

No. 25-7194

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

STATE OF OREGON, et al.,
P/4inz'v-Appel//ees,

v.

DONALD J, TRUMP, 271 /Qi; @j%ia/ azpnwigf as Pfsidefzt of t/96 Ufziiea' States, et al.,
D nφz'411z's-APPe//411z's.

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

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY
PENDING APPEAL AND A PARTIAL ADMINISTRATIVE STAY BY
NOVEMBER 21**

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INTRODUCTION

Since June, the Immigration and Customs Enforcement (ICE) office in Portland has been targeted by violence and threatened violence. In mid-June, crowds of approximately 450 agitators started fires, assaulted officers, blocked traffic, and vandalized the facility. Unrest continued over the next three months. Agitators have hurled mortars at the facility, assaulted and thrown objects at officers, blocked traffic, pounded on vehicles, unloaded sticks and bats, doxed and threatened to kill federal agents, and made other threats against the facility.

As a result, ICE was forced to close the Portland office for more than three weeks. Federal officials had to reassign a large contingent of Federal Protective Service (FPS) officers and other federal officers for round-the-clock protection, an arrangement that has proven unsustainable. On September 26, the Department of Homeland Security (DHS) thus sought "assistance from the Department of War (DoW) in order to safeguard federal personnel, facilities, and operations in the State of Oregon" that "have come under coordinated assault by violent groups intent on obstructing lawful federal enforcement action." The President granted the request and directed the federalization of a small number of Oregon National Guard members (subsequent extended to members from other States) .

The President's determination was plainly lawful. Under 10 U.S.C. § 12406, the President may federalize the 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." And federal courts must "give a great level of deference to the President's determination that [one of Section 12406's] predicate condition[s] exists," asking at most whether "it reflects a colorable assessment of the facts and law." *Ney/sow W. Twzwp*, 141 F.4th 1032, 1048, 1051 (9th Cir.) (per curiam), *v6/Qg 677 84716 46112641 No. 25-3727, 2025 WL 2977104* (9th Cir. Oct. 22, 2025) .

The district court nonetheless issued a permanent injunction barring federalization and deployment of the Oregon National Guard or Guardsmen from any other state to Portland. In so ruling, the district court wholly failed to give the President's determination the deference required, instead effectively reviewing de novo the law and facts. The court also wrongly downplayed the dangerous conditions at the ICE facility. The court acknowledged large-scale violent protests in June, but treated them as irrelevant to the President's determination just a few months later. And while the court attempted to paint a picture of sharp decline in violent activity since then, the record shows that violence and threats of violence recurred more-or-less continuously. More broadly, the court emphasized that certain incidents did not result in significant violence. But this ignores the substantial and continuous *IWM!* of violence and resulting inhibition of federal operations. The President certainly had "colorable" grounds to determine that regular forces were "unable" to sufficiency protect federal personnel and property and that the conditions rose at least to the level of a "danger" of rebellion.

The district court's order impinges on the Commander in Chiefs supervision of military operations, countermands a military directive to officers in the field, and

endangers federal personnel and property. The balancing of harms weighs strongly in favor of a stay pending appeal. At the least, Defendants respectfully request an administrative stay by November 21 of the portion of the injunction requiring defederalization of Oregon Guard members, given the harms and alteration of the status quo worked by that portion of the injunction.¹

STATEMENT

A. Legal Background

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. Congress has "created the National Guard of the United States, a federal organization comprised of state national guard units and their members." *P64926/9 W. Dqbrztiwent ofDqQ* 496 U.S. 334, 338 (1990). Once called into federal service, members become federal soldiers, 10 U.S.C. § 10106, and serve under the President, see U.S. Const. art. II, §2, cl. 1. Section 12406 authorizes the President to call the National Guard into federal service if, as relevant here:

(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

B. Factual Background

1. Throughout the summer, ICE has seen a sharp increase in protests aimed at impeding enforcement of federal immigration laws. ICE's facility in downtown

¹ Before trial, Defendants asked the district court to stay any injunction pending appeal, Dkt. 115 at 34, but the district court granted only a limited stay. See *£194* p.10.

