

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION

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EL PASO COUNTY, TEXAS, and )  
BORDER NETWORK FOR HUMAN RIGHTS, )  
Plaintiffs, )  
v. ) Civil Action No. 3:19-cv-66-DB  
DONALD J. TRUMP, in his official capacity as )  
President of the United States of America, )  
PATRICK M. SHANAHAN, in his official capacity as )  
Acting Secretary of Defense, )  
KEVIN McALEENAN, in his official capacity as Acting )  
Secretary of Homeland Security, )  
TODD D. SEMONITE, in his official capacity as )  
Commanding General, )  
United States Army Corps of Engineers )  
DAVID BERNHARDT, in his official capacity as )  
Acting Secretary of the Interior, and )  
STEVEN T. MNUCHIN, in his official capacity as )  
Secretary of the Treasury, )  
Defendants. )

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

Iraq and Afghanistan Veterans of America (IAVA) hereby respectfully moves for leave to appear as *amicus curiae* for the purpose of filing the attached brief in support of neither party concerning the motion for summary judgment. IAVA's legal and policy expertise with regard to the potential effect of reprogramming government funding on service members, veterans, and their

families enables it to contribute to this Court's consideration of the motion. Granting this motion would not prejudice any party, and the accompanying brief complies with all applicable rules.

**I. Identity and interest of *amicus curiae*.**

IAVA is a nonpartisan nonprofit 501(c)(3) organization founded in 2004, and dedicated to connecting, uniting and empowering the post-9/11 generation of veterans. IAVA's 425,000 members nationwide include veterans of all generations, currently serving military service members, and their family members and supporters. The organization files *amicus* briefs when its members' interests are directly implicated.

Among IAVA's principal advocacy goals is protecting veterans and veterans' interests, which includes protecting their pay, pensions, other military benefits, veterans' physical and mental wellbeing, and their financial security and stability. IAVA also provides support to veterans who reach out to IAVA's Rapid Response Referral Program. Government funding, now and in the future, for military and veterans' programs directly impacts IAVA's membership, IAVA's advocacy work and its provision of services to veterans. IAVA believes its policy and legal expertise will assist this court in its decision on summary judgment.

**II. Granting the motion to appear as *amicus curiae* would not prejudice any party and would assist this court's consideration of the motion.**

"Although neither the Rules of Civil Procedure nor the Local Rules of this Court prescribe procedures for filing an *amicus curiae* brief, the district court's inherent authority to allow the participation of *amicus* under conditions that the court finds appropriate has been recognized in numerous cases. ... As the District Court for the District of Columbia recently stated, "it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the *amicus*." *Cobell v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C. 2003)." *Alex Pacheco v. Freedom Buick*

*GMC Truck, Inc.*, MO-10-CV-116, 2011 WL 13234884, at \*1 (W.D. Tex. Nov. 1, 2011) (internal citations omitted).

The proposed brief addresses important issues that are touched on by neither party's motion regarding summary judgment: the impact of reprogramming Department of Defense funding on military service members, veterans, and their families. All efforts must be made to avoid negative outcomes for these Americans, who have already borne so much for this country. The proposed *amicus* brief examines the effect that the National Emergency Declaration and this Court's decision – could have on service members, veterans and their families.

## CONCLUSION

The motion for leave to file should be granted.

Respectfully submitted,

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**CERTIFICATE OF CONFERENCE**

I hereby certify that on May 2, 2019, I conferred with counsel for Defendants with regard to the relief requested in this motion and they do not oppose this motion.

*/s/ Clark Richards*  
**CLARK RICHARDS**

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 3<sup>rd</sup> day of May 2019, a true and correct copy of the foregoing document was filed with the U.S. District Court for the Western District of Texas by using the CM/ECF system, which will send notifications of such filing to all CM/ECF counsel of record.

