No. 25A443

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,

Applicants,

v.

STATE OF ILLINOIS AND CITY OF CHICAGO,

Respondents.

On Application for a Stay of the Order Issued by the United States District Court for the Northern District of Illinois

BRIEF OF PROFESSOR MARTIN S. LEDERMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

Amicus is Professor from Practice at the Georgetown University Law Center (GULC) and Senior Fellow of the GULC Supreme Court Institute. He has for many years taught and written on constitutional law and on presidential authority with respect to the military. Amicus served as Deputy Assistant Attorney General in the Department of Justice Office of Legal Counsel (OLC) from 2009 to 2010 and from 2021 to 2023, and as Attorney Advisor in OLC from 1994 to 2002.

INTRODUCTION

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As the Solicitor General acknowledges (App. 18), in order to obtain the requested stay the Applicants must, at a minimum, demonstrate a likelihood of success on the merits. Those merits turn largely on the proper meaning of the phrase "the President is unable with the regular forces to execute the laws of the United States" in 10 U.S.C. § 12406(3)—the statutory precondition the President invoked as the basis for his order "call[ing] into Federal service members and units of the National Guard … in such numbers as he considers necessary to … execute those laws" in Illinois. The parties sharply contest the meaning of the word "unable" in § 12406(3) and whether the proper test was satisfied on the facts of this case.

The principal function of this amicus brief, by contrast, is to explain why it is unnecessary for the Court to address those questions because the applicants are not likely to succeed on the merits for an independent reason—namely, that both the President and the Solicitor General have mistakenly assumed that the term "the regular forces" in § 12406(3) refers

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution to its preparation or submission.

to *civilian* law enforcement personnel (in this case, to actors in the Department of Homeland Security (DHS), including Immigration and Customs Enforcement (ICE) officers). That is incorrect. "[T]he regular forces" to which § 12406(3) refers are the regular, or "standing," *military* personnel serving in the United States Armed Services. Even assuming *arguendo* that the President has the legal authority to deploy those regular military forces to help execute federal laws in Illinois—an uncertain question that this Court need not and should not address, *see infra* at 19-24—there is no basis for concluding that the President would be "unable" to enforce such laws with the assistance of those forces if it were legal for him to direct such a deployment. Accordingly, a necessary precondition for the President's order to deploy the National Guard to Illinois pursuant to § 12406(3) has not been met.

The district court agreed. It held (App'x 68a-71a) that the Government's mistake about the nature of the "regular forces" is a sufficient basis for concluding that the President did not properly call forth the National Guard pursuant to § 12406(3). The Solicitor General devotes only a cursory footnote to this question (App. 30 n.4), however, and the Respondents do not address it in their brief to this Court. The court of appeals did not opine on the question, thereby avoiding what it called a "thorny and complex issue[] of statutory interpretation" (App'x 100a). The question of how to construe the term "the regular forces" in § 12406(3), however, is not the least bit thorny or complex. The meaning of "the regular forces" is straightforward—and it is reason enough to conclude that the applicants are unlikely to prevail on the merits, in contrast to the more uncertain question of what it means for the President to be "unable" to execute federal laws.

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ARGUMENT

I. Applicants are Unlikely to Succeed on Their Other Arguments

In addition to his argument concerning the proper reading of the statutory phrase "the President is unable with the regular forces to execute the laws of the United States" (10 U.S.C. § 12406(3)), the Solicitor General offers two other arguments about why applicants might prevail on the merits—one involving whether Congress has conferred unreviewable discretion upon the President, and the other about whether "a rebellion or danger of a rebellion against the authority of the Government of the United States" is ongoing in the Chicago area.

Largely for the reasons offered by the court of appeals, Applicants are unlikely to prevail on either of these two arguments. Amicus addresses them in this Part only briefly, in order to offer some discrete considerations not emphasized by the court of appeals and the Respondents, before turning, in Part II, to a more extensive discussion about the meaning of the statutory term "the regular forces."

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A. Nonreviewability Because of Presidential Discretion

Contrary to the Solicitor General's characterization (App. 22), plaintiffs are not asking the judiciary to "second-guess" a presidential determination about whether violent activities that have occurred in Illinois "warrant" calling up the National Guard, all things considered. Nor are they seeking to have the courts make their "own unmoored determination," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012), of whether involvement of the National Guard is appropriate in Illinois, or requesting the courts to make any "policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). The parties' dispute is, instead, largely about whether the specific statutory predicates

for presidential action under § 12406 have been satisfied. As the court of appeals held (App'x 96a), "[n]othing in the text of § 12406 makes the President the sole judge of whether these preconditions exist." Nor is there any other basis for assuming that Congress has stripped the courts of their authority to answer such questions.

Moreover, and of particular importance here, Congress has not conferred upon the President an unbounded, unilateral authority to determine the proper *meaning* of the terms "rebellion," "unable" and "regular forces." Plaintiffs are asking the courts to "decide if [applicants'] interpretation of the statute is correct"—a "familiar judicial exercise." *Zivotofsky*, 566 U.S. at 196; *see also Japan Whaling Ass'n*, 478 U.S. at 230 ("under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones," even in a dispute involving "this Nation's foreign relations," a field in which Congress and the Executive play "the premier role"). The courts' answers to those questions of statutory interpretation will not in any way impinge upon an authority Congress has delegated to the President alone. Those answers will, instead, simply determine whether he has properly exercised his statutory authorities within the terms of Congress's delegation.

