No. 25A443

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.* v. STATE OF ILLINOIS, *et al.*

ON APPLICATION TO STAY THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS AND REQUEST FOR AN ADMINISTRATIVE STAY

BRIEF OF MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici are 155 current members of Congress, whose full names and titles appear in the Appendix. As members of Congress, *Amici* are well acquainted with their constitutionally assigned role of providing for the calling forth and regulation of militias pursuant to Article I, Section 8, Clauses 15 and 16 of the U.S. Constitution. *Amici* take seriously their responsibilities as members of an equal branch of the federal government and seek to ensure that the executive does not unlawfully assert power that it does not inherently possess or that Congress has not appropriately delegated to it. As Members of Congress, *Amici* write to assert their views on the appropriate stance of federal courts towards congressional delegations of authority to the President regarding use of the National Guard.[1]

SUMMARY OF THE ARGUMENT

Article I, Section 8, Clause 15 of the U.S. Constitution says that Congress shall have the power of "calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." In 10 U.S.C. § 12406, Congress partially delegated that authority to the President under certain specific circumstances. In passing 10 U.S.C. § 12406, Congress made clear that the President does not have discretion over the circumstances in which he may federalize and deploy the National Guard domestically, contrary to Applicant's argument that the statute gives the President unfettered discretion.

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[1] No party or counsel for a party helped to draft this brief, and no party or counsel to a party made a monetary contribution to fund the filing of this brief. Sup. Ct. R. 37.6.

It is the duty of the federal courts to interpret the meaning of statutes enacted by Congress under its enumerated powers. Were it to abandon its traditional role of reviewing federal legislation, this Court would undercut Congress's constitutional prerogative to pass legislation, including legislation delegating authority to the President, and would grant an unprecedented level of deference to the executive branch. Fulfilling its duty to review legislation is particularly critical where the President invokes federal law to deploy the U.S. military on American soil and where such deployment implicates the constitutional rights of Americans. Whatever level of deference may be due the President in other contexts, far less is due when the executive branch deploys the military domestically during times of peace.

Applicant's argument that delegations of authority to the President are completely unreviewable by federal courts is more extreme still. President Trump's suggestion that the executive branch should be the sole arbiter of its own delegated authority ignores and disrespects Congress's right to legislate under its enumerated powers and would relegate this Court to an observer status. In the present context, where the President is attempting to deploy the military on domestic soil in contravention of clear statutory limits, it is critical for federal courts to exercise their constitutional responsibility to interpret and apply the law.

ARGUMENT

I. IN 10 U.S.C. § 12406, CONGRESS AUTHORIZED THE PRESIDENT TO DEPLOY THE NATIONAL GUARD UNDER ONLY SPECIFIC AND NARROW CIRCUMSTANCES.

Article I, Section 8, Clause 15 of the U.S. Constitution says that Congress shall have the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." In 10 U.S.C. § 12406, Congress partially delegated that authority to the President under certain specific circumstances. When a case or controversy arises over the meaning of such a statute, it falls to the judiciary to interpret it. As Chief Justice Marshall said in *Marbury v. Madison*, "It is emphatically the province and duty of the Judicial Department to say what the law is." 5 U.S. 137, 177 (1803); U.S. Const. art. III.

In this case, the Court is called upon to interpret the meaning of the terms of 10 U.S.C. § 12406 to settle the question whether the President has properly invoked that provision in calling forth the Illinois and Texas National Guard to the City of Chicago.

As an initial matter, 10 U.S.C. § 12406 provides that "the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary" for any of the purposes outlined in the statute: 1) to forestall an invasion by a foreign nation; 2) when "there is a rebellion or danger of a rebellion against the

government of the United States"; or 3) when "the President is unable with the regular forces to execute the laws of the United States." While the statute requires that one of these three conditions applies, it does not provide the President with sole discretion to determine the applicability of these provisions.

The question the Court must decide is whether the predicate conditions required under the statute are satisfied on the factual record before the court. But Applicant's argument would effectively read those predicate conditions—and therefore the role of Congress—out of the statute. *See* Applicant's Br. at 26 (arguing review must "be highly circumscribed"). Traditional principles of statutory interpretation, combined with this Court's historical jurisprudence relating to presidential authority, unambiguously refute Applicant's view that the President has unfettered discretion to determine whether and when any of the above three conditions obtains.

