U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 10, 2025

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Donald J. Trump, President of the United States, et al. v. State of Illinois and City of Chicago, No. 25A443

Dear Mr. Harris:

On October 29, 2025, the Court directed the government and respondents to file supplemental letter briefs addressing "[w]hether the term 'regular forces' refers to the regular forces of the United States military, and, if so, how that interpretation affects the operation of 10 U.S.C. § 12406(3)." In short, the answer to the first question is "no"; and the answer to the second question is that, regardless of how "regular forces" is interpreted, the President permissibly called up the National Guard in Illinois pursuant to Section 12406(3).

I. Under 10 U.S.C. 12406(3), the President may call up the National Guard when he is "unable with the regular forces to execute the laws of the United States." In that provision, the term "regular forces" does not refer to the standing military. It refers instead to the civilian forces that regularly "execute the laws" at issue but are "unable" to do so in present circumstances.

This interpretation is supported by the text, structure, and history of Section 12406. That provision conditions the President's ability to use the National Guard "to execute the laws" on his inability to execute the laws at issue using "the regular forces." Thus, the "regular forces" are most naturally understood to be the civilian forces with whom the President regularly executes the relevant laws, not the standing military, which generally does not—indeed, often cannot—execute federal law. That understanding is bolstered by the fact that the "regular forces" condition is included only in Section 12406(3), but not in Sections 12406(1) and 12406(2), which authorize the President to call up the National Guard to address invasions and rebellions—situations most naturally addressed by the standing military. The selective imposition of that condition makes sense only if the "regular forces" are civilian law-enforcement officers rather than the standing military: civilian law-enforcement officers are less well suited to address invasions and rebellions, whereas the standing military is often less well suited to address obstruction of civil law enforcement. Finally, there is a strong tradition in this country of favoring the use of the militia rather than the standing military to quell domestic disturbances. Indeed, the Constitution expressly provides that "the Militia," not the standing military, may be called forth "to execute the Laws of the Union" in times of domestic disturbance. U.S. Const. Art. I, § 8, Cl. 15. Nothing in the history of Section 12406 suggests that the statute was intended or has been understood to invert that norm,

by requiring that the President first consider invoking the exceptions under which the standing military can be deployed domestically to ensure the execution of federal law.

II. In all events, a stay of the injunction below is warranted whether or not the term "regular forces" in Section 12406(3) refers to the standing military. In calling up the National Guard in Illinois, the President "determined that the regular forces of the United States are not sufficient to ensure the laws of the United States are faithfully executed." D. Ct. Doc. 62-1, at 16 (Oct. 8, 2025). That determination did not specify who "the regular forces" were, much less exclude the standing military from consideration. See *ibid.*

Under *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827), and its progeny, courts must presume that the President made the required determination, and they cannot review the adequacy of that determination—especially if that requires second-guessing the Commander in Chief's judgment about the proper deployment of the standing military. If review is available at all, courts must grant extraordinary deference to the President in the exercise of his Commander-in-Chief power, akin to highly deferential rational-basis review, under which the President's determination should be upheld if there is any plausible basis for it. Cf. *Trump* v. *Hawaii*, 585 U.S. 667, 704 (2018). At minimum, the President's determination must be upheld if there is even a "colorable assessment" that the President is "unable with the regular forces" to execute federal immigration laws within the meaning of Section 12406(3). *Newsom* v. *Trump*, 141 F.4th 1032, 1051 (9th Cir. 2025) (per curiam). Here, there was ample basis for the President to determine that execution of both the immigration laws and the laws proscribing violence against federal personnel and property would be "significantly impeded" (*id.* at 1052) if he were forced to use the standing military to perform protective functions that the National Guard is better suited to undertake. DHS agents are facing incessant violent resistance on the streets of Illinois—including ambushes where their vehicles are rammed by trucks and dangerous projectiles are thrown at them, potentially motivated by bounties placed on their heads by violent gangs and transnational cartels. Federal agents faced with such threats and violence—in Chicago and elsewhere—operate, on a daily basis, in a climate of fear for their lives and safety, forced constantly to focus on self-defense and protection instead of executing federal law. And state and local authorities exacerbate those fears by using reckless epithets like "jack-booted thugs" to publicly malign federal immigration agents who are doing the work that Congress charged them to execute. Given the nature of the problem in Illinois, it was a reasonable exercise of the President's discretion to deploy National Guardsmen, who are civilians temporarily called up to serve with deep experience in deescalating domestic disturbances among their fellow citizens, rather than the standing military, whose primary function is to win wars by deploying lethal force against foreign enemies. It would turn Section 12406(3) on its head to insist that the President must nevertheless instead use the standing military to protect DHS agents while they execute federal immigration laws.