Portland has experienced significant unrest targeting both the facility and those who work in it. On June 11, a crowd of 60-100 people (estimated by the Portland Police Bureau (PPB)) gathered outside and "engaged in behavior such as starting tires next to a federal building, assaulting police officers, and interfering with officers arresting persons." A444. The size of the protests surged throughout the next day, reaching "well over 400" people that night. A422. "[A]pproximately half the crowd (~200) [was] in black bloc and ready for a fight." A422. "Corkers" intentionally blocked all traffic lanes. A422. Protestors screamed at federal officials, and several individuals were observed carrying squirt guns with unknown fluids and bags of rocks. A422. Agitators attempted to light a fire in the driveway. A422. Violent agitators also threw or slingshot a rock through a second story window, breaking it. A423.

The PPB was "directed not to engage in this hostile crowd for safety reasons." A421. An hour into the event, with "graffiti spreading," the PPB declined to intervene because it had not observed any felony offenses or "life-safety risk that requires intervention." A421. Officers attempted to engage with protestors blocking traffic, but when their attempted engagement was met with "hostility," officers "disengage[d] to prevent Hashpoint." A422.

The violence and unrest continued through June 14, when the PPB declared a riot. A414. According to the Oregon State Police (OSP), "[t]he crowd numbered approximately 400, with around 1 /3 ... dressed in 'black bloc.'" A417, see A435 (PPB estimated crowd-size of 450). The OSP strongly criticized the PPB's response, noting

that their "seemingly high threshold ... for arrests" "resulted in no real intervention by law enforcement, while simultaneously allowing low-level public disorder criminal activity to continue." A418. "Protesters were free to throw objects at the building, kick at doors, graffiti the windows and walls and no enforcement action was taken by local law enforcement." A419.

DHS had to close the ICE facility for more than three weeks starting in mid-June because it was too dangerous to work there. A148. DHS had to relocate its personnel to an alternate site while some immigration processing was diverted to a DHS processing center in Tacoma, Washington, requiring aliens to travel there. A149-50.

Throughout June, crowds and disruptions remained high, albeit in reduced numbers. On June 19, activists began pouring motor oil on the driveway in front of the facility, potentially creating a fire risk and causing hazards for federal officials protecting the property. A413. On June 24, approximately 70 people blocked the driveway, shouting "FUCK ICE" and "ICE out of Portland", FPS was able to clear the driveway only by using pepperballs and other non-lethal munitions. A404-12. On July 4, a crowd of about 150 gathered, PPB described the protesters as "intent on altercation with FPS." A394. Protestors hurled mortars at the facility and FPS made multiple arrests. A394.

On August 9, a group of 30-40 protesters dressed in black bloc with helmets and gas masks threatened federal officers with violence and began hitting ICE and FPS vehicles with their fists as the vehicles left the facility. A381. FPS officers were outnumbered three-to-one and had to use pepper balls to push protesters away. A382.

On August 18, there were further protests in which agitators shouted threats at FPS officers and screamed racial slurs and profanities, and a protestor deliberately abandoned her vehicle in the facility's driveway, disrupting operations due to fears that it contained explosives. A371.

Unrest continued throughout September. On September 1, approximately 200 protestors gathered, with agitators assembling a mock guillotine and blocking the roadway. A352. The protesters were confrontational, yelling obscenities toward FPS and ICE personnel. A359. On September 3, an individual illegally flew a drone near the upper windows of the facility and, while being arrested, became violent and spit on agents. A352. On September 4, FPS arrested a person described as "a daily chronic problem," who is "very aggressive," "can be very violent," and was armed with a rifle. A352. On September 6, protesters spread fake blood at the driveway entrance, threw objects at FPS officers, and aimed high-powered lights at them. A345. On September 9, protesters again aimed high-powered lights at federal agents, a group of approximately twelve protestors surrounded a counter-demonstrator, and physically harassed her. A331-33. On September 12, there were more protesters in black bloc, some of whom unloaded weapons from a vehicle. A326. On September 18, "the afternoon started with around 150 plus" protestors outside the ICE facility, later there were 50 to 60 of the "normal agitators." A325. Protesters screamed and threw objects at a PPB car. A325. On September 19, approximately 50 protestors gathered. As summarized by the PPB, "once a marked car drives through," the protestors "will Hip

off, scream and throw objects at the car and in most cases run towards the car as if they are going to charge the car." A324. A protester assaulted a journalist with a large sword or stick. A324. The next day, there were again about 50 protesters, which PPB characterized as "more agitated than most nights." A322.

