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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

GAVIN NEWSOM, in his official capacity as  
Governor of the State of California, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States of America, et al.,

*Defendants.*

Case No. 3:25-cv-04870-CRB

**DEFENDANTS' MOTION TO DISMISS**

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1 **MOTION TO DISMISS**

2 Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), Defendants, the President of  
3 the United States, the Secretary of War, and the Department of War (“DoW”), will move this Court  
4 as soon as they may be heard for an order granting Defendants’ motion to dismiss, with prejudice,  
5 all claims remaining in Plaintiffs’ Complaint, ECF No. 1. The following are the points and  
6 authorities in support of this motion. A proposed order is attached.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **SUMMARY OF ARGUMENT**

9 In June of this year, the President invoked 10 U.S.C. § 12406 to federalize and deploy 4,000  
10 members of the California National Guard to respond to serious and substantial threats to federal law  
11 enforcement officers and federal property, which Defendants have characterized as the Federal  
12 Protection Mission. Plaintiffs—the State of California and its Governor—sued, alleging *ultra vires*,  
13 Tenth Amendment, Administrative Procedure Act (“APA”), and Posse Comitatus Act (“PCA”)  
14 claims. This Court has since entered partial final judgment on the PCA claim. Defendants now move  
15 to dismiss Plaintiffs’ remaining claims. Fed. R. Civ. P. 12(b)(1), (6).

16 Plaintiffs’ *ultra vires* claim based on 10 U.S.C. § 12406 (Count I) fails to state a claim because  
17 Plaintiffs cannot show that the President acted “entirely in excess of [his] delegated powers and  
18 contrary to a *specific prohibition* in a statute.” *NRC v. Texas*, 605 U.S. 665, 681 (2025) (internal quotation  
19 marks omitted). Indeed, an *ultra vires* claim “is essentially a Hail Mary pass . . . the attempt rarely  
20 succeeds.” *Id.* at 681-682 (citation omitted). This is particularly the case here because—even assuming  
21 the President’s determination is reviewable (which Defendants will not press here in light of the Ninth  
22 Circuit’s binding, contrary ruling)—the Court must, at a minimum, “give a great level of deference to  
23 the President’s determination that [one of Section 12406’s] predicate condition[s] exists,” *Newsom v.*  
24 *Trump*, 141 F.4th 1032, 1048 (9th Cir. 2025) (per curiam), and must uphold the determination if it  
25 “reflects a colorable assessment of the facts and law within a range of honest judgment,” *id.* at 1051  
26 (citation omitted). In light of the substantial threat to federal personnel and property in California as  
27 alleged in the Complaint, the President clearly had at least a colorable basis for determining that he “is  
28 unable with the regular forces to execute the laws of the United States [.]” 10 U.S.C. § 12406(3), and a

1 panel of the Ninth Circuit has also held that the President “likely acted within his authority [under  
2 § 12406(3)] in federalizing the National Guard[.]” *Newsom*, 141 F.4th at 1052.

3 The President’s decision is also independently supported by § 12406(2), which authorizes him  
4 to call the National Guard into federal service when “there is a rebellion or danger of a rebellion  
5 against the authority of the Government of the United States[.]” 10 U.S.C. § 12406(2). As the  
6 Complaint alleges, in the days leading up to the federalization, protesters were acting violently,  
7 throwing objects at law enforcement officers, damaging property, setting fires during the protests, and  
8 otherwise breaking the law, while local law enforcement had declared “an unlawful assembly” in  
9 certain protest sites to disperse the protesters. Compl. ¶ 35. The President thus had at least a colorable  
10 basis to determine that there was, at minimum, a “danger” of rebellion, 10 U.S.C. § 12406(2), and that  
11 determination clearly survives the “highly deferential” standard of review under *Newsom*. 141 F.4th at  
12 1052.

13 Because the President’s invocation of § 12406 to federalize and deploy the California National  
14 Guard was proper, Plaintiffs’ Tenth Amendment claim (Count II) must also fail. Unsurprisingly,  
15 Plaintiffs previously acknowledged in the preliminary injunction stage that “[their] Tenth  
16 Amendment claim . . . rises and falls with their ultra vires claim based on § 12406.” *Newsom*, 141 F.4th  
17 at 1044. The analysis is the same here. Moreover, Plaintiffs’ Tenth Amendment claim of the Federal  
18 Protection Mission’s purported interference with the State’s police power cannot overcome the federal  
19 government’s “uncontested interest in the protection of federal agents and property and the faithful  
20 execution of law.” *Id.* at 1054. Indeed, Plaintiffs do not allege that their police power extends to the  
21 protection of federal property and personnel—the sole focus of the Federal Protection Mission.  
22 Compl. ¶ 56 (Presidential memo directing federalized California National Guard to “perform those  
23 military protective activities that the Secretary of Defense determines are reasonably necessary to  
24 ensure the protection and safety of Federal personnel and property”). In fact, they cannot.

