No. 25-5553

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAVIN NEWSOM, *in his official capacity as Governor of the State of California*; STATE OF CALIFORNIA,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*; PETER HEGSETH, *in his official capacity as Secretary of the Department of Defense*; UNITED STATES DEPARTMENT OF DEFENSE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS

BRETT A. SHUMATE
Assistant Attorney General

ERIC D. MCARTHUR
Deputy Assistant Attorney General

MARK R. FREEMAN
SHARON SWINGLE
ANDREW M. BERNIE
J. KAIN DAY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3511

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S. Constitution:

Statutes:

Executive Materials:

Other Authorities:

INTRODUCTION

Again, the district court has entered an extraordinary order that superintends the Executive Branch's control over lawfully federalized National Guard members that have been deployed to protect federal officers and federal property from violence. This Court stayed the district court's previous order, concluding that the President likely acted lawfully when he deployed the National Guard to address violent attacks that interfered with federal officers' enforcement of federal law in Los Angeles. The district court's latest order enjoins the government on a new ground—that defendants have violated the Posse Comitatus Act (PCA)—but it is equally erroneous.

Plaintiffs' PCA claim fails for multiple threshold reasons. There is no private right of action for civil injunctive relief from an asserted violation of the PCA, a criminal statute that imposes criminal penalties for willful violations. Plaintiffs cannot use a criminal statute with a mens rea requirement offensively in a civil action to enjoin the federal government's operations—the district court's contrary conclusion is unprecedented under either the PCA (enacted nearly 150 years ago) or other federal criminal laws.

Furthermore, any claim based on the PCA would have to be a nonstatutory ultra vires claim, as even the district court acknowledged. But that too is unavailable here. And even if it were, it would require plaintiffs to make the extraordinary

showing that the agency had engaged in "blatantly lawless" action, *Oestereich v. Selective Serv. Sys. Loc. Bd No. 11*, 393 U.S. 233, 238 (1968), or has *clearly* misconstrued a statute. The district court itself acknowledged that case law "does not provide clear answers" to the PCA questions, but simply concluded that defendants had violated the PCA. The district court was wrong but, that aside, that sort of ordinary alleged error of law cannot support relief under an ultra vires theory.

In any event, the district court's conclusion that defendants had violated the PCA was wrong. The PCA's general bar on willfully using the federalized National Guard to execute the laws does not apply to law-execution "expressly authorized by . . . Act of Congress." 18 U.S.C. § 1385. Section 12406(3) allows the President to federalize the Guard where he "is unable with the regular forces to execute the laws of the United States." 10 U.S.C. § 12406(3). And the statute further authorizes the President to federalize Guard members "in such numbers as he considers necessary to . . . execute those laws." *Id.* § 12406. A clearer authorization is difficult to imagine.

Finally, even if the National Guard were barred from law-execution activities, the district court's conclusion that Defendants engaged in such activities was incorrect. Plaintiffs adduced no evidence—during a multi-day trial—that the National Guard and the Marines engaged in execution of the laws, let alone that defendants willfully ordered them to so do. Defendants have not and are not engaging in traditional law-enforcement activities such as investigating crime,

making arrests or prosecution decisions, or applying for and executing warrants; the district court did not suggest otherwise. The district court instead concluded that setting up security perimeters and blockades to protect federal officials engaged in law enforcement *itself* involves law execution forbidden by the PCA. It cited no legal authority for this conclusion, which is flatly at odds with this Court's precedents. *See United States v. Klimavicius–Viloria,* 144 F.3d 1249, 1259 (9th Cir. 1998); *United States v. Khan*, 35 F.3d 426, 432 (9th Cir. 1994). The district court further erred when it concluded that defendants acted willfully—a predicate for any PCA violation. *See* 18 U.S.C. § 1385. Contrary to the district court, willfulness in the criminal-law context requires "knowledge that the conduct is *unlawful*." *Bryan v. United States*, 524 U.S. 184, 196 (1998) (emphasis added). There is no such evidence here.

The district court otherwise built its opinion around strawmen and non-sequiturs. It devoted a significant portion of its analysis to "refuting" an argument—the Constitution empowers the President to ignore the PCA—that defendants did not make. It pointed to internal communications and testimony from non-lawyers about their subjective views of the PCA's requirements, all of which was irrelevant to the legal question about what the statute permits. It criticized the Guard for particular missions it believed were unnecessary. And it repeatedly criticized this Court's decision staying its prior injunction, and expressed its view that the Guard's presence

was unnecessary. None of this is relevant to the legal questions in this case, and simply underscores the district court's failure to correctly apply the relevant legal standards.

Finally, the district court's injunction is in any event overbroad, and effectively prohibits any protection of federal personnel performing federal functions.

This Court should reverse, vacate the injunction, and direct entry of judgment for defendants on plaintiffs' PCA claim.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346, and 2201(a). ER-163. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court entered an injunction. ER-55.

STATEMENT OF THE ISSUES

1. Whether plaintiffs have a cause of action to civilly enforce the PCA against the federal government.

2. Whether plaintiffs can seek relief based on the PCA under an ultra vires theory and, if so, whether the highly demanding standards for obtaining such relief are satisfied here.

3. Whether 10 U.S.C. § 12406(3) expressly authorizes properly federalized National Guard forces to engage in execution of the laws within the meaning of the PCA.

4. Whether plaintiffs demonstrated standing on their PCA claim.

5. Whether the district court correctly found that defendants are willfully violating the PCA by setting up perimeters and otherwise providing security for federal officials.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

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 (Congress can "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"). 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 state National Guards, under the command of each State, 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 or airmen, 10 U.S.C. §§ 10106, 10112, and serve under the President as Commander in Chief, *see* U.S. Const. art. II, § 2, cl. 1.

2. Congress has granted the President several 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 third condition provides that "[w]henever . . . the President is unable with the regular forces to execute the laws of the United States . . . the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to . . . execute those laws." *Id.* § 12406(3).

3. The PCA makes it a federal crime to "willfully use[] any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws," except "in cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. When called into federal service, members of a state National Guard are "part of the Army" or the "Air Force," as the case may be, within the meaning of Section 1385. *Id.*; *see* U.S. Dep't of Def., Instruction 3025.21, *Defense Support of Civilian Law*

Enforcement Agencies para. 2.d (Feb. 27, 2013); *see also* Jennifer K. Elsea, Cong. Rsch. Serv., R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* 61-62 (2018) (CRS Report). Accordingly, the PCA criminalizes the willful use of federalized members of the National Guard "to execute the laws" of the United States except as authorized by the Constitution or another federal statute.

B. Factual Background

1. On Friday, June 6, 2025, officers from U.S. Immigration and Customs Enforcement (ICE) conducted federally authorized immigration-enforcement operations in Los Angeles, California. *See* ER-144. A group of protestors gathered and tried to prevent ICE officials from operating by throwing objects at ICE vehicles. ER-144. Around 5:00 pm that evening, a crowd began to gather at the Enforcement and Removal Operations (ERO) facility located in a federal building in downtown Los Angeles. ER-145. The crowd quickly turned violent, and the protests spread across downtown, threatening several federal facilities and other public buildings. ER-145. Protestors threw "concrete chunks, bottles of liquid, and other objects" at Federal Protective Service officers attempting to prevent the mob from breaching federal property. ER-145-46. The officers were "pinned down in a defensive position by protesters and severely outnumbered," while rioters attempted "to use large rolling commercial dumpsters as a battering ram" to violently "break open the garage

gate and break into the federal building." ER-145-46. The federal officers managed to prevent a breach of the facility, but it took Los Angeles Police Department (LAPD) officers nearly an hour and a half to arrive and assist the federal officers in pushing the crowd back from the parking garage gate. ER-146-47. Meanwhile, the violence continued, with demonstrators using chairs, dumpsters, and other items as weapons against federal law-enforcement officers. ER-147. Once on scene, the LAPD declared an "unlawful assembly" and ordered protesters to disperse, but many protestors instead began attacking LAPD officers, and the scene was not cleared for several hours, leaving extensive damage to multiple federal buildings. ER-147-48 (quotation marks omitted).