The Portland facility and officials working there have also been subject to repeated threats. On July 22, a social media account with more than 7,000 followers posted a picture of a utility pole less than 40 feet from the ICE facility and detailed instructions about how to turn off the facility's power. A391. The mock guillotine that protestors placed outside the ICE facility on September 1 was also viewed as a death threat by the officers. A140-41. On September 4, doing flyers for three agents containing threatening language were discovered. A354. On September 9, one of the doxed agents' home addresses was listed on Google. A340. And multiple social media accounts with Oregon-based users have posted death threats. A327. As FPS's Deputy Regional Director testified, it was common for the officers to be filmed going in and out of the facility, to have their license plate numbers taken down, and to be followed to their home or hotel, to the point that there were flyers organizing people to gather at hotels where FPS or supporting agencies are staying. A134-35.

In response to these volatile conditions, FPS has been forced to surge officers from around the country to Portland. A156. FPS's Deputy Regional Director explained that these irregular deployments were unsustainable. A129. Whereas before June 2025 only four FPS inspectors protected the ICE facility along with approximately 100 other

federal facilities, A127, the ICE facility now has required the protection of anywhere from 120 to 196 federal officers in a 24-hour period sourced from not just FPS but also other DHS and Department of Justice components, with 180 being the optimal number to meet the potential threat. A130-33. FPS has had to reduce FPS officers' rotation from 30 days to 20 days to reduce fatigue from the long shifts and the stress on officers' mental health due to their close proximity to protestors "who say some of the most vulgar, foul, racial slurs consistency throughout the day, throughout the night, on bullhorns." A127-28.

2. On September 26, DHS transmitted a memorandum to DQW requesting "immediate and sustained assistance ... in order to safeguard federal personnel, facilities, and operations in the State of Oregon." A320. DHS requested this assistance because "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." A320. DHS sought 200 DoW personnel to "direct[ly] support [] federal facility protection, access control, and crowd control measures." A321 .

On September 27, the President directed the Secretary of War to coordinate the deployment of forces to Portland to protect ICE personnel and facilities. A317. The DoW first contacted the Oregon Adjutant General to see if Oregon would supply National Guard members in a federally funded but non-federalized status. See A144,319. Governor Kotek rejected the request. A147. The President judged that the conditions

in Portland met the conditions of Section 12406 and federalized Oregon National Guard members. A311 .

Those conclusions were consistent with assessments the President made in federalizing California National Guard members in response to violence in Los Angeles, finding that "violent protests threaten the security of and significant damage to Federal immigration detention facilities and other Federal property." A459. This Court stayed a district court order enjoining that federalization and deployment, concluding that the President likely acted lawfully in invoking Section 12406. *See Ney/sow*, 141 F.4th at 1040-41.

3. On September 28, Secretary of War Pete Hegseth issued a memorandum mobilizing 200 members of the Oregon National Guard for sixty days. A315.

C. Prior Proceedings

Plaintiffs filed suit alleging violations of 10 U.S.C. § 12406, the Posse Comitatus Act, the Administrative Procedure Act (APA), and the Constitution. The district court granted a temporary restraining order (TRO) on October 4, enjoining implementation of the September 28 memorandum as to the Oregon National Guard. A278. The next day, Defendants redirected approximately 200 federalized California National Guard troops to Portland. A183. The district court then granted a second TRO enjoining the deployment in Oregon of any "federalized members of the National Guard." A181.