ARGUMENT

I. The "Regular Forces" Referred To In 10 U.S.C. 12406(3) Are The Civilian Forces That Regularly "Execute The Laws" Currently Being Obstructed

The President is authorized to "call into Federal service members and units of the National Guard of any State" when he determines that he "is unable with the regular forces to execute the laws of the United States." 10 U.S.C. 12406(3). The term "regular forces" must be construed in

"the specific context in which [it] is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). While the term "regular forces" may in other situations refer to the standing military, the particular text, structure, and history of Section 12406(3) demonstrate that the term in this provision refers instead to the civilian forces that regularly execute the laws currently being obstructed.

A. The text and structure of Section 12406 do not support construing the term "regular forces" to refer to the standing military

1. In Section 12406(3), the term "regular forces" is contained within the broader phrase "unable with the regular forces to execute the laws." Accordingly, the term should be construed in light of the function it serves in that phrase. See *Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 318 (2006) (recognizing that the "meaning" of a term in a statute often "depends on the context in and purpose for which it is used").

Section 12406(3) authorizes the President to call up the National Guard when he is "unable * * * to execute the laws," and "with the regular forces" qualifies that condition. Instead of asking whether the President is unable to execute the laws with the use of any and all federal officers and employees, the provision focuses on whether the President is unable to execute the laws "with the regular forces" in particular. Put differently, the term refers to a sub-set of federal actors—"the regular forces"—and asks whether President is able to "execute the laws" with them, obviating the need to call up the National Guard. In this context, "regular forces" most naturally refers to the specific civilian forces that regularly execute the laws at issue that are currently being obstructed. It is *their* inability to execute the laws that necessitates the use of the National Guard.

By contrast, it is unnatural in this context to construe "regular forces" to refer to the standing military. After all, the standing military does not "regular[ly]" "execute the laws." 10 U.S.C. 12406(3). Indeed, under the Posse Comitatus Act, the standing military is generally *prohibited* from "execut[ing] the laws," unless "expressly authorized by the Constitution or Act of Congress." 18 U.S.C. 1385. Of course, the standing military can sometimes execute the laws under other federal statutes, such as the Insurrection Act. See, *e.g.*, 10 U.S.C. 252, 253. And the standing military also can facilitate the execution of the laws pursuant to the President's Article II authority "to use troops for the protection of federal property and federal functions." *Authority to Use Troops to Prevent Interference With Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions*, 1 Supp. Op. O.L.C. 343, 343 (1971); see *id.* at 344 (discussing *In re Neagle*, 135 U.S. 1 (1890), and *In re Debs*, 158 U.S. 564 (1895)). Nevertheless, it would be odd for Congress to condition the President's ability to call up the National Guard to execute the obstructed laws on whether he is unable to execute those laws with the standing military, when Congress by another statute has generally prohibited the standing military from executing the laws.

2. The structure of Section 12406 further confirms that "regular forces" refers to the civilian law-enforcement officers who regularly execute the obstructed laws. Unlike clause (3), clauses (1) and (2)—which authorize the President to call up the National Guard to address invasions and rebellions—do not impose a condition that he must first determine he is "unable" to address those threats "with the regular forces." The selective inclusion of that condition only in clause (3) would be illogical if the regular forces referred to the standing military.

If the "regular forces" condition refers only to the civilian law-enforcement officers who regularly execute the obstructed laws at issue, it makes perfect sense to include that condition only in clause (3). Civilian law-enforcement officers are typically not as well suited as the armed forces to respond to invasions or rebellions. Congress thus appropriately deemed those officers irrelevant to whether the President can call up the National Guard to address the threat of invasions or rebellions.

By contrast, if the "regular forces" condition refers to the standing military, it would make no sense to include that condition only in clause (3). After all, the standing military is far better suited to address invasions and rebellions than obstructions to civil law enforcement. It would be entirely backwards for Congress to require the President to determine that he is unable to use the standing military before using the National Guard to address threats to civil law enforcement, while allowing the President to use the National Guard to address the threat of invasions or rebellions regardless of whether he is able to use the standing military instead.