That night, President Trump spoke with Governor Newsom, informing the Governor of the dangers to federal personnel and property and urging him to take action to stop the violence.[1] The next day, the violence only intensified. On Saturday morning, large crowds congregated near a Homeland Security Investigations office in the Los Angeles area as officers prepared for another immigration-enforcement operation. ER-148. The crowd blocked traffic and began to attack ERO and Customs and Border Protection (CBP) officers, leading to seven hours of fighting between

[1]Emma Colton & John Roberts, *Trump Brings Receipts He Called Newsom Amid LA Riots as California Gov Claims There Wasn't 'Even a Voicemail',* Fox News (June 10, 2025, at 16:15 ET), https://perma.cc/Z25U-GD5X; *see also* Governor Gavin Newsom, *Watch: Governor Newsom Discusses 'Donald Trump's Mess' in Los Angeles* (June 9, 2025), https://perma.cc/6W95-2DZQ.

federal officials and protesters. ER-148-59. The crowd surrounded an ERO officer's vehicle, pounding on the car and pummeling it with stones. ER-148-49. Protestors boxed in federal officers, launching mortar-style fireworks with multiple explosions at them and throwing objects of all nature, shattering the wrist of a CBP officer. ER-148-49. The perimeter fence of the DHS office was breached, and several vehicles were damaged. ER-149.

Protests continued in the following days. ER-150. Protesters blocked the 101 Freeway. ER-150. They also set dumpsters on fire and launched commercial-grade fireworks at federal officers. ER-150. Federal and state buildings were damaged, and a federal building security checkpoint was left in ruins. ER-150-51. Officers were injured. ER-150-51. And the federal complex in downtown Los Angeles, which was closed due to the unrest, ER-151, was severely damaged and vandalized, ER-150-51. At a press conference, LAPD Chief Jim McDonnell admitted that the LAPD had been "overwhelmed," lamented that "things have gotten out of control," and added that "somebody could easily be killed."[2]

2. In response to the violence, the President signed a memorandum on June 7 calling into federal service at least 2,000 members of the California National Guard

[2] Josh DuBose, *'That Can Kill You': L.A. Police Attacked with Fireworks, Rocks, Molotov Cocktails*, KTLA (June 8, 2025, at 22:49 PT), https://perma.cc/M756-BBSW; Michele McPhee, *LAPD Chief Jim McDonnell Says, 'Violence I Have Seen Is Disgusting,' Recounting Attacks on Cops*, L.A. Mag. (June 8, 2025), https://perma.cc/9848-BJES.

to protect federal personnel and property. ER-184-85. 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. ER-184. "In addition, violent protests threaten the security of and significant damage to Federal immigration detention facilities and other Federal property." ER-184. The President determined that protests and 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." ER-184. "In light of these incidents and credible threats of continued violence," the President invoked Section 12406 to mobilize the National Guard "to temporarily protect ICE and other United States Government personnel who are performing Federal functions, including the enforcement of Federal law, and to protect Federal property." ER-184.

The President further directed the Secretary of Defense "to coordinate with the Governors of the States and the National Guard Bureau in identifying and ordering into Federal service the appropriate members and units of the National Guard under this authority." ER-184. The Secretary was also authorized to deploy members of the Armed Forces "to augment and support the protection of Federal functions and property." ER-185.

The Secretary of Defense subsequently transmitted orders to the California Adjutant General to effectuate the call into federal service of the National Guard.

See ER-183. The Adjutant General, in turn, relinquished command of the requested National Guard units to the federal commander. *See* ER-171. The Secretary later sent orders to federalize additional National Guard members, ER-182, and also ordered the mobilization of a complement of active-duty marines.

3. Once in service, the National Guard members received training before deploying in the field to protect federal personnel and property. *See* ER-58. This included training on the scope of permissible activities under the PCA, ER-58; that training made clear that "[p]rotection of Federal property, functions, and personnel" does not violate the PCA, ER-187.

Once in the field, National Guard members began providing protection to Federal installations, personnel, and functions consistent with the President's June 7 memorandum. *See* ER-65-66, 71-72, 78-79, 81, 93-95, 97-98. The Guard members and Marines established outside perimeters, observation posts, and perimeter patrols for federal property at locations targeted by protests, and the National Guard members provided personnel protection for federal law-enforcement officers conducting operations to enable them to conduct their Federal functions safely and with minimal interference from bystanders. *See* ER-65-66, 71-72, 78-79, 81, 93-95, 97-98.

The National Guard members have since performed an entirely protective mission. *E.g.*, ER-99. We discuss several of the operations specifically highlighted by the district court in the argument section.

The Secretary subsequently reduced the number of federalized National Guard members and other military forces deployed for the protective mission. As of August 8, 2025, when plaintiffs' PCA claim proceeded to trial, there were only about 300 Guard members who remained assigned to the mission in Los Angeles, continuing to protect federal personnel and property. *See* ER-106. The Marines had been released as of that date. ER-106. Today, only 100 California Guard members assigned to that mission remain in federal service, all of whom are deployed in California.[3]

On December 10, 2025, the district court further issued a third injunction, this one replicating relief stayed in *Newsom*—enjoining the deployment and ordering return of the Guard's control to Governor Newsom. Defendants appealed and, earlier today, sought a stay pending appeal of that latest order.

C. Prior Proceedings

1. On June 9, 2025, the State of California and Governor Gavin Newsom sued defendants alleging, among other things, that the President exceeded his authority

[3] *See* https://www.northcom.mil/Missions/Homeland-Defense/Federal-Protection-Mission/.

under 10 U.S.C. § 12406 and that the defendants violated the PCA. ER-161-70. With respect to the PCA, plaintiffs purported to raise a nonstatutory ultra vires claim, alleging that a "[v]iolation of the Posse Comitatus Act [wa]s imminent, if not already underway." ER-177.

The next day, plaintiffs sought a temporary restraining order. Their proposed order would have enjoined the President's deployment of federalized Guard members in California, ER-158, but the district court went further, barring *any* federalization of the California Guard members and directing the President to return the California Guard to state control. *See Newsom v. Trump*, 786 F. Supp. 3d 1235, 1251-59, 1263-64 (N.D. Cal. 2025). In granting the motion, the district court did not reach the PCA claim, relying instead on its conclusion that the President had not lawfully federalized the Guard members under Section 12406. *Id.* at 1259.

Defendants appealed, and in a published opinion issued after oral argument, a unanimous panel of this Court granted a stay pending appeal. *Newsom v. Trump*, 141 F.4th 1032, 1040-41 (9th Cir. 2025) (per curiam). This Court denied rehearing en banc of the stay decision. 158 F.4th 984 (9th Cir. 2025). After briefing on the merits, the panel held oral argument. No decision on the merits has yet been issued.

2. While the federalization appeal has been pending, the district court proceeded to adjudicate plaintiffs' PCA claim. The parties engaged in discovery, and plaintiffs requested another preliminary injunction. The district court set a hearing

on plaintiffs' motion and consolidated that hearing with a full trial on the merits. ER-6. The district court subsequently rejected the parties' joint proposal to limit the proceedings to oral argument on California's preliminary injunction motion (and for the court to treat plaintiffs' preliminary injunction motion as a motion for summary judgment), ER-127. The court instead ordered that a bench trial take place from August 11-13, to include the testimony of live witnesses. ER-125. That trial was held as scheduled. ER-6.

On September 2, 2025, the district court entered a permanent injunction against all defendants except the President. ER-55. The court enjoined those defendants "from deploying, ordering, instructing, training, or using the National Guard currently deployed in California, and any military troops heretofore deployed in California, to execute the laws, including but not limited to engaging in arrests, apprehensions, searches, seizures, security patrols, traffic control, crowd control, riot control, evidence collection, interrogation, or acting as informants, unless and until [d]efendants satisfy the requirements of a valid constitutional or statutory exception, as defined herein, to the Posse Comitatus Act." ER-55.

The district court started by rejecting defendants' threshold defenses. The court initially held that plaintiffs have standing. ER-25-29. The district court also held that plaintiffs have a cause of action for injunctive relief under the PCA, despite the criminal nature of that statute. ER-26, 49-51, 53. It principally viewed the

criminal nature of the PCA as irrelevant, *see* ER-49, relying to a lesser extent on the availability of injunctive relief to enforce other statutes, and what the district court understood to be the purposes behind the PCA, ER-50-51.

Next, the district court rejected defendants' argument that Section 12406 provides express authorization for the Guard to engage in law execution for PCA purposes. ER-29-35. Much of the court's analysis was devoted to lodging its disagreement with this Court's stay decision in *Newsom*, *see* ER-30-32, 34-35, disagreement the court repeatedly expressed throughout its opinion, *see infra* pp. 50-51. Otherwise, the district court viewed defendants' interpretation as "novel," as threatening to render the PCA a nullity, and as unsupported by other statutes that provide such authorization. *See* ER-29-35.

