

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 TEMPORARY RESTRAINING ORDER ISSUED
BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL
LIBERTIES UNION OF ILLINOIS, FOUNDATION FOR INDIVIDUAL RIGHTS
AND EXPRESSION, KNIGHT FIRST AMENDMENT INSTITUTE
AT COLUMBIA UNIVERSITY, AND RUTHERFORD INSTITUTE
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

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Other Authorities	Page(s)
--------------------------	----------------

Adams, John, Adams’ Argument for the Defense (1770), <i>reprinted in</i> Legal Papers of John Adams (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).....	6
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Warren, Earl, <i>The Bill of Rights and the Military</i> , 37 N.Y.U. L. Rev. 181 (1962)	6
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INTERESTS OF *AMICI CURIAE*¹

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 1.7 million members. The ACLU was founded in 1920 and is dedicated to the principles of liberty, separation of powers, and the rule of law enshrined in the Constitution. The ACLU of Illinois is the National ACLU’s state affiliate. The ACLU and its affiliates have appeared before this Court as direct counsel and *amicus curiae* in numerous cases involving First Amendment rights, executive power, and civil liberties.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nation-wide through public advocacy and targeted litigation. FIRE represents speakers, without regard to their political views, in lawsuits across the United States.

The Knight First Amendment Institute at Columbia University is a nonpartisan, not-for-profit organization that works to defend the freedoms of speech and the press through strategic litigation, research, and public education. The Knight Institute’s aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity,

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than *amici*, their members, or their counsel contributed money intended to fund the preparation or submission of the brief.

accountability, and effective self-government. Protecting the right to peacefully protest is of special concern to the Knight Institute.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

President Trump’s decision to forcibly federalize National Guard members and deploy them in response to political protest would have shocked this country’s Founders. As *amici* explain, the Founders feared and rejected the use of the military to suppress political opposition. And they understood that a President with unchecked power to deploy national troops against the civilian population would pose “an intolerable threat to individual liberty.” *See Perpich v. Dep’t of Defense*, 496 U.S. 334, 340 (1990) (describing the 1787 Constitutional Convention as manifesting a “widespread fear” of military encroachment on civil liberties).

Reflecting the Founders’ grave concerns, our laws and traditions are designed to prevent such abuses. Congress, the courts, and the executive have long treated military regulation of the American people as a last resort, appropriate only in the rarest and most urgent emergencies. And all three branches of government have repeatedly recognized strict limits on the President’s authority to call out federal troops against civilians.

President Trump is flouting these constraints. *See, e.g.,* C-SPAN, *President Trump Holds Cabinet Meeting*, at 3:12:29–40 (C-SPAN, Aug. 26, 2025), <https://bit.ly/4mIDTME> (“I [have] the right to do anything I want to do. I’m the President of the United States. If I think our country is in danger, and it is in danger in these cities, I can do it.”). Since June, he has claimed unreviewable authority to deploy federal troops to American cities, without geographic or temporal limitation, in response to political protests against federal policies and abuses. *See* Memorandum from Donald J. Trump, President, to the Sec’y of Defense, et. al., *Department of*

Defense Security for the Protection of Department of Homeland Security Functions
(June 7, 2025), <https://perma.cc/FUU3-HDNG>.

The Court should deny the government’s stay application. The President’s claims of legal authority and his actions blatantly disregard established legal limitations—and, in doing so, gravely threaten cherished First Amendment liberties. As this Court has long recognized, political protest is a fundamental right and serves a core function in our democracy. Protest is to be expected when the government takes controversial action. Despite the President’s insistence, sporadic unlawful conduct—let alone the mere *possibility* of it—neither constitutes “rebellion” nor renders the government unable to enforce the law. The President’s military deployment orders, which unmistakably aim to suppress his political opponents’ speech, are incompatible with our nation’s ideals and threaten to suppress countless Americans’ exercise of First Amendment rights.

The playbook is now familiar: The President orders federal law enforcement agents to conduct intrusive and often violent raids against residents in cities he associates with political opposition—Chicago, Portland, and Los Angeles, so far. He stokes confrontations with state and local officials who are lawfully seeking to safeguard their communities. When residents exercise their First Amendment right to protest the President’s actions—overwhelmingly peacefully—federal agents respond with force, including chemical weapons and stun grenades. Even when protests are small and sedate, the President paints a fictitious picture of war-like chaos. Seizing on sporadic or isolated instances of unlawful conduct that local officials

can address, the President falsely proclaims himself unable to enforce the law, declares that a rebellion is afoot, and seizes command of National Guard troops under 10 U.S.C. § 12406.

