

No. 19-123

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In the  
**Supreme Court of the United States**

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SHARONELL FULTON, ET AL.

*Petitioners,*

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,

*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

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**BRIEF OF FORMER SERVICE SECRETARIES  
AND THE MODERN MILITARY ASSOCIATION  
OF AMERICA AS AMICI CURIAE  
SUPPORTING RESPONDENTS**

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### INTEREST OF AMICI CURIAE<sup>1</sup>

The amici curiae are Secretary Ray Mabus, Secretary Deborah Lee James, Secretary Eric Fanning, and the Modern Military Association of America (“MMAA”). Amici share an interest in policies that enhance the military’s readiness and protect the interests of service members and their families. Amici respectfully submit this brief to advocate for a ruling that affirms the government’s right to include anti-discrimination provisions in contracts and that recognizes how a right to discriminate would harm the military by stigmatizing and otherwise negatively affecting service members and their families.

Secretary Ray Mabus was the 75th U.S. Secretary of the Navy from 2009 to 2017, the longest to serve as leader of the Navy and Marine Corps since World War I. Throughout his tenure, he focused on four key priorities—People, Platforms, Power, and Partnerships—that enabled the Navy and Marine Corps’ unique ability to maintain the global presence that reassures our allies and deters our adversaries. Among his achievements, he spearheaded the “21st Century Sailor and Marine” initiative, which was designed to build and maintain the most resilient and ready force possible and to prepare service members

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<sup>1</sup> The parties have consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part; no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

and their families for the high-tempo operations of today's military.

Secretary Deborah Lee James was the 23rd U.S. Secretary of the Air Force. Previously, she served in the Pentagon as the Assistant Secretary of Defense for Reserve Affairs, where she was the Secretary of Defense's Senior Advisor on National Guard and Reserve personnel. As a professional staff member on the House Armed Services Committee, she served as Senior Advisor to the Military Personnel and Compensation Subcommittee, the NATO Burden Sharing Panel, and the Chairman's Member Services team.

Secretary Eric Fanning was the 22nd U.S. Secretary of the Army. As Secretary, he had statutory responsibility for all matters related to the Army, including manpower, personnel, and reserve affairs. Previously, he served as Chief of Staff to the Secretary of Defense, as Acting Secretary of the Air Force, as Under Secretary of the Air Force, and as Deputy Under Secretary of the Navy/Deputy Chief Management Officer. He is the only person to have held senior appointments in all three military departments and the Office of the Secretary of Defense.

MMAA is a non-profit, non-partisan legal services, policy, and watchdog organization serving lesbian, gay, bisexual, transgender, and queer ("LGBTQ") military personnel, veterans, military spouses, family members, and allies, and individuals living with HIV.<sup>2</sup> MMAA has over 75,000 members. MMAA has

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<sup>2</sup> While lesbian, gay, bisexual, and queer service members can openly serve, transgender people are not permitted to serve or enlist in the military, except if they serve in their original sex

a unique understanding of the challenges faced by the populations it serves. Since 1993, MMAA and its predecessor entities have assisted over 12,500 clients.

MMAA and its predecessor entities have filed lawsuits challenging laws and regulations that target, stigmatize, discriminate against, or otherwise negatively affect LGBTQ service members and their families—reducing morale and diminishing military readiness by inhibiting the military’s efforts at recruiting and retention. MMAA and its predecessors also have submitted amici briefs to this Court in cases that directly affected LGBTQ service members, including *Obergefell v. Hodges*,<sup>3</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>4</sup> and *Bostock v. Clayton County*.<sup>5</sup>

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assignment, had been grandfathered in prior to April 12, 2019, or were given a waiver. See Office of the Deputy Secretary of Defense, Directive-type Memorandum (DTM)-19-004 at 2-3 (Mar. 2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM%2019-004.PDF?ver=2020-03-17-140438-090>. Thus, transgender people continue to serve in the military, and there are thousands who are veterans. As they would be subject to similar repercussions depending on the outcome of this case, amici therefore includes transgender people in their arguments unless otherwise noted.