The statute expressly leaves to the President's determination "such numbers [of the National Guard] as he considers necessary" to execute the laws of the United States, but such language is not present elsewhere in the statute. 10 U.S.C. § 12406(3). As a matter of statutory construction, courts assume that, in drafting legislation, Congress chose its words carefully and with intentionality. *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, Congress's explicit assignment of discretion to the President in one part of 10 U.S.C. § 12406, and its failure to assign such discretion in another part, indicates clearly that Congress did not make the President the exclusive judge of whether the United States has been invaded, faces a rebellion, or is unable to execute the laws with

the regular forces. This part of the statute establishes factual conditions that must be met, and it is the role of the courts to determine both the meaning of those conditions and whether, upon the record, those required factual circumstances are present.

Treating the entire statute as an explicit grant of authority to the President to determine the meaning of the law and serve as arbiter of the facts, Applicant claims that "when the President calls up the National Guard for federal service pursuant to an 'express . . . authorization of Congress, his authority is at is [sic] maximum' . . . and thus it is 'supported by the strongest of presumptions and the widest latitude of judicial interpretation.'" Applicant's Br. at 20 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring)). But Applicant misconstrues the statute: the President's authority to call forth the National Guard under the statute is not unlimited. Rather, the delegation of congressional authority to the President is subject to the existence of one of 10 U.S.C. § 12406's three predicate conditions.

II. CONGRESS DID NOT IN 10 U.S.C. § 12406 GRANT THE PRESIDENT THE TOTAL DEFERENCE HE CLAIMS.

Applicant's position with regard to the deference he is owed, however, is even more deeply flawed than a mere misreading of the statute. Affording the President such deference on the meaning and application of 10 U.S.C. § 12406 would unconstitutionally infringe on the roles and responsibilities of Congress as well as the courts.

Whatever deference may be appropriate when the President is acting in his Commander-in-Chief capacity in a theatre of war, no such basis for deference obtains when the President is exercising congressionally delegated authority domestically, in a peacetime military deployment, unless the legislature has chosen to provide otherwise. Here it has not, with the singular exception of committing to the President's discretion the numerosity of troops to deploy once one of the statute's predicate conditions exists.

Underscoring the importance of the context in which the President exercises his authorities as Commander-in-Chief, this Court has famously refused to accept unfettered presidential discretion in exercising wartime authorities domestically even during war. As this Court said in *Youngstown* at the height of the Korean War:

> Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

343 U.S. at 587.

The same must be said when the President is attempting to "take possession" of the streets of a major U.S. city like Chicago by commandeering National Guard units from two separate states purportedly to protect federal personnel and property

in that city. Any actions by the President to federalize the National Guard under 10 U.S.C. § 12406 may not exceed the authority to do so under statutes enacted by Congress.

Moreover, historically this Court has routinely been willing to engage in statutory interpretation of congressional delegations of war powers authority without abject deference to the executive branch. In staking out its claim to substantial deference, Applicant emphasizes *Martin v. Mott,* claiming that it establishes the President's "exclusive discretion" over the militia by law. Applicant's Br. at 20–21. But *Martin* rejected the competency of members of the militia—not the courts—to question presidential decisions. *See* 25 U.S. 19, 29–30 (1827) ("Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President?"). Applicant attempts to claim broader authority for the principle that lies behind the *Martin* case but provides no basis for that assertion.

This Court cannot accept Applicant's use of *Martin* without putting itself out of a job and striking Congress's powers under Article I, Section 8, Clause 15 from the Constitution. Applicant claims not only that federal courts should be "highly deferential" to presidential determinations regarding his authority to call forth the militia under 10 U.S.C. § 12406, but that in fact federal courts must defer so thoroughly as to make presidential decision making *de facto* unreviewable. Indeed, Applicant's brief declares that

"*Martin* forecloses such review" of presidential action. Applicant's Br. at 24–25 (internal citation omitted). Applicant's brief goes on, citing *Sterling v. Constantin* for the proposition "that when 'the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen,' the executive's 'decision to that effect is conclusive.'" *Id.* at 25 (quoting *Sterling v. Constantin*, 287 U.S. 378, 399 (1932)). Yet, for reasons discussed earlier, in exercising its constitutional authority under Article I, Section 8, Clause 15, Congress has not granted the President total discretion to determine whether and when to utilize the militia. To the contrary, Congress has granted the President only limited authority to do so by setting forth required preconditions in 10 U.S.C. § 12406.