25 Finally, Plaintiffs’ APA claim (Count III) must be dismissed for lack of jurisdiction and for  
26 failure to state a claim. The President is not an “agency” under 5 U.S.C. § 704, and although Plaintiffs  
27 do not directly challenge the President’s federalization and deployment decision under the APA, they  
28 seek to do so indirectly by challenging the Secretary of War’s issuance of two deployment orders,

1 which implemented the President’s decision. The fact that the Secretary of War carried out the  
2 President’s decision to deploy California Guardsmen to address the crisis in California does not change  
3 the Presidential character of those deployment orders. They remain presidential actions because only  
4 the President can federalize and deploy troops under § 12406, and it defies common sense to suggest  
5 that the President must personally carry out his statutory authority.

6 Even assuming the Secretary of War’s exercise of delegated Presidential authority in issuing  
7 the challenged deployment orders can be construed as agency action, it is not “final agency action”  
8 for purposes of APA review because it does not carry legal consequences (as opposed to practical  
9 ones) or determine the rights and obligations of any regulated parties. *See Bennett v. Spear*, 520 U.S.  
10 154, 177-78 (1997). Instead, the legal consequences of issuing the deployment orders, if any, flowed  
11 from the President’s decision to federalize and deploy the California National Guard.

12 Finally, the challenged DoW deployment orders are not subject to judicial review under the  
13 APA because they are “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). There are no  
14 judicially manageable standards for this Court to judge the military’s deployment decisions, which are  
15 quintessential professional military judgments that the Judiciary has no competence to review. *See*  
16 *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[C]ourts traditionally have been reluctant to intrude  
17 upon the authority of the Executive in the military and national security affairs.”).

### 18 **LEGAL BACKGROUND**

19 The Constitution authorizes Congress both to raise and support a national Army and to  
20 organize “the Militia.” *See* U.S. Const. art. I, § 8, cl. 15 (granting Congress the power to “provide for  
21 calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel  
22 Invasions”). Exercising that authority, Congress has “created the National Guard of the United  
23 States, a federal organization comprised of state national guard units and their members.” *Perpich v.*  
24 *Dep’t of Def.*, 496 U.S. 334, 338 (1990) (citation omitted). The National Guard is composed of both  
25 the state National Guard, under the command of the several States, and the National Guard of the  
26 United States, a federal entity under the federal chain of command. *See* 10 U.S.C. § 10101.

27 Congress has granted the President several authorities, including 10 U.S.C. § 12406, under  
28 which he may call forth the National Guard. Once ordered into federal service, “members of the

1 National Guard . . . lose their status as members of the state militia during their period of active duty,”  
 2 *Perpich*, 496 U.S. at 347, become federal soldiers, 10 U.S.C. § 10106, and serve under the President as  
 3 Commander in Chief, *see* U.S. Const. art. II, § 2, cl. 1.

4 Here, the President has invoked § 12406 to federalize the California National Guard. That  
 5 statute provides:

6 Whenever—

7 (1) the United States, or any of the Commonwealths or possessions, is invaded or is  
 8 in danger of invasion by a foreign nation;

9 (2) there is a rebellion or danger of a rebellion against the authority of the Government  
 of the United States; or

10 (3) the President is unable with the regular forces to execute the laws of the United  
 11 States;

12 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 repel the invasion, suppress  
 13 the rebellion, or execute those laws. Orders for these purposes shall be issued through  
 the governors of the States or, in the case of the District of Columbia, through the  
 14 commanding general of the National Guard of the District of Columbia.

15 10 U.S.C. § 12406.

## 16 PROCEDURAL HISTORY

17 Plaintiffs filed their Complaint on June 9, 2025, ECF No. 1 (“Compl.”), seeking declaratory  
 18 and injunctive relief. Count I of the Complaint alleges that Defendants’ federalization and deployment  
 19 of the California National Guard under 10 U.S.C. § 12406 was *ultra vires*. Compl. ¶¶ 79-92. It further  
 20 alleges a PCA claim. *Id.* ¶ 91. Count II alleges a violation of the Tenth Amendment on the basis that  
 21 Defendants’ actions purportedly deprived the Governor of command and availability of those  
 22 mobilized units and infringed on the State’s police power. *Id.* ¶¶ 93-101. Count III alleges that DoW  
 23 Defendants’ implementation of the President’s federalization order was arbitrary and capricious and  
 24 in excess of statutory authority in violation of the APA, 5 U.S.C. § 706. *Id.* ¶¶ 102-06. In addition,  
 25 both Counts I and III allege that Defendants have failed to comply with the procedural requirements  
 26 of 10 U.S.C. § 12406. *Id.* ¶¶ 79-92, 102-06.