On the merits, the court concluded that, because National Guard members have "set[] up protective perimeters, traffic blockades, crowd control, and the like," those members have "executed domestic law." ER-45. The court concluded this is a "clear[]" violation of the PCA because defendants have used the military to bolster law enforcement operations and as a show of force, purportedly in an "intentional" fashion to "establish[] a military presence" and "enforc[e] federal law." ER-45-46. The court also relied on Guard members' purported exercise of "regulatory, proscriptive, and compulsory power," and the number of deployed Guard members as compared to the size of the protected law-enforcement forces. *See* ER-46. The

district court characterized the record as "replete with evidence" in support of its conclusions, but identified only a few examples in which the Guard set up traffic blockades or established perimeters. ER-45.

According to the district court, defendants willfully used the National Guard members to enforce the law in violation of the PCA. ER-48. In reaching that conclusion, the court found that defendants "knew that they were ordering troops to execute domestic law beyond their usual authority" and in contravention of defendants' own training materials. ER-48. It "does not matter," the district court stated, that defendants "believed that some constitutional or other exception applied" to their conduct; "ignorance of the law is no excuse." ER-48 (quotation marks omitted). The district court also relied heavily on the fact that the Guard members had been "expressly instructed" that they could protect federal personnel and property. *E.g.*, ER-45. It viewed that instruction, which the court claimed to be inconsistent with defendants' training materials, as explicit guidance to "engage in some law enforcement actions." *See* ER-12, 48.

Separately, the district court rejected defendants' argument that plaintiffs had failed to satisfy the exacting standard for ultra vires relief. ER-51-53. It concluded that defendants "exceeded the authority delegated to them by Congress and directly violated the [PCA]'s specific prohibition against domestic military law enforcement." ER-52. The court suggested this was a "classic situation" for ultra

vires relief, since no other statutory scheme would afford plaintiffs a remedy. ER-52.

Lastly, the district court concluded that the equities favor injunctive relief. It stated that its injunction allowed Guard members to protect federal *property*, but did not appear to deny that, as a practical matter, the injunction would likely prohibit any meaningful use of the Guard to protect federal officials executing federal law outside federal property. ER-53-54 (stating that the federal government must ensure the safety of federal officials "in a lawful manner—such as, for example, by coordinating with state and local law enforcement"). The district court also speculated about deployments of troops outside of Los Angeles and California. ER-54.

3. The district court administratively stayed its injunction for 10 days, *i.e.*, until noon on September 12, and entered a partial final judgment in plaintiffs' favor. ER-55; ER-56. Defendants noticed this appeal on September 3, 2025, and sought an administrative stay and a stay pending appeal on the same day. A panel of this Court has granted defendants' request for an administrative stay. The motion for a stay pending appeal remains pending.

SUMMARY OF ARGUMENT

I. Plaintiffs' PCA claim fails on numerous threshold grounds

A. As numerous courts have concluded and the district court acknowledged, plaintiffs lack a cause of action under the PCA.

B. The district court erred in concluding that plaintiffs may enforce the PCA under an ultra vires theory.

1. Ultra vires review is unavailable to create a cause of action far removed from what was available in a court of equity. That principle bars an ultra vires action here. There is no longstanding tradition of suits in equity for private enforcement of the criminal laws. Indeed, until the decision below, there was not a single decision in the nearly 150-year history of the PCA allowing for civil enforcement of that statute against the government—nor does there appear to be any other example of an implied equitable ultra vires cause of action based on *any* federal criminal statute. The district court's contrary reasoning—observing that injunctions have been issued against executive officials for violation of other types of laws, while simply asserting that some civil remedy must be available—is unpersuasive and wrong.

2. Even if an ultra vires claim were available here, plaintiffs plainly did not satisfy the highly demanding standards for obtaining such relief. To do so, plaintiffs were required to show blatant and obvious violations of a clear statutory mandate, of the sort that leaves no room for reasonable disagreement. Plaintiffs did not meet those standards here, and the district court did not hold plaintiffs to them. At bottom, the district court concluded that plaintiffs were entitled to relief because,

in the court's view, defendants were violating the PCA. Ultra vires review demands more than this.

C. Plaintiffs' PCA claim also fails because any execution of the laws is expressly permitted by the PCA. The PCA does not apply "under circumstances expressly authorized by . . . [an] Act of Congress, 18 U.S.C. § 1385, and Section 12406(3) authorizes the President to federalize the National Guard "to execute the laws of the United States" when he is unable to do so with "regular forces," *see* 10 U.S.C. § 12406(3), and expressly states that once federalized, Guard members may in fact execute the laws. The district court simply refused to engage with this language, and its various responses—*e.g.*, that this plain-text reading is "novel," that it would supposedly nullify the PCA, and that it purportedly runs afoul of the principle that Congress does not hide elephants in mouseholes—are meritless.

D. Plaintiffs lack standing. The only ground on which the district court found standing—that the Guard's purported execution of the laws undermines its police powers—is without merit. The federal government has authority to enforce federal law in California and California suffers no cognizable injury to the extent the federalized Guard, rather than other federal officials, performs this task. Any such injury is also not judicially cognizable.

II. In all events, defendants are not violating the PCA. The Guard is not investigating crime, arresting people, making prosecution decisions, executing

warrants, or engaged in any similar law-enforcement activities, and the district court did not find otherwise. Instead, the district court held that the Guard's establishment of blockades and perimeters to protect federal officials itself constitutes law execution proscribed by the PCA. The district court cited no authority for this proposition, which is directly contrary to this Court's decisions in *United States v. Klimavicius–Viloria*, 144 F.3d 1249 (9th Cir. 1998) and *United States v. Khan*, 35 F.3d 426, 432 (9th Cir. 1994). The district court otherwise appeared to contend that whether the PCA is violated depends not on what activities the military is conducting but on how "extensive" they are; that standardless "test" has no basis in this Court's caselaw, and the Guard's activities would not violate any such test anyway.

The district court further erred when it concluded that defendants acted willfully—a predicate for any PCA violation. The sole piece of purported evidence the district court cited was a single email from a field-grade military officer that is entirely innocuous. The district court otherwise concluded that it did not matter whether defendants believed their conduct was lawful. But if defendants believed they were acting lawfully, their conduct cannot be a willful violation.

The district court otherwise peppered its opinion with strawmen, irrelevant policy disagreements, and disagreements with this Court. It claimed that the Guard was engaging in missions that were unnecessary and low-risk, criticized the Guard for supposed insufficient coordination with the LAPD, and faulted the particulars of

a few operations. The district court's slanted presentation of the facts was wrong, but that aside, these are all non-sequiturs as to the legal issues in this case and simply underscore the lack of support for the district court's conclusions.

III. The district court's injunction is overbroad. Though certain terms in the injunction are vague and undefined, as a practical matter the injunction seems to prevent any use of the Guard to protect federal officials. That injunction is far broader than necessary to redress any injury to California, and is directly contrary to this Court's analysis of the equities in *Newsom*.

STANDARD OF REVIEW

This Court reviews the district court's grant of an injunction for abuse of discretion, but questions of law are reviewed de novo. *See Columbia Pictures Indus., Inc. v. Fung*, 710 F. 3d 1020, 1030 (9th Cir. 2013).

ARGUMENT

I. Plaintiffs' PCA Claim Fails as a Matter of Law

Plaintiffs (A) lack a cause of action under the PCA, (B) cannot seek relief under an ultra vires theory or satisfy the demanding standards for obtaining such relief, (C) cannot proceed on any PCA claim as to the Guard because section 12406 authorizes the Guard to engage in law enforcement, and (D) failed to establish standing.

A. Plaintiffs Have No Cause of Action to Enforce the PCA.

Plaintiffs lack a cause of action to enforce the PCA. That Act imposes criminal penalties for "willfully us[ing] any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws," except in "cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. Numerous courts have found that the PCA does not create a private civil cause of action. *See, e.g.*, *Smith v. United States*, 293 F.3d 984, 988 (7th Cir. 2002); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 511 (2d Cir. 1994); *Davis v. State*, 2025 WL 992899, at *5-6 (M.D. Fla. Mar. 17, 2025), *report and recommendation adopted*, 2025 WL 987514 (M.D. Fla. Apr. 2, 2025). Those decisions are correct. Plainly, the PCA does not provide a cause of action for civil claims, and the district court acknowledged as much. ER-51. And even if it did, plaintiffs have failed to deduce any evidence that defendants willfully violated the statute.

