No. 25-2798

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STATE OF ILLINOIS, et al.,
Plaintiffs-Appellees,

v.

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

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

EMERGENCY MOTION FOR STAY PENDING APPEAL AND IMMEDIATE ADMINISTRATIVE STAY

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INTRODUCTION

The district court entered an extraordinary order enjoining the President from federalizing and deploying the National Guard to protect federal officers in Illinois from violent attacks and to protect federal property from further damage. This Court should grant an immediate administrative stay and a stay pending appeal, just as the Ninth Court did after a district court enjoined the federalization of National Guard members in Los Angeles.

Under 10 U.S.C. § 12406, the President is authorized to federalize the National Guard when he "is unable with the regular forces to execute the laws of the United States" or "there is a rebellion or danger of a rebellion against the authority of the Government of the United States." Both conditions apply in the Chicago area. In recent weeks, organized agitators have assaulted federal law enforcement officers with fireworks, bottles, rocks, and tear gas. They have followed federal officers, confronted officers at their homes, and offered bounties for the murder of senior immigration officials. They have run occupied government vehicles off the road, blockaded entries and exits from federal buildings, and damaged federal property. In one recent incident, ten vehicles surrounded a government vehicle, and when the federal officers exited their vehicle, an assailant, who was later found with a handgun, attempted to run them down with her vehicle. These violent events, which local law-enforcement officials have been unwilling or unable to control, impede the ability of

U.S. Immigration Customs and Enforcement (ICE) and other federal officials to enforce federal law and constitute a rebellion against federal authority.

In concluding that Section 12406's conditions were not satisfied, the district court impermissibly second-guessed the Commander in Chief's military judgments—something district courts lack the authority and competence to do. Nearly 200 years ago, the Supreme Court made clear that these judgment calls are for the President to make. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827). At a minimum, as the Ninth Circuit explained in staying the order enjoining the deployment in Los Angeles, courts must "give a great level of deference to the President's determination that [one of Section 12406's] predicate condition[s] exists." *Newsom v. Trump*, 141 F.4th 1032, 1048 (9th Cir. 2025) (per curiam). And the President here had more than ample grounds to determine that regular forces were "unable" to sufficiently protect federal personnel and property and that the conditions in Chicago at least rose to the level of a "danger" of rebellion. Where ongoing violence, threats of violence, and harassment targeted at interfering with the enforcement of federal immigration laws have stretched the regular forces beyond their capacity and left them unable to adequately enforce the laws, the President can call up the Guard in response to the most acute dangers and the most significant drain on federal enforcement resources. In countermanding the President's military judgment, the district court largely ignored the facts on the ground, relied on an improper *ex parte* factual investigation, and rested on an adverse "credibility" finding that had no basis in the record.

The district court's order improperly impinges on the Commander in Chief's supervision of military operations, countermands a military directive to officers in the field, and endangers federal personnel and property. The balancing of harms thus weighs strongly in favor of interim relief pending appeal so that the National Guard may protect federal personnel and property while this appeal is pending, and this Court should also grant an immediate administrative stay pending consideration of that request for relief.

STATEMENT

A. Legal Background

1. The Constitution authorizes Congress to raise and support a national Army and to organize "the Militia." *See* U.S. Const. art. I, § 8, cl. 15. Exercising that authority, Congress has "created the National Guard of the United States, a federal organization comprised of state national guard units and their members." *Perpich v. Department of Def.*, 496 U.S. 334, 338 (1990) (quotation marks omitted). The National Guard is composed of both the State National Guard, under the command of the several States, and the National Guard of the United States, a federal entity under the federal chain of command, *see* 10 U.S.C. § 10101. Once called into federal service, "members of the National Guard . . . lose their status as members of the state militia during their period of active duty," *Perpich*, 496 U.S. at 347, become federal soldiers, 10 U.S.C. § 10106, and serve under the President as Commander in Chief, *see* U.S. Const. art. II, § 2, cl. 1.