Consider, for example, two different types of threats to the enforcement of a particular federal tax. On the one hand, there could be organized violent resistance targeting the federal tax collectors, analogous to the Whiskey Rebellion. See Appl. 32-33. Such violence would constitute a "rebellion" authorizing the President to call up the National Guard under Section 12406(2), whether or not the "regular forces" (however defined) were also able to suppress the rebellion. On the other hand, there could be a nationwide strike of the tax collectors, analogous to the 1970 postal strike. See Appl. 29. If the "regular forces" meant the standing military, then the President would be unable to call up the National Guard to execute the tax law under Section 12406(3) unless the standing military was "unable" to do so. But for purposes of calling up the National Guard, it would be perverse to require the President to first consider the standing military's ability to collect a federal tax when he need not consider their ability to suppress a rebellion against the tax collectors; and it would be even more perverse to actually require him to use the standing military rather than the National Guard to collect the tax (if an exception to the Posse Comitatus Act applied). The statutory context, therefore, confirms that "regular forces" in this scenario refers to the federal tax collectors who regularly execute the tax law: given their strike, the President would be "unable" to execute the tax law with them, and thus he could call up the National Guard to assist in collecting the tax, whether or not the standing military was able to do so too.

B. The historical tradition and practice before and after Section 12406 confirm that the term "regular forces" does not refer to the standing military

1. This Nation has a longstanding norm and tradition favoring the use of the militia over the standing army to ensure the execution of the laws during domestic disturbances. That preference has its roots in the "widespread fear" at the Founding "that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States." *Perpich* v. *Department of Def.*, 496 U.S. 334, 340 (1990). While recognizing the need to provide for the common defense, the Framers were well aware of the English experience, where the king "by means of a standing army quartered among the people, was able to overawe them, and compel them to submit to the most arbitrary, cruel, and illegal measures." *Aymette* v. *State*, 21 Tenn. 154, 157 (1840). Because of "[t]he sentiment * * * strongly disfavor[ing] standing armies[,] the common view [at the Founding] was that adequate defense of country and laws could be secured

through the Militia—civilians primarily, soldiers on occasion." *United States* v. *Miller*, 307 U.S. 174, 179 (1939).

The Constitution echoes the Framers' preference for using the militia rather than the standing army for law-enforcement assistance. While silent on whether a standing army can engage in domestic law-enforcement activities, it grants Congress the authority "[t]o provide for calling forth the Militia to execute the Laws of the Union" (and also to "suppress Insurrections and repel Invasions"). U.S. Const. Art. I, § 8, Cl. 15. The reason for that authority, the Constitution's proponents explained, was to mitigate the threat to individual liberty posed by a standing army—especially a standing army engaged in domestic law enforcement.

For example, Alexander Hamilton argued that because "the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate," the federal government could "dispense with" a standing army. The Federalist No. 29, at 182 (Jacob E. Cooke ed., 1961). Likewise, during the Virginia ratification debates, James Madison defended giving the federal government authority to call up the militia because, compared to the standing army, the militia was "safe" and rendered reliance on the latter "unnecessary." 10 *The Documentary History of the Ratification of the Constitution* 1301 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (*Documentary History*). "[T]he only possible way to provide against standing armies, is, to make them unnecessary," Madison explained, and "[t]he way to do this, is to organize and discipline [the] militia." *Id.* at 1302; see *id.* at 1272. That included using the militia to execute the laws when necessary. Patrick Henry had objected to a prior statement made by Madison "that the militia should be called forth to quell riots," arguing that, in England, the "civil force is sufficient to quell riots." *Id.* at 1300. Madison responded that there was never "a complaint in [England], that the militia could be called forth" to suppress a riot; to the contrary, "the militia are proper to quell it, to prevent resort to" a standing army. *Id.* at 1302-1303. But, Madison continued, the militia should be called forth only when civilian law enforcement is unable to execute the laws. See *id.* at 1303. In short, Madison viewed the Militia Clause as allaying fears about a standing army because the militia, not the standing army, would execute the laws when civilian law enforcement is unable.

That is also how Joseph Story defended the constitutional provision. "[I]f the militia could not be called in aid" of civil authorities in cases of "violent opposition to the laws," then "it would be absolutely indispensable to the common safety to keep up a strong regular force in time of peace." 3 Joseph Story, *Commentaries on the Constitution of the United States § 1196*, at 81-82 (1833). But that, Story continued, "would certainly not be desirable, or economical; and therefore this power over the militia is highly salutary to the public repose, and * * * an additional security to the public liberty." *Id.* at 82.

Congress's first comprehensive actions under the Militia Clause underscore the Founding era's preference for using the militia to ensure the execution of federal laws. The 1792 and 1795 Militia Acts authorized the President, whenever the execution of the laws was obstructed by forces too powerful for civilian officers, to call forth only the militia, not a standing army. See Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264; Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424. It was not until the Insurrection Act of 1807 that Congress authorized the President to use the standing army when the 1795 Militia Act allowed him to call forth the militia. See Act of March 3, 1807, ch. 39, 2 Stat. 443. And in none of those statutes did Congress require the President to first determine that the

standing army was unable to address the problem before he could call forth the militia. Thus, if "regular forces" in Section 10246(3) refers to the standing army, the provision is profoundly at odds with this constitutional tradition. But if it refers to the civilian law-enforcement forces being obstructed, it advances and reinforces the same tradition.