Other historical examples support the appropriateness of judicial review of congressional delegations of Presidential authority. In *Bas v. Tingy*, for example, this Court proceeded to interpret congressional acts of 1798 and 1799 based on a potential conflict between the acts coupled with a detailed reading of the language of the acts and an assessment of the facts it found. 4 U.S. 37 (1800). The Court applied ordinary tools of statutory interpretation and took many factors into account in reaching its determination that the United States was in a "partial war" with France, including the intent of Congress, preceding legislation bearing on the matter, and possible objection that Congress had failed to declare war on France. *See id.* Indeed, in addition to engaging in statutory construction, Justice Chase explicitly endorsed a view that Congress, in delegating war powers to the President, may limit the President's use of those powers—as it did in that very case. *Id.* at

43 ("Congress may wage a limited war, limited in place, in objects, and in time. . . . [I]f a partial war is waged, its extent and operation depend on our municipal laws.").

Substantial deference to the executive is even less warranted when the President orders the military deployed domestically in peacetime. *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962). ("In times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty."). Under these circumstances, not only are the President's wartime authorities absent, but the frequent appeal to the President's foreign affairs powers as a basis for deference is also unavailable. *See United States v. Curtiss-Wright*, 299 U.S. 304, 321 (1936) (noting the "marked difference between foreign affairs and domestic affairs" with regard to presidential authority).

Put otherwise, the mere fact that Congress has delegated authority to the executive branch provides an insufficient basis for executive branch deference. As the Court observed in *Loper Bright Enters. v. Raimondo,* while "[c]areful attention to the judgment of the Executive Branch may help inform" the question of "whether an agency has acted within its statutory authority," ultimately, "[c]ourts must exercise their independent judgment." 603 U.S. 369, 412–13 (2025).

Rejecting the kind of blanket deference to the executive branch called for by Applicant is an essential part of protecting Congress's enumerated powers under Article I, Section 8, Clause 15 of the U.S.

Constitution. Under that provision, the Framers reserved to Congress the power "to provide for calling forth the Militia to execute the Laws of the Union." U.S. Const. art. I, § 8, cl. 15. One of the Militia Clauses, this provision reserves to Congress uniquely the power to set the conditions for calling forth the Militia to execute the laws of the United States. This is a power that Congress has delegated to the President in 10 U.S.C. § 12406, but only under certain specified conditions. However, to defer entirely to the interpretation of the executive branch as to the authority Congress has granted under the statute and the meaning of its provisions would be tantamount to stripping Congress of its authority to legislate under the Militia Clauses.

Excessive deference to the President in this context would be particularly improper because domestic deployments risk infringing upon the constitutional rights of Americans, particularly those contained in the First and Fourth Amendments. This is especially the case where the National Guard is deployed in response to citizens' exercise of their First Amendment rights. Applicant's deployment of National Guard troops in Chicago, Portland, and Los Angeles targets individuals expressing their opposition to the government's policies. But

> [t]he right to voice dissent against the policies of one's government without fear of legal or political repercussions is the essence of a democracy and is a right protected by the First Amendment of the U.S. Constitution. . . . [W]hen the constitutional rights of Americans are under threat by presidential decision-making regarding use of the military, deference

> to presidential authority is not warranted, and federal courts have a mandate, indeed a duty, to intervene.

Motion For Leave to File Br. of *Amici Curiae* and Br. of *Amici Curiae* by the Center for Ethics and the Rule of Law et al. at 31, *Newsom v. Trump*, No. 25-cv-4870 (N.D. Cal. Aug. 21, 2025), ECF. No. 168.