27 On June 10, 2025, Plaintiffs moved for a temporary restraining order, which this Court  
 28 granted, ECF No. 64, but the Ninth Circuit stayed that injunction pending Defendants’ appeal from

1 the Court's injunction, *Newsom*, 141 F.4th at 1040-41. That appeal remains pending. In August, this  
2 Court held a bench trial on Plaintiffs' PCA claim and granted partial final judgment in Plaintiffs'  
3 favor on that claim. *See* ECF Nos. 176, 182. Defendants' appeal from that judgment is also pending  
4 in the Court of Appeals. And recently, Plaintiffs moved for a preliminary injunction, challenging the  
5 extensions of the California National Guard's federalization. *See* ECF No. 212. That motion is fully  
6 briefed. *See* ECF Nos. 214, 215.

### 7 LEGAL STANDARD

8 Defendants move to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).  
9 Under Rule 12(b)(1), a party may move to dismiss for lack of subject matter jurisdiction. As the party  
10 seeking to invoke this Court's jurisdiction, Plaintiffs have the burden to demonstrate that subject  
11 matter jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "A failure  
12 to state a claim [under Rule 12(b)(6)] may result from the lack of a cognizable legal theory or from an  
13 absence of sufficient facts alleged to support a cognizable legal theory." *Lanyers for Fair Reciprocal*  
14 *Admission v. United States*, 141 F.4th 1056, 1065 (9th Cir. 2025) (citation omitted). To survive a motion  
15 to dismiss under Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true,  
16 to 'state a claim to relief that is plausible on its face.'" *Ascroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
17 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility only  
18 when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that  
19 the defendant is liable for the misconduct alleged." *Id.* "Where a complaint pleads facts that are  
20 merely consistent with a defendant's liability, it stops short of the line between possibility and  
21 plausibility of entitlement to relief." *Id.* (cleaned up). Finally, "[i]n addition to the complaint itself, on  
22 a motion to dismiss, the district court may consider documents that are referenced by the complaint,  
23 are central to the plaintiff's claims, and the authenticity of which is undisputed." *Janda v. T-Mobile*  
24 *USA, Inc.*, 378 F. App'x 705, 707 (9th Cir. 2010).

## ARGUMENT

### I. Plaintiffs Fail to State an Ultra Vires Claim Because the President’s Action Under 10 U.S.C. § 12406 Was Within His Statutory Authority and, at a minimum, the President Had a Colorable Basis for Invoking the Statute.

Plaintiffs’ principal argument is that the President’s invocation of 10 U.S.C. § 12406 was *ultra vires*. Because “[t]he actions of the President . . . are not reviewable under the APA,” *Dalton v. Specter*, 511 U.S. 462, 470 (1994), Plaintiffs’ only path to judicial review of the President’s invocation of § 12406 is a non-statutory *ultra vires* claim—a “Hail Mary pass” that “rarely succeeds.” *NRC*, 605 U.S. at 681-82 (citation omitted). And “[b]ecause ultra vires review could become an easy end-run around the limitations” Congress imposed in the APA and other judicial-review statutes, such review must be “strictly limited.” *Id.* at 681. The extremely stringent standard for *ultra vires* review requires Plaintiffs to show not merely that the President “has arguably reached a conclusion which does not comport with the law” but that the President “has taken action entirely in excess of [his] delegated powers and contrary to a *specific prohibition* in a statute.” *Id.* (citation omitted). That is, Plaintiffs must show that Defendants have engaged in “blatantly lawless” action, *Oestereich v. Selective Serv. Sys. Loc. Bd. No. 11*, 393 U.S. 233, 238 (1968), or have “plainly and openly crossed a congressionally drawn line in the sand,” *Fed. Express Corp. v. U.S. Dep’t of Com.*, 39 F.4th 756, 765 (D.C. Cir. 2022); *see also Am. Soc’y of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 456 (7th Cir. 2002) (holding that *ultra vires* review only requires a “cursory look at the merits”).

On top of the extremely stringent *ultra vires* review standard, review of the President’s invocation of § 12406, if available at all, must also be “highly deferential.” *Newsom*, 141 F.4th at 1040. 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.” *Id.* 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 (citation omitted). “Affording the President that deference, [a panel of the Ninth Circuit] conclude[d] that it is likely that the President lawfully exercised his statutory authority under § 12406(3), which authorizes federalization of the National Guard when ‘the President is unable with the regular forces to execute the laws of the United States.’” *Id.* at 1040 (quoting 10 U.S.C. § 12406(3)). Notably, the term “regular forces” is construed in “the specific context in which [it] is used, and the

1 broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Under  
2 *Newsom*, and in the specific context here, § 12406(3) refers to the civilian forces that regularly “execute  
3 the laws” at issue but whose “ability to execute the laws” was “significantly impeded” by the violent  
4 protests. *See Newsom*, 141 F.4th at 1051-52.