Defendants appealed the first TRO and this Court granted an administrative stay, allowing Defendants to maintain the federalization of the Oregon Guard. A177. A

divided panel of this Court granted a stay pending appeal of the TRO. *O7fqgo7z W. Twzwp*, --- F.4th ----, No. 25-6268, 2025 WL 2951371 (9th Cir. Oct. 20, 2025) (per curia). The Court then voted for rehearing en bane, vacating the panel decision. A154

After further proceedings, including a three-day hearing and bench trial, the district court granted partial final judgment on November 7, holding that Defendants violated 10 U.S.C. § 12406 and the Tenth Amendment and permanency enjoining them from federalizing and deploying the Oregon National Guard or the Guard of any other State based on the same predicate conditions. The court issued a 14-day administrative stay of its order as to federalization of the Oregon National Guard.

ARGUMENT

1. The federal government is likely to prevail on the merits.

Congress empowered the President to "call into Federal service" members of the National Guard when "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 the district court had no basis to override that judgment.

² Defendants have since moved to dismiss that appeal as moot..

1. Even if some judicial review of the President's determination is permitted,³ courts must "give a great level of deference to the President's determination that [one of Section 12406'5] predicate condition[s] exists." *Ney/sow*, 141 F.4th at 1048, see *id.* at 1047, 1052 ("highly deferential" and "especially deferential."). The President's determination must be upheld so long as it "reflects a colorable assessment of the facts and law within a range of honest judgment." *Id.* at 1051. That conclusion accords with general principles governing judicial review of presidential action. The President is not an agency subject to the APA, see *Fmmé/in W. It/lassw/Qfzsetts*, 505 U.S. 788, 800-01 (1992), and Plaintiffs' only path to judicial review of the President's determination is *an m/W4 virus* claim, which requires showing that the President acted "entirely in excess of [his] delegated powers and contrary to a specific prohibition in a statute." *NRC W. Texas*, 605 U.S. 665, 681 (2025).

2. 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." A320. Starting with the initial violent protests in June, when large crowds started fires, assaulted officers, and vandalized the Portland ICE facility, unrest continued on a regular basis throughout the subsequent months. See *supra* pp.4-8. And as also discussed above, the

³ Defendants maintain and preserve for further review their argument that the President's determination that the statutory criteria are met is unreviewable. *W. Mon*; 25 U.S. (12 Wheat.) 19, 30 (1827).

facility and officials working there have been subject to repeated threats. Defendants have done their best to cope with the violence and threats by relocating officers across the country, including from outside FPS and outside DHS, but that redeployment is unsustainable.

Based on all of this, the President had ample and certainly "colorable" 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. And it is common sense that federal agents would be able to engage in greater enforcement of the immigration laws or otherwise perform their duties in protecting federal facilities and personnel if they were not operating under the threat of assaults and obstruction.

3. In concluding otherwise, the district court made several critical errors.

i. The court substituted its own judgment for the President's rather than engage in the "highly deferential" review mandated by *Ney/sow*, which asks whether the President's determination "reflects a colorable assessment of the facts did /aw within a range of honest judgment." 141 F.4th at 1049, 1051-52 (emphasis added). Again, *Nell/50779* is consistent with *Hz/tm wires* review more generally, which requires showing that the decisionmaker "has plainly and openly crossed a congressionally drawn line in the sand." *Federal E->§Zwess C041 W. U. §. Deg# Of Co/w.*, 39 F.4th 756, 765 (D.C. Cir. 2022). "[C]h]allengers must show more than the type of routine error in statutory interpretation or challenged findings of fact that would apply if Congress had allowed APA review."

Id.; *G/084 H6rz/l/9 Cwzwi/ W. Twzwp*, 153 F.4th 1, 20 (D.C. Cir. 2025) (error must be "so extreme that one may view it as jurisdictional or nearly so").