The government now asks the Court to hold either that the courts have no role in determining whether the President has met Section 12406’s legal and factual preconditions or, at most, that the Judiciary owes the President’s assertions of authority great deference. But the government’s argument relies on inapt nineteenth-century cases in an effort to contravene history, tradition, and settled law. Curbing the President’s unlawful reliance on Section 12406 is an appropriate and urgently needed exercise of the judicial power. The Court should deny the President’s application for a stay.

ARGUMENT

I. AMERICAN HISTORY, TRADITION, AND LAW STRICTLY LIMIT THE PRESIDENT’S AUTHORITY TO DEPLOY THE MILITARY AGAINST CIVILIANS.

No President has ever possessed the unilateral and unreviewable authority to federalize National Guard members and deploy them against civilians on American soil. Contrary to President Trump’s assertion that he can “command” federalization of states’ National Guards under Section 12406 at his “exclusive discretion,” Stay Appl. at 20–21, this nation’s history, tradition, and laws demand robust judicial review of the President’s actions.

The “strong resistance of Americans to any military intrusion into civilian affairs” has “deep roots in our history.” *Laird v. Tatum*, 408 U.S. 1, 15 (1972). “The

Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.” *Reid v. Covert*, 354 U.S. 1, 23–24 (1957).

The Founders’ mistrust of a federal military force was based in part on their knowledge of the past: “They knew that ancient republics had been overthrown by their military leaders” and “were familiar with the history of Seventeenth Century England, where Charles I tried to govern through the army and without Parliament.” *Id.* at 24. Indeed, since Oliver Cromwell’s autocratic use of the military in the 1600s, *see id.* at 25, Anglo-American political thought had warned of “the military tyranny that ensued” from “the executive power . . . being able to oppress,” William Blackstone, 1 Commentaries on the Laws of England 401 (1765).

Personal experience, too, convinced the Founders that using a national military force to regulate the people “posed an intolerable threat to individual liberty and to the sovereignty of the separate States.” *Perpich*, 496 U.S. at 340. The colonies “had long been subjected to the intemperance of military power.” Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 183 (1962). “Within their own lives,” the Founders “had seen royal governors sometimes resort to military rule,” including by deploying British troops to Boston “to support unpopular royal governors and to intimidate the local populace.” *Reid*, 354 U.S. at 27; *see also* John Adams, Adams’ Argument for the Defense (1770), *reprinted in* 3 Legal Papers of John Adams 242, 266 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (stating, after the 1770 Boston Massacre in which British troops killed five American protestors, that “soldiers

quartered in a populous town[] will always occasion two mobs, where they prevent one”).

In short, the Founders understood that a ruler’s domestic deployment of a standing army posed an ongoing threat to individual civil liberties. *See, e.g.,* Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1035 (2008); *see also* Samuel Adams, Bos. Gazette, Oct. 17, 1768, <https://perma.cc/VVB3-9Z4J> (opposing British Quartering Acts requiring housing of soldiers with civilians because of concern that soldiers enforcing self-made laws “by the *power of the sword!* . . . always will happen when troops are put under the direction of an *ambitious* or a *covetous* governor!”).

Indeed, as a general in the Revolutionary War, George Washington famously forbade military interference with civilian institutions or civil law, establishing a foundational principle for the Continental Army. During the Newburgh Affair of 1783, when soldiers were prepared to take action against the Continental Congress because of undelivered backpay, General Washington delivered an impassioned speech instructing American military leaders, “as you respect the rights of humanity, & as you regard the Military & national character of America, to express your utmost horror & detestation of the Man who wishes, under any specious pretences, to overturn the liberties of our Country, & who wickedly attempts to open the flood Gates of Civil discord, & deluge our rising Empire in Blood.” George Washington, Address to Officers of the Army (Mar. 15, 1783), <https://perma.cc/W4B2-HU6F>. Later, when General Washington could have aggrandized the powers Congress gave him

during the Revolutionary War and taken control of a new nation, he instead chose to resign his military commission, establishing a resonant example of American leadership that refused “to seek, seize, or otherwise hold power outside of legitimate means.”² Robert F. Williams, *George Washington and the Foundations of Civilian Control of the Military*, 105 Mil. Rev. 73, 84 (2025).