5 Here, Plaintiffs do not come close to satisfying the extraordinarily demanding standards  
6 discussed above. The Complaint itself alleges that there have been substantial protests against federal  
7 law enforcement operations in the Los Angeles area, and that some protesters were violent, including  
8 throwing objects at law enforcement; damaging property; and setting fires. Compl. ¶ 29. Not only  
9 did local authorities make an arrest, they also declared “an unlawful assembly” on more than one  
10 occasion, used tear gas canisters, and dispersed crowds in multiple locations across the Los Angeles  
11 area. *Id.* ¶¶ 27, 35-44. The protests spread across several sites over multiple days. *Id.* ¶¶ 25-29. Thus,  
12 Plaintiffs’ own allegations confirm that the President had at least a colorable basis for his invocation  
13 of § 12406(3).

14 Indeed, under *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), and its progeny, courts must  
15 presume that the President made the required determination, and they cannot second-guess the  
16 Commander in Chief’s judgment about the deployment of troops. The “presumption of regularity”  
17 also applies, and it sustains the President’s decision to federalize the National Guard “in the absence  
18 of clear evidence to the contrary.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United*  
19 *States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). And as discussed above, if review is available at  
20 all, courts must give extraordinary deference to the President in reviewing his exercise of Commander  
21 in Chief powers, akin to highly deferential rational-basis review, under which the President’s  
22 determination should be upheld if there is any plausible basis for it. *Cf. Trump v. Hawaii*, 585 U.S. 667,  
23 704 (2018). Such is the case here.

24 Apart from the President’s authority under § 12406(3), his decision is independently supported  
25 by § 12406(2), which authorizes him to call the National Guard into federal service when “there is a  
26 rebellion or danger of a rebellion against the authority of the Government of the United States[.]” 10  
27 U.S.C. § 12406(2). The term “rebellion” is properly understood to encompass violent resistance to  
28 lawful enforcement of federal law. Although Black’s Law Dictionary defines rebellion to include

1 “[o]pen, organized, and armed resistance to an established government or ruler; esp., an organized  
2 attempt to change the government or leader of a country, usu. through violence,” Congress has plainly  
3 used “rebellion” in a broader sense here. *See* Rebellion, Black’s Law Dictionary (12th ed. 2024).  
4 Otherwise, § 12406 would fail to encompass instances, both before and after its initial enactment in  
5 1903, in which the President has called the militia into federal service to address defiance of federal  
6 authority in situations that fell short of organized efforts to overthrow the government.

7 Most famously, President Washington called up the militia to assist in suppressing the Whiskey  
8 Rebellion, a violent protest in western Pennsylvania targeted at tax assessors attempting to collect a  
9 federal excise tax on distilled whiskey. *See* Jennifer Elsea, Cong. Research Serv., The Posse Comitatus  
10 Act and Related Matters: The Use of the Military to Execute Civilian Law, R42659, at 8 (Nov. 6, 2018)  
11 (“CRS Report”). President Washington took that action under a 1792 statute that did not, by its terms,  
12 refer to “rebellion.” *See* CRS Report at 7-8; *see also* Act of May 2, 1792, ch. 28, §§ 1-2, 1 Stat. 264. But  
13 when Congress later enacted statutes referring to a “rebellion,” those statutes plainly extended to cover  
14 this original historical precedent of violent opposition limited to a particular federal law. The Whiskey  
15 Rebellion, moreover, is only one example of a range of civil disorders that members of the militia and  
16 other federal military forces have long been called upon to address. Throughout the early years of the  
17 Republic, Presidents routinely called out troops to suppress opposition to other federal revenue laws.  
18 *See* CRS Report at 9-12. In the late 1800s and early 1900s, states frequently requested assistance from  
19 federal troops to address violence stemming from labor disputes and miners’ strikes. *See id.* at 13-14,  
20 35-37. And Presidents Eisenhower and Johnson used the federalized National Guard to ensure the  
21 enforcement of federal civil rights laws and to protect civil rights advocates in the 1950s and 1960s.  
22 *See id.* at 37-38.

23 The situation in California exhibits many of the same features as these historical precedents.  
24 At a minimum, the conditions created a “danger of a rebellion.” 10 U.S.C. § 12406(2)-(3). In response  
25 to law enforcement efforts, agitators have specifically targeted federal property and officials with  
26 violence, intimidation, and threats. As the Complaint states, protesters threw objects at law  
27 enforcement officers, damaged property, and set fires during the protests. Compl. ¶ 29. Federal  
28 agents sent a request to the Los Angeles Police Department for assistance after protesters gathered at

1 the Roybal Federal Building, and another crowd gathered around agents in Chinatown, while the Los  
2 Angeles County Sheriff's Department likewise encountered "a significant number of individuals  
3 gathering to protest" in Paramount, California. *Id.* ¶ 42. These events occurred across several  
4 locations, mirroring the unrest that has historically prompted deployment of the National Guard. *Id.*  
5 ¶¶ 25, 41. Congress sensibly did not require the President to await an actual rebellion before  
6 federalizing National Guard members where a significant threat of rebellion exists. The existence of  
7 life-threatening dangers for federal officers enforcing federal law and the targeting of federal officials  
8 for performing their official duties surely amount to a dangerous risk of rebellion. The President was  
9 not required to wait for tragedy to occur before acting to protect federal officials and property. Given  
10 the coordinated events alleged in the Complaint—including multiple unlawful-assembly declarations  
11 by the Los Angeles Police Department and Los Angeles Sheriff's Department, *id.* ¶¶ 35-44, the  
12 violence targeting law enforcement officers and federal property, *id.* ¶ 29, and the escalating threat  
13 surrounding federal detention facilities, *id.* ¶¶ 25, 27, 54—the President had ample basis for  
14 determining that there is, at minimum, a "danger" of rebellion, 10 U.S.C. § 12406(2).