*/s/ Clark Richards*  
**CLARK RICHARDS**

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Defendants. )

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**BRIEF OF IRAQ AND AFGHANISTAN VETERANS OF AMERICA**  
**AS AMICUS CURIAE**

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## **INTEREST OF AMICUS CURIAE**

Iraq and Afghanistan Veterans of America (IAVA) submits this brief as amicus on behalf of neither party. IAVA is the leading non-profit devoted to the interests of the post-9/11 generation of veterans, with 425,000 members comprised mostly of veterans of the wars in Iraq and Afghanistan. IAVA's membership also includes active duty service members, military spouses and dependents, and other veterans who served domestically or during other conflicts.

Military service is about answering the call to protect and defend the Constitution of the United States. Military service members do not choose their assignments and honorable service is about performing duties regardless of politics. As long as their orders are lawful, service members are compelled to obey them.

IAVA therefore will not opine about the national policy to build a border wall, the existence of a national emergency, or the value of deploying military service members to the Southern Border. Instead, IAVA writes to provide their broad perspective on the potential impact of relevant legal decisions on service members, veterans and their families.

## **ARGUMENT**

Members of the U.S. military swear an oath to support and defend the Constitution of the United States.<sup>1</sup> As they were obligated to follow the Constitution and the laws during their military service, service members and veterans expect the government to do the same. While on active

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<sup>1</sup> 10 U.S.C. § 502, the enlistment oath, is as follows: "I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God." 5 U.S.C. § 3331, the officer's oath, is as follows: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

duty, military service members are also strictly required to avoid partisan political activity.<sup>2</sup> This notion of the military being apolitical yet staunchly committed to defending the Constitution carries over to the veterans' community. While IAVA will not opine about politics or specific government policy decisions, the service members and veterans they represent believe strongly in the separation of powers, and sound government decision-making regardless of politics.

Regardless of the merits of this Administration's policies at the Southern Border and related legal decisions, they must not come at the expense of U.S. service members, veterans, or their families. Over the course of the legal and political decision-making related to the border wall thus far, service members, veterans and their families have been disproportionately negatively impacted. Current and future missions at the border and the reprogramming of Department of Defense funding for the border wall itself have a predictable likelihood of also disproportionately negatively impacting this important cohort of Americans. The cost of these decisions must not be unfairly borne by our American heroes.

In the President's Fiscal Year 2019 Budget Proposal, the Administration requested \$18 billion to fund a border wall.<sup>3</sup> Congressional leadership did not support funding at those levels, if at all. The ensuing political negotiation resulted in the longest government shutdown in history, which lasted from December 22, 2018 to January 25, 2019.

The government shutdown had grave impacts on American veterans and active duty members of the U.S. Coast Guard. One third of the federal workforce are veterans.<sup>4</sup> Of those

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<sup>2</sup> Department of Defense Directive 1344.10, Political Activities by Members of the Armed Forces, February 19, 2008, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/134410p.pdf>.

<sup>3</sup> Office of Management and Budget, *Budget of the U.S. Government, Efficient, Effective, Accountable; An American Budget* (February 2018), <https://www.govinfo.gov/content/pkg/BUDGET-2019-BUD/pdf/BUDGET-2019-BUD.pdf>.

<sup>4</sup> Office of Personnel Management, *Employment of Veterans in the Federal Executive Branch Fiscal Year 2016* (June 2017), <https://www.fedshirevets.gov/veterans-council/veteran-employment-data/employment-of-veterans-in-the-federal-executive-branch-fy2016.pdf>.

veterans, about 155,000 veterans were employed by agencies directly affected by the government shutdown.<sup>5</sup> They missed multiple paychecks creating financial instability for themselves and their families. The entire active duty Coast Guard (about 41,000 men and women)<sup>6</sup> missed their paychecks during this time as well. IAVA's own masters-level case managers – the Rapid Response Referral Program (RRRP)<sup>7</sup> – experienced a massive influx of interest in our services prompted by shutdown-based outreach during this time.<sup>8</sup>