Where the Fourth Amendment is concerned, courts have recognized that when federal troops are engaged in law-enforcement activities, there is a risk of violating constitutional prohibitions against unlawful search and seizure. *United States v. Dreyer*, 804 F.3d 1266, 1279 (9th Cir. 2015) (en banc) (noting the "constitutional underpinnings" of the Posse Comitatus Act with regard to Fourth Amendment activities); *Bissonette v. Haig*, 776 F.2d 1384, 1388 (8th Cir. 1985) ("We believe that the limits established by Congress on the use of the military for civilian law enforcement provide a reliable guidepost by which to evaluate the reasonableness for Fourth Amendment purposes of the seizures and searches in question here.").

Finally, Applicant's approach would have the Court abandon its traditional role of adjudicating disputes between states and the federal government, and balancing Tenth Amendment considerations against executive branch priorities. In particular, state governors are normally the final arbiters of the use of their states' National Guard, and the President may commandeer those Guard units in only the rarest of circumstances. Properly understood, 10 U.S.C. § 12406 reflects Congress's view of the proper balance between the rights of states to control their own

militias and the power of the federal government to override that control under exigent circumstances. The proper functioning of U.S. democracy depends on federal courts faithfully acting to safeguard Congress's judgment on such matters of federalism and the use of the militia, particularly at home. *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism.'").

III. THE PRESIDENT'S ACTIONS UNDER 10 U.S.C. § 12406 ARE REVIEWABLE BY FEDERAL COURTS.

Applicant's most extreme argument goes beyond a claim that courts must defer to the President over Congress's expressed will. Rather, Applicant seeks to eliminate this Court's role in reviewing congressional delegations of authority entirely. Applicant's brief claims that "when a valid statute 'commits [a] decision to the discretion of the President,' the President's exercise of discretion is not subject to judicial second-guessing." Applicant's Br. at 24 (citation omitted). In other words, the President is claiming that once Congress delegates authority to him, the federal judiciary cannot review his judgment and both Congress and the American people must simply accept his interpretation of the law without recourse.

Applicant asserts that a congressional delegation of authority to the President effectively strips the courts of jurisdiction and commits all

decisions of whether and how to exercise that authority to the President's sole discretion. Applicant's Br. at 24. In other words, the President is claiming that once Congress has delegated this authority to him, even federal courts cannot review the interpretation of the law he chooses, or the factual claims that underly it. That position is inconsistent with the Constitution, with Congress's intentions, and with the express language in 10 U.S.C. § 12406.

The Constitution does not assign exclusive interpretive authority over this question to the President. 10 U.S.C. § 12406 was promulgated by Congress pursuant to its enumerated Article I, Section 8, Clause 15 and 16 powers. Enumerated congressional powers cannot be understood to be delegated to the President without permitting subsequent judicial review.

Moreover, the interpretation of statutes passed pursuant to these enumerated powers simply involves a routine task that courts are required to undertake. Unlike in the cases where this Court has held that the Constitution commits a question to another branch's discretion, *e.g.*, *Nixon v. United States*, 506 U.S. 224, 226–38 (1993), this case calls only for deciding whether Applicant's interpretation of the statute is correct, *see Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.'" (citation omitted)); *Trump v. J. G. G.*, 604 U.S. 670, 672 (2025) (affirming judicial review available via habeas against claim of nonreviewability in national security case).

The statute's plain language confers no unreviewable discretion on the President; rather, Congress gave clear specifications for when the President may federalize the National Guard—specifications that are susceptible to judicial review.

Neither the Constitution nor 10 U.S.C. § 12406 grants the President unreviewable power. It did not do so here, and the Court should not override Congress's explicit choice.

CONCLUSION

It is the duty of federal courts to interpret the meaning of statutes enacted by Congress. Failure to do so by granting an unwarranted level of deference to the President would abdicate the Court's constitutional responsibility to say what the law is and would undercut Congress's constitutional prerogative to enact statutory limits on the executive's use of the militia. Such an abdication of the Court's responsibility would be particularly problematic in the present context, where the constitutional rights of Americans and preservation of the Constitution's core system of federalism, separation of powers, and checks and balances are at stake. Whatever level of deference, if any, the executive branch may be entitled to in other contexts, such deference is unwarranted in a domestic, peacetime deployment.

The application to stay the order issued by the United States District Court for the Northern District of Illinois and the request for an administrative stay should be denied.

Respectfully submitted,

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APPENDIX: LIST OF AMICI CURIAE

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