15 Not only is the President's invocation of 10 U.S.C. § 12406 proper, but Defendants also  
16 satisfied the statute's procedural requirement, and thus, Plaintiffs fail to allege that Defendants have  
17 violated the procedural requirements of 10 U.S.C. § 12406. Compl. ¶¶ 82-87, 105. Plaintiffs' claim  
18 also has no merit. Section 12406 specifies that the President's orders calling National Guard members  
19 into service "shall be issued through the governors of the States." 10 U.S.C. § 12406. That procedural  
20 mechanism reflects the dual control of the Guard and ensures that responsibility for the soldiers is  
21 clearly transferred from state to federal control.

22 The President and the Secretary of War satisfied this procedural requirement. As alleged in the  
23 Complaint, Governor Newsom was at least aware of the planned federalization because he publicly  
24 opposed the federalization the same day the President signed the June 7, 2025 Memorandum  
25 federalizing at least 2,000 National Guardsmen. Compl. ¶¶ 53-54. The President's Memorandum  
26 directed the Secretary of War "to coordinate with the Governors of the States and the National Guard  
27 Bureau in identifying and ordering into Federal service the appropriate members and units of the  
28 National Guard under this authority." *Id.* ¶ 56. The Secretary of War then sent a memorandum to

1 California's Adjutant General calling forth 2,000 Guardsmen. ECF No. 22-2. The Adjutant General  
2 is a state cabinet-level official who is required under California law to perform "duties consistent with  
3 the regulations and customs of the United States Army, United States Air Force, and the United States  
4 Navy[.]" including "issu[ing] all orders *in the name of the Governor.*" Cal. Mil. & Vet. Code Ann. § 163  
5 (emphasis added). The Secretary's June 7 memorandum bore the label "THROUGH: THE  
6 GOVERNOR OF CALIFORNIA," as does his June 9 memorandum, which called forth an additional  
7 2,000 Guardsmen, ECF No. 22-3.

8 The transmission of the order through the official who issues orders on behalf of the  
9 Governor was sufficient to satisfy Section 12406's requirement. Nothing in the statute supports  
10 Plaintiffs' contention that the Governor needed to issue the mobilization order himself. Section 12406  
11 states that orders are issued "through," not "by," governors. 10 U.S.C. § 12406. There is a  
12 fundamental difference between orders being issued "by" a person (making them the decision maker)  
13 and orders being issued "through" that person (providing notice of and making them a conduit for a  
14 decision already made). The latter structure better aligns with the purpose of the procedural  
15 requirement: to effectuate the handover of command and control of the National Guard members  
16 from the state military commander to the federal military commander, thereby avoiding command  
17 confusion during an emergency. It is not surprising then that the Ninth Circuit determined in its stay  
18 decision that Defendants' actions "likely met the procedural requirement because the federalization  
19 order was issued through an agent of the Governor in the Governor's name," and "[n]othing in §12406  
20 prevents the State from delegating to a subordinate, such as the Adjutant General, the Governor's  
21 authority to issue such orders." *Newsom*, 141 F.4th at 1052, 1053.

22 Plaintiffs are likewise incorrect to suggest that the President needed to obtain the Governor's  
23 consent prior to federalizing National Guard members. Compl. ¶¶ 82-86. When Congress wants to  
24 require gubernatorial consent in National Guard matters, it says so explicitly. *See, e.g.*, 10 U.S.C.  
25 § 12301(d) (members "may not be ordered to active duty . . . without the *consent* of the governor or  
26 other appropriate authority of the State concerned" (emphasis added)). Nor was the President  
27 required to consult with the Governor about the prudence and specifics of the order. When a  
28 commander issues an order "through" a subordinate, that is not an invitation for the subordinate to

1 debate whether the order should have been issued in the first place. The Ninth Circuit confirmed  
2 this point, holding that “the text of § 12406 does not give governors any veto power over the  
3 President’s federalization decision” and that the statute does not grant governors any “consulting”  
4 role. *Newsom*, 141 F.4th at 1053.