The district court did not heed these restrictions. It stated that "this Court must determine the *fe/4z'ive* importance of the facts that go toward whether the President violated 10 U.S.C. § 12406(3)." A83. And it conducted its own assessment of the President's calling-forth authority (concluding that Section 124068) requires a total failure of the "civil power") and of the facts (finding, among other things, that the President wrongly relied in part on significant violence and unrest in mid-June when he made his determination approximately three months later). A84-88. The district court's effectively *de novo* analysis would be impermissible even if this were an APA case. But *at wort*, the district court's disagreement with the President's determination amounts to the sort of "routine error" in statutory interpretation or factual assessments that cannot support an *H/z/m virus* claim.

ii. Lack of deference aside, the court's legal analysis was wrong. The district court reasoned that the President could not invoke Section 124068) unless the "civil power" "i.e., the civil government"- -was unable to execute the laws. A74. That standard was not met, in the court's view, because "law enforcement resources from Customs and Border Patrol, the Bureau of Prisons, and other law enforcement agencies were available between June and September 27, 2025." A86. But nothing in Section 12406 suggests that, before the President can federalize the National Guard in response to an exigency, he first must exhaust every other resource at his disposal. Nor did

President Nixon appear to think such a requirement applied when he invoked Section 12406's predecessor to federalize the National Guard in response to the 1970 postal strike. See 35 Fed. Reg. 5003 (Mar. 24, 1970).

Nor does *Ney/sow* lend any support to this framework. The Court did not there probe whether the President could have surged DHS officials from other areas of the country or personnel from other law enforcement agencies, before holding that the President had a sufficient basis to determine that Section 12406(3)'s predicate conditions wended.

iii. The district court's application of the law to the facts is also untenable. Most obviously, the district court erred in discounting the importance of the mob violence occurring in mid-June. Even the court acknowledged this serious violence, A6, and the significant similarities between events on those days and the unlawful activities in *Ney/sow*, A78. The court nonetheless deemed it irrelevant because the President waited until September to federalize the Guard. A78. But it is untenable to hold that the still-recent mob violence in mid-June was categorically irrelevant such that the President's consideration of it cannot reflect even a *60/omb/€* assessment of the facts. Nothing in Section 12406 suggests the President may consider only events immediately preceding his federalization decision.

The district court's reasoning also ignores that FPS responded to the earlier mob violence by relocating federal law enforcement officers from across the country. The President was well within his discretion to consider months-long unrest in Portland, as

well as the potential for continuing unrest over the foreseeable future and the fact that ongoing redeployment of outside forces was not sustainable conduct by "regular forces."

iv. Even artificially excluding the serious unrest in June from the analysis, it is clear that the President had a "colorable basis" for federalizing and deploying the Guard. It is true that the sheer volume of protestors has not since reached the same levels. But there is no support for the district court's characterization of subsequent violence as "aberrational," A84, or "at most, an emergency in the past." A83. The record is clear that violence—and certainly *incidents of violence*—have recurred essentially continuously since mid-June, necessitating a significant diversion of FPS and other officers to address the ongoing risk of violence. To summarize just some of the incidents: in late June, a crowd blocked the ICE facility driveway, forcing FPS to use pepper spray and other non-lethal munitions to clear the crowd, a crowd of about 150 people that PPB stated were "intent on altercation" gathered on July 4, and threw mortars at the facility, during multiple protests in August, activists shouted threats and hit ICE and FPS vehicles, forcing FPS officers (who were outnumbered three-to-one) to use pepper balls to push protesters away, and unrest continued throughout September, with significant incidents on September 1, 3, 4, 6, 9, 11, 12, 18, and 19. See *wppfa* pp. 5-8. Even the district court acknowledged that "[t]he decline in protest activity was not linear," and "there were occasional spikes in activity after June 14..." A24.

v. The district court largely downplayed or dismissed these numerous more recent instances by concluding that no serious violence ultimately occurred. See A24 (noting spikes but contending that "any crime was generally low-level"). For example, the court acknowledged that the September 1 guillotine incident (in a protest of approximately 200 people) "was alarming given previous protester statements that federal officers deserve[d] to be decapitated." A39 (quotation marks omitted). But the court observed that this incident "never evolved into physical violence" and appeared to treat it as irrelevant. A39. Similarly, the court noted that "[p]rotesters frequently made verbal threats to FPS and ICE personnel" (a considerable understatement), A79-80, but it dismissed these threats too. A79 ("But by the end of June, most of this violence was rhetorical."). The court acknowledged that between June and October, there were "some acts of doing, as well as some concerning tips or perceived threats," but it stated these concerns "turned out to be unfounded." A81. And while noting that multiple activists deliberately abandoned cars right in front of the ICE facility-raising obvious and well-founded concerns about explosive devices-the court simply noted that no explosive devices were ultimately found. A81.