B. Plaintiffs Cannot Enforce the PCA on an Ultra Vires Theory

Notwithstanding its acknowledgment that plaintiffs lacked a cause of action under the PCA, the district court created an extra-statutory path for relief, applying the narrow exception that allows for ultra vires review of agency action under exceedingly rare circumstances. That was error.

1. Nonstatutory ultra vires review is an artifact of history. *Nuclear Regul. Comm'n v. Texas*, 605 U.S. 665, 680 (2025) (*NRC v. Texas*). Before the Administrative Procedure Act was enacted, "courts sometimes entertained a bill in equity to attack administrative action when no statutory review was available." *Id.* (quotation marks omitted). The ultra vires doctrine preserves such review in limited circumstances, but it cannot be used to create a cause of action far removed from what was available in a court of equity. *Cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

That is precisely what the district court did here. There is no longstanding tradition of suits in equity for private enforcement of the criminal laws. Ultra vires review historically has been used to enforce individual rights created by regulatory schemes. *Leedom v. Kyne*, 358 U.S. 184 (1958) (National Labor Relations Act provisions); *see also Murphy Co. v. Biden*, 65 F.4th 1122 (9th Cir. 2023) (presidential action under the Antiquities Act and other statutory provisions). Criminal statutes, by contrast, protect the rights of the public and "rarely impl[y] a private right of action." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). This contrast is especially stark in criminal statutes with specific intent requirements—like the PCA. *See* 18 U.S.C. § 1385 (requiring "willful[]" conduct). It would be exceedingly strange for a criminal statute to allow for civil actions—let

alone injunctions—contingent on peering into the intent of the federal government or its officers.

Given this, the appropriate remedy for a PCA violation, if any, is criminal prosecution of individuals who willfully violate the PCA—or at most and under highly limited circumstances, suppression of evidence[4] seized in violation of the Act or other defensive use of the statute by defendants in a criminal prosecution. Virtually all the relevant PCA caselaw has emerged in these contexts or a closely related context.[5] By contrast, although the PCA has been in force since 1878 and the

[4] Even suppression is highly disfavored. As one court recently observed, "federal courts have overwhelmingly refused to impose the extraordinary remedy of the exclusionary rule for a violation of the PCA." *United States v. Eleuterio*, 2024 WL 1620383, at *3 (D.V.I. Apr. 15, 2024); *see also id.* at *3 n.7 (collecting cases); *United States v. Dreyer*, 804 F.3d 1266, 1277-80 (9th Cir. 2015) (en banc) (suppression of evidence held unwarranted remedy for the asserted PCA violations there but suggesting that remedy could be available for "widespread and repeated violations" of the PCA) (quotation marks omitted). The consistent reluctance of courts to allow use of the PCA even for this much more modest purpose underscores that plaintiffs' attempt to use it offensively against the federal government has no legal basis.

[5] *See Dreyer*, 804 F.3d at 1275 (appeal from denial of motion to suppress following criminal conviction); *United States v. Hitchcock*, 286 F.3d 1064, 1067 (9th Cir.) (same), *opinion amended and superseded on unrelated grounds*, 298 F.3d 1021 (9th Cir. 2002); *United States v. Hutchings*, 127 F.3d 1255, 1257–58 (10th Cir. 1997) (same); *United States v. Walden*, 490 F.2d 372, 375 (4th Cir. 1974) (same); *United States v. Khan*, 35 F.3d 426, 431 (9th Cir. 1994) (claim by criminal defendant that prosecution was outside United States' jurisdiction); *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (claim that indictment should have been dismissed because the government seized defendant in violation of the PCA); *United States v. Mendoza–Cecelia*, 963 F.2d 1467, 1478 (11th Cir. 1992) (similar); *United States v. McArthur*, 419 F. Supp. 186, 192 (D. N.D. 1975) (criminal defendant arguing that

Continued on next page.

subject of extensive caselaw (as well as multiple amendments) since then, the decision below is the first *ever* in which a court enjoined the federal government's operations in a civil action based on the PCA. Indeed, the government has not located a single case in which a court has granted injunctive relief against the government on an implied equitable ultra vires theory based on *any* criminal statute.[6]

The district court did not meaningfully address any of this. The court did not dispute that there is no historical tradition of authorizing enforcement of criminal laws via private civil injunction against the Executive. Instead, the court observed that injunctions have been issued against executive officials for violation of *other types* of laws. ER-50. But the Supreme Court has required a much closer historical fit to support a court's exercise of its equitable powers. *See Trump v. CASA, Inc.*,

element of crime—that law enforcement officers defendant interfered with were engaged in lawful activities—was not met because they received assistance in violation of the PCA), *aff'd per curiam sub nom. United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976); *United States v. Red Feather*, 392 F. Supp. 916, 921 (D. S.D. 1975) (similar); *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974) (similar); *see also Wrynn v. United States*, 200 F. Supp. 457 (E.D.N.Y. 1961) (suit for money damages under Federal Tort Claims Act for injuries sustained as a result of operation of an Air Force helicopter to search for an escaped civilian prisoner in violation of the PCA).

[6] The district court cited two cases in which injunctions were issued based on criminal statutes. ER-50. Those cases involved suits by the Government—and the relevant orders in those cases simply barred the defendants from violating certain criminal laws. *United States v. Dixon*, 509 U.S. 688, 695 (1993); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1202 (10th Cir. 2009). That is obviously quite different than recognizing an ultra vires claim to civilly enforce a criminal statute against the Executive.

606 U.S. 831, 846-50 (2025) (rejecting attempt to analogize universal injunctive relief to decree obtained on a bill of peace); *Grupo Mexicano*, 527 U.S. at 319 (rejecting attempt to analogize injunction preventing transfer of assets to relief obtained by creditors post-judgment).

The district court also described it as "counterintuitive" "that the exceptional remedy of ultra vires relief is available where Congress has imposed civil penalties but not where it has taken the more severe step of imposing criminal penalties." ER-53. But this simply inverts the principle that civil enforcement of federal criminal law is rare and disfavored. And it is not counterintuitive. To the contrary, it is a basic feature of our system of government that the Executive Branch has exclusive authority over prosecuting federal crimes, including its exercise of prosecutorial discretion. *See United States v. Texas*, 599 U.S. 670, 680 (2023) (citing, *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985)). That authority cannot be transferred to private citizens, *cf. Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), and courts cannot adjudicate a private citizen's (or a State's) grievance over the Executive Branch's prosecutorial decisions, *see Texas*, 599 U.S. at 680-81. These principles operate as a "limitation[]" on "[t]he power of federal courts of equity to enjoin unlawful executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). In nevertheless allowing plaintiffs to pursue their PCA claim, the district court violated these principles and impermissibly empowered plaintiffs

to override the federal government's decisions with respect to the enforcement of federal criminal law.

The district court also noted that there is no other statute that could provide relief to plaintiffs on their claim of PCA violations, which the court thought supported its conclusion that this case "presents a classic situation for an *ultra vires* claim." ER-52-53. Not so. The existence of an alternative statutory scheme is an independent ground *barring* an ultra vires claim. *NRC*, 605 U.S. at 681-82. But ultra vires review is not available simply because no statute provides a cause of action—particularly where, as here, plaintiffs assert a cause of action entirely unlike those available in equity at our Nation's founding. *See supra* p. 23.

The district court also suggested that the PCA would be "ineffective" without civil enforcement, since that would task the federal government with enforcing the law against itself. ER-53. But a similar argument could be raised as to any federal criminal statute and, again, there is no authority for enforcing criminal statutes against the federal government. Nor does that make the PCA ineffective. As discussed above, courts have allowed criminal defendants to raise asserted violations of the PCA as a basis for suppression. The PCA also serves as an important check against rogue actors—who might willfully use the military as a posse comitatus in contravention of the Executive Branch's authority. If Congress wants to allow for

civil enforcement of the PCA against the Executive, it can create a civil cause of action. But it is for Congress, not the courts, to do so.