5 For those reasons, Plaintiffs’ *ultra vires* claim should be dismissed.

## 6 **II. Defendants’ Actions Are Consistent with the Tenth Amendment.**

7 Plaintiffs’ Tenth Amendment argument rests on the flawed premise that the President’s lawful  
8 exercise of statutory authority infringes on the State’s police power. The Supreme Court “long ago  
9 rejected the suggestion” that the federal government “invades areas reserved to the States by the Tenth  
10 Amendment simply because it exercises its authority . . . in a manner that displaces the States’ exercise  
11 of their police powers.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 291 (1981).  
12 If a federal action is authorized by the Constitution, “the Tenth Amendment gives way.” *United States*  
13 *v. Hatch*, 722 F.3d 1193, 1202 (10th Cir. 2013); see *United States v. Comstock*, 560 U.S. 126, 144 (2010)  
14 (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims  
15 any reservation of that power to the States . . .” (quoting *New York v. United States*, 505 U.S. 144, 156  
16 (1992))).

17 Here, the text of the Constitution makes clear that Congress may “provide for calling forth  
18 the Militia[.]” U.S. Const. art. I, § 8, cl. 15. And § 12406 rests on that express grant of authority,  
19 authorizing the President to “call into Federal service members and units of the National Guard of  
20 any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or  
21 execute those laws.” 10 U.S.C. § 12406. The President’s invocation of § 12406 to protect federal  
22 officials and property, therefore, falls squarely within that constitutional and statutory framework.

23 The President’s invocation of § 12406 is also plainly consistent with the Tenth Amendment.  
24 Plaintiffs do not contend that § 12406—some variant of which has existed since virtually the  
25 Founding—is unconstitutional. So if the federalization and deployment are authorized by § 12406—  
26 which they are—the Tenth Amendment has no independent role to play here. That is particularly so  
27 because, as the Ninth Circuit has recognized, the federal government has “an uncontested interest in  
28

1 the protection of federal agents and property and the faithful execution of law.” *Nensom*, 141 F.4th  
2 at 1054.

3 Plaintiffs’ references to “policing” and “local control” do not alter that analysis. Plaintiffs  
4 ignore the “facially legitimate and bona fide” reason for the President’s action as the Commander in  
5 Chief—namely, the protection of federal officials and property. *Cf. Hawaii*, 585 U.S. at 703 (in an  
6 area where the Executive has broad discretion, once the Executive has provided a “facially legitimate  
7 and bona fide reason” for his action, the Court “will neither look behind the exercise of that  
8 discretion, nor test it by balancing its justification” (citation omitted)). Indeed, Plaintiffs cannot  
9 claim any interest in the protection of federal personnel and property, and thus, the alleged intrusion  
10 by the National Guard’s performance of the Federal Protection Mission into the State’s exercise of  
11 police power rings hollow.

12 For these reasons, Plaintiffs’ Tenth Amendment claim fails to state a claim.

### 13 **III. Plaintiffs’ APA Claim Fails.**

14 Plaintiffs also seek to subject DoW’s June 7 and June 9 Orders, which implemented the  
15 President’s directive to deploy the California National Guard, to APA review, by calling forth a total  
16 of 4,000 California National Guard personnel. Compl. ¶¶ 102-06. But not every action taken by the  
17 federal government is subject to the APA’s strictures. First, as Plaintiffs appear to acknowledge, acts  
18 of the President are not reviewable under the APA. *See id.*; *Franklin v. Massachusetts*, 505 U.S. 788, 800-  
19 01 (1992); *Dalton*, 511 U.S. at 476 (“The actions of the President cannot be reviewed under the APA  
20 because the President is not an ‘agency’ under that Act.”). Second, only “final agency actions” from  
21 which legal consequences flow to the regulated public can be challenged under the APA. 5 U.S.C. §  
22 704; *Bennett*, 520 U.S. at 177-78. Finally, the APA does not permit review of those questions  
23 “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). All three restrictions apply to preclude  
24 APA review here.

25 Although Plaintiffs do not directly challenge the President’s June 7, 2025 federalization and  
26 deployment decision under the APA, *see* Compl. ¶¶ 102-06, they seek an order holding invalid  
27 Secretary Hegseth’s June 7 and June 9 Orders “implementing the June 7, 2025 Presidential  
28 Memorandum,” *id.* ¶ 106. But the orders are not “agency” actions because they merely carried out

1 the President’s exercise of his statutory authority under § 12406, including the authority to determine  
2 the number of troops to deploy at a given time. *See* 10 U.S.C. § 12406 (“the President may call into  
3 Federal service members and units of the National Guard of any State *in such numbers as he considers*  
4 *necessary* to repel the invasion, suppress the rebellion, or execute those laws” (emphasis added)).  
5 Because only the President can invoke § 12406 and deploy such numbers of Guardsmen as he deems  
6 appropriate under that statute, the fact that he delegated to the Secretary of War the task of  
7 implementing his directive does not change the fact that the deployments memorialized in the June 7  
8 and June 9 Orders are Presidential actions.