This was error on multiple levels. For one, threats against federal officials are themselves often crimes. See 18 U.S.C. § 115. More fundamentally, officials cannot know in advance which threats will materialize and which "low-level physical violence," A80, will escalate into more substantial violence. As an FPS incident commander noted, the ICE facility and personnel at the facility have been under a constant threat of

violence. A137-38. And as noted above, that threat has only been controlled by a massive and unsustainable deployment, including officials from outside FPS. 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), warranting federalization of a limited number of Guard members.

vi. Finally, the district court contended that "from June 17 to September 27, 2025, PPB maintained an open line of communication with federal law enforcement and consistently responded to requests for assistance when PPB resources permitted." A87-88. The first and last clauses of this sentence are telling. As the use of "June 17" as the starting point illustrates, not even the district court concluded that PPB's handling of the mid-June riot was sufficient. And "when PPB resources permitted" is a significant qualification. The PPB's Central Precinct has only 12-18 officers working each shift, to cover 200,000 people and 40 square miles. A123-24.

Even after June 17, the record is replete with evidence of the PPB not responding or indicating that it would not be able to respond to disturbances. During the June 24 disturbances, PPB provided no assistance, while acknowledging that they ^{ma/41' 19496} provided assistance if the protests were not targeting ICE. A411. On July 4, PPB acknowledged that the protesters "were clearly energized, and intent on altercation with FPS," but made no arrests and did not otherwise provide meaningful assistance. A394-95. On September 9, after protestors surrounded a counter-demonstrator, PPB officers drove by the area but did not ~~e>dt~~ their cars or otherwise respond. A332. On September

19, PPB noted that "FPS Agents were busy," but stated that "even if these folks were still at ICE or nearby, we would not be able to address the call or make an arrest with the resources we have." A324.

And even when PPB is available, it offers only limited help. PPB policy is "not [to] provide traffic control in the immediate area of the ICE facility" absent narrow exceptions. A158. A PPB official acknowledged that "the chief is on record stating that we would not be removing barricades from the ICE driveway." A119. That same official noted that it was "fairly common" for protestors to stand in the driveway, that this sometimes means vehicles cannot enter or exit, that this represents criminal trespass, but that "[t]he PPB cannot remove these people because that might be facilitating immigration enforcement." A120. And while the PPB acknowledged that protestors frequently block and even charge at cars entering and existing the facility, A324, a PPB official confirmed that it "can't assist in removing the protestors to allow for that e>dt." A121. This prohibition applies even if the PPB has no reason to believe the blocked vehicle is engaged in immigration enforcement. A121. Another PPB officer testified that PPB officers were not to make arrests at the ICE facility even when protestors threw objects at their cars and in most cases the officers would leave if protestors started charging their cars. A125. Through PPB's inaction, it became "common knowledge that [PPB] [was] not going to respond to assist [FPS] with the protest activity at the ICE facility." A143.

Section 12406 does not impose any sort of local exhaustion requirement. But the President could reasonably conclude that the PPB is not a reliable partner in protecting federal officials and property, which only further underscores that he had a colorable basis for his determination.

vii. Although the Court need not reach this issue to grant a stay, the President's action was independency warranted under 10 U.S.C. § 12406(2). The President reasonably 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," A459, or, at minimum, create a "danger of a rebellion." The district court construed "rebellion" in Section 12406(2) to mean "Can organized group engaged in sustained, armed hostilities for the purpose of overtaking an instrumentality of government by unlawful or antidemocratic means." A102-03. But dictionaries from the 18905 and 19005 define "rebellion" to focus on deliberate resistance to the government's laws and authority. Et., *Reba//iw*, Blac;k's Law Dictionary (1st ed. 1891); *Reba//ion*, An American Dictionary of the English Language (1900). And the district court's definition would fail to encompass numerous instances in which the President has called the militia into federal service to address open defiance of federal authority in situations that fell short of organized efforts to overthrow the government. The district court emphasized that, in its view, the crowds were not "organized." A28-30. But the record at least reflects "some level of organic organization," A118, as the

district court acknowledged. That degree of organization is sufficient to establish a rebellion or, at the least, a danger of rebellion.