2. There is no basis to conclude that Congress reversed the historical preference for using the militia rather than the standing army to ensure the execution of federal laws when it enacted the "unable with the regular forces" language in the statutory predecessor to 10 U.S.C. 12406(3)—namely, in the 1908 amendments to the Dick Act of 1903. See Act of May 27, 1908, ch. 204, § 3, 35 Stat. 400 (amending Act of Jan. 21, 1903, ch. 196, § 4, 32 Stat. 776). To the contrary, those early 20th century laws sought to strengthen and modernize the militia, not to newly subordinate it to the standing army.

Following the Civil War, "the United States militia reached its nadir." Robert Reinders, *Militia and Public Order in Nineteenth-Century America*, 11 J. Am. Stud. 81, 91 (1977) (Reinders). During that time, "less than one-third of the states" had an organized militia; many that did were undermanned and underequipped; and the "largest state militia in the country"—New York's—had, as "its chief task[,] * * * keeping * * * historical records." *Id.* at 91-92. Thus, during the nationwide railroad strikes in 1877, the standing army had to step into the gap to maintain order. See *id.* at 93-94. But states began to reorganize their militias "following the 1877 labor disputes, often under the name 'National Guard,'" and were focused on "controlling late nineteenth-century labor unrest." Robert Leider, *Deciphering the "Armed Forces of the United States"*, 57 Wake Forest L. Rev. 1195, 1227 (2022) (Leider). State-level reforms to the militia led the National Guard "to be considered the principal savior of law and order in industrial disputes" and to be called upon "for riot duty 328 times between 1886 and 1895." Reinders 97-98. "[F]ailures in the Spanish-American War," however, prompted national reform. Leider 1227. Congress attributed those failures "to the fact [the militia] was regarded as a local State force and was divided in control and heterogeneous in training, discipline, armament, and equipment, with short period[s] of enlistment." H.R. Rep. No. 1067, 60th Cong., 1st Sess. 1 (1908) (1908 House Report).

Through the 1903 Dick Act and the 1908 amendments, Congress sought to transform the organized militias "into an effective fighting force." *Perpich*, 496 U.S. at 341-342; see H.R. Rep. No. 1094, 57th Cong., 1st Sess. 2 (1902) (1902 House Report) (noting the bill "would result in greatly improving the efficiency of the National Guard as the second line of the country's defense in time of war"). To that end, the Dick Act provided uniform standards "for organizing, arming, and disciplining the militia" and revamped the extant law governing the militia, which had been in effect since 1792. See 1902 House Report 3; Frederick T. Wilson, *Federal Aid in Domestic Disturbances: 1787-1903*, S. Doc. No. 209, 57th Cong., 2d Sess. 255 (1903). The 1908 amendments to the Dick Act further advanced the purpose of placing the National Guard "upon such a footing in respect to efficiency and material equipment as will enable [it] to instantly respond to a call for troops issued by the President." 1908 House Report 5 (quoting the War Department's summary of the House bill's purpose); see S. Rep. No. 630, 60th Cong., 1st Sess. 2 (1908) (endorsing the House report, which involved a bill similar to the one that was adopted by the Senate). Major changes in the 1908 amendments included allowing the National Guard to serve "either within or without the territory of the United States," *Perpich*, 496 U.S. at 343, increasing funding for the National Guard, excising a nine-month limit on the time the National

Guard may be federalized, and providing that the National Guard should be called into service before any volunteer force, 1908 House Report 5-6.