<sup>3</sup> Amicus Curiae OutServe-Servicemembers Legal Defense Network and American Military Partner Association Br., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556 et al.), 2015 WL 981531.

<sup>4</sup> Amicus Curiae Outserve-SLDN, Inc., American Military Partner Association, and American Veterans for Equal Rights Br., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5152970.

<sup>5</sup> Amicus Curiae Modern Military Association of America and Transgender American Veterans Association Br., *Bostock v.*

### SUMMARY OF ARGUMENT

Amici agree with Respondents that the Constitution does not prohibit the government from requiring private parties, including religious entities, that wish to enter into voluntary contractual arrangements to deliver government services to commit not to discriminate in the provision of those services on the basis of a recipient's sexual orientation or other personal characteristics. Amici further agree with Respondents that the government is not required to exempt religious entities that voluntarily elect to contract with the government from complying with generally applicable nondiscrimination requirements. Amici also agree with Respondents that overruling *Employment Division v. Smith* would have far reaching and negative consequences.

Amici submit this brief not to rehash those arguments, but to address the substantial practical consequences of this case for LGBTQ service members, spouses, and family members—and therefore the military itself. Service members are stationed throughout the country according to the military's needs and, unlike civilians, cannot choose to live in the communities of their choice. LGBTQ service members—and many others—benefit when the government where they are stationed requires parties with whom it contracts to serve *everyone* within the community, without regard to race, religion, or sexual orientation.

A rule exempting private parties who seek to contract with the government from complying with generally applicable nondiscrimination laws will

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*Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 et al.), 2019 WL 2915034.

particularly disadvantage LGBTQ service members. For example, LGBTQ individuals and couples are, as a whole, more likely to adopt children than heterosexual couples. In many areas where service members are stationed, there are few child welfare agencies to whom those seeking to adopt children can turn. Thus, access to such services is especially vital for LGBTQ families. Similarly, there are a limited number of private service providers in rural areas with which the government contracts to provide countless other services. If those organizations can discriminate against individuals or couples on the basis of sexual orientation notwithstanding nondiscrimination laws and policies, it will not only directly harm LGBTQ service members and their families, but undermine the military's recruitment and retention of LGBTQ personnel, thus damaging vital national security interests.

In short, a ruling for Petitioners would weaken military readiness. The military needs LGBTQ service members—not just because of the struggle to meet recruiting goals, but because a diverse military is critical to its effectiveness. Allowing the discrimination urged here would directly harm LGBTQ service members and their families, and, faced with being relocated to areas where discrimination might impede them from accessing vital services, many LGBTQ people will be discouraged from enlisting or continuing their service. That would undermine important military interests.

## ARGUMENT

### I. LGBTQ SERVICE MEMBERS, THEIR SPOUSES, AND THEIR FAMILIES ARE INTEGRAL TO THE MILITARY'S ABILITY TO ACCOMPLISH ITS MISSION

#### A. LGBTQ Service Members Are Integral To America's Armed Forces

LGBTQ service members are integral to America's Armed Forces. Indeed, LGBTQ individuals make up a substantial number of overall service members throughout every branch of the armed services. More than 71,000 military personnel identify as lesbian, gay, or bisexual. See Jeremy T. Goldbach & Carl Andrew Castro, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Service Members: Life After Don't Ask, Don't Tell*, 18 *Current Psychiatry Rep.* 56 at 1 (online ed. Apr. 16, 2016), <https://cir.usc.edu/wp-content/uploads/2016/04/GoldbachCastro-LGBT-Military.pdf> ("Goldbach Study"). As of 2015, LGBTQ personnel made up 6.1% of service members and serve in every branch of the armed services. Sarah O. Meadows et al., Rand Corp., *2015 Department of Defense Health Related Behaviors Survey* at xxx (2018), [https://www.rand.org/pubs/research\\_reports/RR1695.html](https://www.rand.org/pubs/research_reports/RR1695.html). It is estimated that at least 6,600 additional service members identify as transgender. Rand Study at x-xi.

