

Nos. 19-17501, 19-17502, 20-15044
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,
Plaintiff-Appellees,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,
Defendant-Appellants.

STATE OF CALIFORNIA, et al.,
Plaintiff-Appellees / Cross-Appellants,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,
Defendant-Appellants / Cross-Appellees.

BRIEF FOR IRAQ AND AFGHANISTAN VETERANS OF AMERICA AS
***AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE**

On Appeal from the United States District Court
for the Northern District of California

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amicus curiae* Iraq and Afghanistan Veterans of American states that it has no parent corporation and that no publicly held corporation owns more than 10% of its stock.

Dated: February 20, 2020

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INTEREST OF *AMICUS CURIAE*¹

Iraq and Afghanistan Veterans of America (“IAVA”) submits this brief as *amicus curiae* on behalf of Plaintiffs-Appellees. IAVA is the leading non-profit devoted to the interests of the post-9/11 generation of veterans, with 425,000 members comprising mostly veterans of the wars in Iraq and Afghanistan. IAVA’s membership also includes active-duty service members, military spouses and dependents, and veterans who served domestically or during other conflicts.

IAVA’s membership is diverse and represents the full spectrum of political persuasions. IAVA will not opine about the merits of the national policy to build a border wall, the existence of a national emergency, or the constitutionality of the President’s declaration. IAVA instead writes to provide its unique perspective on the impact of the President’s decision to divert funding from much-needed military construction projects. This diversion of funds to build a border wall exacerbates a longstanding military construction budget crunch, with profound consequences for military service members and families. It endangers the well-being of currently serving military members and their families and diminishes their quality of life. For

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* certifies that (1) this brief was authored entirely by counsel for *amicus* and not by counsel for any party, in whole or part; (2) no party or counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from *amicus* and its counsel, no other person contributed money to fund preparing or submitting this brief.

that reason, IAVA opposes the diversion of military construction funding to the border wall.

IAVA sought and received consent from all parties to the filing of this *amicus* brief.

INTRODUCTION & BACKGROUND

Military construction is funded through a painstaking, time-consuming process. By statute, no funds may be appropriated for military construction unless “specifically authorized by law.” 10 U.S.C. § 114(a)(6). The process of seeking such authorization starts on the ground, with engineering staff evaluating the need for new or rehabilitated facilities.² Identified construction needs in each military branch then pass through a multilayered chain of approvals, requiring evaluation and prioritization, before being submitted to the Office of the Secretary of Defense, which further narrows the projects for which funding will be requested.³ Legislation for construction project appropriation is then considered by congressional committees and subcommittees before it reaches a vote by Congress.⁴ Even for the highest-priority projects, it can take “three or more years” before an identified need makes it into a budget request, and years longer for “congressional authorization and appro-

² Lynn M. Williams, Cong. Research Serv., *Military Construction: Process, Outcomes, and Frequently Asked Questions* 5-6 (May 16, 2018), <https://fas.org/sgp/crs/natsec/R44710.pdf>.

³ *See id.* at 6-11.

⁴ *See id.* at 11.

priations, implementation of the federal contracting process, and the physical construction of the project.”⁵

The problem of underfunded military construction has been exacerbated by the Budget Control Act of 2011, which was passed to avert a government shutdown and has been amended in response to subsequent budget impasses. That Act places spending limits on defense discretionary budget authority.⁶ The availability of military construction funding has diminished year after year due to those spending caps. As a result, the living and working conditions of service members and their families have already “been neglected in favor of other priorities,” and “many construction projects are long overdue.”⁷ Indeed, as recently as June 2018, the Director of the White House’s Office of Management and Budget (OMB) complained that the Senate Appropriations Committee’s proposed military construction bill would not “fully fund[] military construction projects” and would thus “delay[] critical resources to

⁵ Williams, *supra* note 2, at 1.

⁶ See generally Budget Control Act of 2011 (as amended), P.L. No. 112-25, P.L. No. 112- 240, P.L. No. 113-67, P.L. No. 114-74, P.L. No. 115-123, & P.L. No. 116-37.