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If, for example, the courts were to hold that private parties' obstructions in the Chicago area—even on the applicants' view of the facts—do not, *as a matter of law*, constitute or threaten a "rebellion … against the authority of the Government of the United States," then such obstructions could not justify calling forth of the National Guard pursuant to § 12406(2). Likewise, if the courts conclude that the President was mistaken to assume, as he appears to have done (*see* Presidential Memorandum for the Secretary of War, et al., re: *Department of War Security for the Protection of Federal Personnel and Property in Illinois* at 1 (Presidential

Memorandum), reprinted in D. Ct. Doc. 62-1, at 16), that a President is "unable" to execute federal laws for purposes of § 12406(3) whenever private conduct merely "impede[s]" an agency's execution of federal laws, then the President's calling forth of the National Guard was based upon the application of an improper legal standard—in which case it cannot be defended on the basis of § 12406(3), either.[2] And, regardless of the proper meaning of "unable," if the President misidentified "the regular forces" to which § 12406(3) refers, then his determination that he "is unable with the regular forces to execute the laws of the United States" was based upon his assessment of the wrong question—and that, too, would be a sufficient basis for concluding that he did not act in accord with the authority Congress conferred in § 12406(3).

It is well within the judiciary's proper role to answer any or all of these three legal questions. Congress has not assigned such statutory interpretation exclusively to the President.

B. Rebellion

The Solicitor General also argues (App. 31-34) that, regardless of whether the President had authority to call up the National Guard pursuant to § 12406(3), subsection 12406(2) authorized him to do so because the private violence in the Chicago area established a "rebellion or danger of a rebellion against the authority of the Government of the United States" and the President could have determined that it is "necessary" to use the National Guard to "suppress" that rebellion.

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[2] In his application to this Court, the Solicitor General suggests that ICE's enforcement of the immigration laws would be "*greatly* impeded" if it had to act "in the midst of a climate of violent mass resistance." App. 30 (emphasis added). The Solicitor General does not, however, go so far as to argue that the "unable" test turns on whether the ability to execute the law is "greatly" impeded and, more to the point, the President himself did not make any such determination—he found only that the agency's work was "impeded" in some unknown degree.

The President, however, did not find that there was a rebellion, or the threat thereof, in the Chicago area, and therefore he did not determine the "numbers" of National Guard units or members, if any, that would be "necessary" to suppress a rebellion, as § 12406(2) requires. That is reason enough to conclude that the applicants are unlikely to prevail on the Solicitor General's argument that § 12406(2) authorized the President's calling forth of the National Guard.

Moreover, there is good reason why the President did not invoke § 12406(2)—namely, that it would be absurd to suggest that a "rebellion against the authority of the Government of the United States" is ongoing or threatened in or around the City of Chicago.

The Solicitor General argues (App. 31) that such a result is not as counterintuitive as it might appear because the term "rebellion" is very broad, encompassing any "violent resistance to lawful authority, including to the enforcement of particular laws." That cannot be right. It would mean that a "rebellion" is afoot virtually any time persons protesting federal government action resort to any violent conduct to demonstrate their opposition—indeed, not only when their protest is against "particular federal laws" (App. 33), but also where, as here, their opposition is directed against the government's *means of enforcing* such laws, even if the protestors are not trying either to overturn the government itself or (as in the case of the so-called "Whiskey Rebellion") to coerce the government to change its laws. *See also* App'x 99a (court of appeals opinion) (a protest does not "become a rebellion merely because of sporadic and isolated incidents of unlawful activity or even violence committed by rogue participants in the protest"). Surely Congress did not intend to authorize the use of military force in the countless cases where such protests are attended by one or more violent outbursts and the state governor has not requested federal assistance.

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Moreover, such a definition would be difficult to square with the argument President Trump himself recently made to this Court (in his capacity as a then-former President) that the attack on the United States Capitol on January 6, 2021 did not amount to even an "insurrection," let alone a "rebellion," because it "did not involve an organized attempt to overthrow or resist the U.S. Government." Reply Brief for Petitioner in *Trump v. Anderson*, No. 23-719, at 15 (Feb. 2024), 601 U.S. 100 (2024). Section 3 of the Fourteenth Amendment imposes its disqualification rule upon covered persons who "shall have engaged in insurrection or rebellion against the [United States]." If the Solicitor General were correct that any "violent resistance to lawful authority, including to the enforcement of particular laws," establishes a rebellion, then the January 6 uprising obviously would have qualified as a "rebellion," in which case it would have served no purpose for former President Trump to argue to this Court that it was not even an "insurrection." *See* General Orders No. 100: *Instructions for the Government of Armies of the United States in the Field* Art. 151 (the so-called "Lieber Code," issued by President Lincoln on April 24, 1863) ("The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.").

