous panel of this court stayed a district court order enjoining that Los Angeles deployment, concluding that the President likely acted lawfully in invoking Section 12406. *See Newsom v. Trump*, 141 F.4th 1032, 1040-41 (9th Cir. 2025) (per curiam).

3. On September 28, Secretary of War Pete Hegseth issued a memorandum to the Adjutant General and the Governor of Oregon mobilizing 200 members of the Oregon National Guard for sixty days. A48.

### **C. Prior Proceedings**

Plaintiffs, the State of Oregon and the City of Portland, filed suit alleging that the defendants violated 10 U.S.C. § 12406, the Posse Comitatus Act, the Administrative Procedure Act (APA), and the Constitution. A1-41. Plaintiffs sought a temporary restraining order, which the district court granted after full briefing and a hearing. A105-35. The court concluded that the federalization order violated Section 12406 and the Tenth Amendment and “enjoined” defendants from “implementing [their] September 28, 2025, Memorandum ordering the federalization and deployment of Oregon National Guard service member to Portland.” A136. The district court denied defendants’ request to stay the injunction. A137.

## ARGUMENT

The federal government is entitled to a stay because it is likely to succeed on the merits, it will suffer irreparable harm absent a stay, and the balance of the equities and public interest favor a stay. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009).

### I. This Court has appellate jurisdiction.

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). “[W]here an order has the ‘practical effect’ of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction.” *Abbott v. Perez*, 585 U.S. 579, 594 (2018). Here, “several factors counsel in favor of construing the District Court’s order as an appealable preliminary injunction.” *Department of Education v. California*, 145 S. Ct. 966, 968 (2025) (per curiam). The court issued a comprehensive, 31-page order, “an adversary hearing has been held, and the court’s basis for issuing the order is strongly challenged.” *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 762 (9th Cir. 2018) (cleaned up). The order also threatens to inflict irreparable harm by exposing federal property and officials to a threat of violence and exposing lawful federal immigration enforcement efforts to interference and obstruction, thus warranting immediate review. *Abbott*, 585 U.S. at 594-95. For these reasons, a stay panel of this Court concluded that it had jurisdiction over the similar district court order enjoining the deployment of National Guard members in Los Angeles. *See Newsom v. Trump*, 141 F.4th 1032, 1043 (9th Cir. 2025).

In the alternative, this Court may exercise mandamus jurisdiction to review the district court's order. *See Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 993 (9th Cir. 2004). The order imposes irreparable harm by impinging on the ability of the President and the Secretary of War to use the National Guard to protect federal officials enforcing federal law, leaving the federal government with “no other adequate means to attain the relief.” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quotation marks omitted). And mandamus is “appropriate under the circumstances” because the district court has claimed authority to superintend the Executive Branch's control over the military. *Id.* at 381.

## **II. The federal government is likely to prevail on the merits.**

The Constitution authorizes Congress to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. Const. art. I, § 8, cl. 15. In Section 12406, Congress empowered the President to “call into Federal service” members of the National Guard “[w]henever,” *inter alia*, “there is a rebellion or danger of a rebellion against the authority of the Government of the United States” or “the President is unable with the regular forces to execute the laws of the United States.” 10 U.S.C. § 12406(2)-(3). The President judged that those conditions were satisfied in Portland, and there is no lawful basis for plaintiffs or the district court to override that judgment.

**A. The President lawfully concluded that Section 12406's conditions are satisfied in Portland, and his judgment is conclusive.**

1. Congress vested the decision whether to call up the National Guard in the President, not the courts, as the Supreme Court observed nearly 200 years ago in *Martin*, 25 U.S. (12 Wheat.) 19. There, President Madison activated the state militia into federal service pursuant to a 1795 law that provided that “whenever the United States shall be invaded, . . . it shall be lawful for the President of the United States to call forth such number of the militia . . . as he may judge necessary to repel such invasion.” *Id.* at 29 (quotation omitted). A member of the New York militia challenged the penalties imposed on him by a court martial after he refused to comply with orders to report for federal service. *See id.* at 20-23.

The Supreme Court refused to entertain the militia member's contention that the President had misjudged the danger of an invasion, explaining that “the authority to decide whether the exigency has arisen[] belongs exclusively to the President.” *Id.* at 30. The Court emphasized that the 1795 law “confided” the power to call up the militia “to the Executive of the Union,” as Commander in Chief, and thus “necessarily constituted” the President himself as “the judge of the existence of the exigency in the first instance.” *Id.* at 31. Once the President judged that such an exigency existed, his judgment was “conclusive upon all other persons.” *Id.* at 30. That includes the courts. *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849).