Against this backdrop, it is little wonder that Federalists and Anti-Federalists alike, while debating the nascent Constitution, agreed on the perils of using a national military to regulate civilians. *See, e.g.*, James Madison, Address to the Constitutional Convention (June 29, 1787), *reprinted in* 1 The Records of the Federal Convention of 1787, at 465 (Max Farrand ed., 1911) (“A standing military force, with an overgrown Executive will not long be safe companions to liberty . . . Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people.”); The Federalist No. 8 (Alexander Hamilton) (in a military state, civilians “are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights”); William Paterson, 1 Records of the Federal

² Seeking to justify its actions, the government makes much of President Washington’s use of the militia in response to the Whiskey Rebellion, *see, e.g.*, Stay Appl. at 31–32, but ignores that President Washington acted for years with restraint and deployed troops only as a last resort and after judicial review. The Whiskey Rebellion involved “several years of escalating violence,” *Newsom v. Trump*, No. 25-3727, 2025 WL 2977104, at *12 (9th Cir. Oct. 22, 2025) (Berzon, J., regarding rehearing en banc). President Washington called up the militia only after presenting evidence to a justice of this Court that an organized “group of 7,000 to 15,000 armed men gathered,” *id.*, seized government officials, and forced the closure of the local federal district court, *see* Br. of Constitutional Accountability Ctr. as *Amicus Curiae* at 18. President Trump’s justifications and actions are a stark departure from President Washington’s example.

Convention of 1787, at 349 (Max Farrand ed., 1911) (“[Y]ou can no more execute civil Regulations by Military Force than you can unite opposite Elements, than you can mingle Fire with Water . . .”). The Founders reserved police powers to the states in part for these reasons. *See* Br. of *Amici Curiae* Bipartisan Former Governors at 6–9.

The Founders’ aversion to a national army deployed within the United States against the civilian population continues to shape the law of the modern era. Today, the Posse Comitatus Act embodies the nation’s profound resistance to using the military for ordinary policing of civilians, criminalizing the use of federal troops “to execute the laws” except when “expressly authorized by the Constitution or Act of Congress.” 18 U.S.C. § 1385. The logic of this prohibition is straightforward: “[M]ilitary enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights.” *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985). What’s more, it “may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.” *Id.* (footnote omitted).

Exceptions to this rule are narrow by design. Consistent with history and tradition, Congress has authorized the President to use federal troops to execute the law or quell violence only in the most extreme emergencies. The Insurrection Act, 10 U.S.C. §§ 251–55, is the prime example. In relevant part, the Insurrection Act authorizes the President to use federal troops “to enforce the laws of the United States,” or to suppress exceptional instances of “insurrection, domestic violence,

unlawful combination, or conspiracy,” when “the ordinary course of judicial proceedings” or ordinary civilian forces cannot. 10 U.S.C. §§ 252–53. As the Department of Justice’s Office of Legal Counsel (“OLC”) has long recognized, the portions of the Insurrection Act authorizing the President to deploy troops domestically without the consent of a state “have always been interpreted as requiring, as a prerequisite to action by the President,” that “state authorities are either directly involved, by acting or failing to act, in denials of federal rights of a dimension requiring federal military action, or are so helpless in the face of private violence that the private activity has taken on the character of state action.” *Use of Marshals, Troops, and Other Federal Personnel for Law Enforcement in Mississippi* (July 1, 1964), 1 Op. O.L.C. Supp. 493, 497 (Nathan A. Forrester ed., 2013), <https://perma.cc/QT82-YYG4>. Notably, and contrary to the government’s novel assertion here, OLC has taken the position that the existence of these prerequisites is a proper subject of judicial review. Memorandum from OLC, *Authority of President to Keep Troops in Little Rock* 24 (May 8, 1958), <https://perma.cc/B87D-NGDX>.