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It is, therefore, very unlikely Applicants will be able to successfully defend the President's actions on the basis of the Solicitor General's virtually unbounded definition of "rebellion."[3]

[3] The fact that § 12406(2) is not the only federal law that refers to "rebellion" is reason enough not to adopt such an expansive and unusual definition of that term. Such a definition might have significant implications when applied to, for example, Section 3 of the Fourteenth Amendment and the criminal provision prescribing a ten-year sentence for engaging in or assisting "any rebellion," 18 U.S.C. § 2383.

II. Because "the Regular Forces" Refers to Military Personnel Serving in the United States Armed Forces, the Precondition to the Exercise of the President's Authority Under Section 12406(3) Has Not Been Satisfied

The President based his calling-forth order on his assessment that "the regular forces of the United States are not sufficient to ensure the laws of the United States are faithfully executed," including in Chicago. Presidential Memorandum at 1, reprinted in D. Ct. Doc. 62-1, at 16. In so doing, he was relying upon 10 U.S.C. 12406(3), which provides in pertinent part 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."

The Solicitor General confirms (App. 30 n.4) that the "regular forces" to which the President referred in his Memorandum are personnel working within *civilian* federal law enforcement agencies—i.e., ICE and other entities within DHS, including the Federal Protective Service (FPS). It is highly uncommon, however, to refer to such civilian officials and employees as any kind of "forces" at all; and they certainly are not "the regular forces" to which § 12406(3) refers. "[T]he regular forces" to which the statute refers are, instead, the standing military forces of the Armed Services, within the Department of Defense.

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That conclusion is undeniable in light of the history of § 12406(3) and of the contemporaneous usage of the term "regular forces." Congress enacted the original version of § 12406(3) as part of the Militia Act of 1903, commonly known as the Dick Act (so-named after Representative Charles Dick, Chair of the House Committee on Militia). *See* Act of Jan. 21, 1903, ch. 196, § 4, 32 Stat. 775, 776. The principal purpose of that legislation was to establish, organize and subsidize a well-trained, well-equipped and efficient militia that could be called into federal service to effectively supplement the efforts of the standing military, whose forces

were commonly referred to as "Regulars." This initiative was important because the nascent organized militia that Congress had provided for calling forth back in 1792 had "proved to be a decidedly unreliable fighting force." *Perpich v. Department of Defense*, 496 U.S. 334, 341 (1990).

In his first annual message to Congress, on December 3, 1901, President Roosevelt described the nation's militia law as "obsolete and worthless." *Id.* (quoting 14 Messages and Papers of the Presidents 6672). In the absence of an effective federal militia, Congress and the President had to resort to using units of temporary volunteers to supplement the regular armed forces, including in wars overseas. *See, e.g.*, Act of Apr. 22, 1898, ch. 187, §§ 2-5, 30 Stat. 361, 361 (declaring that "in time of war the Army shall consist of two branches which shall be designated, respectively, as the Regular Army and the Volunteer Army of the United States"; defining the "Regular Army" as the permanent military establishment"; and establishing a process by which the President could ask Congress to raise a Volunteer "force"). Many of those volunteer units lacked proper or sufficient training, organization and readiness. President Roosevelt therefore implored Congress to remedy the situation by establishing a means by which the states' militia could be enhanced and effectively called into federal service. Of particular significance for purposes of this case, Roosevelt urged Congress to ensure that the organization and armament of the new federalized national militia "be made identical with those provided *for the regular forces*." Perpich, 496 U.S. at 341 n.10 (emphasis added).

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Congress heeded the President's entreaty in substantial measure. The Dick Act of 1903 established "the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia." Act of

Jan. 21, 1903, § 1, 32 Stat. at 775. The Act undertook "to regulate and provide for … various relations of the National Guard and its members to the general system; to conform the organization armament, and discipline of the guard to that of the Regular and Volunteer armies of the United States; to establish closer relations and better cooperation between the National Guard and the Regular Army; [and] to promote the efficiency and dignity of the guard as a part of the military system of the United States." S. Rep. 57-2129 at 2 (1902).[4] (It is worth noting the Senate's conspicuous references in this passage to the new Guard's relationship to the "Regular" Army—terminology that was commonplace in the legislative history of this and earlier statutes.)

One provision of the Dick Act (Section 4) authorized the President to call forth this newly established National Guard to perform the functions described in the first Militia Clause of the Constitution, Art. I, § 8, cl. 15 ("The Congress shall have Power ... To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."). The particular part of that provision that described the precondition for the President to call forth the National Guard for purpose of law-execution did not originally refer—as the current § 12406 does—to an inability of the President to execute federal laws with the "regular forces." Instead, it referred to situations in which "the President is unable, *with the other forces at his command*,

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[4] As the Court explained in *Perpich*, 496 U.S. at 342, the Dick Act itself did not accomplish everything President Roosevelt had requested, because it authorized the use of the National Guard only pursuant to the constitutional militia clauses, which meant that the President could call forth the organized militia only for service in the United States and its territories. The 1908 amendment to the Dick Act, however (discussed below), authorized the use of members of the organized militia outside U.S. territory, as well, *see id.* at 342-343; and as of 1933, all persons who enlisted in a state National Guard unit were simultaneously enlisted in a new National Guard of the United States, in which capacity they could be "ordered into active service whenever Congress declared a national emergency and authorized the use of troops in excess of those in the Regular Army," *id.* at 345.

to execute the laws of the Union in any part thereof." Act of Jan. 21, 1903, § 4, 32 Stat. at 776 (emphasis added).[5] Presumably Congress used that formulation in 1903 because the President then had *two* types of "other forces" at his command—the professional, standing Regular Army and volunteer units that had been, or would be, raised for temporary service (*see supra* at 9).