Those same principles apply here. Plaintiffs seek to second-guess the President’s judgment that attacks on federal personnel and property satisfied Section 12406’s prerequisites for federalizing the National Guard in Portland. But as the Los Angeles stay decision explained, Section 12406 “is, in several material respects, the same as” the 1795 law at issue in *Martin*. *Newsom*, 141 F.4th at 1049. Section 12406 thus makes clear that Congress has granted “the authority to decide whether” its conditions are satisfied “exclusively to the President,” whose decision must be treated as “conclusive.” *Martin*, 25 U.S. (12 Wheat.) at 30.

Notwithstanding *Martin*, the panel that stayed the order enjoining the Los Angeles deployment concluded that some—albeit highly deferential—judicial review of the President’s Section 12406 decision is available. *See Newsom*, 141 F.4th at 1046-50. The panel relied on *Sterling v. Constantin*, 287 U.S. 378 (1932), but that case underscores the conclusive nature of the President’s judgments. *Sterling* involved a challenge to orders the Governor issued to the Texas National Guard after concluding that oil and gas producers were “in a state of insurrection.” *Id.* at 387-88 (quotation omitted). The Court made clear that the Governor was “appropriately vested with the discretion to determine whether an exigency requiring military aid . . . has arisen” and that “[h]is decision to that effect [wa]s conclusive.” *Sterling*, 287 U.S. at 399. The Court did not second-guess the Governor’s judgment that an insurrection justified the deployment of the militia and evaluated only the measures taken by the militia once deployed. *See id.* at 401, 404.

2. Even if some judicial review is permitted, courts must, at a minimum, “give a great level of deference to the President’s determination that [one of Section 12406’s] predicate condition[s] exists.” *Newsom*, 141 F.4th at 1048. So long as that determination “reflects a colorable assessment of the facts and law within a range of honest judgment,” courts must defer. *Id.* at 1051 (quotations omitted). That conclusion is consistent with general principles governing judicial review of presidential action. While plaintiffs challenging federal agency action ordinarily rely on the APA, 5 U.S.C. § 701 *et seq.*, the President is not an agency subject to the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). Plaintiffs’ only path to judicial review of the President’s decision to invoke Section 12406, therefore, is a non-statutory ultra vires claim—a “Hail Mary pass” that “rarely succeeds.” *NRC v. Texas*, 605 U.S. 665, 681-82 (2025) (quotation omitted). The same is true of the DoW’s implementation of that presidential directive. *See DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 25 (2020) (declining to consider claim that the Secretary of Homeland Security was “required to explain a legal conclusion that was not hers to make”).

Plaintiffs cannot satisfy these demanding standards. In the weeks leading up to the federalization in Portland, ICE and FPS came “under coordinated assault by violent groups intent on obstructing lawful federal enforcement actions.” A52. Outside of ICE’s facility in downtown Portland, protestors attacked federal officers with rocks, bricks, pepper spray, and incendiary devices. *See* A66-67; A82-83. Protestors attempted to impede government vehicles as they entered or exited the

facility, throwing objects at the vehicles, blocking and surrounding them, and shouting threats at the occupants. A84; A68-69; A73. Individuals working inside the facility were followed home after work, and other federal personnel were doxed. A83; A68-69; A73-76. Protestors attempted on several occasions to burn down the facility and painted death threats on the facility's walls. A67-68; A71-72. Requests for assistance from local police resulted in no concrete actions or were ignored. A84-85; A78-79. As a result, DHS was forced to close the facility for three weeks and to reassign additional federal officers to support the protection of the facility and its occupants, significantly impeding its ability to perform its regular law enforcement functions. A70; A71; A76-77. These conditions amply support the President's judgment that he was "unable with the regular forces to execute the laws of the United States," 10 U.S.C. § 12406(3), and thus that federalization of a limited number of Guard members was warranted. *See* Oct. 1 Truth ("Federal Law Enforcement Officers have not been able to enforce the Laws in Oregon.").