Yet there is no indication that, merely by using the term "regular forces," Congress intended to reverse the historical preference for using the militia rather than the standing army to address domestic disturbances obstructing execution of federal law. Just the opposite: Congress expressly recognized and legislated against the backdrop of that preference. The report on the Dick Act from the House Committee on Militia acknowledged "the hereditary fear of standing armies, as a menace to liberty in time of peace," which led the Framers to provide for the federal government to call forth the militia from the states. See 1902 House Report 22-23. And it included a curated list of presidential statements, which stretched back to the Founding, affirming that the militia is "the great bulwark of defense and security for free States, and the Constitution * * * committed to the national authority a use of that force, as the best provision against unsafe military establishment." *Id.* at 7 (quoting President Madison). Indeed, it recited the view of numerous Presidents that the militia—not the standing army—is the first line of defense in cases of domestic disturbances. For example, the report recounted President Jackson's observation that the country should "rely in the first instance upon the" militia "[t]o suppress domestic violence." *Id.* at 9. It also noted that President Van Buren believed that "[i]n periods of danger and alarm we must rely principally upon a well-organized militia." *Ibid.* And it quoted President Tyler's declaration that "[i]n all cases of emergency the reliance of the country is properly placed in the militia of the several States." *Ibid.* There is no indication that the 1908 Congress concluded otherwise, *sub silentio*. And there certainly is not the "more explicit" indication that one would expect if Congress intended to "impinge on a tradition so well grounded in history and reason." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 745 (1982).

Accordingly, the strong historical preference for using the militia rather than the standing army to quell domestic disturbances reinforces the text and structure of Section 12406(3), including the "unable with the regular forces" phrase adopted in the 1908 amendments to the Dick Act. 35 Stat. 400. Read in that light, there is no reason to think that Congress intended to newly subordinate the National Guard below the standing military—let alone that it perversely intended to do so *only* for obstructions of civil law enforcement, not for invasions and rebellions, even though the standing military is far better suited to address the latter than the former. If anything, since the legislative reforms were revitalizing the militia by "increasing [its] efficiency," 1908 House Report 3, the statute reflects a natural preference that the National Guard play a larger, not smaller, role in quelling domestic disturbances. There is thus every reason to think that Congress preserved the historical preference and that "regular forces" in this particular statutory context simply refers to the civilian forces that regularly execute the laws being obstructed—consistent with how Madison described the operation of the Militia Clause. See 10 *Documentary History* 1302-1303.

3. Post-enactment practice is consistent with that interpretation of "regular forces." 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 *ibid.* (citing 10 U.S.C. 3500 & 8500 (1964)). And in finding that he was "unable solely with the regular forces" to execute the postal laws, he was clearly referring to the postal workers rather than the standing military. See *ibid.* After all,

he also authorized the Secretary of Defense to use the standing military as necessary; he did not say that the standing military alone would be unable to solve the problem; and he did not direct that the National Guard could be used only insofar as the standing military proved insufficient. See *ibid.* Indeed, Presidents have traditionally used the standing military to execute the laws "only as a last resort" "when no other solution seem[ed] possible." *Use of Marshals, Troops, and Other Federal Personnel for Law Enforcement in Mississippi*, 1 Supp. Op. O.L.C. 493, 497 (1964).

In sum, it would be unprecedented and profoundly ahistorical to require the President to treat the standing military as the first line of defense for ensuring that federal laws can be executed, with the National Guard relegated only to a secondary role despite their comparative advantage. Instead, as the immediate statutory context suggests, the "regular forces" for purposes of Section 12406(3) are the civilian law-enforcement officials that regularly "execute the laws" currently being obstructed. Here, those are the DHS agents charged with enforcing federal immigration law and protecting their colleagues, and the President acted well within his discretion in finding that they were unable to do their jobs without the support of the National Guard in light of the violent, organized resistance they are facing. See Appl. 27-31; Reply 8-11.

II. Regardless Of How The Term "Regular Forces" Is Interpreted, The President Permissibly Called Up The National Guard In Illinois Pursuant To Section 12406(3)

In any event, a stay of the injunction below is warranted regardless of whether the term "regular forces" in Section 12406(3) refers to the standing military. The President's determination to call up the National Guard is a core exercise of his power as Commander in Chief over military affairs, based on an explicit delegation from Congress. That determination is not judicially reviewable at all; at minimum, it is entitled to extremely deferential review, under which it should be upheld.

A. If "regular forces" refers to the standing military, judicial review of the President's determination is even more improper

1. As the government has explained, Appl. 19-27; Reply 3-7, the President's determination that the conditions for calling up the National Guard under Section 12406(3) were satisfied is not subject to judicial review under *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827), and its progeny. That bar on judicial review extends to the proper interpretation of "the regular forces" with whom the President is "unable * * * to execute the laws." 10 U.S.C. 12406(3).

On that issue, like others under the statute, "the authority to decide whether the exigency has arisen[] belongs exclusively to the President, [such] that his decision is conclusive upon all other persons." *Martin*, 25 U.S. at 31. At minimum, the government's view that the term "regular forces" refers to the relevant civilian law-enforcement officers is entitled to extraordinary deference and "reflects a colorable assessment of the * * * law" that may not be judicially overridden. *Newsom* v. *Trump*, 141 F.4th 1032, 1051 (9th Cir. 2025) (per curiam); see *NRC* v. *Texas*, 605 U.S. 665, 681 (2025) (holding that "ultra vires review"— the cause of action asserted by respondents here, Appl. Appx. 63a n.13—"does not apply simply because [the Executive] has arguably reached a conclusion which does not comport with the law" (quotation marks omitted)).