Five years later, however, Congress amended Section 4 of the Dick Act to authorize the President to call forth National Guard units where he "is unable *with the regular forces at his command* to execute the laws of the Union in any part thereof." Act of May 27, 1908, ch. 204, § 3, 35 Stat. 399, 400 (emphasis added). The effect of this change was to ensure that in cases where the use of the "regular forces" was inadequate to execute federal laws, the President would have to call upon the National Guard as the initial supplement to the standing army *before* deploying any volunteer units. As the Senate Committee on Military Affairs described it less than two years later, the 1908 amendment "constitutes the militia the second line of defense." S. Rep. 61-216, at 1 (1910). Moreover, in order to ensure the proper order of operations in cases where military participation within the United States was authorized—i.e., first to use the regular armed forces, followed by the National Guard when necessary, with volunteer units to be deployed only as a last resort—the 1908 amendment added a proviso to Section 5 of the Dick Act stating that "when the needs of the Federal Government arising from the necessity to execute

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[5] The provision read in full:

> That whenever the United States is invaded, or in danger of invasion from any foreign nation or of rebellion against the authority of the Government of the United States, or the President is unable, with the other forces at his command, to execute the laws of the Union in any part thereof, it shall be lawful for the President to call forth, for a period not exceeding nine months, such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose to such officers of the militia as he may think proper.

the laws of the Union, suppress insurrection, or repel invasion can not be met by the regular forces, the organized militia shall be called into the service of the United States in advance of any volunteer force which it may be determined to raise." Act of May 27, 1908, ch. 204, § 4, 35 Stat. at 400-401.[6]

There can hardly be any question that the term "the regular forces" in the 1908 Act—which has remained in the statute ever since, appearing today in 10 U.S.C. § 12406(3)—referred to the standing, professional *military* forces, who were commonly known as "Regulars." The effect of the law was to prescribe the National Guard as the "second line of defense," S. Rep. 61-216, at 1, i.e., as a supplement to the regular army. Requiring the President first to make use of "the regular" military forces, and to mobilize the National Guard only if and when those regular forces were inadequate to the task, helped to ensure that the militia remained subject to state control except where necessary. *See* Clayton D. Laurie & Ronald H. Cole, *The Role of Military Forces in Domestic Disorders, 1877-1945*, at 187 (the effect of Section 4 of the Dick Act, as amended in 1908, was that "the National Guard remained under state control until such time as it was needed and federalized by the president for cases in which Regular troops were unable to meet an emergency alone").

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References to "Regulars" and to "the Regular Army"—particularly in discussing the relationship between the standing military and the militia (or the volunteer forces)—pervade the congressional reports concerning the 1903 and 1908 legislation. *See generally* H.R. Rep. 57-1094 (1902); S. Rep. 57-2129 (1902); H.R. Rep. 60-1067 (1908); S. Rep. 60-620 (1908). That is

[6] The 1908-enacted proviso does not appear in current law. It was omitted when Congress codified Titles 10 and 32 of the U.S. Code in 1956 because the Judge Advocate General of the Army had concluded that Congress "impliedly repealed" it many years earlier. *See* H.R. Rep. 84-970, at 222-223 (1955).

hardly surprising, because such references to the U.S. military, especially the army—as well as the use of the term "the regular forces" itself to refer to military personnel—were commonplace in federal law and, more broadly, in writings within all three branches concerning the militia and the army, including in opinions of this Court.

For example, as this Court recounted just a few months before Congress enacted the Dick Act, in 1776 the Continental Congress promulgated a comprehensive set of Articles of War, one provision of which—Section XVII, Article 1—provided that "[t]he officers and soldiers of any troops, whether minute-men, militia, or others, being mustered and in continental pay, shall at all times, and in all places, when joined, or acting in conjunction *with the regular forces* of the United States … and shall be subject to be tried by courts-martial in like manner with the officers and soldiers *in the regular forces*, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender." 5 Journals of the Continental Congress 788, 805 (Sept. 20, 1776), quoted in *McClaughry v. Deming*, 186 U.S. 49, 55 (1902) (emphasis added).

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Similarly, when the U.S. Congress updated the Articles of War in 1806, Article 97 declared that "[t]he officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times, and in all places, when joined, or acting in conjunction with *the regular forces* of the United States, be governed by these articles, and shall be subject to be tried by courts martial, in like manner with the officers and soldiers *in the regular forces*, save only that such courts martial shall be composed entirely of militia officers." Act of Apr. 10, 1806, ch. 20, § 1, 2 Stat. 359, 371 (emphasis added). This Court quoted that provision in *McClaughry*, too, 186 U.S. at 56-57, as did Justice Story, decades earlier, in *Houston v. Moore*, 5 Wheat. (18 U.S.) 1, 62 (1820) (opinion of Story, J.).