Finally on this point, the district court found "remarkable" the proposition that civil enforcement of the PCA is unavailable, and contended that "[s]urely the Act must provide for some other enforcement mechanism." ER-53. This gets things precisely backward. Again, before the decision below, there *never had been* any decision allowing for civil enforcement of the PCA—or as best as we can tell, any decision allowing an ultra vires claim against the federal government based on a criminal statute with no civil remedies. It is the district court's decision that is remarkable, not defendants' position.

2. Even if ultra vires review were available, the district court erred in concluding that plaintiffs satisfied the standards for such relief. To do so, a plaintiff must meet a highly demanding standard. As then-Judge Kavanaugh memorably put it, *ultra vires* review is "essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009); *see also NRC*, 605 U.S. at 681-82 (repeating this). "The agency overstep must be 'plain on the record and on the face of the [statute].'" *Federal Express Corp. v. U.S. Dep't of Com.*, 39 F.4th 756, 765 (D.C. Cir. 2022) (alteration in original) (quoting *Oestereich v. Selective Serv. Sys. Loc. Bd. No. 11*, 393 U.S. 233, 238 n.7 (1968)). That overstep must amount to a "clear departure by

the [agency] from its statutory mandate" or be "blatantly lawless" agency action. *Oestereich*, 393 U.S. at 238. A plaintiff seeking to challenge agency action via a nonstatutory *ultra vires* claim thus "must show more than the type of routine error in statutory interpretation or challenged findings of fact that would apply if Congress had allowed [Administrative Procedure Act] review." *Federal Express Corp.*, 39 F.4th at 765 (quotation marks omitted). Instead, "*ultra vires* claimants must demonstrate that the agency has plainly and openly crossed a congressionally drawn line in the sand." *Id.*

The district court either did not understand this highly demanding standard or simply refused to apply it. The court did not even contend, for example, that the PCA violations it identified were obvious or blatant. It did not suggest that no reasonable official (or other jurist) could reach a contrary conclusion. Nor did it contend that any precedent from this Court (or any other court) was squarely on point. And as discussed below—when we show that there was no PCA violation here to begin with—any such contention would be baseless.

Indeed, the district court acknowledged that the PCA's case law "does not provide clear answers." ER-36. Instead, the court simply stated that defendants "exceeded the authority delegated to them by Congress and directly violated the Posse Comitatus Act's specific prohibition against domestic military law enforcement." ER-52. But plaintiffs cannot prevail on an ultra vires theory by

showing merely that an "agency has arguably reached a conclusion which does not comport with the law." *NRC v. Texas*, 605 U.S. at 681 (quotation marks omitted). The district court's analysis here is indistinguishable from de novo review.

Under the proper legal standard, plaintiffs' ultra vires claim is an obvious non-starter. As discussed further below, none of the activities the district court highlighted violates the PCA, let alone constitutes "blatantly lawless" agency action sufficient to support an ultra vires claim. And for the reasons set forth below none of this matters anyway because Section 12406(3) expressly authorizes the Guard to execute the law. But even if the district court were correct in some of its legal conclusions—which it is not—that is simply not enough to support relief under an ultra vires theory. *See NRC v. Texas*, 605 U.S. at 682 (stating that "[e]ven if one were to disagree with the D.C. Circuit's conclusion, the statutory argument falls well shy of a meritorious" ultra vires claim).

C. Section 12406(3) Authorizes the Guard to Execute the Laws.

Plaintiffs' PCA claim fails at the threshold for the additional reason that the alleged National Guard actions challenged here are expressly permitted by the PCA. The PCA's prohibition on the use of armed forces "as a posse comitatus or otherwise to execute the laws" does not apply "in cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. Section 12406(3)—which this Court already held likely authorized the President's

mobilization of the National Guard, *Newsom v. Trump*, 141 F.4th 1032, 1052 (9th Cir. 2025) (per curiam)—authorizes the President to federalize the National Guard "to execute the laws of the United States" when he is unable to do so with "regular forces." *See* 10 U.S.C. § 12406(3).

The parallel between Section 12406(3) and the PCA is undeniable. The latter prohibits use of the military to "execute the laws" unless authorized by, *inter alia*, an Act of Congress, 18 U.S.C. § 1385, and Section 12406(3) allows the National Guard to be federalized for exactly that purpose. If that were not enough, the statute further provides expressly that, once federalized, the Guard can in fact execute the laws. It authorizes the President to federalize Guard members "in such numbers as he considers necessary to . . . execute those laws." *Id.* § 12406. It is difficult to imagine a more explicit authorization for execution of law.[7]

That plain-text reading, moreover, is consistent with historical practice. In 1970, President Nixon found that a postal-worker strike was "preventing the execution of" the postal laws and authorized the Secretary of Defense to call up the National Guard "to execute" those laws. 35 Fed. Reg. 5003, 5003 (Mar. 24, 1970). In doing so, he invoked the statutory authority now codified at 10 U.S.C. § 12406(3). *See id.* (citing 10 U.S.C. §§ 3500, 3800 (1970)).

[7] Although Section 12406(2) does not contain similarly overlapping language, that provision is also likely express authorization for law execution, at least insofar as such activities are necessary to respond to a rebellion.

The district court's contrary analysis does not withstand even minimal scrutiny. The court did not engage with the text of Section 12406(3) at all. The court instead focused on the purported novelty of the interpretation. ER-30. It is not novel. Congress's own research service has recognized Section 12406(3) as expressly authorizing law execution under the PCA. *See* CRS Report 31 n.224. At most, one might say that this question has not *been the subject of litigation*—but that is simply because, until the decision below, no court had ever concluded that it could civilly enforce the PCA against the federal government. More fundamentally, novelty cannot foreclose an interpretation where the plain text of the statute demands it.

At bottom, the district court's objections amount to a disagreement with this Court's prior stay decision, which the district court characterized as lacking any "limiting principle" and creating an "expansive view of presidential discretion to invoke [Section] 12406(3)." ER-34. But that disagreement does not authorize the district court to ignore this Court's precedent, or the plain text of the PCA, and the obvious parallels between the PCA and Section 12406(3).

Contrary to the district court's puzzling suggestion, interpreting Section 12406(3) as express authorization for PCA purposes does not make the PCA meaningless. ER-32; *see also* ER-32 (contending that such an interpretation would "nullif[y] the Act itself" and "undermine the whole act"). For one, Section 12406 authorizes only the National Guard to execute laws, so the PCA applies with full

force to other members of the armed forces. Defendants do not make this argument as to the Marines, who have since left the Los Angeles area and whose activities were limited to protecting federal property, which the district court concluded did not violate the PCA. Section 12406(3) also requires the President to determine that the regular forces are unable to execute the laws; the PCA prohibits execution of the laws where the President has not so determined. Finally, the Guard members can execute only "those laws" that the regular forces are unable to execute; the PCA's bar applies with full force to all other laws.

Indeed, while defendants' plain-text interpretation of Section 12406(3) allows that statute and the PCA to operate independently and alongside one another, the district court's interpretation significantly undermines Section 12406(3). Under the district court's view, lawfully federalized Guard members cannot execute *any laws*—including "those that the President found he could not enforce under § 12406(3)." ER-32. That is nonsensical. And although, as discussed further below, defendants' protective activities do not constitute law execution, the district court's opinion—while stressing that it was not ordering removal of the Guard—would seem to prevent them from doing anything to protect federal officials from violence. *See infra* pp. 51-53.

Finally on this point, the district court's reference to the principle that Congress does not hide elephants in mouseholes, *see* ER-32 (discussing *Whitman v.*

American Trucking Ass'ns, Inc., 531 U.S. 457, 4681 (2001), is not well taken. An authorization for the Guard to engage in law execution is not an "elephant." There is no independent constitutional bar on the military executing the laws. The Constitution expressly empowers Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union." U.S Const. art. I, § 8 cl. 15. And the PCA was enacted nearly a century after the Constitution's ratification, only criminalizes willful violations, contemplates statutory and constitutional authorizations for the military to engage in law execution, and did not even include the Navy or Marines until 2021.[8] Nor is Section 12406(3) a "mousehole." It is a delegation to the President of the United States, some variant of which has existed since the Washington Administration (and which thus predates the PCA by nearly a century).

[8] If an authorization for the military to engage in law execution were an elephant, one would expect courts to recognize such authorization only upon the clearest of statements. But courts have repeatedly found express authorization even when the statute providing that authorization makes no mention of the PCA. *See, e.g.*, *United States v. Hernandez-Garcia*, 44 F.4th 1157, 1164 (9th Cir. 2022); *United States v. Allred*, 867 F.2d 856, 870-71 (5th Cir. 1989). In *Hernandez-Garcia*, the provision at issue not only made no mention of the PCA, but was buried within an approximately 800-page omnibus authorization act. *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 1059(a), (c)(2), 129 Stat. 726, 986 (2015). Neither the district court nor this Court had any difficulty concluding that the provision constituted express authorization for PCA purposes.