2. Moreover, when the President "determined that the regular forces of the United States are not sufficient to ensure the laws of the United States are faithfully executed" in Illinois, he did not specify who those "regular forces" were, let alone exclude the standing military from consideration. See D. Ct. Doc. 62-1, at 16 (Oct. 8, 2025). Courts thus must presume that he also considered the standing military in making that determination if that is the proper interpretation of Section 12406(3).

As *Martin* explained, "[w]hen the President exercises an authority confided to him by law, the presumption is[] that it is exercised in pursuance of law." 25 U.S. at 32-33. The President is not an "agency" subject to the APA, *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992), and courts may not demand that he write detailed reasons supporting his determinations to facilitate judicial review. Instead, the "presumption of regularity" applies, and it sustains the President's decision to federalize the National Guard "in the absence of clear evidence to the contrary." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chem. Found, Inc.*, 272 U.S. 1, 14-15 (1926)).

Here, there is no "clear evidence" that the President did not consider the standing military to be the "regular forces." To be sure, the government has consistently argued that the President's determination satisfied Section 12406(3) because the term "regular forces" refers to ordinary civilian law-enforcement agents. See Appl. 30 n.4; C.A. Stay Appl. 16. But even if that is wrong, in light of the presumption of regularity, it was not the government's burden to clearly establish that the President properly construed the term; it was respondents' burden to clearly establish that he improperly construed the term. Because they did not (and cannot) do so, "the validity of" the President's regular-forces interpretation "will not be reviewed by the courts." *Chem. Found.*, 272 U.S. at 15.

3. Likewise, there can be no judicial review of "the basis of fact on which" the President made the presumed determination that he was unable within the meaning of Section 12406(3) to execute federal immigration laws in Illinois with the standing military. *Chem. Found.*, 272 U.S. at 15. Indeed, if the question of inability to execute the immigration laws focuses on the standing military rather than on DHS agents, then it is even more essential that "the legality of [the President's] order[]" rests exclusively "on his own judgment of the facts," not "the finding of those facts upon the proofs submitted to a" court. *Martin*, 25 U.S. at 33. After all, courts would far exceed their constitutional role if they tried to second-guess the President's judgment about whether the members of the standing military are more urgently needed elsewhere or are less well-suited than National Guardsmen to suppress violent resistance on the streets of American cities. See pp. 10-12, *infra*.

"Under Article II of the Constitution, the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces." *Austin* v. *U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring). His decision on how best to deploy troops falls squarely within his constitutional prerogative. See, *e.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at this command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."). Furthermore, because the deployment of troops implicates issues of foreign affairs, it also invokes the President's role as the "sole organ of the nation in its external relations." *United States* v. *Curtiss-Wright Export*

Corp., 299 U.S. 304, 319 (1936); see *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 20, 27-30 (2011) (discussing the President's constitutional authority to deploy troops abroad).

In this context, injunctions second-guessing where troops are deployed fall far outside the remedies "traditionally accorded by courts of equity." *Trump* v. *CASA, Inc.*, 606 U.S. 831, 841 (2025). The tradition is instead refusal by "courts * * * to intrude upon the authority of the Executive in military and national security affairs." *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988). In *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), for instance, this Court determined that a suit seeking injunctive relief involving the "training, weaponry and orders" of the Ohio National Guard did not present a justiciable controversy. *Id.* at 4; see *id.* at 6, 11. The Court explained that "[t]he complex, subtle, and professional decisions as to the * * * control of a military force are essentially professional military judgments." *Id.* at 10. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible" or "to conceive of an area of governmental activity in which the courts have less competence." *Ibid.* Indeed, *Gilligan* so held notwithstanding that the injunction requested there would run only against state officials, *id.* at 3—not even, as here, federal officials following the President's direct commands. For good reason, as *any* injunction involving the "orders of the Guard[] would * * * embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government"—namely, the constitutional authority that Congress and the President, "as the Commander in Chief of the Armed Forces," have over the Guard. *Id.* at 6-7.

Again, these constitutional problems would be exacerbated if "regular forces" in Section 12406(3) meant the standing military. Federal judges have neither the competence nor the authority to second-guess the Commander in Chief's judgment that the standing military is better deployed elsewhere or that the National Guard is better suited to address the problem at hand.