In 1814, Congress enacted a law providing that "for the trial of militia, drafted, detached and called forth for the service of the United States, *whether acting in conjunction with the regular forces or otherwise*," courts martial "shall, whenever necessary, be appointed, held, and conducted in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting courts martial for the trial of delinquents in the army of the United States." Act of Apr. 18, 1814, ch. 82, § 1, 3 Stat. 134, 134 (emphasis added). Justices Washington and Story each quoted this provision in *Houston v. Moore*, *see* 5 Wheat. (18 U.S.) at 13-14 (opinion of Washington, J.); *id.* at 63 (opinion of Story, J.), and Justice Story did so again seven years later, in his opinion for the Court in *Martin v. Mott*, 12 Wheat. (25 U.S.) 19, 36 (1827).

This Court, too, has itself often referred to the standing army as "the regular forces" (or a similar term using the adjective "regular"). In his opinion for the Court in *McClaughry*, for example, issued just months before Congress enacted the Dick Act, Justice Peckham repeatedly drew a distinction between the militia (or the voluntary forces) and the "Regular Army" or "the regular forces" of the army. *See, e.g.*, 186 U.S. at 54 ("The reading of [the 77th article of the articles of war in § 1342 of the Revised Statutes of the United States] shows that the existence of other forces than those of the Regular Army is contemplated. When a volunteer force is spoken of as well as a regular army force, in the statutes of the United States, such force would seem to come within the description of some other force than that of the Regular Army."); *id.* at 56 ("We think … there was [in the 1776 Articles of War], in addition to the idea of state control over the troops from a state, a recognition of the fact that there was a substantial *difference between the regular forces and the militia*.") (emphasis added); *id.* at 57 (the 1806 Articles of War "still recognized the difference between the militia and the regular forces"); *id.* at 59 ("We cannot read the various provisions of … two acts of Congress [in 1898 and 1899] without being brought to

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the conclusion that they contemplated and particularly provided for the existence of other forces than that of the Regular Army. The Volunteer Army was one of such other forces, and also the militia when in active service of the United States, and the Marine Corps when detached and placed upon duty with the Army by order of the President. The volunteer force is certainly not the *regular force* or army, and if not, it must be some other force, and if so, its members cannot be tried by officers of the regular force or army.") (emphasis added).

The Court has used similar formulations in other cases, as well, both before and after Congress's use of the term "the regular forces" in the 1908 amendment to the Dick Act. *See, e.g.*, *Edmondson v. Bloomshire*, 78 U.S. 382, 383 (1871) ("Volunteer forces for the public service in the war of the Revolution were, in many instances, furnished by the States, and all such, as well as the regular forces, were paid for their services to a large extent in continental money, which so depreciated in a short time as to become almost valueless."); *Terrace v. Thompson*, 263 U.S. 197, 219 (1923) ("The fourth paragraph of article 1 of the treaty (37 Stat. 1504), invoked by the appellants, provides that the citizens or subjects of each shall be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; also from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."); *Gilligan v. Morgan*, 413 U.S. 1, 7 (1973) ("The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war.").[7]

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[7] *See also Perpich*, 496 U.S. at 342 (the Dick Act "created a table of organization for the National Guard conforming to that of the Regular Army, and provided that federal funds and Regular Army instructors should be used to train its members"); Brief for the [Federal] Respondents in *Perpich*, No. 89-542, at 12 (1990) ("The federal government relies on the federal element of the system—the [Army and Air National Guard of the United States]—as an essential reserve component of this Nation's armed forces. Under the 'Total Force' doctrine, … the regular (or active duty) armed forces are intentionally maintained at smaller levels than would be

Presidents and other Executive Branch actors have regularly done likewise. Most significantly, as noted above, in his 1901 speech that prompted Congress to develop the Dick Act, President Roosevelt asked Congress to ensure that the organization and armament of a new National Guard "should be made identical with those provided *for the regular forces*." (Emphasis added.)[8] And in 1908, just after Congress amended the Dick Act to refer to the "regular forces," Secretary of State Luke Edward Wright repeatedly distinguished between the militia and the "regular forces" in his annual report to the President, which Congress published. *See* Annual Report of the Secretary of War (Dec. 10, 1908), published in H.R. Doc. 1042, 60th Cong. 2d Sess., vol. I, at 36 ("It would be fortunate if the several States of the Union appreciated the importance of increasing their organized militia to the extent indicated, and in order to bring about this result the General Government might well, in furtherance of the act of May 27, 1908, still further increase the appropriations for the equipment of the militia and for general maneuvers of the militia with the regular forces."); *id.* at 157 ("It is now, under these conditions, possible to inaugurate a scheme which has been suggested, of dividing the country into territorial districts, each district to contain a sufficient number of Organized Militia and regular forces to constitute, on mobilization, an army corps."); *id.* at 168-169 ("One of the most important problems which confronts the department in its effort to develop an adequate field army in time of war by utilizing the Organized Militia of the country in conjunction with the regular forces is

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necessary to assure our security. For virtually any important military mission, the national security depends upon the immediate availability of trained [National Guard] troops to supplement the regular forces.").