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

> Whenever ... (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or (3) the President is unable with the regular forces to execute the laws of the United States ... the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to ... suppress the rebellion, or execute those laws." *Id.*

B. Factual Background

1. Throughout the summer, ICE has seen a sharp increase in violent protests and attempts to impede its duties of enforcing the Nation's immigration laws. *See* A191. In Los Angeles, violent mobs attacked federal officers with concrete chunks and commercial-grade fireworks and used dumpsters as battering rams to breach federal buildings. *See Newsom v. Trump*, 141 F.4th 1032, 1041 (9th Cir. 2025) (per curiam). In Portland, agitators assaulted federal officers with rocks, bricks, and incendiary devices, followed federal officers to their homes, and threatened to kill them on social media. A196-200. In late September, a man opened fire on an ICE field office in Dallas, killing two detainees and injuring another. A200-201.

The current level of violence directed at immigration officials in Chicago is the highest that a 23-year federal law enforcement veteran has seen and is quickly eclipsing the violence in other cities. A206, A210-211. Federal officers have been

physically attacked and seriously injured: one officer had his beard ripped from his face, and others have been hospitalized for injuries like torn ACLs. A175-179, A190. While driving, federal officers have been followed by groups of vehicles and rammed by other drivers. A208, A209-210. One officer was followed to his home and aggressively confronted. A179. His home was later broken into, and his service weapon was stolen from the safe in his car. A179. Officers have received death threats on social media. A176, A179, A190, A211-212. And local gang members placed a $10,000 bounty on the life of a senior immigration officer. A190, A208.

The violence has escalated in recent weeks. Last weekend, ten vehicles surrounded and boxed in a government vehicle carrying U.S. Customs and Border Protection (CBP) agents while driving on a public road. A209. Two drivers rammed the government vehicle on both sides, and when the federal officers exited the vehicle, one of the assailants drove her vehicle directly at one of the officers. A209. Faced with an imminent threat of death of serious bodily injury, the officer was forced to discharge his firearm, striking the driver, who fled the scene and was later found to be in possession of a handgun. A209. Approximately 200 rioters then converged near the scene, and over the next four hours, rioters attacked the officers, throwing objects, including glass bottles, at them. A209. CBP diverted other officers to assist, but those officers were also attacked and rammed by vehicles while they were driving to the scene. A178. And later that same day, ICE officers were surrounded by rioters

who slashed their vehicle's tires, forcing the officers to abandon the vehicle for their own safety. A178-179.

ICE's facility located a few miles outside of Chicago, known as the Broadview Processing Center, has been a focal point of unrest. A181-189. Federal personnel have been punched, hit, and assaulted with potentially blinding lasers and devices that risk causing permanent hearing loss. A182, A186, A189. Rioters have shot fireworks and thrown bottles, rocks, and tear gas at officers stationed outside the building. A186-188, A189. They have blocked, swarmed, and slashed the tires on vehicles entering or leaving the facility—all while the federal employees are trapped inside. A182. They have organized themselves offsite and transported in new rioters armed with shields, protective padding, and gas masks. A183. More than thirty ICE officers have been injured during these assaults, A190, and loaded handguns have later been discovered in the possession of several arrested individuals, A189, A207, A209-210. Even "employees of nearby businesses, mistak[en] . . . for ICE employees," have been accosted and their personal vehicles vandalized. A183.

Federal law enforcement officers have been diverted from their regular responsibilities to protect federal personnel and property in Chicago. A190-191, A210. ICE has mandated 12-hour duty shifts for officers providing security to the Broadview facility and has been forced to redeploy personnel from around the country and across different ICE components, significantly impeding those officers' ordinary law enforcement missions. A185-186, A190-191. ICE has also solicited

assistance from other DHS components as well as other federal agencies, undermining those agencies' own law-enforcement efforts. A206, A210, A212. And while federal officers have attempted to contact local police for assistance, the local police have often failed to respond to calls for assistance or their response has been delayed. A180-181, A208-209.

2. Based on this escalating violence in the Chicago area, DHS requested assistance from the Department of War (DoW) to safeguard federal personnel, facilities, and operations. *See* A148-149, A153-158. The President, in turn, judged that Section 12406's conditions were satisfied and called forth members of the National Guard to protect federal personnel and property in the region. A159-161. The President explained that "[f]ederal facilities in Illinois, including those directly supporting [ICE] and the Federal Protective Services (FPS), have come under coordinated assault by violent groups intent on obstructing Federal law enforcement activities." A160. "These groups have sought to impede the deportation and removal of criminal aliens through violent demonstrations, intimidation, and sabotage of Federal operations." A160. And the "violent activities," the President observed, "appear to be increasing . . . , particularly in and around the city of Chicago." A160.