9 The Ninth Circuit has endorsed the common-sense proposition that a President need not  
10 personally perform his statutory authority for the action to be Presidential action. In *Jensen v. National*  
11 *Marine Fisheries Service*, a case involving an APA challenge to the State Department’s exercise of  
12 authority delegated by the President regarding the approval of regulations issued by a treaty-created  
13 commission, the court said that “[f]or the purposes of this appeal the Secretary’s actions are those of  
14 the President, and therefore by the terms of the APA the approval of the regulation at issue here is  
15 not reviewable.” 512 F.2d 1189, 1191 (9th Cir. 1975); *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d  
16 826, 835 (S.D. Tex. 2022) (President’s determination “not reviewable under the APA,” and applying  
17 APA standards to the President’s determination as implemented by an agency would be improper),  
18 *aff’d*, 63 F.4th 366 (5th Cir. 2023) (en banc), *vacated on other grounds*, 144 S. Ct. 480 (2023); *NRDC v. U.S.*  
19 *Dep’t of State*, 658 F. Supp. 2d 105, 113 (D.D.C. 2009) (holding that “the decision to issue a [cross-  
20 border] permit, whether made by the President himself or the State Department as the President’s  
21 delegee, is a presidential action not reviewable” under the APA); *Tulare Cnty. v. Bush*, 185 F. Supp. 2d  
22 18, 28-29 (D.D.C. 2001) (APA review not available when agency “merely carr[ies] out” President’s  
23 directives), *aff’d*, 306 F.3d 1138 (D.C. Cir. 2002). “Any argument suggesting that [the Secretary of  
24 War’s] action[s] [are] agency action[s] would suggest the absurd notion that all presidential actions  
25 must be carried out by the President him or herself in order to receive the deference Congress has  
26 chosen to give to presidential action.” *Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 29 (D.D.C.  
27 2001), *aff’d* 306 F.3d 1138 (D.C. Cir. 2002); *see also Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 659 F.  
28 Supp. 2d 1071, 1081-82 (D.S.D. 2009).

1 For similar reasons, the Secretary’s June 7 and June 9 Orders are not “final agency actions”  
2 under the APA. An agency action is “final”—and therefore reviewable in a judicial action brought  
3 pursuant to the APA—only when it “mark[s] the consummation of the agency’s decisionmaking  
4 process” and is “one by which rights or obligations have been determined, or from which legal  
5 consequences will flow.” *U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 578 U.S. 590, 597 (2016) (quoting  
6 *Bennett*, 520 U.S. at 177-78). Not all consequences of agency action are “legal” in nature; merely  
7 practical effects of agency actions do not give rise to judicial review. For instance, a decision to  
8 “[i]nitiat[e] an enforcement proceeding against a company” might be viewed as the consummation of  
9 a decision-making process, and it “may have a devastating effect on the company’s business, but that  
10 does not make the agency’s action final.” *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 645 (6th Cir.  
11 2004) (collecting cases); *see also Air Cal. v. Dep’t of Transp.*, 654 F.2d 616, 621–22 (9th Cir. 1981) (holding  
12 that a legal interpretation contained in a letter from the general counsel of the FAA to a local airport  
13 was non-final, despite serious indirect effects on plaintiff’s business). Moreover, the legal  
14 consequences must be felt by a “regulated party.” *Advanced Integrative Med. Sci. Inst., PLLC v. Garland*,  
15 24 F.4th 1249, 1259 (9th Cir. 2022); *see also Sierra Club v. EPA*, 955 F.3d 56, 63 (D.C. Cir. 2020)  
16 (challenged agency action not “final” because, among other things, it “imposes no obligations,  
17 prohibitions or restrictions on *regulated entities* [and] does not subject them to new penalties or  
18 enforcement risks”) (emphasis added).

19 Plaintiffs’ APA claim assumes that DoW’s June 7 and June 9 Orders are final agency actions.  
20 *See* Compl. ¶¶ 102-06. Specifically, they argue that “Plaintiffs are entitled to a declaration that Secretary  
21 Hegseth’s June 7 and June 9 Orders are invalid, and an injunction prohibiting DoW Defendants from  
22 implementing the June 7, 2025 Presidential Memorandum.” *Id.* ¶ 106. But this contention ultimately  
23 challenges the President’s federalization decision, not any separate final agency action. It is that  
24 Presidential act, as opposed to steps implemented by DoW, that arguably has legal consequences, even  
25 assuming the deployed troops subject to the Orders are “regulated” parties for purposes of  
26 determining finality under the second prong of the *Bennett* test. However, the troops are not “regulated  
27 parties;” they are soldiers who can be federalized under applicable law and subject to the federal chain  
28 of command. DoW’s directives—such as assigning units, adjusting troop numbers, and deploying

1 personnel—are ongoing operational measures that do not themselves have legal consequences or  
2 represent the consummation of any discrete agency decision-making process. Rather, they are  
3 inherently interlocutory given that troop levels, for example, have fluctuated since the deployment.  
4 *See* ECF No. 214. Such fluid, implementation level judgments do not constitute “final agency action.”  
5 *See Bennett*, 520 U.S. at 177-78.