In any event, the plain text of Section 12406(3) could not be clearer and that is dispositive.[9]

D. Plaintiffs Did Not Demonstrate Standing.

Plaintiffs also failed to establish standing. Notably, the district court rejected plaintiffs' speculation about any fiscal harm to California or its residents as a basis for standing, ER-27-28, and it concluded that their complaints about the Guard escalating tensions in Los Angeles were "intangible harms" that could not support standing, ER-29.

The district court held, however, that California suffered a cognizable and redressable injury to its police powers when the federalized Guard engaged in law enforcement activities. ER-25-27. But although the district court asserted that "law enforcement" is "a domain traditionally within the state's control," ER-26, it is the federal government that has the authority to enforce federal law within California's

[9] In opposing defendants' motion for a stay, plaintiffs noted that the federalized Guard is "'subject to the laws and regulations governing the Army or the Air Force,'" which includes the PCA. Dkt. 10.1 at 18 (quoting 10 U.S.C. § 12405). True, but irrelevant. The PCA allows the military to execute the laws so long as there is a statute expressly authorizing them to do so; and Section 12406(3) is such a statute, when members of the Guard are validly federalized under that provision. In other words, members of the Guard remain subject to the PCA, but fall within the PCA permission for law execution expressly authorized by law when they are executing the laws that the regular forces were unable to execute. Were it otherwise, Section 12406(3) would only permit the federalized Guard members to enable others to execute those laws, not to execute the laws themselves. That is not a tenable reading of Section 12406(3).

borders. California's PCA claim solely concerns *which* federal officers enforce federal law—California has no distinct interest in that question. And even if plaintiffs have a redressable injury, it would not be judicially cognizable. *Texas*, 599 U.S. at 676-78 (holding that the desire to see criminal law enforced against another is not a cognizable interest).

II. The Guard Members Are Not Conducting Law Enforcement

Since plaintiffs' PCA claim fails as a matter of law on numerous grounds, this Court can and should reverse without analysis of the merits. Should the Court nevertheless reach the merits, plaintiffs utterly failed to demonstrate that the Guard's activities violate the PCA.

1. The President was clear in his memorandum that the National Guard members' mission in Los Angeles is limited to "protect[ing] ICE and other United States Government personnel who are performing Federal functions, including the enforcement of Federal law," and "protect[ing] Federal property, at locations where protests against these functions are occurring or are likely to occur." ER-184. The Department of War memoranda repeat these explanations, stating that Guard members will "temporarily protect [ICE] and other United States Government personnel who are performing Federal functions, including the enforcement of Federal law, and to protect Federal property." ER-183.

The witnesses at trial uniformly testified that the National Guard and Marines deployed to Los Angeles acted consistently with this limited protective mission. William Harrington, who until recently served as the Deputy Chief of Staff of the unit responsible for the deployed troops, described the military's role in operations as "provid[ing] force protection," ER-78-79, 81 and emphasized that the military did not have "interactions with any civilians," ER-79. Major General Scott M. Sherman, who served as commanding general of the deployed force until July 10, 2025, described the training the Guard members and Marines received about the scope of their mission, *see, e.g.*, ER-93, which instructed soldiers that "they weren't allowed to do any law enforcement actions" and "were strictly there to protect federal law enforcement, allowing them to do their law enforcement job," ER-98. Ernesto Santacruz, the Field Office Director of the Los Angeles ERO Field Office, explained that he understood the military's role in immigration enforcement operations was "only . . . to protect federal property and only to protect federal personnel." ER-101.

Providing protection for federal officials is not law execution for PCA purposes. This is just common sense. The Guard does not engage in law enforcement merely because they protect those who do. When the Guard protects ICE agents who are engaged in immigration enforcement actions, it is still the ICE agents who are executing federal immigration laws. By analogy, the Secret Service is not exercising Presidential authority when it protects the President. And when the U.S. Marshals

Service protects members of the judiciary, it is of course not exercising the judicial power of the United States.

This Court has twice squarely rejected the argument that providing security for law enforcement operations violates the PCA (even where, unlike here, that security was combined with additional support). *See United States v. Klimavicius–Viloria*, 144 F.3d 1249, 1259 (9th Cir. 1998) (no violation where "the Navy supplied equipment, logistical support and backup security"); *United States v. Khan*, 35 F.3d 426, 432 (9th Cir. 1994) ("logistical support and backup security").

That precedent is consistent with longstanding Executive Branch practice. The President has an "inherent" protective and emergency power derived from the Take Care Clause. *See In re Neagle*, 135 U.S. 1, 69 (1890). Indeed, the Court in *Neagle* viewed it *as obvious* that protection of federal officials enforcing the laws was within the President's authority:

> So, if the president . . . is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed, and the mail carriers assaulted and murdered, in any particular region of country, who can doubt the authority of the president . . . to make an order for the protection of the mail, and of the persons and lives of its carriers, by . . . providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a posse comitatus properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?"

Id. at 65. Similarly, as then-Assistant Attorney General Rehnquist explained more than half a century ago, the President has inherent Article II authority "to use troops

for the protection of federal property and federal functions." *Authority to Use Troops*, 1 Supp. Op. O.L.C. 343, 343 (1971); *see id.* at 344 (discussing decisions in *Neagle* and *In re Debs*, 158 U.S. 564 (1895)). There is no reason to read the PCA as displacing that authority. Simply put, protection is not law execution.

There was no evidence, moreover, that any Guard member participated in (or directly aided) a law-enforcement investigation, execution of a search warrant, an arrest, or any similar traditional law-execution activity. *E.g.*, ER-103. Plaintiffs identified one instance in which a Marine temporarily detained an individual for approximately 30 minutes after that individual attempted to enter a restricted area on federal property multiple times, despite being warned to stop. The district court held that this brief detention did not violate the PCA. ER-46.[10] And that conclusion was correct. *Cf. United States v. King*, 2022 WL 17976787, at *4 (N.D. Okla. Dec. 28, 2022) (recognizing in appropriate circumstances, "civilians may be detained [by military personnel] for a limited period of time until they can be referred for

[10] Below, plaintiffs relied on another purported "detention," but the video plaintiffs provided of that incident simply shows Guard members directed a protester back towards other protesters; they in no way seized or constrained her, and she remained free to walk away during the entire interaction. (The video of that incident is available on the district court docket as Exhibit B to the declaration at docket number 127-4.) This incident was totally innocuous and the district court apparently found it too trivial to even discuss. That this is the best supposed evidence of illegality plaintiffs could muster following discovery and a multi-day trial simply underscores the military's rigorous compliance with their instructions regarding the scope of mission.

prosecution by civilian law enforcement"); *Applewhite v. United States Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993) (same).

2. How then, did the district court possibly conclude that the Guard engaged in impermissible law enforcement that, in its view, violated the PCA? According to the court, the Guard "set up traffic blockades on roads at a residential enforcement operation in Long Beach, as part of Operation Excalibur at MacArthur Park, and as part of the Carpinteria cannabis farm operation," and "similarly used riot shields and military vehicles to establish a perimeter at the DEA enforcement operation in Mecca." ER-45. According to the court, "[s]uch conduct is a serious violation of the Posse Comitatus Act." ER-46.

This is ipse dixit, not legal analysis. As the district court's description of these incidents make clear, these "perimeters" and "blockades" were put in place to protect federal officials. The Guard is allowed to establish perimeters around ongoing federal enforcement operations if necessary to protect federal officials executing federal law, including blocking traffic and people if necessary for the safety of such officials. That is because, as noted above, providing protection and security to those performing federal functions is not law enforcement for PCA purposes. The district

court cited no cases or other authority for the proposition that such protective functions constitute law execution.[11]

The district court attempted to distinguish this Court's decision in *Khan* (which as noted, squarely held that providing security did not violate the PCA) by contending that it and other cases finding no PCA violations "involve military actions that are both passive and isolated in nature." ER-47. That purported distinction of military involvement as "passive" is at odds with the facts of *Klimavicius* (which the district court did not discuss) and *Khan*. In *Klimavicius*, the Navy's involvement was in any fair reading quite extensive—and certainly more extensive than the military's involvement here. The Navy helped transfer fluids among the tanks the Coast Guard searched; transported equipment to help the search; showed the Coast Guard how to use the equipment; helped transfer the arrestees; and subsequently supervised them. 144 F.3d at 1259. In *Khan*, similarly, the "Navy participated in the operation by providing ships, communication on the [relevant ship's] position, aerial reconnaissance, and interception of the" ship. 35 F.3d at 431-32.