The President determined that "these incidents, as well as the credible threat of continued violence, impede the execution of the laws of the United States" and that "the regular forces of the United States are not sufficient to ensure the laws of the United States are faithfully executed." A160. The President accordingly "call[ed] into

Federal service at least 300 members of the Illinois National Guard" to "protect ICE, FPS, and other United States Government personnel who are executing Federal law in the State of Illinois, and Federal property in the State of Illinois." A161. Pursuant to the President's directive, the Secretary of War mobilized 300 Illinois Guard members, A167-168, and then further mobilized up to 400 members of the Texas National Guard, A169-170.

3. The President's conclusions and the DoW directives were consistent with the assessments the President made when federalizing National Guard members to protect federal officials from the mob violence in Los Angeles and Portland. *See* A162-165. The Ninth Circuit stayed a district court order enjoining that Los Angeles deployment, concluding that the President likely acted lawfully in invoking Section 12406. *See Newsom*, 141 F.4th at 1040-41. Another Ninth Circuit panel has administratively stayed a district court injunction against federalization of the Oregon National Guard. *See Oregon v. Trump*, No. 25-6268 (Oct. 8, 2025).

C. Prior Proceedings

Plaintiffs, the State of Illinois and the City of Chicago, filed suit and sought a temporary restraining order, which the district court granted after full briefing and a hearing. The court concluded that the federalization order likely violated Section 12406 and the Tenth Amendment, and "enjoined" defendants from "ordering the federalization and deployment of the National Guard of the United States within Illinois." A220, A269. The court denied a stay of the injunction. A221.

ARGUMENT

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

I. This Court has appellate jurisdiction.

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). "[W]here an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Abbott v. Perez*, 585 U.S. 579, 594 (2018). Here, "several factors counsel in favor of construing the District Court's order as an appealable preliminary injunction." *Department of Education v. California*, 145 S. Ct. 966, 968 (2025) (per curiam). The court issued a 51-page opinion (A222-273) after full briefing and an adversary hearing. *See Rolle v. Creedon*, 2023 U.S. App. LEXIS 4533, *5 (7th Cir. Feb. 23, 2023). The order also inflicts irreparable harm by exposing federal property and officials to a threat of violence and exposing lawful federal immigration enforcement efforts to interference and obstruction. *Abbott*, 585 U.S. at 594-95.

In the alternative, this Court may exercise mandamus jurisdiction to review the district court's order. *See In re Sandahl*, 980 F.2d 1118 (7th Cir. 1992). The order imposes irreparable harm by impinging on the ability of the President and the Secretary of War to use the National Guard to protect federal officials enforcing federal law, leaving the federal government with "no other adequate means to attain

the relief." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quotation marks omitted). And mandamus is "appropriate under the circumstances" because the district court has claimed authority to superintend the Executive Branch's control over the military. *Id.* at 381.

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

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

A. Congress vested the decision whether to call up the National Guard in the President, not the courts, as the Supreme Court observed nearly 200 years ago in *Martin*, 25 U.S. (12 Wheat.) 19. There, President Madison activated the state militia under a 1795 law providing that "whenever the United States shall be invaded, . . . it shall be lawful for the President of the United States to call forth such number of the militia . . . as he may judge necessary to repel such invasion." *Id.* at 29 (quotation

omitted). A state militia member challenged court martial penalties imposed after he refused to report for federal service. *See id.* at 20-23.

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

Those principles govern here. Plaintiffs challenge the President's judgment that attacks on federal personnel and property satisfied Section 12406's prerequisites for federalizing the National Guard in Illinois. But Section 12406 "is, in several material respects, the same as" the 1795 law at issue in *Martin*. *Newsom*, 141 F.4th at 1049. Congress has granted "the authority to decide whether" 12406's conditions are satisfied "exclusively to the President." *Martin*, 25 U.S. (12 Wheat.) at 30.

This result follows not because the President's determination implicates a nonjusticiable political question, as the district court mistakenly believed the federal defendants to be arguing, but as a straightforward application of the principle that, when a valid statute "commits [a] decision to the discretion of the President," the

President's exercise of that discretion is not subject to judicial review. *Dalton v. Specter*, 511 U.S. 462, 474 (1994).