Adhering to these foundational principles, when President Dwight D. Eisenhower invoked the Insurrection Act in 1957 and called out federal troops, including federalized members of the Arkansas National Guard, he did so to enforce the Court’s decision in *Brown v. Board of Education* and to protect the Little Rock Nine and other children desegregating the Little Rock School District, ensuring their safe passage through a racist and violent mob. Critically, President Eisenhower acted only after Arkansas Governor Orval Faubus had deployed state forces, including

units of the Arkansas National Guard, to support segregationists in blocking the children's access to their school—in direct defiance of this Court's decision. *See* Exec. Order No. 10,730, 3 C.F.R. § 389 (1954–1958); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 584 F. Supp. 328, 331–32 (E.D. Ark. 1984) (recounting history).

In contrast, President Trump's invocation of Section 12406, over the Illinois governor's objection, to deploy Illinois and Texas National Guard troops to Chicago in response to almost-entirely peaceful protests is neither lawful nor in keeping with this nation's history and traditions.

II. THE PRESIDENT'S DEPLOYMENT OF MILITARY TROOPS IN RESPONSE TO PROTESTS RAISES GRAVE FIRST AMENDMENT CONCERNS AND DEMANDS SEARCHING JUDICIAL REVIEW.

The President's invocation of Section 12406 in response to overwhelmingly lawful protests also raises grave First Amendment concerns. Presidents may not, consistent with First Amendment principles, use the military to quell or deter political protests. This is so even when a protest might include individuals who engage in unlawful conduct, including vandalism or clashes with law enforcement. If presidents could deploy troops against any assembly that opposed their policies, so long as *any* person or persons engaged—or *might* engage—in sporadic unprotected acts, then the constitutional right to protest would be transformed beyond recognition. Put differently, if Section 12406 meant what President Trump says it means, it would collide inexorably with First Amendment liberties. It is within the heartland of the judicial function to interpret the statute—all the more so when the

President’s interpretation of law and assertion of facts is at odds with the people’s First Amendment rights.

A. Robust Judicial Review of Executive Action Preserves the Vital Role of the Right to Protest in Our Democracy.

This Court has long recognized that “the right to speak freely,” including the right to protest, is “one of the chief distinctions that sets us apart from totalitarian regimes.” *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (citation modified).

Indeed, “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981). Protest serves this core democratic function even—indeed, especially—“when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello*, 337 U.S. at 4. It is true, as the Court has acknowledged, that protest “may cause trouble,” but “our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969) (citation modified); *United States v. Baranski*, 484 F.2d 556, 565 (7th Cir. 1973) (“If the First Amendment has any substance, it must mean that the Government’s powers, even where the Government is seeking to protect legitimate interests, are not absolute.”).

Settled First Amendment doctrine therefore dictates that any government infringement on the right to protest, even when that protest expresses a viewpoint that is vehemently opposed to governmental policy or is offensive to other private parties, must withstand constitutional scrutiny. *See Snyder v. Phelps*, 562 U.S. 443, 451–58 (2011); *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006). Targeting a protest based on the message it expresses is “presumptively unconstitutional.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Courts recognize that “[m]uch speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake.” *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986). But if the remedy is not “very closely confined, it could be more dangerous to speech than all the libel judgments in history.” *Id.* Therefore, when the government responds to unlawful conduct during the course of a protest, it “may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (citation modified).

To be sure, the First Amendment’s protection does not extend to all conduct that occurs at or near a protest. *Claiborne Hardware*, 458 U.S. at 916 (noting that the First Amendment does not protect “violence”). But even when unprotected “conduct occurs in the context of constitutionally protected activity,” “‘precision of regulation’ is demanded.” *Id.* at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438

(1963)). This means, among other things, that when the government addresses the unprotected conduct of *some* protesters, it may not suppress the protected conduct of *other* protesters, even if they are part of the same general demonstration or share the same viewpoint. *See id.* at 908, 916–19; *Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994) (denying that the “police and other public officials can seek to protect the populace at the expense of” protected speech by silencing the speech “rather than the violent rioters”).