⁷ Aaron Gregg & Erica Werner, *Pentagon Has Warned of Dire Outcomes If Military Projects Canceled for Wall Don’t Happen*, Washington Post (Sept. 18, 2019), https://www.washingtonpost.com/business/economy/pentagon-has-warned-of-dire-outcomes-if-military-projects-canceled-for-wall-dont-happen/2019/09/18/03e99ac6-d988-11e9-ac63-3016711543fe_story.html.

complete high-priority budgets . . . put[ting] the burden on future budgets to make up the difference.”⁸

In early 2019, when President Trump declared a national emergency and signaled his intention to divert military construction funding to fund a border wall, IAVA grew concerned about the potential for this funding diversion to exacerbate the problems cited by the OMB director, especially insofar as they impact military servicemembers, veterans, and their families.⁹ Those concerns became reality when, on September 4, 2019, the Pentagon released a list of military construction projects that are being deferred so that \$3.6 billion in funding can be diverted to the border wall.¹⁰ As discussed below, each of these projects would improve safety, quality of life, or work environment for military service members and their families—improvements that will not be made if the Administration’s diversion of funds is permitted to proceed.

⁸ Letter from Mick Mulvaney, Director of the Office of Management and Budget, to Sen. Richard Shelby 2 (June 18, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/06/Shelby-MilCon.pdf>.

⁹ See generally Brief of Iraq and Afghanistan Veterans of America as *Amicus Curiae*, *El Paso County v. Donald J. Trump*, No. 3:19-cv-66-DB (W.D. Tex. filed May 3, 2019), ECF 61-1.

¹⁰ Claudia Grisales, *These are the Military Projects Losing Funding to Trump’s Border Wall*, National Public Radio (Sept. 4, 2019), <https://www.npr.org/2019/09/04/757463817/these-are-the-11-border-projects-getting-funds-intended-for-military-construction>.

ARGUMENT

Putting aside the wisdom of the Administration's policies at the Southern border, these decisions must not come at the expense of U.S. service members or their families. The Department of Defense is reprogramming funding that was intended to keep military service members and their families safe—both at home and abroad—and to improve the quality of their lives. Our American heroes, who have already sacrificed so much, should not bear these costs of the political dispute over building the wall.

I. DIVERTING DEFENSE FUNDS TO THE BORDER THREATENS THE SAFETY OF SERVICE MEMBERS AND DIMINISHES THEIR QUALITY OF LIFE

Even the limited information that is publicly available shows that the Administration's planned funding diversions places service members in harm's way. These consequences begin at home, where service members at U.S. military bases keep the world's greatest fighting force ready to face an array of complex threats. The Administration's proposal diverts funds that are needed to address outdated and unsafe conditions at critical sites.

The following are just a few examples of deferred military construction that will make service members stationed in the United States less safe:

- *Unsafe weapons construction and maintenance.* Soldiers at an ammunition plant in Indiana currently work in violation of Army safety standards

while handling and storing explosives. The \$16 million required to revamp the rail holding area, allowing for safer storage of munitions, has been diverted to the border wall. Similarly, without needed maintenance for weapons facilities in Alabama, troops there continue to face an increased risk of accidents due to what the Pentagon has deemed “unnecessary movement of artillery pieces.”¹¹

- ***Dangerously outdated vehicle and aircraft facilities.*** Diverted funding also means cancellation of construction projects for maintenance buildings at Fort Huachuca in Arizona that date as far back as the 1930s. The current facilities do not meet Army standards for military vehicle testing and maintenance, requiring service members to work in “unsafe” facilities that “jeopardize personnel health, security and safety.” In New Orleans, diversion of funding to the border wall delays replacement of an aircraft parking ramp abutting a public roadway. Service members and even civilians passing by the military base currently face what the Air Force has called an “unacceptable risk” of harm from an explosive accident. Similarly delayed are proposed repairs to sinking concrete parking slabs inside aircraft

¹¹ Gregg & Werner, *supra* note 7.

shelters, which are causing pipes and electrical wiring to pull loose and thus increase the risk of fires and explosions.¹²

- ***Displaced facilities for specialized training.*** Another casualty is a \$37 million specialized Air Force facility in Maryland for unloading hazardous cargo and a range for bomb-defusing training—which has been deferred, even though it was made necessary by the relocation of an aircraft hangar to hold President Trump’s new, bigger Air Force One plane.¹³
- ***Inadequate aviation facilities.*** New Mexico’s Holloman Air Force Base has halted plans for a new training facility for drone pilots, whose existing facility suffers from sink holes and a bat infestation. Without repair, that facility cannot be operated at the classified level, so that trainees cannot use safety systems designed to prevent aircraft from crashing into each other and to alert pilots about the location of ground-based personnel. Hill Air Force Base in Utah has similarly been deprived of the \$28 million required to build a new control center designed to replace two “dilapidated WWII-era” warehouses, one used for air traffic control and one for mission control. Those warehouses have been labeled “structurally deficient,” due in part to “roof leaks from failing asbestos panel roof systems.”¹⁴

¹² Gregg & Werner, *supra* note 7.