As to the district court's focus on whether military activities are "isolated," this too was wrong. This Court found no PCA violations in *Klimavicius* and *Khan*

[11] Indeed, the district court acknowledged that protection of federal buildings was consistent with the PCA, ER-46, but never explained the distinction between this permissible activity and supposedly impermissible protection of federal officials.

because the security assistance in those cases did not constitute execution of the laws for PCA purposes; nothing in those decisions suggests that the analysis would have been different if the Navy had repeated the same activities multiple times. And even if the district court were right that the PCA inquiry turns on the number of times the military takes action (rather than what action the military actually performs), the district court identified only a few examples in which the Guard set up traffic blockades or established perimeters.

Although the district court's attempts to distinguish this precedent were entirely unpersuasive, the court's attempt to analogize this case to decisions where courts have found legal violations was even more indefensible. The district court relied on this Court's decision in *United States v. Dreyer*, 804 F.3d 1266 (9th Cir. 2015) (en banc), and the Eighth Circuit's decision in *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985). Those decisions are entirely inapposite.

In *Dreyer*, a military official's conduct "pervaded the actions of civilian law enforcement": among other things, he and two other military officials "initiated an operation to search for individuals sharing child pornography online"; the military official prepared a report that "formed the basis of the state warrant to search [the criminal defendant's] home," the execution of which "yielded the evidence that led to the charges against [the defendant]"; and the military official testified that he was conducting an "investigation," which was "active." 804 F.3d at 1275 (quotation

marks omitted). That is obviously worlds apart from the facts here. The district court here characterized *Dreyer* as follows: "NCIS investigation was 'systemic' and thus violated Posse Comitatus Act." ER-47. That is not what *Dreyer* said. This Court characterized "[t]he violations" as systemic in *Dreyer* as part of its analysis of whether exclusion of evidence was warranted, not on whether the PCA was in fact violated in the first place. 804 F.3d at 1275, 1281.

As for the Eighth Circuit's 40-year-old decision in *Bissonette*, that was not even a PCA case. Rather, it was an action for constitutional violations—specifically an alleged unreasonable search and seizure (in which the plaintiffs argued that the alleged violation of the PCA demonstrated that the seizure was constitutionally unreasonable). 804 F.3d at 1385. The military was not involved. *Id.* ("members of the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Indian Affairs Police"). It was also an action "for damages" (which everyone agrees the PCA does not permit). *Id.* And in that case, the Eighth Circuit held that plaintiffs stated a claim upon which relief could be granted where they alleged "that the defendants seized and confined plaintiffs within an 'armed perimeter,'" and where an entire village was sealed off for *10 weeks*. *Id.* The decision has no bearing whatsoever on this case.

The district court also suggested in a footnote that "[t]roops do not serve a protective function when they act as a force multiplier at a 'show of presence' (as in

MacArthur Park), when they outnumber federal personnel by 100 at a remote location with a low risk of resistance (as in Mecca), or when they are deployed merely to speed up federal operations (as in Carpinteria)." ER-47. This is not a factual finding but, rather, a legal conclusion. And it is obviously wrong. The ratio of Guard members to other federal personnel on a single mission (and the district court's assessment of the risk of that mission) has nothing to do with whether the Guard members who are present are engaged in law execution. Nor does the Guard's "show of presence" mean they are engaged in law execution as opposed to present for protection. And likewise, the district court identified no activities of the Guard constituting law execution in Carpinteria.

3. The district court further erred when it concluded that defendants acted willfully—a predicate for any PCA violation. The peculiar nature of this inquiry as applied to an action against the government only underscores that there is no civil enforcement of the PCA against the government in the first place. *See supra* pp. 23-24. But there is plainly no willfulness here. For the reasons explained above, the district court's analysis as to why defendants' activities supposedly violated the PCA was flimsy at best. But even if the district court were correct, it is extraordinary to contend that defendants *knew* they were violating the PCA. Indeed, as noted above, defendants' understanding that the Guard's protective activities were not prohibited is consistent with OLC's longstanding position. *See supra* pp. 38-39. Almost by

definition, executive branch actors cannot be acting willfully when they are following OLC's longstanding advice that their conduct is lawful.

Again, the district court's contrary analysis is indefensible. The court cited only one piece of purported "evidence" for the proposition that defendants knew the Guard was engaged in law execution in violation of the PCA: an email from a Lieutenant Colonel instructing those involved in the protection mission to "[s]ubstitute 'protection' for 'security'" and "detect, monitor, and report" for "surveillance," which the district court characterized as instructing "agencies as to what language to use when submitting requests for assistance in an attempt to circumvent the Act." ER-12, 48 (quotation marks omitted). This is tendentious in the extreme. For one, "security" and "protection" in this context are essentially synonyms. As discussed above, this Court has held twice that "security" does not violate the PCA. And the obvious purpose of this requested substitution was simply to align the language used with the Presidential and DoW memoranda, which use the term "protection." *See supra* p. 10. This same email also made clear that "[i]f the requested activity cannot be converted to a 'protection' term, *then we cannot perform it*." ER-136 (emphasis added). As for the other suggested substitution, the email simply suggested (in the form of a *question*) "will 'detect, monitor, and report' be a more accurate activity we are really doing instead of 'surveillance?'" ER-136. Finally, even if this wholly innocuous email could be read as an instruction to violate

the law, one communication from a single field-grade officer does not demonstrate that the actual decisionmakers believed that the Guard was engaged in forbidden law execution.

The district court also appeared to apply an erroneous legal standard for willfulness, reasoning that it did "not matter" if defendants "believed that some constitutional or other exception applied" to allow for their conduct. ER-48. But willfulness in the criminal-law context requires "knowledge that the conduct is *unlawful*." *Bryan v. United States*, 524 U.S. 184, 196 (1998) (emphasis added). If defendants believed they were acting lawfully, exercising their rights under a statute that authorizes law execution (or if they believed that their activities did not constitute law execution for PCA purposes to begin with), their conduct cannot be "willful."[12] That is precisely what occurred here.

[12] In a confusing footnote, the district court acknowledged that willfulness when used in a criminal context ordinarily requires a defendant's "knowledge that his conduct was unlawful," asserted that "[t]hat definition fits here," and reasoned that the "constitutional concerns that sometimes demand a stricter reading of the statute are not applicable where the statute is straightforward and criminal enforcement is not at issue." ER-48 (quotation marks omitted). It is not clear what "stricter" reading the district court meant to reject; in certain contexts, willfulness has been read to require knowledge of the *specific law* the defendant is accused of violating as opposed to general knowledge that one's conduct is unlawful. Whether this stricter standard applies here is irrelevant since willfulness here requires knowledge of illegality, as the district court appeared to acknowledge in this passage (though as noted above, the court did not actually apply that requirement). Nor was the district court correct to characterize the PCA as "straightforward"; courts have articulated multiple, open-ended tests for determining whether the PCA was violated, *United States v. Yunis*,

Continued on next page.

4. In addition to lacking any valid legal or factual basis for concluding that defendants violated the PCA, the district court's opinion is notable for its many strawmen and non-sequiturs. Although those errors are generally irrelevant to the legal issues on appeal, we touch on a few briefly to clarify the record and defendants' legal arguments.

a. The district court was apparently determined to frame the critical issue in this case as whether the Constitution allows the President to *violate* the PCA—and to resolve that strawman against defendants. As noted above, the district court made virtually no effort to establish that, in setting up security perimeters and blockades intended to protect federal officials, the National Guard violated the PCA. Instead, the district court treated this proposition as more or less a given, and framed the issue as whether such assertedly PCA-violating conduct was permissible under a "constitutional exception" to the PCA. The court then spent a significant portion of its decision purporting to rebut the argument "that the Posse Comitatus Act harbors an exception beyond the framework that the case law establishes." ER-36-

681 F. Supp. 891, 892 (D.D.C. 1988), and have grappled with how to apply the PCA, including what entities are and are not subject to it, what statutes expressly authorize law execution, and what activities do and do not qualify as impermissible execution of the laws. *See supra* note 5. And while this case is not a criminal prosecution, the PCA is a *criminal statute*; if plaintiffs can enforce the PCA at all, they must demonstrate willfulness as it is used in that statute.