To faithfully apply this blackletter First Amendment law, federal courts must engage in factfinding and legal interpretation as a matter of course. *E.g.*, *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 363–64 (1997); *Claiborne Hardware*, 458 U.S. at 911–12; *Puente v. City of Phoenix*, 123 F.4th 1035, 1042–49 (9th Cir. 2024); *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 834 (9th Cir. 2020); *Thayer v. Chiczewski*, 705 F.3d 237, 242 (7th Cir. 2012); *Carr v. D.C.*, 587 F.3d 401, 402–04 (D.C. Cir. 2009). Therefore, as the district court did here, courts regularly answer a variety of questions in adjudicating protest cases: How large was a demonstration? What did the participants do? What did law enforcement do? Who, if anyone, violated the law, and in what way?

Under long-settled precedents, courts are perfectly well-equipped to answer the factual questions at the heart of this case—including whether protesters were seeking to “bring about political, social, and economic change” through the lawful exercise of First Amendment rights or rather through “riot or revolution.” *Claiborne Hardware*, 458 U.S. at 911–12. President Trump’s invocation of Section 12406 in

Illinois and request for a stay of the lower courts' decisions evinces no understanding of or intent to comply with these principles of First Amendment law.

B. Adding Federal Troops to the Mix Neither Diminishes the Courts' Competence Nor Entitles the Executive to Special Deference.

The President disregards this blackletter First Amendment law and instead contends that courts have no role in determining whether political protests satisfy the statutory prerequisites for federalizing and deploying the military under Section 12406. Stay Appl. at 19–26. At most, says the President, courts may engage in something “akin to highly deferential rational-basis review.” Reply at 2, 8 (citing *Trump v. Hawai‘i*, 585 U.S. 667, 702 (2018) and *Newsom v. Trump*, 141 F.4th 1032, 1051 (9th Cir. 2025)). The President thus takes issue with what he characterizes as the Seventh Circuit’s de novo review of the facts and law. Reply at 9. In short, the President argues that his decision to deploy federal troops against civilians in response to domestic protest is entitled to extraordinary, if not total, judicial deference.

That position is profoundly mistaken. As discussed above, domestic political protest is not, and has never been, an area in which the political branches may supplant the Judiciary’s core functions of interpreting the law and finding facts. Adding military troops to the mix does not diminish the Judiciary’s competence to perform those core functions; nor does it entitle the Executive to greater deference than it would otherwise be due.

The government cites cases in which this Court reviewed the legality of the Executive Branch’s actions with particular deference—but those cases are inapposite because they did not concern domestic law enforcement contexts. For example, this case is entirely unlike *Trump v. Hawai‘i*, where the Court applied rational basis review because the challenged presidential action concerned the “admission and exclusion of foreign nationals.” 585 U.S. at 702. Nor is it like *Holder v. Humanitarian Law Project* (“HLP”), 561 U.S. 1, 35 (2010). *HLP* concerned speech coordinated with or directed to a “foreign terrorist organization”—not, as here, residents of an American city coming together to exercise their constitutional right to object to government conduct and petition for change. *Id.*; cf. *Illinois v. Trump*, No. 25-2798, 2025 WL 2937065, at *6–7 (7th Cir. Oct. 16, 2025) (“Political opposition is not rebellion” and “[e]ven applying great deference to the administration’s view of the facts,” protest activity has not “significantly impeded” federal agents’ ability to enforce the law).³

In an effort to foreclose—or, at minimum, drastically curtail—judicial review of his invocation of Section 12406, the President relies heavily on two nineteenth-century opinions of this Court: *Martin v. Mott*, 25 U.S. 19 (1827), and *Luther v.*

³ The lower courts correctly held that the President’s interpretation of the text of Section 12406 is not entitled to deference. *Illinois v. Trump*, 2025 WL 2937065, at *5; *Illinois v. Trump*, No. 25-cv-12174, 2025 WL 2886645, at *14 (N.D. Ill. Oct. 10, 2025). And while the President also takes issue with the lower courts’ assessments of the facts, Reply at 9–10, those courts afforded the President’s factual determinations “a great level of deference,” *Illinois v. Trump*, 2025 WL 2937065, at *5 (citing *Newsom v. Trump*, 141 F.4th at 1048; *HLP*, 561 U.S. at 34); *Illinois v. Trump*, 2025 WL 2886645, at *14.

Borden, 48 U.S. 1 (1849). Stay Appl. at 19–26. Yet neither case supports the President’s dramatic arrogation of authority. Instead, the holdings in both *Martin* and *Luther* turned on justiciability concerns wholly absent from the facts of this case.