LGBTQ service members are highly decorated, having received numerous military awards and commendations. Technical Sergeant Leonard P. Matlovich, the first gay service member to purposefully out himself to the military, received the Purple Heart and the Bronze Star. See Amy Byrne, *5 LGBTQ service members who changed military*



*history*, MilSpouseFest, <http://militaryoneclick.com/5-lgbt-service-members-changed-military-history/> (last visited Aug. 11, 2020). Kristin Beck, who is transgender, served thirteen tours overseas as a special operator on the Navy's SEAL Team Six. Derek Coy, *5 Transgender Service Members Who Are Defying Military Norms*, Task & Purpose (Nov. 17, 2015), <http://taskandpurpose.com/5-transgender-service-members-defying-military-norms/>. She was awarded the Bronze Star for heroic action under fire, the Purple Heart, and the Defense Meritorious Service Medal with an oak leaf cluster. *Id.* And openly gay Major General Randy S. Taylor, Chief of Staff of U.S. Strategic Command has been awarded the Distinguished Service Medal, the Ranger Tab, the Expert Infantryman Badge, the Senior Parachutist Badge, the Air Assault Badge, and the Presidential Service Badge. United States Strategic Command Biography, Maj. Gen. Randy S. Taylor, <https://www.stratcom.mil/Portals/8/Documents/Bios/COS.pdf?ver=2020-04-30-181347-937> (last updated Apr. 2020). These are just a few examples.

Given this record of service, it is unsurprising that military leaders recognize that welcoming LGBTQ people in the Armed Forces has enhanced the military's ability to achieve its mission. In 2015, former Secretary of Defense and Republican Senator Chuck Hagel said “[g]ay and lesbian service members and LGBT civilians are integral to America’s armed forces . . . [,] [making] our military and our nation stronger, much stronger.” Dep’t of Defense, Remarks by Secretary Hagel at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium (Jun. 25, 2013), <https://archive.defense.gov/transcripts/transcript.aspx>

?transcriptid=5262. In 2016, then-Defense Secretary Ash Carter recognized that the readiness and willingness to serve of “brave LGBT soldiers, sailors, airmen, Coast Guardsmen, and Marines ha[s] . . . made our military stronger and our nation safer.” Ash Carter, U.S. Dep’t of Defense, Secretary of Defense Message, LGBT Pride Month Message (June 7, 2016), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/793510/lgbt-pride-month-message/>. Similarly, Rear Admiral Robert Sharp, director of the National Maritime Intelligence-Integration Office and commander of Office of Naval Intelligence, stated that including LGBTQ service members in the Armed Forces “makes the best use of our talent, strengthens the team and ensures we identify, assess and recruit the nation’s best and brightest.” Office of Naval Intelligence Public Affairs, *Sharp Gives Keynote at LGBT Pride Month Summit*, [https://www.oni.navy.mil/Portals/12/Media/in\\_the\\_news/PAO%20Release%2027July17bgs.pdf?ver=2017-07-27-090649-807](https://www.oni.navy.mil/Portals/12/Media/in_the_news/PAO%20Release%2027July17bgs.pdf?ver=2017-07-27-090649-807) (last visited Aug. 11, 2020).

The contributions of LGBTQ service members are vital to the military’s ability to accomplish its national security goals, and their inclusion and retention furthers important military objectives and the long-term national security and public interests of the United States.

**B. Military Families, Including LGBTQ Military Families, Also Are Integral To The Military’s Ability To Accomplish Its Mission**

Military families—the recognized “key element” of readiness and effectiveness—are also vital to

maintaining a strong and resilient all-volunteer force and to helping service members meet the challenges of military service.

Most service members have families: 51% are married, and another 6% are single parents. Karen Jowers, *Dunford: Military Families Key to National Security*, *Military Times* (Oct. 11, 2016), <https://www.militarytimes.com/spouse/2016/10/11/dunford-military-families-key-to-national-security/>. About 40% of service members are parents. Committee on the Well-Being of Military Families, National Academies of Sciences, Engineering, and Medicine, *Strengthening the Military Family Readiness System for a Changing American Society* 93 at Fig. 3-5 (2019), [https://www.ncbi.nlm.nih.gov/books/NBK547607/pdf/Bookshelf\\_NBK547607.pdf](https://www.ncbi.nlm.nih.gov/books/NBK547607/pdf/Bookshelf_NBK547607.pdf).