6 Finally, DoW’s June 7 and June 9 Orders are not subject to judicial review under the APA for  
7 another independent reason—they are “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2).  
8 “[E]ven where Congress has not affirmatively precluded [judicial] review” of agency action, such  
9 review is not permitted “if the statute is drawn so that a court would have no meaningful standard  
10 against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985);  
11 *accord City and County of San Francisco v. Dep’t of Transp.*, 796 F.3d 993, 1001 (9th Cir. 2015). “[I]f no  
12 judicially manageable standards are available for judging how and when an agency should exercise its  
13 discretion, then it is impossible to evaluate agency action for ‘abuse of discretion.’” *Heckler*, 470 U.S.  
14 at 830.

15 Here, the challenged DoW decisions are interlocutory military decisions for which no judicially  
16 manageable standards exist. After the President has made a decision to federalize and deploy the  
17 Guardsmen, courts have no legal standards or institutional competency to determine what the  
18 appropriate number of troops is, where they should be deployed, and what tasks they should perform.  
19 Indeed, as noted above, § 12406 specifically commits to the President’s discretion the decision about  
20 the appropriate number of Guardsmen to federalize and deploy at any given time. Assessing such  
21 issues is precisely the type of military judgment committed to the Commander in Chief and his delegee,  
22 the Secretary of War. In particular, courts are not “given the task of running the Army” given that  
23 “[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army  
24 matters as the Army must be scrupulous not to intervene in judicial matters.” *Kreis v. Sec’y of Air Force*,  
25 866 F.2d 1508, 1511 (D.C. Cir. 1989) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)). The  
26 absence of meaningful standards of review is particularly acute in areas involving military decisions as  
27 courts are ill equipped to “second-guess” decisions such as the “allocat[ion] [of] military personnel in  
28 order to serve the security needs of the Nation.” *Id.*; *see also Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)

1 (the “complex, subtle, and professional decisions as to the . . . control of a military force are essentially  
2 professional military judgments,” and it is “difficult to conceive of an area of governmental activity in  
3 which the courts have less competence”); *see NFFE v. United States*, 905 F.2d 400, 405-06 (D.C. Cir.  
4 1990) (concluding that decisions about closure of military bases were committed to agency discretion  
5 by law because “the federal judiciary is ill-equipped to conduct reviews of the nation’s military policy”).  
6 In sum, because the June 7 and June 9 orders are committed to the agency’s discretion, this Court has  
7 no jurisdiction to review Plaintiffs’ challenge to those orders. *Spencer Enters., Inc. v. United States*, 345  
8 F.3d 683, 688 (9th Cir. 2003) (the APA “withdraws jurisdiction to review agency decisions that are  
9 “committed to agency discretion by law”).

10 Even if Plaintiffs can overcome the threshold hurdles for APA review (which they cannot),  
11 the challenged deployment orders are not arbitrary and capricious or in violation of any statute. “The  
12 arbitrary or capricious standard is a deferential standard of review under which the agency’s action  
13 carries a presumption of regularity.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994  
14 (9th Cir. 2014). The review is a “narrow” one, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360,  
15 378 (1989), and courts will “uphold a decision of less than ideal clarity if the agency’s path may  
16 reasonably be discerned,” *Motor Vehicle Mfrs. Ass’n. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*,  
17 463 U.S. 29, 43 (1983). That is, “[i]t is not the reviewing court’s task to make its own judgment about  
18 the appropriate outcome.” *Locke*, 776 F.3d at 994 (citation and internal quotation marks omitted).

19 Here, the orders clearly meet this deferential standard of review. Again, the orders were issued  
20 to implement the President’s valid exercise of statutory authority under § 12406, and the statute  
21 specifically commits to the President’s discretion to “call into Federal service members and units of  
22 the National Guard of any State in such numbers as he considers necessary to . . . suppress the  
23 rebellion, or execute those laws.” The Secretary of War complied with the President’s directive, which  
24 required the Secretary to deploy at least 2,000 National Guard personnel. *See* ECF No. 22-2 (June 7,  
25 2025 Presidential Memorandum). His action in following the Commander in Chief’s directive clearly  
26 is not arbitrary and capricious. *Cf. Trump v. Orr*, No. 25A319, 2025 WL 3097824, at \*1 (U.S. Nov. 6,  
27 2025) (mem.) (plaintiffs “not likely to prevail in arguing that the State Department acted arbitrarily  
28

1 and capriciously by declining to depart from Presidential rules”). Nor have Plaintiffs pointed to any  
2 statute that DoW has violated beyond § 12406, which is a statute directed only at the President.

3 **CONCLUSION**

4 For the foregoing reasons, this Court should dismiss the Complaint.

5 Respectfully submitted,

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