Martin concerned a militia officer’s collateral attack on punishment imposed by a court-martial and therefore implicated deference to the military chain of command. The case arose when the President invoked the Militia Act of 1795, calling the militia into federal service. *Martin*, 25 U.S. at 28. A militia officer refused to report for federal duty and was court martialed. *Id.* Challenging his punishment, the officer contended that he was under no obligation to answer the President’s call because no exigency justified the President’s invocation of the Militia Act. *Id.* at 30.

This Court refused to entertain the officer’s argument. Its holding was rooted in the problems that would have been posed by the Judiciary’s intrusion into the military chain of command. As the Court explained, “[i]f a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier.” *Id.* In that scenario, said the Court, military effectiveness would crumble: The country would be unable to defend itself if “subordinate officers or soldiers” were continually “pausing to consider whether they ought to obey” their commander’s orders. *Id.* What was more, said the Court, if military personnel could *challenge* the factual bases for the President’s orders under the Militia Act in federal litigation, then military personnel who immediately *obeyed* the same orders could be subject to “ruinous litigation.” *Id.* at 30–31. “Such a course,” the Court reasoned, “would be subversive of all discipline.”

Id. As the court of appeals correctly noted, no such concerns are present here. *See Illinois v. Trump*, 2025 WL 2937065, at *5.

Luther is an even more unusual and inapposite case. It involved a dispute between two rival governments in Rhode Island. The question there was whether the state's longstanding "charter" government was legitimately in power on a certain date. *Luther*, 48 U.S. at 38. The Court held that the answer could be supplied only by the political branches, not the Judiciary. *Id.* at 39. Specifically, the Court held that "it rests with Congress to decide what government is the established one in a State," *id.* at 42, and that Congress had, in the Militia Act of 1795, provided a limited delegation of its decision-making authority to the President, *id.* at 43.

Luther, which presaged today's political-question doctrine, has no bearing here. Having concluded that the power to determine the legitimacy of state governments belonged to the political branches, the Court considered itself bound by the President's recognition. *Id.* at 44; *see also* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. 605, 707 (2024) (*Luther* "held that the question of which government constituted the lawful government of the state was a political question committed to the judgment of Congress and the President and that the judiciary lacked authority to interfere with the political branches' actions (and inactions), which had tacitly supported the charter government"). But recognition of Rhode Island's charter government as legitimate was the only relevant issue in *Luther*; the President neither called out the

militia nor concluded that it was appropriate to do so under the Militia Act. *See Luther*, 48 U.S. at 44. No similar question is presented in this case.

In sum, the Court’s cardinal precedents involving the Militia Act of 1795 provide no support for the President’s assertion of unreviewable—or near-unreviewable—authority to invoke Section 12406.

C. The President’s Pattern of Deploying Troops Pursuant to Section 12406 Underscores the Importance of Searching Judicial Review.

Robust review of the Executive’s legal and factual assertions is particularly appropriate here. For a third time in four months, the President has invoked Section 12406 to seize command of state National Guard troops over a governor’s objection *after* abusive conduct by federal law enforcement provoked public protests. *Cf. Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996) (protests “can be expected when the government acts in highly controversial ways”). And the President did so based on a mischaracterization of those overwhelmingly peaceful protesters as a violent mob.

This pattern is calculated to punish and quell peaceful protest. The President spent months broadcasting his intent to deploy federal troops to Chicago. Chillingly, weeks before he made good on his threat, he wrote: “Chicago about to find out why it’s called the Department of WAR.”⁴ And the President used “Operation Midway

⁴ President Donald J. Trump, @realDonaldTrump, Truth Social (Sep. 6, 2025, 11:38 AM ET), <https://perma.cc/5M29-JN5W?type=standard> (depicting an AI-generated image of the President against a backdrop of the Chicago skyline, military helicopters, flames, and the phrase “Chipocalypse Now,” stating “I love the smell of deportations in the morning” and “Chicago about to find out why it’s called the Department of War. . .”).