The district court distinguished *Martin* on the ground that it involved an invasion by a foreign government, A249-250, but the first prong of Section 12406 also authorizes the President to call forth the militia when the United States "is invaded or is in danger of invasion by a foreign nation," and it makes little sense to treat that determination as conclusive but not a determination that one of the other two statutory prongs is met. The Supreme Court also relied heavily on *Martin* in *Luther v. Borden*—a case involving a "purely domestic dispute" between two factions each purporting to constitute the legitimate government of Rhode Island. *Id.* (citing *Luther*, 48 U.S. (7 How.) at 44-45).

Nor has *Martin*'s reasoning been undermined by subsequent precedent. *Contra* A250-251. The Supreme Court has repeatedly cited *Martin*'s holding with approval. *See Luther*, 48 U.S. (7 How.) at 45; *Sterling v. Constantin*, 287 U.S. 378, 399 (1932); *see also Moyer v. Peabody*, 212 U.S. 78, 83 (1909) (citing *Luther*). More recent cases similarly recognize that Congress can vest unreviewable discretion in the President, especially in emergency contexts where courts have neither technical competence nor official responsibility. *See Dalton v. Specter*, 511 U.S. 462, 474 (1994); *Baker v. Carr*, 369 U.S. 186, 213 (1962).

The Ninth Circuit in *Newsom* nonetheless concluded that some—albeit highly deferential—judicial review of the President's Section 12406 decision is available,

relying on *Sterling v. Constantin*, 287 U.S. 378 (1932). 141 F.4th at 1046-50. *Sterling*, but that case underscores the conclusive nature of the President's judgments. *Sterling* involved a challenge to orders the Governor issued to the Texas National Guard after concluding that oil and gas producers were "in a state of insurrection." *Id.* at 387-88 (quotation omitted). The Supreme Court made clear that the Governor was "appropriately vested with the discretion to determine whether an exigency requiring military aid . . . has arisen" and that "[h]is decision to that effect [wa]s conclusive." *Id.* at 399. The Court evaluated only the measures taken by the militia once deployed. *See id.* at 401, 404.

B. Even if some judicial review is permitted, courts must, at a minimum, "give a great level of deference to the President's determination that [one of Section 12406's] predicate condition[s] exists." *Newsom*, 141 F.4th at 1048. That conclusion is consistent with general principles governing judicial review of presidential action. While plaintiffs challenging federal agency action ordinarily rely on the APA, 5 U.S.C. § 701 *et seq.*, the President is not an agency subject to the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). Plaintiffs' only path to judicial review of the President's decision to invoke Section 12406, therefore, is a non-statutory ultra vires claim—a "Hail Mary pass" that "rarely succeeds." *NRC v. Texas*, 605 U.S. 665, 681-82 (2025) (quotation omitted); *see also American Soc'y of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 456 (7th Cir. 2002). The district court misunderstands *ultra vires* relief when it suggests any violation of delegated authority will do. *See* A251 n.13.

Plaintiffs cannot satisfy these demanding standards. In the weeks leading up to the federalization in Chicago, federal officers have come "under coordinated assault by violent groups intent on obstructing lawful federal enforcement actions." A159-161. Outside of ICE's facility, organized agitators—several of whom were later found with handguns—have attacked and seriously injured federal officers with fireworks, rocks, bottles, and tear gas. A182-200. Rioters have routinely followed, surrounded, and rammed government vehicles—in one case engaging in a choreographed attack with ten cars where one assailant tried to run down federal officers with her vehicle. A208-210. Rioters have blocked and swarmed government vehicles as they enter and exit ICE facilities, slashing their tires and trapping federal personnel inside. A182, A206-207. ICE officers have been followed home from work and aggressively confronted. A179. Other federal personnel have been subjected to death threats on social media. A176, A179, A190. Requests for assistance from local police resulted in no concrete actions or were ignored. A180-181, A208-209. As a result, DHS and other agencies have been forced to reassign additional federal officers to support the protection of the ICE facility and its occupants, significantly impeding their ability to perform their own regular law enforcement functions. A190-191, A210, A212.