The President further explained why "protests or acts of violence" that "directly inhibit the execution of the laws . . . constitute a form of rebellion against the authority of the Government of the United States" (A61) or, at minimum, create a "danger of a rebellion," 10 U.S.C. § 12406(2). Contrary to the district court's conclusion, the term "rebellion" is not limited to an organized, armed, and open attempt to overthrow the entire government. [A129]. Congress enacted Section 12406's predecessor in response to the Whiskey Rebellion—a protest against a

specific tax, not an effort to overthrow the government as a whole. And dictionaries from the relevant time period, including those cited by the district court, define “rebellion” in a manner that encompasses deliberate resistance to the government’s laws and authority. That broader conception of “rebellion” better reflects the historical context in which Section 12406 was enacted and the instances in which Presidents have federalized National Guard members since Section 12406 was enacted. *See* Jennifer K. Elsea, Cong. Rsch. Serv., R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* 9-12, 35-38 (2018). The fact that some on-the-ground conditions might both constitute a rebellion and render the President unable to enforce the federal laws does not create impermissible superfluity. *Contra* A128-30. “[S]ometimes the better overall reading of the statute contains some redundancy.” *Bufkin v. Collins*, 604 U.S. 369, 387 (2025) (quotation omitted). The Whiskey Rebellion, undoubtedly rose to the level of a “rebellion” and also rendered the President “unable” to enforce the federal excise tax on whiskey.

3. In issuing its injunction, the district court substituted its own judgment for that of the President and failed to engage in the “highly deferential” review mandated by this Court’s California stay decision. *See Newsom*, 141 F.4th at 1049. Put simply, the district court built its entire decision around a single premise: that “the protests were small and uneventful” when the President issued his federalization decision. A123; *see also* A123-30. But the district court itself identified several incidents in September, A123-24, and there is ample record evidence showing the violence was far

from “small” or “uneventful,” providing more than a “colorable” basis to support the President’s decision to federalize the Guard. *See Newsom*, 141 F.4th at 1049.

Plaintiffs’ own evidence shows the dire situation in Portland on the eve of the President’s decision to federalize the Oregon National Guard. Throughout September 2025, ICE officials and property were the subject of regular, often-violent protests. On Labor Day, for example, hundreds of protesters gathered outside ICE facilities and built a mock guillotine, requiring FPS officials to exert physical force to keep order and resulting in several arrests. A95-97. Multiple citizens called complaining about PPB’s failure to control the mob, one calling PPB “useless.” A94. Just a few days later, on September 6, a mob of 50 to 60 protesters gathered to harass federal personnel by flashing lights, swinging sticks, and blocking vehicles from accessing the building. A98-100. This violence lasted hours, yet nothing suggests that PPB rendered any assistance. *See* A98-100. Less than a week later, a group of protesters offloaded a car’s worth of sticks and bats—potentially gearing up to engage in violence or at least “re[-]suppl[y]ing” an already-armed mob. A101-02. On September 19, FPS was stretched beyond its means—unable to handle protesters threatening vehicles and at least one protester wielding a large stick or sword. A103-04. On the same day, federal officers had to respond to a bomb threat. A71. During one protest, PPB concluded that it “would not be able to address [a] call” for assistance “with the resources [it] [had].” A104.

This is far from “categorically different from the violent incidents” in California that justified the federalization of the California Guard, especially given the highly deferential standard of review. *Contra* A123-24. Both situations involved physical threats against federal personnel—like arming protesters (A101-04) and throwing rocks, sticks, and explosives at federal officers (*Newsom*, 141 F.4th at 1052). And both also involved attempts to damage federal property—like interfering with vehicles (A98-100) and destroying federal property (*Newsom*, 141 F.4th at 1052). While there were fewer agitators in Portland than in California, that just explains why the President federalized and deployed just 200 Guardsman in Portland, compared to 4,000 in California. It is not a basis for discrediting the President’s colorable assessment of the facts. In short, the district court ignored evidence and minimized the seriousness of the problems in Portland during September.

The district court erred by focusing entirely on the situation in Portland in the handful of days preceding the President’s federalization decision. *See* A123 (discounting events that occurred “at least two weeks” before federalization), A124 (same for an event that “occurred a week before” federalization). Nothing in Section 12406 suggests the President must consider only events that immediately precede his federalization decision, and reading in such a requirement was improper. Indeed, a recency requirement would make no sense—analysis of a threat necessarily encompasses consideration of how the situation on the ground has evolved over time. The President was well within his discretion to consider the months’-long unrest in

Portland, as well as the potential for continuing unrest over the foreseeable future, and both considerations support the President's federalization decision.

Although violence has somewhat abated in the recent month, that is only because of an intensive deployment of FPS forces. *Contra* A124-25. By relocating officers across the country and running 12-hour shifts seven days a week, FPS has done its best to cope with the mob violence in Portland—without any meaningful aid from local police. Contrary to the district court's suggestion, that Herculean effort is far from sustainable conduct by "regular forces." The President is not required to deploy nationwide federal law enforcement resources 24/7 to contain the situation in Portland; instead, he may lawfully determine that those forces are overstretched, that he is unable to execute the laws with those forces, and that federalization of Guard members is necessary to assist.