Blitz” as the pretext for the deployment. First, federal law enforcement agents dramatically increased immigration-related arrests and deportations. Armed federal agents even rappelled from Black Hawk helicopters to a building in Chicago’s largely Black South Shore neighborhood, detaining immigrants, children, and U.S. citizens. Sophia Tareen, *Using helicopters and chemical agents, immigration agents become increasingly aggressive in Chicago*, AP News (Oct. 6, 2025), <https://perma.cc/QTY3-HWGM>. Chicagoans protested. Overwhelmingly, their protests were peaceful. *See Illinois v. Trump*, 2025 WL 2886645, at *2–4; Resp. in Opp’n at 3. They presented “no generalized threat of violence against federal employees.” *See Br. of Amici Curiae Chicago Headline Club et al.* at 3–4. Indeed, it was federal agents who dealt out violence, “routinely using excessive force against journalists gathering the news, clergy praying in public spaces, and peaceful demonstrators in retaliation for their constitutionally protected activities.” *See id.*⁵ Nevertheless, President Trump used

⁵ In a separate case, on October 9, a federal district court enjoined federal agents from using excessive force against protestors and others in retaliation for their First Amendment activities, and from otherwise burdening individuals’ right to free exercise. *See* TRO, Order, *Chicago Headline Club v. Noem*, 25-cv-12173 (N.D. Ill., Oct. 9, 2025), Dkt. Nos. 42, 43; *see also* Modified TRO, *Chicago Headline Club v. Noem*, 25-cv-12173 (N.D. Ill., Oct. 17, 2025), Dkt. No. 66. The district court found that federal law enforcement agents had “assaulted and deployed tear gas, PepperBalls, rubber bullets, flash-bang grenades, and other munitions against peaceful protesters who were engaged in the lawful expression of their First Amendment rights.” *Id.* Despite that order, the abuses have continued. On October 28, the district court held an emergency hearing to address multiple reports that federal agents had violated its injunction. *See* Tr. of Proceedings, *Chicago Headline Club v. Noem*, 25-cv-12173 (N.D. Ill., Oct. 28, 2025), Dkt. No. 144. During the hearing, the court noted “kids were tear-gassed on their way to celebrate Halloween in their local school parking lot,” *id.* at 30; federal agents threw tear gas at protestors without warning while driving away from a demonstration, *id.* at 32; and federal agents pointed a PepperBall gun and a firearm at a combat veteran peacefully protesting on the side of the road, *id.* at 26.

these protests as an excuse to unlawfully and unnecessarily invoke Section 12406 to federalize Illinois National Guard members.

The record during and since the President’s invocation of Section 12406 is clear: There is no factual basis for the deployment of the military. What the President calls “rebellion” is precisely the sort of First Amendment activity the Founders deemed vital to protect. In communities across Chicago, neighbors have gathered to look out for one another and citizens as young as high schoolers have voiced their concerns about their government’s actions. *See* Francia Garcia Hernandez, *300 Little Village High Schoolers Walk Out To Protest Immigration Raids*, Block Club Chicago (Oct. 28, 2025), <https://perma.cc/PXW5-HFSQ>. Whether the President recognizes it or not, what is happening in Chicago is democracy at work.

Events in Oregon followed a similar trajectory. Protests at the Portland ICE facility began in June, after ICE officials arrested an asylum seeker at immigration court. They were relatively small and almost entirely peaceful. To the extent that anyone present engaged in unlawful conduct, local police intervened; the need to do so was “limited.” Opp’n to Mot. for Admin. Stay at 4–5, *Oregon v. Trump*, No. 25-6268 (9th Cir. Oct. 5, 2025), Dkt. No. 13. Yet the President baselessly claimed that Portland’s residents were “living in hell,” falsely described the city as “War ravaged,” and instructed the Secretary of Defense to use “Troops” with “Full Force.” *Id.* at 1, 6.

“Bang, bang, and you’re dead, liberal,” a federal agent told the veteran. *Id.* at 26. On November 6, based on this record of violence, the district court converted its temporary restraining order into a preliminary injunction. *See* Prelim. Inj. Order, *Chicago Headline Club v. Noem*, 25-cv-12173 (N.D. Ill. Nov. 6, 2025), Dkt. No. 250.