These conditions more than supported the President's judgment that "the regular forces of the United States are not sufficient to ensure the laws of the United States are faithfully executed." A160; *see* 10 U.S.C. § 12406(3). The district court reasoned that the statute could not apply unless the federal government was entirely

incapable of enforcing federal laws, A256, but the fact that ICE has successfully conducted some arrests and deportations does undermine that judgment. Section 12406(3) "does not have as a prerequisite that the President be completely precluded from executing the relevant laws of the United States in order to call members of the National Guard into federal service, nor does it suggest that activation is inappropriate so long as any continued execution of the laws is feasible." *Newsom*, 141 F.4th at 1051. To suggest otherwise would mean that "so long as any quantum of federal law enforcement could be accomplished in the face of mob violence," "the President would be unable to call up the Guard to respond." *Id.* (quotation omitted). That reading makes no sense, and it is inconsistent with prior instances in which Presidents have invoked Section 12406(3), such as the Postal Strike of 1970 during which some postal employees continued to deliver mail. *See The Strike That Stunned the Country*, TIME (Mar. 30, 1970), https://perma.cc/X5E6-QN9Y. The district court does not engage with the Ninth Circuit's well-reasoned approach to this question, nor the factual circumstances surrounding the Postal Strike. A256.

In concluding that the President lacked an adequate basis to determine that "the regular forces of the United States are not sufficient to ensure the laws of the United States are faithfully executed," 10 U.S.C. § 12406(3), the district court reasoned that the "regular forces" means the regular military forces such as the Army and Navy, and that the President cannot federalize the National Guard under 12406(3) unless he has first deployed regular military forces to assist with execution of the laws and they

have been unable to do so successfully. A256. That extraordinary conclusion should be rejected. Even plaintiffs agree that the "regular forces" include "federal law and enforcement agencies of a *nonmilitary* nature." A345 (emphasis added); *see also* A345-347. That reading also follows from the plain text and context of the statute. It is most natural to read the "regular forces" in this statutory provision as the ordinary forces that "execute the law"—*i.e.*, federal law-enforcement personnel. Military forces, in contrast, do not regularly "execute the law." Indeed, Congress has generally made it illegal for them to do so. 18 U.S.C. § 1385. And when President Nixon deployed the National Guard to deliver the mail, he made no finding that the military was unable to accomplish that task. Regardless, even if this were a requirement, the President implicitly made such a finding when he ordered federalization of the Guard.

The conditions on the ground in Chicago similarly support the President's judgment that "protests or acts of violence" that "directly inhibit the execution of the laws . . . constitute a form of rebellion against the authority of the Government of the United States," A163, or, at minimum, create a "danger of a rebellion," 10 U.S.C. § 12406(2). The term "rebellion" is not limited to an organized, armed, and open attempt to overthrow the entire government akin to the Civil War. *Contra* A254. Congress enacted Section 12406's predecessor in response to the Whiskey Rebellion—a protest against a specific tax, not an effort to overthrow the government as a whole. And dictionaries from the relevant time period, including those cited by the district court, define "rebellion" in a manner that encompasses deliberate

resistance to the government's laws and authority. That broader conception of "rebellion" better reflects the historical context in which Section 12406 was enacted and the instances in which Presidents have federalized National Guard members. *See* Jennifer K. Elsea, Cong. Rsch. Serv., R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* 9-12, 35-38 (2018).

2. In issuing its injunction, the district court recognized that the Executive is better suited than a court to evaluate the precise nature of a threat and that the President is entitled to deference on whether peculiar factual circumstances satisfy Section 12406's conditions. A252-253. The court nevertheless substituted its own judgment for that of the President and flatly rejected the federal government's assessment of the facts on the ground. *E.g.*, A230-232. In so doing, the court contravened the longstanding presumption that "public officer[s] [are] presumed to act in obedience to [their] duty, until the contrary is shown." *Martin*, 25 U.S. (12 Wheat.) at 33. That presumption applies with particular force in the context of a statute like Section 12406 that vests the President with discretion to address "sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." *Id.* at 30-31.

The district court had no legal basis for ignoring the important facts detailed in defendants' declarations. The court appears to have conducted its own investigation and—based on evidence admittedly "outside of the record"—concluded that some of the federal declarants' statements are "untrue." A294. The court proceeded to decide

that nothing DHS or ICE says can be trusted because two grand juries have failed to return indictments and other courts have issued preliminary rulings in legal proceedings wholly unrelated to the President's federalization decisions. A373-375. That is the very definition of an abuse of discretion.