Resolution of the government shutdown and ensuing negotiations between the President and Congressional leadership during early February 2019 did not result in significant border wall funding. On February 15, 2019, President Donald J. Trump declared a “national emergency” at the Southern Border.<sup>9</sup> In his declaration under the National Emergencies Act,<sup>10</sup> President Trump activated his authority to divert military construction funding under 10 U.S.C. § 2808 and to mobilize the reserves under 10 U.S.C. § 12302. President Trump also directed the Department to reprogram \$2.5 billion for Support for Counterdrug Activities under 10 U.S.C. § 284.<sup>11</sup> Use of each of these authorities has the potential to adversely impact military service members, veterans, and their families; such impact must be avoided.

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<sup>5</sup> See *id.*

<sup>6</sup> U.S. Department of Homeland Security, *U.S. Coast Guard Overview* (2016), [https://www.work.uscg.mil/Portals/6/Documents/PDF/USCG\\_Overview.pdf?ver=2016-10-21-114442-890](https://www.work.uscg.mil/Portals/6/Documents/PDF/USCG_Overview.pdf?ver=2016-10-21-114442-890).

<sup>7</sup> More information available at <http://iava.org/rrrp>.

<sup>8</sup> Data on file with Iraq and Afghanistan Veterans of America Chief Services Officer, Hannah Sinoway. She can be reached through IAVA Counsel.

<sup>9</sup> President of the United States, *Declaring a National Emergency Concerning the Southern Border of the United States* (February 15, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>.

<sup>10</sup> National Emergencies Act, Pub. L. No. 94-412 (codified at 10 U.S.C. § 1601 et seq.).

<sup>11</sup> White House Fact Sheets, *President Donald J. Trump’s Border Security Victory*, February 15, 2019, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/>.

## I. SOURCES OF BORDER WALL FUNDING MAY TAKE AWAY RESOURCES FROM MILITARY SERVICE MEMBERS, VETERANS AND THEIR FAMILIES

On March 25, the Department of Defense announced its plan to spend \$1 billion on border wall construction.<sup>12</sup> The funding came from reprogrammed money from 2019 Military Personnel, Army and Army Reserve accounts.<sup>13</sup> For IAVA's members, regardless of their position in the border wall, diversion of funding that adversely affects Army service members or veterans' pay, pensions, or other benefits would be unacceptable. According to media reports, the identified funds in this specific case appear to be unused money related to the Army's missed recruiting targets and lower-than-expected enrollment in the new blended retirement system.<sup>14</sup>

The other major potential source of funding identified for the border wall is military construction. In March, the Department of Defense (DoD) released a fact sheet to clarify guiding principles and potential sources of reprogrammed money for the border wall.<sup>15</sup> Excluded from the list provided on the DoD fact sheet are military housing projects, which could have directly impacted military families.<sup>16</sup> Included on the list, however, are numerous projects that have the potential to impact quality of work and quality of life for military service members and their families. Without knowing more about which projects would be canceled in favor of the border wall, it is impossible to state whether military service members or their families might be adversely affected.

<sup>12</sup> Department of Defense, *DoD Authorizes Support to Counter Drug Border Security*, March 25, 2019, <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1795239/dod-authorizes-support-to-counter-drug-border-security/>.

<sup>13</sup> House Committee on Appropriations, *Visclosky Denies Request to Use Defense Funds for Unauthorized Border Wall*, March 27, 2019, <https://appropriations.house.gov/news/press-releases/visclosky-denies-request-to-use-defense-funds-for-unauthorized-border-wall>.

<sup>14</sup> Andrew Taylor and Lisa Mascaro, *Military may tap military pay, pensions for border wall*, Associated Press, March 7, 2019, <https://www.apnews.com/ba6c2bc1fa024393801131bfbaa9cd89>.

<sup>15</sup> Department of Defense, *Fact Sheet on Section 2808 Funding Pool*, <https://assets.documentcloud.org/documents/5774495/2808-Funding-Pool.pdf>.