[8] *See also, e.g.*, President Herbert H. Hoover, Annual Message to the Congress on the State of the Union (Dec. 3, 1929) ("In 1914 the officers and men in our regular forces, both Army and Navy, were about 164,000, in 1924 there were about 256,000, and in 1929 there were about 250,000. Our citizens' army, however, including the National Guard and other forms of reserves, increase these totals up to about 299,000 in 1914, about 672,000 in 1924, and about 728,000 in 1929.").

the one of providing field artillery for such an army."). The distinction also appeared in contemporaneous army regulations. *See* Regulations for the Army of the United States, Art. III, ¶ 10, at 10 (1908) ("Militia officers, when employed with the regular or volunteer forces of the United States, take rank next after all officers of like grade in those forces.").

These examples are only the tip of the iceberg. Yet they are more than enough to demonstrate the critical point for purposes of understanding the 1908 amendment to the Dick Act, and its modern-day iteration in 10 U.S.C. § 12406(3)—namely, that whenever anyone in one of the three branches discussed "the regular forces" in relation to the militia, the National Guard or the volunteer forces, they were referring to those persons serving within the standing U.S. military, particularly in the army.[9] Amicus is unaware of any counterexamples in which government officials or entities used the term "regular forces" to refer to civilian law enforcement officials in another executive department, as the President has done in this case.[10] It is, of course, possible that there were *some* counterexamples where civilian officials were referred to as "regular forces." If there were any such cases, however, the Solicitor General has

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[9] *Cf. also* A.V. Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 291 (7th ed. 1908) (noting that the standing army in England is known in "technical language" as "the Regular Forces").

[10] It is telling that the predicate for action in the amended Dick Act provision was very different from the precondition in first militia acts Congress enacted more than a century earlier. Section 2 of the "Calling Forth Act" of 1792 authorized the President to call forth the militia of a state if and when a federal judge agreed with the President that the execution of federal laws was obstructed by "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, *or by the powers vested in the marshals by this act*." Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (emphasis added); *see also* Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, 424 (likewise referring to combinations "too powerful to be suppressed by … the powers vested in the marshals by this act"). The "marshals" mentioned in these early calling-forth statutes were *civilian* law enforcement officials in the federal government. Congress could easily have followed that model in the Dick Act; instead, however, it provided that the President could call forth the Guard to help execute laws only if the regular *military* forces are unable to do so.

not identified them. And, in any event, they would be overwhelmed in volume by the countless references to army (and other standing military) personnel as "regular forces" and "regulars."

It is therefore unsurprising that in 1917, the Army Judge Advocate General (JAG) concluded that the amended Dick Act authorized the President "to call forth such number of the militia as he may deem necessary to execute the laws, *subject only to the condition that the available regular forces be employed for this purpose before recourse is had to the militia*." JAG Op. 58-100 (Mar. 12, 1917), as summarized in Digest of Opinions of the Judge Advocate General of the Army, 1912-1930, at 14–15 (1932) (emphasis added). (It is plain from the context (and the author) that the JAG was referring there to regular *army* forces.) Amicus has not been able to identify any cases, until this one, in which the precondition described by the JAG was not met, i.e., in which a President called forth National Guard units or members pursuant to § 12406(3) (or its predecessors) to help execute federal laws *without* having employed troops from the standing military services and without having determined that such "regular" military forces were "unable" to adequately ensure execution of those laws.[11]

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[11] The Solicitor General refers (App. 29) to President Nixon's use of the National Guard to help sort the mail during a postal strike in 1970. In the court of appeals, the Government asserted that Nixon "made no finding that the military was unable to accomplish that task." Ct. App. Doc. No. 6, at 16. That is incorrect. What is more, it also appears that National Guard units in question were not called into active federal service duty *pursuant to the Dick Act provision* during the 1970 postal strike but were instead ordered into active duty pursuant to a different authority relating to national emergencies.

In his first order related to the postal strike, President Nixon authorized the Secretary of Defense to use *both* the regular Armed Forces *and* units of the Army and Air National Guard to help restore postal service and to execute the postal laws of the United States. Executive Order 11519 §§ 1-3 (Mar. 23, 1970), 35 Fed. Reg. 5003 (1970). In order that the Secretary of Defense could call forth National Guard units to serve this function, Nixon further invoked the iteration of § 12406(3) then in place (10 U.S.C. §§ 3500 and 8500 (1970), which applied to the Army and the Air Force National Guards, respectively), but only after making the "determin[ation]" that "I am unable solely with the regular forces to cause the aforesaid laws to be executed." Executive Order 11519, Preamble. President Nixon thus appears to have called forth the National Guard

Because President Trump has not used regular military forces to assist or protect ICE in the Chicago area, he cannot—and he has not—determined that the Executive Branch would be "unable" to execute any federal laws with the aid of such regular military forces. Moreover, on any plausible understanding of what it means to be "unable" to execute federal laws, it is difficult to imagine that the President would be "unable" to ensure faithful execution of those laws *if* he were to first deploy regular military forces to assist ICE, assuming a sufficient number of such forces were available to perform that function.