Even so, the court was incorrect to suggest that the federal government declarations are flatly inconsistent with other submissions in the record. A230-231. Plaintiffs' own evidence confirms the dire situation in Chicago. One of plaintiffs' declarants described protests at Broadview with hundreds of people, A110, and protests occurring "almost around the clock," A133. Another declarant confirmed that on October 4, there was a collision involving a government vehicle at one location and that a large crowd formed at another location and threw objects at law enforcement. A218. Plaintiffs likewise acknowledged that protesters have impeded ICE operations by unlawfully blocking their vehicles from entering and exiting an ICE building, A91, and that protesters have attempted to break through lines of law enforcement officers, A95.

Finally, to the extent the district court's decision can be read to suggest the President did not act in good faith, there is no support for such a conclusion. *Cf.* A233-235. Federal personnel and property in the greater Chicago area have been subjected to increasing threats and violence in recent weeks, and the President accordingly federalized a limited number of National Guard members to "protect ICE, FPS, and other Untied States Government personnel" and "Federal property."

A159-161. That decision was consistent with the longstanding recognition, by both the Supreme Court and the Executive Branch, of the President's authority to use troops for the protection of federal property and federal functions. *Auth. to Use Troops to Prevent Interference With Fed. Emps. by Mayday Demonstrations & Consequent Impairment of Gov't Functions*, 1 Op. O.L.C. Supp. 343, 343 (1971); *see In re Neagle*, 135 U.S. 1, 65, 69 (1890); *see also In re Debs*, 158 U.S. 564, 582 (1895). The district court's reliance on extra-record materials to second-guess the President's motive was improper. *See Trump v. Hawaii*, 585 U.S. 667, 703 (2018).

3. As the district court recognized, the plaintiffs' Tenth Amendment claim "rise[s] and fall[s] with Plaintiffs' 10 U.S.C. § 12406 claim." A269. Because the government is likely to succeed on the *ultra vires* challenge based on the statute, it is also likely to prevail on the constitutional claim.

II. The other stay factors strongly favor the government.

In staying the Los Angeles injunction, the Ninth Circuit recognized that the federal government has "an uncontested interest in the protection of federal agents and property and the faithful execution of law" and that threats directed at federal personnel and property harm that interest. *Newsom*, 141 F.4th at 1054. The federal government also suffers irreparable harm when its immigration officials are prevented from safely and successfully enforcing the law. The court's suggestion that the federal government can deploy more law enforcement officers to protect its personnel and property ignores the evidence that those officers are already overstretched and

inappropriately second-guesses the President's judgments about limited Executive Branch resources, *cf. United States v. Texas*, 599 U.S. 670, 680 (2023).

On the other side of the ledger, plaintiffs have not established irreparable injury warranting extraordinary relief. Plaintiffs' argument that the deployment inflicts sovereign injury, "is, in essence, a merits argument," *Newsom*, 141 F.4th at 1055, which is wrong for the reasons explained. *See supra* pp. 10-19. The decision to call National Guard members into federal service necessarily renders those members temporarily unavailable to serve in state roles, but that is the result of the dual system of control created by the Constitution and Congress. Nor was it correct for the district to credit plaintiffs' assertion that the federalized Guardsman will "engage in crime-fighting or other activities falling within the ambit of Illinois's sovereign police powers." A246. The federalized Guard is protecting federal personnel and property, and nothing about that implicates Illinois's sovereign interests. *See* A159-161.

Plaintiffs and the district court can only speculate that unrest might occur in Illinois while the Guard is deployed. That theory of injury is suspect, as it presumes that the violence occurring prior to the President's memorandum was caused by immigration enforcement, but that going forward, it will be caused instead by the National Guard's protection of federal personnel and property. Regardless, such speculation cannot establish "more than a mere possibility" that plaintiffs will suffer irreparable harm absent interim relief. *Michigan v. United States Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011). And even if an emergency occurs, it is implausible

to suggest that 300 otherwise-occupied Guard members will impair the State's ability to respond. Here again, the district court relied on evidence "outside of the record"—an unrelated lawsuit—as establishing this harm. That evidence is irrelevant, and it was not appropriate to rely on it here.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,197 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ J. Kain Day
J. KAIN DAY