¹³ *Id.*

¹⁴ *Id.*

- ***Service members will be denied basic living necessities and emergency services.*** For instance, the Air Force needs \$41 million to replace a failing central heat power plant boiler at Eielson Air Force Base in Alaska, where winter temperatures reach 65 degrees below zero. And at the Marine Corps Air Station Beaufort in South Carolina, diverted funds would have been used to build a satellite fire station—without which, the Pentagon warns, “personnel . . . will continue to work from a significantly undersized and unsafe facility.”¹⁵

Service members overseas will also be affected by the deferral of numerous projects that would have significantly improved their safety and well-being:

- ***A special operations joint parachute-rigging facility in Baumholder, Germany.*** Parachute-rigging is among the most important jobs for keeping special operators safe, but the current facilities in Germany are “sub-standard, severely undersized[,] and poorly configured.”¹⁶ The planned diversion delays the construction of a new anti-terrorism/force protection

¹⁵ Gregg & Werner, *supra* note 7 (ellipsis in original).

¹⁶ Dep’t of Defense, *Fiscal Year (FY) 2019 Budget Estimates* 201 (Feb. 2018), https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2019/budget_justification/pdfs/07_Military_Construction/21-Military_Construction_Defense-Wide_Consolidated.pdf.

compliant facility to support the operations, training, and deployment of forces.¹⁷

- ***Two special operations maintenance hangars in Okinawa, Japan, and two operations and warehouse facilities in Honshu, Japan.*** Dilapidated and abandoned infrastructure on bases in Japan awaits funding for improvements. These include decades-old warehouses, hangars, and other facilities at the Kadena and Yokota Air Bases, which are critical for the day-to-day work that keeps the military prepared in the Asia-Pacific region.¹⁸
- ***Munitions structures and truck unload facilities in Japan.*** Working with munitions and unloading truck cargo are among the more dangerous non-combat jobs performed in the military. Kadena Air Base, the largest and most active U.S. Air Force base in East and Southeast Asia, requires replacement munitions structures, and its truck unloading facilities currently fail to meet resiliency standards. These deficiencies, which would be addressed but for the planned funding diversions, undermine the base's capability to provide adequate support to regional flying missions.¹⁹

¹⁷ *Fiscal Year (FY) 2019 Budget Estimates*, supra note 16, at 200.

¹⁸ Grisales, supra note 10.

¹⁹ *Fiscal Year (FY) 2019 Budget Estimates*, supra note 16, at 67.

- ***Working dog treatment facility replacement in Guantanamo Bay.***

Working dogs are an essential part of the mission in Guantanamo, including for detecting and locating weapons and explosives and conducting searches. The dogs, moreover, become like family to their service-member handlers. The treatment facility is necessary not only to ensure that working dogs receive proper veterinary and surgical care, including for dogs suffering from combat wounds and post-traumatic stress, but also for the prevention of zoonotic disease.²⁰

If funded, all of these projects would significantly improve the safety of our service members. And they would help provide the military with a work environment worthy of their service. Any working professional can appreciate the improvement to effectiveness and morale that results from improved working conditions. The Administration's proposed funding diversions would force the U.S. military to do without those improvements.

II. DIVERTING DEFENSE FUNDS TO THE BORDER WALL ENDANGERS THE WELL-BEING OF SERVICE MEMBERS' FAMILIES

The disastrous consequences of deferring military construction in favor of the border wall do not end with the effects on service members—the planned funding diversions would also harm the health and welfare of service members' families.

²⁰ *Fiscal Year (FY) 2019 Budget Estimates*, *supra* note 16, at 7.

Service members and their families, already asked to sacrifice for the good of their country on a daily basis, would be forced to continue doing so with substandard healthcare. And their children, who often share those sacrifices as they follow their parents to military bases both here and abroad, would not get the help they need to ensure the schools they attend are safe and effective.