For this reason alone, Applicants are unlikely to prevail on the merits of whether the § 12406(3) precondition was met in Illinois.

* * * *

In offering this argument about the proper meaning of "the regular forces," amicus does not mean to suggest that the President has legal authority to direct regular military forces to execute federal laws in Illinois. Whether or not the President may do so is anything but certain, particularly in light of the Posse Comitatus Act, 18 U.S.C. § 1385, which prohibits anyone from willfully using any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space

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simultaneously with the regular military forces, after having concluded that not enough of the latter were available to effectively execute the laws in question (presumably because so many of the regular armed forces were deployed to Southeast Asia). Moreover, in a proclamation he promulgated the same day as the executive order, Nixon declared a state of national emergency pursuant to 10 U.S.C. § 673 (1970) (the current version of which is codified at 10 U.S.C. § 12301(a)) as the basis for authorizing the Secretary to take steps to ensure the execution of the postal laws. *See* Proclamation 3972—Work Stoppages in the Postal Service (Mar. 23, 1970), 35 Fed. Reg. 5001 (1970). According to the Army's "After Action" report, the Department of Defense used only the "state of emergency" provision, and *not* the Dick Act provision, to order Guard units into active federal duty. United States Army, After Action Report: *Operation Graphic Hand, 1970*, at 154 (Aug. 27, 1970) (Annex E at 2); *accord Kurlan v. Calloway*, 510 F.2d 274, 277 (2d Cir. 1974) (recounting that the National Guard units were ordered to federal duty pursuant to the President's emergency declaration, without mentioning the Dick Act provisions).

Force "to execute the laws," "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." *See* App. 30 n.4 (acknowledging, with a citation to § 1385, that "[m]ilitary forces … do not regularly 'execute the law'").[12]

Nothing in the Constitution "expressly" authorizes the President (or the Secretary of Defense) to use the armed forces to execute federal laws.[13] In order to use the military for such a purpose, therefore, the President would need to be able to properly invoke an express *statutory* authority. And it is not clear that any such authority would be available here.

Some have speculated that the President might invoke 10 U.S.C. § 253(2), which provides that the President may, even without a request from state or local authorities, use "the militia or the armed forces, or both," to "take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it— … opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws." *See, e.g.*, Bob Bauer & Jack Goldsmith, *Here's What Trump Could*

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[12] If such forces would not execute any laws in Illinois, then the President might have power pursuant to Article II of the Constitution to assign them to perform a purely "protective" function that would not run afoul of the Posse Comitatus Act. In light of the fact, however, that the President purported to call National Guard forces into service in Illinois to "execute [federal] laws" pursuant to 10 U.S.C. § 12406(3), it is hard to imagine a scenario in which regular military forces would refrain from any law execution if they were expected to perform the same functions that the President anticipates the National Guard would perform—including, presumably, the possible use of coercive force against private parties who interfere with ICE's functions.

[13] During deliberations of the appropriations legislation that contained the posse comitatus provision, the Senate voted to strike out the adverb "expressly." 7 Cong, Rec. 4302 (1878). When the bill went to conference, however, the House conferees were so committed to the inclusion of that word that they threatened to scuttle the legislation altogether if it were not included, so as to ensure that the army could not "be used in all cases where implied authority might be inferred." The Senate conferees acceded to the House's insistence, and the adverb was restored in the final legislation. *Id.* at 4686 (remarks of Rep. Hewitt).

Unleash by Invoking the Insurrection Act, N.Y. Times (Oct. 18, 2025), https://www.nytimes.com/2025/10/18/opinion/trump-insurrection-act.html.

It is far from clear, however, that the President may use this provision of the so-called "Insurrection Act" to authorize the military to execute federal law in reaction to any and every concerted effort to "oppose[] or obstruct[]" the operation of such law.[14]

As Deputy Attorney General Nicholas Katzenbach explained in an important memorandum to President Johnson in 1964, Section 253(2), together with Section 252 (*see supra* note 14), is "designed to deal with situations where state and local law enforcement have completely broken down, either because local officials are themselves opposing and obstructing federal law or because they are unable or unwilling to control private groups that are in command of the situation." *Use of Marshals, Troops, and Other Federal Personnel for Law Enforcement in Mississippi*, 1 Supp. Op. O.L.C. 493, 496 (1964). Although those provisions might "appear on their face to confer broad authority to use troops to enforce federal law generally, whenever the President deems it necessary," Katzenbach explained, they are "limited … by the Constitution and by tradition." *Id.* Katzenbach informed the President that the

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[14] The term "Insurrection Act" refers to sections 251 through 254 of Title 10 collectively—a collection of provisions that Congress enacted (and amended) over the course of almost 80 years during the nation's first century. Congress first enacted the provision discussed in the text above, 10 U.S.C. § 253(2), as a clause within section 3 of the Civil Rights Act of 1871 (often referred to as the Ku Klux Act). *See* Act of Apr. 20, 1871, ch. 22, § 3, 17 Stat. 13, 14.