Military leaders recognize families as the “force behind the force”—impacting service members’ morale, readiness, enrollment, and retention. U.S. Army, *Keeping Our Army Strong*, <https://www.army.mil/families/> (last visited Aug. 11, 2020); *see also* Shannon Collins, U.S. Dep’t of Defense, *Senior Leaders Discuss Importance of Supporting Military Children*, *DOD News* (July 31, 2015), <https://www.defense.gov/News/Article/Article/612730> (noting that leaders recognize “[f]amily is part of readiness, and [the military has] to have that balance between mission, family and . . . community” (quoting Army Lt. Gen. David D. Halverson)). Testifying before the United States Senate, Master Chief Petty Officer Steven S. Giordano explained, “[t]aking care of marines *and their families* is a key element of overall readiness and combat effectiveness.” U.S. Senate Subcomm. on Personnel, Comm. on Armed Services, *Hearing to Receive Testimony on*

*Department of Defense Single Servicemember and Military Family Readiness Programs*, Transcript 11 (Feb. 14, 2017), [https://www.armed-services.senate.gov/imo/media/doc/17-10\\_02-14-17.pdf](https://www.armed-services.senate.gov/imo/media/doc/17-10_02-14-17.pdf) (“Feb. 14, 2017 Hearing Tr.”) (testimony of Steven S. Giordano, Master Chief Petty Officer of the Navy) (emphasis added). Chief Master Sergeant of the Air Force James A. Cody agreed: “Families are often the catalyst to an airman’s decision to stay or leave the Air Force.” *Id.* at 15 (testimony of James A. Cody, Chief Master Sergeant of the Air Force). And in 2020, the Association of the U.S. Army—the Army’s premier, nonprofit, educational and professional association—gave its highest award, the George Catlett Marshall Medal, to the “Army Family.” Thomas Brading, *‘The Army Family’ awarded AUSA Marshall Medal for selfless service*, Army News Service (Aug. 10, 2020), [https://www.army.mil/article/237884/the\\_army\\_family\\_awarded\\_ausa\\_marshall\\_medal\\_for\\_selfless\\_service](https://www.army.mil/article/237884/the_army_family_awarded_ausa_marshall_medal_for_selfless_service). At the time, Dee Geise, Chief of the Soldier and Family Readiness Directorate in the Office of the Deputy Chief of Staff, G-9, emphasized that “if Soldiers are worried about their Families, they may be unable to focus on their mission. That’s why, along with modernization and reform, ‘Army Families are a focal point for Army readiness[.]’” *Id.*

The military demands sacrifices from service members’ families. Families routinely must relocate based on national security and military necessity, instead of their own geographic preferences. See Margaret C. Harrell et al., Rand National Defense Research Inst., *Working Around the Military: Challenges to Military Spouse Employment and Education* 18-20 (2004), [https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND\\_](https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_)

MG196.pdf. The Rand Corporation has observed that during a five-year study period, fewer than half of civilian families moved, while that number was 90% for military families. *Id.* at 18-19. And many military moves require relocating along distances. *Id.* at 19.

Service members and their families also are not infrequently separated. When service members' duties require separation from their family, their "[d]ominant [c]oncern" is "the impact of separation on their families and worries about their spouses' ability to cope with deployment-related challenges." See Committee on the Assessment of Readjustment Needs of Military Personnel, Veterans and Their Families, Institute of Medicine of the National Academies, *Returning Home from Iraq and Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, and Their Families* 274 (2013), [https://www.ncbi.nlm.nih.gov/books/NBK206864/pdf/Bookshelf\\_NBK206864.pdf](https://www.ncbi.nlm.nih.gov/books/NBK206864/pdf/Bookshelf_NBK206864.pdf). Supporting service members' families can help alleviate those worries.