For example, the list of projects to be deferred includes an ambulatory care facility at Camp Lejeune, North Carolina, that would have helped address the problem of medical and dental care “provided in ‘substandard, inefficient, decentralized and uncontrolled facilities.’”²¹ Those facilities—already suffering from storm damage in the aftermath of 2018’s hurricane season—serve not just military service members, but others entitled to healthcare in the military system, including military families. According to the Pentagon itself, not funding the Camp Lejeune project “will result in compromised readiness, uncoordinated care delivery, and inappropriate use of medical resources.”²²

There are also two dining facilities on the list of canceled projects: one in Puerto Rico and another in San Antonio.²³ Without access to dining facilities on base, service members often only have access to fast food, leaving them with few if any healthy and affordable options.

²¹ Gregg & Werner, *supra* note 7.

²² *Id.*

²³ Grisales, *supra* note 10.

Worse still, the list of canceled projects includes *nine different schools*, including a daycare/preschool in Maryland, three elementary schools in Germany, an elementary school in the United States, an elementary school in Japan, an elementary/middle/high school in the United Kingdom, a middle school in Kentucky, and a high school in Japan. These schools all suffer from varied states of disrepair and overcrowding. The current middle school at Joint Base Andrews in Maryland, which has a waitlist of 115 children, suffers from mold and pest infestations as well as sewage backups and heating and ventilation failures.²⁴ The middle school at Fort Campbell in Kentucky is not only undersized and inadequate to serve the current student population, but also suffers from leaks and a broken heating system in certain classrooms.²⁵ And Bechtel Elementary School in Germany, described as “in failing condition,” does not meet U.S. fire suppression standards and needs extensive infrastructure work ranging from electrical branch circuits to lighting to plumbing and piping.²⁶ Planned construction projects at each of these sites would help military families, especially those stationed overseas in

²⁴ Grisales, *supra* note 10.

²⁵ *Id.*; see also Helene Cooper, *No New School at Fort Campbell: The Money Went to Trump’s Border Wall*, *The New York Times* (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/us/trump-border-wall-military-families.html?auth=login-email&login=email>.

²⁶ *Fiscal Year (FY) 2019 Budget Estimates*, *supra* note 16, at 92-93.

areas where local schools might not cater to English speakers or an American teaching style.

III. THE EFFECTS OF THESE FUNDING DIVERSIONS WILL IMPACT THE MILITARY FOR YEARS TO COME

In order for service members and their families to be made whole, the President's diversion of funding should be cancelled, and these projects reinstated. There is little indication that Congress will find other sources of funding for the deferred projects:²⁷ on the contrary, it was recently announced that the administration plans to shift an *additional* \$3.7 billion from military construction funds towards the border wall.²⁸ And even if Congress does eventually decide to restore funding for the affected military construction projects, that would likely lead to the deferral of other high-priority military construction even further down the line.²⁹ Affirmance would allow the Department of Defense to get much-needed military construction back on track.

²⁷ See Meghann Myers, *Here's How Much Border Wall Has Been Built with the Military's Money*, Military Times (Jan. 16, 2020), <https://www.militarytimes.com/news/your-military/2020/01/16/heres-how-much-border-wall-has-been-built-with-the-militarys-money/>.

²⁸ See Michelle Hackman, *Trump Administration Plans to Shift Additional \$7.2 Billion for Border Wall*, The Wall Street Journal (Jan. 13, 2020), https://www.wsj.com/articles/trump-administration-plans-to-shift-additional-7-2-billion-for-border-wall-11578970110?mod=article_inline.

²⁹ See Williams, *supra* note 2, at 17 (“A newly identified requirement may be assessed as having a higher priority than projects already in the planning process. Therefore, some construction, while worthy, may be deferred to later years.”).

Service members are used to discomfort. They signed up to endure hardships so that the rest of American society could live freely and comfortably. And they are used to seeing dilapidated buildings and living and working in substandard conditions. But they should never be asked to work in unnecessarily unsafe or harmful conditions, or to wait even longer for basic facilities that are already long overdue. That is the result of the funding diversions, and this Court should bear that result in mind as it considers the issues before it.

CONCLUSION

This Court's decision will have an outsized impact on the lives of military service members and their families. Those men and women, who swear an oath to support and defend the Constitution of the United States dutifully execute all lawful orders, even when they are asked to put themselves in harm's way. But they should not needlessly be placed in harm's way, nor should their quality of life be unnecessarily impacted, through the deferral of already-stretched military construction budgets in favor of an unrelated political policy. For these reasons, IAVA respectfully asks this Court to take heed of the impacts on military service members and their families as it considers these appeals.

Dated: February 20, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1) and Circuit Rule 32.1, I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word.

I further certify that this brief complies with the word limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,333 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2020, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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