Events outside Portland—like a recent shooting at a Dallas ICE facility—are similarly relevant. *Contra* [A122]; [A125]. Those background facts might provide helpful insight into the potential dangers to federal personnel and property, the current dynamics in our country, historical patterns in mob violence, and lessons learned from prior events. Perhaps more importantly, federal law enforcement is a necessarily national endeavor. If resources must be shifted from one part of the country to another, or if a resource-intensive mission elsewhere is consuming resources, that informs whether the regular forces are able to enforce the laws. How and where to deploy those forces, or whether to reinforce them with the National

Guard, in response to violent resistance to federal law enforcement throughout the country is a judgment the Constitution and laws vest in the President.

Finally, the district court's suggestion that the President did not act in good faith is without factual support. A126. As explained, Portland faced significant protests on the eve of the President's federalization decision, and the President's social media posts are clear that only "necessary Troops" should be federalized—consistent with the limited federalization order at issue here. A126.

**B. Plaintiffs' remaining claims fail.**

The federalization of the Guard does not violate the Tenth Amendment. The Supreme Court "long ago rejected the suggestion" that the federal government "invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority . . . in a manner that displaces the States' exercise of their police powers." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981). If a federal action is authorized by the Constitution, "the Tenth Amendment gives way." *United States v. Hatch*, 722 F.3d 1193, 1202 (10th Cir. 2013); see *United States v. Comstock*, 560 U.S. 126, 144 (2010). Here, the text of the Constitution makes clear that Congress may "provide for calling forth the Militia." U.S. Const. art. I, § 8, cl. 15. And Section 12406 rests on that express grant of authority, authorizing the President to "call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary." 10 U.S.C. § 12406. The district court treated plaintiffs' Tenth Amendment claim as derivative of their statutory claim,

A130-31, so the President’s lawful invocation of Section 12406 defeats any Tenth Amendment claim. *Newsom*, 141 F.4th at 1054 n.5.<sup>1</sup>

## II. The other stay factors strongly favor the government.

A unanimous panel of this Court already recognized that the federal government has “an uncontested interest in the protection of federal agents and property and the faithful execution of law” and that threats directed at federal personnel and property harm that interest. *Newsom*, 141 F.4th at 1054. The government also suffers irreparable harm when its federal immigration officials are prevented from safely and successfully enforcing the law. *See* A79-80. That some individuals have protested peacefully does not diminish the threat posed by the agitators who have attacked and threatened federal personnel and property. *See supra* pp. 4-8.

On the other side of the ledger, plaintiffs have not established irreparable injury warranting extraordinary relief. Plaintiffs’ argument that the deployment upsets the federal-state balance, “is, in essence, a merits argument,” *Newsom*, 141 F.4th at 1055, which is wrong for the reasons explained. *See supra* pp. 13-22. The decision to call National Guard members into federal service necessarily renders those members temporarily unavailable to serve in state roles, but that is the result of the dual system

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<sup>1</sup> The district court declined to address plaintiffs’ remaining claims, but those claims fail for the reasons the federal government explained in district court.

of control created by the Constitution and Congress. And Governor Kotek was given the opportunity to maintain control of the Guard units, in any event.

Plaintiffs, moreover, can only speculate that emergencies and unrest might occur in Oregon while the Guard is deployed. Such speculation cannot establish that it is “likely,” as opposed to merely “possib[le],” that plaintiffs will suffer irreparable harm absent interim relief. *Herb Reed Enters., LLC v. Florida Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013). And even if an emergency occurs, it is implausible to suggest that 200 otherwise-occupied Guard members will impair the State’s ability to respond.

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## CONCLUSION

The Court should stay the district court's order pending appeal and should grant an immediate administrative stay pending consideration of the motion.

Respectfully submitted,

BRETT A. SHUMATE

*Assistant Attorney General*

ERIC D. McARTHUR

*Deputy Assistant Attorney General*

MARK R. FREEMAN

SHARON SWINGLE

*/s/ J. Kain Day*

J. KAIN DAY

*Attorneys, Appellate Staff*

*Civil Division, Room 7517*

*U.S. Department of Justice*

*950 Pennsylvania Avenue NW*

*Washington, DC 20530*

*(202) 353-2689*

*Sharon.swingle@usdoj.gov*

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) and Local Rules 27-1(d) and 32-3 because it contains 5,598 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

*/s/ J. Kain Day*  
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J. KAIN DAY

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