<sup>16</sup> *Id.*

At this point, it appears that no funding has yet been reprogrammed directly affecting military service members, veterans, or their families. However, it is unclear where future funding for the border wall may come from. To date, the Administration has consistently distinguished away funding sources that might affect military families directly, signaling that they may continue to help and support service members and their families.<sup>17</sup> Nevertheless, any potential reprogramming of funding that would negatively impact military service members, veterans, or their families due to the diversion of pay and pension funding or canceled military construction projects would be unjust. These Americans have been asked to sacrifice so much for their country's policies and laws; burdens associated with national policy and law must be shared fairly and more equally throughout the American populace.

## **II. ALL DEPLOYMENTS COME WITH SACRIFICE AND COST FOR MILITARY SERVICE MEMBERS, VETERANS AND THEIR FAMILIES**

Currently there are about 5,000 service members deployed to the Southern border.<sup>18</sup> The mission began in October and the operation will continue until at least the fall,<sup>19</sup> likely requiring many of these service members to be deployed for six months or more.

Deployment to any military operation, regardless whether it is domestic or international, requires significant sacrifice and places strain on military service members and their families. Our service members endure these hardships nobly and willingly – it is what they signed up to do. They also do so with the implicit American promise that as veterans, they will be cared for by the government for injuries and other harms to them that result from their military service.

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<sup>17</sup> See, e.g., Tara Copp, *Pentagon chief: Military housing unlikely to be diverted to border wall*, Military Times, February 16, 2019, <https://www.militarytimes.com/news/your-military/2019/02/16/pentagon-chief-military-housing-money-likely-safe-from-border-wall-use/>.

<sup>18</sup> Leo Shane, *Trump to boost deployments at U.S. southern border again*, Military Times, April 10, 2019, <https://www.militarytimes.com/news/pentagon-congress/2019/04/10/trump-again-looks-to-boost-troop-deployments-at-us-southern-border/>.

<sup>19</sup> *Id.*

As with any deployment under any Administration, the Department of Defense, the Department of Veterans Affairs, and other supporting federal departments and agencies, must be prepared to care for service members and veterans who have served on the border. Any injuries or other harms to them or their families, foreseen or unforeseen, that result from this usage of military personnel will necessarily become an obligation of the government and the American people.

We cannot know now the full extent of the cost to military personnel and their families of their deployments to the border, but that does not mean that future planning for their care should not commence immediately. Potential sources of harm include: any moral injury or mental health consequence of the mission, service-connected physical injuries, financial hardship and other strains on families and relationships, and other unanticipated events.

The decision of this Court may have an outsized impact on the lives of military service members, veterans and their families. Our American heroes, who swear an oath to support and defend the Constitution of the United States, dutifully execute on all lawful orders. In response, they are owed a promise from the American people that they will be cared for and remembered for the sacrifices they endure in service to our country. All efforts should be made to prevent the legal and policy decisions made regarding the border wall and the national emergency declaration from negatively impacting U.S. service members, veterans and their families. Their interests must be considered and kept in mind as decisions are made that will necessarily affect their futures.

## **CONCLUSION**

For these reasons, amicus respectfully submits this brief for the Court's consideration.

Respectfully submitted,

/s/ Lindsay L. Rodman

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this the 3<sup>rd</sup> day of May 2019, a true and correct copy of the foregoing document was filed with the U.S. District Court for the Western District of Texas by using the CM/ECF system, which will send notifications of such filing to all CM/ECF counsel of record.

/s/ Clark Richards

**CLARK RICHARDS**

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STEVEN T. MNUCHIN, in his official capacity as )  
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**ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

Came on for consideration Motion for Leave to File Brief *Amicus Curiae* filed by Iraq and Afghanistan Veterans of America. The Court has concluded that the motion for leave shall be granted.

It is therefore Ordered that Iraq and Afghanistan Veterans of America is granted leave to file its Brief *Amicus Curiae*.

It is so ORDERED.

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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HON. DAVID BRIONES  
UNITED STATES DISTRICT JUDGE