B. The President had reasonable grounds to determine that he was unable to execute the laws within the meaning of Section 12406(3) even if the "regular forces" refers to the standing military

Even assuming that the President's regular-forces determination is subject to review, it should be upheld. Given the separation-of-powers and national-security concerns implicated by judicial review of the Commander in Chief's judgments about troop deployments, any review must be "highly constrained" and "deferential." Cf. *Hawaii* v. *Trump*, 585 U.S. 667, 703-704 (2018); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring in the judgment). At most, it should be akin to "rational basis review," *Hawaii*, 585 U.S. at 704, under which the President's determination "is not subject to courtroom fact-finding," could "be based on rational speculation unsupported by evidence or empirical data," and must be upheld unless respondents "negat[e] every conceivable basis which might support it," *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). And here, there was, to say the least, a "colorable basis" for the President to conclude that, in Illinois, he was unable to execute the laws within the meaning of Section 12406(3) with the standing military. See *Newsom*, 141 F.4th at 1052.

To be sure, the standing military was undoubtedly an available *option* to quash the violent resistance to federal immigration enforcement. As the government has previously explained, DHS agents in Illinois, as in Los Angeles, have been subjected to vicious assaults—including incidents

where projectiles are thrown at them; their vehicles are blocked and the tires slashed; other vehicles ambush and ram them; and bounties are placed on their heads by gangs and cartels. See Appl. 8-10 & n.1; see also *Chi. Headline Club* v. *Noem*, No. 25-cv-12173, Doc. 173-2, at ¶¶ 43-73 (recounting more violence like this against DHS officials in Illinois following the entry of the injunction in this case); Press Release, DHS (Nov. 9, 2025), https://www.dhs.gov/news/2025/11/09/border-patrol-agents-face-shots-fired-vehicle-rammings-bricks-thrown-chicago (Nov. 9, 2025) (report by DHS that, this past weekend, attackers fired shots at DHS agents, threw bricks at them, and rammed their vehicles). To counteract this violent obstruction, the President authorized the National Guard to take necessary measures to protect federal personnel and property in Illinois, see D. Ct. Doc. 62-1, at 17, and such protective functions can also be performed by the standing military under Article II notwithstanding the Posse Comitatus Act, see p. 3, *supra*. Nevertheless, the phrase "unable with the regular forces" in Section 12406(3) "does [not] suggest that activation is inappropriate so long as any continued execution of the laws is feasible." *Newsom*, 141 F.4th at 1051. Instead, the condition for activating the National Guard is satisfied so long as execution of the laws with the regular forces is "significantly impeded." *Id.* at 1052.

Here, the President could reasonably determine that using the standing military rather than the National Guard to protect DHS personnel and property in Illinois would significantly impede execution of the federal immigration laws because the standing military is less well suited than the National Guard to perform such protective functions on the streets of American cities. After all, the standing military's primary function is to win wars by deploying lethal force against foreign enemies, whereas the National Guard traditionally helps to keep the peace among the citizenry during domestic disturbances. In fact, one of respondents' own witnesses, a retired Army general, stated that soldiers in the standing army have "an aggressive mindset" because their "mission" is to "destroy the enemy," not "try to prevent confrontation and reduce the use of lethal force." D. Ct. Doc. 13-7, at ¶ 37 (Oct. 6, 2025). Likewise, given the strident opposition of state and local political leaders, who are actively campaigning for DHS to leave Illinois and have compared federal agents to roving bands of violent criminals and Nazi troopers, see Appl. 11, the President could reasonably have determined that deploying the standing military would result in even more strident resistance, resulting in even more "tepid" support from state and local police, see *ibid.* Similarly, the nature of the violent opposition encountered may have led the President to conclude that the National Guard, not the standing military, is uniquely adapted to achieve the protective mission. As violent mobs confronted ICE agents in Chicago, leading them to fear for their lives on a daily basis, the President could reasonably have determined that the members of the National Guard—with their greater local knowledge, ties to the community, and domestic focus—would be more effective than active-duty soldiers in addressing those threats.

Although the record below does not comprehensively address this specific factual issue, that is only because respondents never argued that the term "regular forces" referred to the standing military and instead affirmatively agreed with the government that the term referred to civilian law-enforcement agents. See C.A. Stay Mot. Add. A345-A347. So under "[t]he presumption of regularity" that the President is afforded, this factual issue cannot be contested by respondents given "the absence of clear evidence to the contrary," especially when all available evidence supports the President's determination. *Chem. Found.*, 272 U.S. at 14-15.