Portland had every reason to fear these provocations. *See, e.g.,* Gosia Wozniacka, *Federal Agents Knock Down Elderly Couple During Portland Protest*, The Oregonian/OregonLive (Oct. 4, 2025), <https://perma.cc/LW2Y-ZLUS> (officers' charge pushed 84-year-old Vietnam veteran off his walker; his wife was hit with a projectile, causing concussion). Still, Portland's people have exercised their First Amendment rights in a manner that is peaceful and often humorous, in accord with the city's unofficial motto, "Keep Portland Weird." Sara Roth & Kristyna Wentz-Graff, *Portland protests enter a new (inflated) era*, Or. Pub. Broad. (Oct. 17, 2025), <https://perma.cc/BS85-YXVN>.

Likewise, in Los Angeles, the President manufactured a pretext for making good on his threats to deploy troops: He ordered armed federal law enforcement to begin "Operation At Large" in Southern California, snatching people from churches, carwashes, and ordinary places of business, and spreading fear and horror through families and communities. *See Vasquez Perdomo v. Noem*, 148 F.4th 656, 663–64, 666 (9th Cir. 2025) (describing start of raids on June 6 and federal agents' actions). When, as might be "expected," *Collins*, 110 F.3d at 1372, the people of Los Angeles protested, the President deployed federal agents who used unlawful and violent measures against them, *see* Order at 2, 32, *L.A. Press Club v. Noem*, No. 25-cv-5563 (C.D. Cal. Sep. 10, 2025), Dkt. No. 55 (finding federal agents "unleashed crowd control weapons indiscriminately and with surprising savagery" against gatherings in response to immigration raids "that included community leaders, families including children and elderly individuals, and other concerned community members"). The President then

pitted military troops against civilians, over the strenuous objections of local and state authorities. That deployment chilled protesters’ speech. *See* Order at 11, *Newsom v. Trump*, No. 25-cv-4870 (N.D. Cal. Sept. 2, 2025), Dkt. No. 176 (presence of U.S. Army Task Force, including federalized National Guard troops, “deterred engagement by the public . . .”). These findings, like those also made by federal district courts in Chicago and Portland, stand in repudiation of the government’s factual allegations.

Maintaining this backstop of judicial review is particularly important in light of the President’s threats of still more troop deployments in American cities. Juliana Kim, *Where has Trump suggested sending troops? In cities run by Democratic mayors*, Nat’l Pub. Radio (Oct. 16, 2025), <https://perma.cc/GN55-48Y4> (additional cities threatened include New York, New Orleans, Baltimore, San Francisco, Oakland, and St. Louis). Thus, although the number of states and troops involved is relatively small so far—300 Illinois and 200 Texas National Guard members ordered to Chicago; a total of 900 Oregon, California, and Texas National Guard troops ordered to Portland; approximately 4,700 California National Guard and active-duty Marines deployed in greater Los Angeles—the consequences of the Court’s decision are likely to be far-reaching.

In late October, news broke that the Defense Department is implementing the President’s August 2025 directive for “the National Guard in every state to develop a ‘quick reaction force,’” totaling 23,000 troops, “to deal with civil disturbances and riots”—with no evidence of any need—“that can be ready to deploy with just hours’

notice.” Konstantin Toropin, *National guard in each state is ordered to create ‘quick reaction forces’ trained in civil unrest*, Wash. Post (Oct. 30, 2025), <https://perma.cc/NEJ9-57SF>. And the President continues to promise more to come: “You know, you have a thing called the Insurrection Act. You know that, right? . . . Do you know that I could use that immediately and no judge can even challenge you on that.” *Transcript of Norah O’Donnell’s Interview with President Trump*, CBS News (Nov. 2, 2025), <https://perma.cc/G7KK-BM4J>.

* * *

Through his novel invocation of Section 12406, the President has contravened this nation’s foundational antipathy to using soldiers to regulate civilians. He has flouted the Executive Branch’s longstanding, narrow interpretation of the President’s authority to deploy the military domestically without the consent of state authorities. And he has ignored U.S. law, going back to the Founding, confirming that political protest is both a core First Amendment right and an essential component of the American political process, even when it creates a societal division or disturbance, and even though an otherwise lawful protest sometimes includes people who engage in unprotected acts of violence or vandalism. It is painfully evident that the President’s legal and factual determinations are not due “great” deference, and granting the government the stay it requests would imperil the First Amendment freedoms of countless people in this country.

CONCLUSION

The Court should deny the government's application for a stay.

Respectfully submitted,

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