45; *see also* ER-44 (purporting to reject an argument of "an inherent protective power that overrides the plain text of the Posse Comitatus Act"); ER-38 (similar).

None of this represents a fair reading of defendants' arguments. Defendants' pre-trial filings and arguments at trial emphasized, consistent with our arguments here, that the protective perimeters and blockades do not violate the PCA. ER-120-23. One half-page of defendants' supplemental pre-trial brief noted the President's longstanding and recognized authority to use troops for the protection of federal officials and property—again, similar to our briefing here. ER-121. That brief description was in support of the government's point that "[t]he Guard does not engage in law enforcement merely because they protect those who do." ER-120.

b. The district court also cited the statements of *witnesses*—such as General Sherman—and intra-Executive Branch communications as the foil for its discussion about a "constitutional exception" to the PCA. ER-36. In context, however, the suggestion of a "constitutional exception" was simply shorthand for the proposition that when the military are carrying out a protective mission consistent with the President's constitutional authority to protect federal personnel and property, they are not engaged in law execution within the meaning of the PCA. The position is clearly correct. And in any event, the district court's focus on a non-lawyer witness's legal understanding is an irrelevant distraction from what really matters: whether defendants' conduct violates the PCA. Relatedly, the district court

treated certain internal training documents and the legal understandings of military officers as essentially dispositive of hotly contested legal issues. For example, the district court repeatedly invoked training materials listing "[s]ecurity patrols," "[t]raffic control," "[c]rowd control," and "[r]iot control" as conduct proscribed by the PCA, ER-10, 48, as well as trial testimony that, for example, impeding vehicle or pedestrian traffic constitutes as law enforcement, ER-61.

The district read these materials—testimony from non-attorney witnesses, and training documents designed to provide concise guidance for soldiers who are not legal professionals—too broadly. Conduct such as control of human and vehicle traffic can constitute law enforcement if done for a law enforcement purpose, but that does not mean that any perimeter or blockade set up to protect federal officials constitutes law enforcement just because it has the effect of blocking human and vehicle traffic from the operation site. Similarly, although the district court pointed to witnesses' testimony "that they understood the Posse Comitatus Act to apply to National Guard troops federalized under 10 U.S.C. § 12406," ER-30, the fact that the military has refrained from law execution does not mean Section 12406(3) does not expressly authorize them to do so.

Relatedly and more fundamentally, these documents and this testimony do not have the force of law; nor do they set the outer limits of the PCA. If plaintiffs could

enforce the PCA, the district court's role—and this Court's role—would be to enforce what the PCA *actually requires*.

c. The district court repeatedly criticized defendants for deploying National Guard members in particular scenarios, disagreeing with the justification for doing so. Thus, the court criticized defendants' position that the risk of unexpected threats would be sufficient grounds for deployment—a position amply justified given their experience in an enforcement operation in Camarillo, in which law enforcement initially deemed Guard assistance unnecessary but subsequently encountered a large, armed and threatening mob. ER-17-18. The court similarly criticized the need for a deployment in MacArthur Park, pointing to a supposed "lack of any high-value targets or threats to federal functions." ER-16. And the court faulted military officials for not coordinating more closely with state and local law-enforcement forces. ER-48. This judicial second-guessing, apart from failing to give due deference to military officials' predictive assessment of potential risk to federal personnel and property, is ultimately irrelevant to the question whether the Guard members' conduct constituted law execution.

d. Finally, beginning on the very first page of its opinion, the district court repeatedly expressed its disagreement with both the federalization and deployment, and this Court's decision to stay the district court's previous injunction. *E.g.*, ER-4 (declaring that "there was no rebellion, nor was civilian law enforcement unable to

respond to the protests and enforce the law"); ER-31 (criticizing stay decision); ER-34 ("The Ninth Circuit's interpretation of § 12406(3) provides no similar limiting principle."); ER-48 (asserting "the lack of any showing by Defendants that state and local officials were unable or unwilling to execute the laws before Defendants deployed troops to engage in typical law enforcement functions").

This Court's prior decision that the federalization was likely consistent with Section 12406 was correct. But that aside, the district court was obligated to follow that decision, to put aside its obvious disagreement with the federalization and deployment, and accurately apply the law to plaintiffs' PCA claim. *Cf. NIH v. American Pub. Health Ass'n*, 606 U.S. __, 2025 WL 2415669, at *4 (U.S. Aug. 21, 2025) (Gorsuch, J., concurring in part and dissenting in part) (reasoning in decisions regarding interim relief "binds lower courts as a matter of vertical *stare decisis*"). The district court did not do that here.

III. The Injunction is Overbroad

In all events, if the district court had been correct that Defendants violated the PCA, its injunction is overbroad. The injunction prevents Defendants from conducting (among many other items) "security patrols, traffic control, crowd control, [or] riot control." ER-55. Although these terms do not have any precise meaning (and the district court made no effort to define them), the district court's opinion is clear that it views them as encompassing any effort to provide perimeters

or otherwise protect federal officials, at least if those efforts result in blocking traffic or crowds from the mission site. *See supra* p. 40. It is hard to see how the National Guard *can* provide protection for federal officials without in some way interposing themselves between those officials and individuals who would potentially do them harm. Indeed, the ban on "riot control" is particularly problematic (and ironic) since this case of course *began with* a riot.

The district court's opinion seemingly goes further than even that. The court criticized one mission (at Long Beach) even in the course of acknowledging that "[t]he record is unclear as to whether Task Force 51's blockades prevented any civilians from using Long Beach Boulevard." ER-14. The court criticized another mission (in MacArthur Park) where the Guard remained in their vehicles outside the Park. ER-15. And the court repeatedly suggested that the mere "show of presence" of the military demonstrated an improper intent to execute the law, even though such presence was to protect federal officials engaged in law enforcement operations should such protection become necessary. ER-15, 46 (quotation marks omitted).

At bottom, the court's opinion seems to suggest that no use of the Guard to protect federal officials executing federal law is permissible. Indeed, the district court all but said as much, stating that the injunction "would have no bearing whatsoever on [the Guard's] ability to protect *federal property*." ER-53 (emphasis added). But as to protection of federal personnel, the court provided no similar

assurance, and instead stated "they can and must ensure this safety in a lawful manner—such as, for example, by coordinating with state and local law enforcement." ER-53.

This was wrong. None of this is necessary to redress any alleged injury to plaintiffs. And as to the equities, this Court already held that the federal government has "an uncontested interest in the protection of federal agents," *Newsom*, 141 F.4th at 1054, and that this harm far outweighed plaintiffs' harm from the deployment. Indeed, plaintiffs' supposed harms are even weaker on the trial record, given that at the time of trial all but approximately 300 Guard soldiers have been released from the mission. This Court's previous assessment of the equities precludes, or at least tilts heavily against, the district court's injunctive relief here—which functionally appears to prevent virtually all use of the Guard to protect federal officials enforcing federal law. *Cf. Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (noting that, considering the Supreme Court's assessment of the equities, "it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction").

CONCLUSION

This Court should reverse the district court's partial final judgment, vacate the injunction, and direct entry of judgment for Defendants on plaintiffs' PCA claim.

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General

ERIC D. MCARTHUR
Deputy Assistant Attorney General

MARK R. FREEMAN
SHARON SWINGLE
J. KAIN DAY

s/ Andrew M. Bernie
ANDREW M. BERNIE
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3411
andrew.bernie@usdoj.gov

December 2025

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that the following case is related to this one within the meaning of the rule: *Newsom, et al. v. Trump, et al.*, No. 25-7781; *Newsom et al. v. Trump et al.*, No. 25-3727.

s/ Andrew Bernie
Andrew M. Bernie

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32-1 because it contains 12,926 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 Times New 14-point font.

s/ Andrew M. Bernie
Andrew M. Bernie

ADDENDUM

TABLE OF CONTENTS

18 U.S.C. § 1385

§ 1385. Use of Army, Navy, Marine Corps, Air Force, and Space Force as posse comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

10 U.S.C. § 12406

§ 12406. National Guard in Federal service: call

Whenever—

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

(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 repel the invasion, suppress 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 commanding general of the National Guard of the District of Columbia.