The language of a neighboring provision of the Insurrection Act, 10 U.S.C. § 252, which Congress enacted early in the Civil War, *see* Act of July 29, 1861, 12 Stat. 281, is similar to that of § 253(2), except that it focuses on cases in which the "the ordinary course of *judicial* proceedings" is obstructed. Section 252 provides that "[w]henever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

Department of Justice has "always" interpreted them "as requiring, as a prerequisite to action by the President," either "that state authorities are … directly involved, by acting or failing to act, in denials of federal rights of a dimension requiring federal military action," or that such state authorities "are so helpless in the face of private violence that the private activity *has taken on the character of state action*." *Id.* at 497 (emphasis added). Where no court order is involved, "reliance [on such provisions] must be placed on the premise that those engaging in violence are either acting with the approval of state authorities or have, like the Klan in the 1870s, *taken over effective control of the area involved*." *Id.* (emphasis added). The situation, in other words, "must be one which, in the judgment of the President, involves a serious and general breakdown of the authority of state and local government in the area affected." *Id.*; *see also id.* ("the use of military force to execute the laws has traditionally been regarded with disfavor—as a course of action that can be lawfully and properly pursued only as a last resort").[15]

As far as amicus is aware, the Executive Branch has adhered to this longstanding, limiting DOJ interpretation of these two Insurrection Act provisions to the present day. In a case such as this one—i.e., one that does not involve a request for assistance from local officials or any need for the President to help enforce compliance with court orders—no President has ever invoked Sections 252 or 253(2) in a manner contrary to the Katzenbach interpretation.

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[15] This understanding is consistent with the final provision of the Insurrection Act, 10 U.S.C. § 254, which requires that "[w]henever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order *the insurgents* to disperse and retire peaceably to their abodes within a limited time." (Emphasis added.) Congress has included this requirement in virtually every such "calling forth" statute going back to 1792. *See* Calling Forth Act of 1792, ch. 28, § 3, 1 Stat. 264, 264. As its language suggests, the provisions in question should be understood to require, at a minimum, some sort of an "insurgen[cy]" before the President may consider using military forces to execute federal laws in the United States.

Moreover, not only does that interpretation comport with the "tradition" Katzenbach described; it also reflects what must have been the enacting Congress's understanding, too, when it approved the Posse Comitatus Act seven years after it enacted what is now § 253(2). Recall that the prohibition in the Posse Comitatus Act does not apply in a case where an "Act of Congress" expressly authorizes the use of the armed forces "to execute the laws." If the predecessor of § 253(2) in the 1871 Civil Rights Act were understood to permit the President to use military forces to execute the laws in response to any and every "unlawful combination" or "conspiracy" to "oppose[] or obstruct[] the execution of the laws of the United States," the Posse Comitatus Act would have been virtually a dead letter upon enactment, because such a construction would threaten to encompass an endless array of common cases in which individuals band together to oppose a particular implementation of federal law in an unlawful manner. The 1878 Congress presumably did not understand the 1871 statute to have any such startling and dramatic effect—one that would, to say the least, be in tension with the nation's deep historical aversion to the use of the military to enforce domestic law.

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Amicus does not mean to suggest that this Court should opine on the scope of the President's powers to use the military pursuant to the Insurrection Act—to the contrary. This brief introduces the question of the proper scope of § 253(2) merely to explain that the Court should *not* assume that the President has any legal authority to use the "regular forces" to execute federal laws in a situation such as the one at issue here.

It is important to emphasize, in that regard, that if neither § 253(2) nor any other legal authority expressly empowers the President to use the "regular forces" in the military to help enforce federal laws in Illinois, it would *not* follow that the precondition for calling forth the National Guard pursuant to 10 U.S.C. § 12406(3) would be satisfied here. It is difficult to

imagine that Congress intended to afford the President the ability to use the National Guard for law-execution purposes in situations where he is "unable" to deploy the regular forces to do so only in the sense that Congress has denied the President the authority to make such use of the regular military. As far as amicus is aware, there is no basis for concluding that Congress intended such a counterintuitive result. Indeed, there is evidence to the contrary: A cognate provision, 10 U.S.C. § 12405, derived from Section 9 of the Dick Act, *see* Act of Jan. 21, 1903, ch. 196, § 9, 32 Stat. at 776, provides that "[m]embers of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or the Air Force, as the case may be, except those applicable only to members of the Regular Army or Regular Air Force, as the case may be." In other words, Congress designed the militia calling-forth authority to enable the President to use National Guard only in the same manner that he may make use of the regular military forces (and only if and when those regular forces are unable to ensure sufficient execution of federal laws)—not as a backdoor that would invite the militarization of law-execution in cases where Congress has foreclosed the use of the standing Armed Forces themselves.

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* * * *

For these reasons, the Applicants are unlikely to prevail on the merits, regardless of the proper understanding of what it means for the President to be "unable" to execute federal laws because of private obstructions or violence.

CONCLUSION

The Court should deny the application for a stay.

Respectfully submitted,

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