viii. Contrary to the district court, the federalization and deployment does not violate the Tenth Amendment, which "gives way" if federal action is authorized by the Constitution. *United States W. I-[af6/9*, 722 F.3d 1193, 1202 (10th Cir. 2013), see *United States W. Cowstowé*, 560 U.S. 126, 144 (2010). Plaintiffs did not contend-and the district court did not hold-that Section 12406 is unconstitutional. If the President's determination complies with the statute, the Tenth Amendment has no role to play. See *Do/tw W. §P6w'€1"*, 511 U.S. 462, 473 (1994) ("claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims"). The district court repeatedly contended that the federal government unlawfully "commandeered" state officials. A62-63,67,107, see *Prim W. United SzWes*, 521 U.S. 898, 935 (1997). But the National Guard is composed of *hot/9* state and federal Guards. *P6493€9*, 496 U.S. at 345. The President does not unlawfully commandeer state officials when he federalizes the Guard *mnsisz'ellz' wit/9* Section 12406.

II. The other stay factors strongly favor the government.

The federal government has "an uncontested interest in the protection of federal agents and property and the faithful execution of law," and threats directed at federal personnel and property harm that interest. *Ney/sow*, 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.

By contrast, Plaintiffs did not establish any irreparable injury warranting permanent injunctive relief, let alone any injury outweighing Defendants' interests supporting a stay. In concluding otherwise, the district court contended that Plaintiffs had demonstrated constitutional violations that themselves constituted irreparable harm. A108. But as discussed above, Plaintiffs' claims are fundamentally statutory, not constitutional, and alleged violations of a federal statute do not give rise to any presumption of irreparable harm. *See Statham/és C041 W. M6Kit1t1Q/*, 602 U.S. 339, 345-48 (2024). Plaintiffs also complained that the federalization required diversion of Oregon National Guard members from state responsibilities, but Oregon provided no example of present or reasonably likely future needs that the state government will be prevented from addressing.

III. The Court should administratively stay the order as to the federalization of the Oregon Guard.

While it considers this motion, the Court should administratively stay the portion of the district court's order requiring d federalization of Oregon Guardsmen. As the district court acknowledged (in administratively staying that aspect of its order for 14 days), a panel of this Court stayed that aspect of the October 4 TRO to "preservel] the status quo in which National Guard members have been federalized but not deployed." A116. And the en banc; court, after vacating the panel's stay order, clarified that this administrative stay remained in place. Plaintiffs will suffer no meaningful harm from a similar administrative stay of that aspect of the new order.

By contrast, an order requiring expedited defederalization imposes significant harms and challenges on the federal government and individual Guard members. "[T]he Oregon National Guard members were scheduled to remain on Title 10 orders until November 26, but the Department of War intends to extend this mobilization." Declaration of Carrie L. Perez ii 2 (filed with this brief). "Demobilization necessitates transporting guardsmen to a designated site in Texas and conducting out-processing, which includes essential medical and administrative screenings that require both time and manpower." M. 114. Defederalized Guard members will not receive federal pay after they return to civilian status, and some members may not immediately be able to return to civilian jobs. Id. ¶ 5. Curtailment of the federalization may also result in loss of healthcare benefits, in addition to other consequences. M. ¶¶ 6-7. Defendants thus respectfully request that, at a minimum, the Court stay this aspect of the district court's order, as it did at the TRO stage (and as the Seventh Circuit did, *Moore v. Twzwp*, 155 F.4th 929, 940 (2025)).

CONCLUSION

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

Respectfully submitted,

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November 2025

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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 5,567 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.

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