Moreover, there is ample support for this factual issue in the record created in parallel litigation. For example, during trial in a case involving the federalization and deployment of the

National Guard to Portland, Oregon, the Acting Vice Chief of the National Guard Bureau testified about the National Guard's experience in addressing domestic civil disturbances, emphasizing that deployment of Guardsmen often has a calming effect given their ties to the community and their mindset as ordinary civilians temporarily called up to serve. See *Oregon* v. *Trump*, No. 25-cv-1756, Oct. 31, 2025 Tr. at 596-599 (D. Ore.). In fact, when the President deployed both the National Guard and the Marines to Los Angeles this summer given the massive riots at the time, a commanding General testified that the Marines were restricted to guarding federal facilities—given their experience protecting embassies around the world—while the Guardsmen protected DHS personnel on city streets from the threat of armed confrontations by fellow citizens. See *Newsom* v. *Trump*, 25-cv-4870, Aug. 12, 2025 Tr. at 214-215 (N.D. Cal.). All of this confirms why use of the standing military to quell domestic violence "only when no other solution seems possible has been the most frequent presidential practice." 1 Supp. Op. O.L.C. at 497. The President here acted well within his discretion under Section 12406(3) in adhering to that practice by calling up the National Guard instead.*

CONCLUSION

For those reasons, and those the government provided in its application and reply, the Court should stay the district court's order of October 9, 2025.

Sincerely,

D. John Sauer
Solicitor General

cc: See Attached Service List

* In any event, the President also properly called up the National Guard under Section 12406(2). He permissibly determined that the violent, organized resistance to federal immigration enforcement constituted "a rebellion or danger of a rebellion," 10 U.S.C. 12406(2); see Appl. 31-34, and Section 12406(2) is not conditioned on the unavailability of the "regular forces" (however defined), see pp. 3-4, *supra*.

SERVICE LIST: TRUMP, ET AL. V. ILLINOIS, ET AL.

Jane Elinor Notz
Office of the Attorney General, State of Illinois
115 South LaSalle Street
23rd Floor
Chicago, IL 60603
JANE.NOTZ@ILAG.GOV
Ph: 312-814-5376

Steven Edwards Art
Loevy & Loevy
311 North Aberdeen Street
Chicago, IL 60647
steve@loevy.com
Ph: (312) 243-5900

Corey John Biazzo
Biazzo Law PLLC
9801 Lakeview Lane
Parkland, FL 33076
corey@biazzolaw.com
Ph: 7032975777

Julia Doyle
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, MD 21202
jdoyle@oag.state.md.us
Ph: (410) 576-7291

Carey R. Dunne
Free and Fair Litigation Group, Inc.
266 West 37th Street, 20th Floor
New York, NY 10018
careydunne1@gmail.com
Ph: (646) 434-8604

Brianne Jenna Gorod
Constitutional Accountability Center
1730 Rhode Island Ave. NW
Suite 1200
Washington, DC 20036
BRIANNE@THEUSCONSTITUTION.ORG
Ph: 202 296 6889

Martin Seth Lederman
600 New Jersey Avenue NW
Washington, DC 20001
martin.lederman@law.georgetown.edu
Ph: 202-662-9937

Jenny Suhjin Ma
Public Rights Project
490 43rd Street
Unit 115
Oakland, CA 94609
jenny@publicrightsproject.org
Ph: 5102146960

R. Trent McCotter
Boyden Gray PLLC
800 Connecticut Ave. NW
Suite 900
Washington, DC 20006
tmccotter@boydengray.com
Ph: 202-706-5488

Aaron Daniel Pennekamp
State of California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Aaron.Pennekamp@doj.ca.gov
Ph: (916) 210-6661

Charles G. Roth
National Immigrant Justice Center
111 West Jackson Blvd., Suite 800
Chicago, IL 60604
croth@immigrantjustice.org
Ph: 3126601613

Gregory Stuart Smith
Law Offices of Gregory S. Smith
913 E Capitol St SE
Washington, DC 20003
gsmith@dctriallawyers.com
Ph: 2024603381

Brian Adair Sutherland
Complex Appellate Litigation Group LLP
96 Jessie Street
San Francisco, CA 94105
brian.sutherland@calg.com
Ph: 415 649 6700

Peter David Ticktin
The Ticktin Law Group, P.A.
270 SW Natura Avenue
Deerfield Beach, FL 33441
serv512@legalbrains.com
Ph: 954-570-6757

Beau Cameron Tremitiere
Protect Democracy United
300 Center Drive, Suite G-251
Superior, CO 80027
beau.tremitiere@protectdemocracy.org
Ph: (202) 579-4582