Therefore, helping military families to face and overcome the burdens imposed on them as a result of a loved one's service is essential to maintaining a robust and skilled volunteer military. Sergeant Major Ronald L. Green testified as much to Senate Committee on the Armed Forces, stating on behalf of the Navy that "[t]aking care of [M]arines and their families is a key element of overall readiness and combat effectiveness. The adage 'we recruit [M]arines, we retain families' remains as true today as ever." Feb. 14, 2017 Hearing Tr. 11 (testimony of

Sergeant Major Ronald L. Green, Sergeant Major of the Marine Corps).<sup>6</sup>

Indeed, because military families are crucial to morale, readiness, and retention, “[w]ere it not for the strength of [military] families, were it not for the[ir] willingness to sacrifice, our nation wouldn’t be safe.” See Jowers, *supra* (quoting Chairman of the Joint Chiefs Gen. Joseph Dunford).

### **C. For Many LGBTQ Service Members, The Ability To Adopt Is Critical To Having A Fulfilling Family Life**

For many service members, adopting children, including through the foster care system, is a critical element of their efforts to build a healthy, positive home life in the midst of the many challenges that military families face. Based on a Department of Health and Human Services study, between 2002 and 2007, about 2% of all U.S. children are adopted, and 37% of children adopted in the U.S. each year come from the foster care system. Sharon Vandivere et al., Dep’t of Health & Human Servs., Office of the Assistant Secretary for Planning and Evaluation, *Adoption USA: A Chartbook Based on the 2007 National Survey of Adoptive Parents* 56 (2009), <https://aspe.hhs.gov/system/files/pdf/75911/index.pdf>. In recognition of the importance of adoption to service members and their families, the military offers a reimbursement for adoption-related

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<sup>6</sup> This sentiment is shared throughout the military. See, e.g., Feb. 14, 2017 Hearing Tr. 15 (statement of James A. Cody) (“Families are often the catalyst to an [A]irman decision to stay or leave the Air Force. These selfless families make many sacrifices, and the Air Force remains clear in its commitment to taking care of them.”).

expenses. Defense Finance & Accounting Serv., *Adoption Reimbursement*, <https://www.dfas.mil/militarymembers/payentitlements/adoptionreimbursement/> (last visited Aug. 11, 2020).

Adoption and foster care—which itself is important to military families both to provide temporary stable homes for children in need and as a potential step towards adoption—are especially important to LGBTQ couples, who are four times more likely to be raising an adopted child and six times more likely to be raising foster children than opposite-sex couples. Gary J. Gates, Williams Institute, *LGBT Parenting in the United States* 3 (Feb. 2013), <https://williamsinstitute.law.ucla.edu/publications/lgbt-parenting-us/>. As Thomas and Jonathan West—a gay military couple and the parents of adopted children—said when describing a family visit to the White House: “To stand together recognized as a same-sex, multi-race military family with all the other families, in that special place, at that moment was one of the most memorable and rewarding experiences of our lives.” *Feature Friday With Thomas & Jonathan West*, *The Property Lovers* (Aug. 24, 2018), [https://www.pjandthomas.com/blog/2018/8/24/feature-friday-with-thomas-west-jonathan](https://www.pjandthomas.com/blog/2018/8/24/feature-friday-with-thomas-west-jonathan;); see also Diane J. Cho, *These Dads Adopted 2 Little Girls Weeks Apart – and Want to Travel the Country to Practice ‘Acceptance Through Visibility,’* *People.com* (June 26, 2019), <https://people.com/parents/pride-month-dads-discuss-lgbtq-activism-and-parenting/>.

Because building a fulfilling family life is vital to service members’ success, discrimination against LGBTQ families in the provision of adoption and foster care services undermines the military’s efforts

to support military families who seek to grow their families through such services.

## **II. PERMITTING RELIGIOUS DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION WOULD BURDEN LGBTQ SERVICE MEMBERS AND FRUSTRATE THE MILITARY'S ABILITY TO ACHIEVE ITS MISSION**

Although the LGBTQ community continues to make important gains nationwide in its pursuit of equality, *see, e.g., Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), the lived experience of being openly LGBTQ still varies dramatically depending on where an individual lives.<sup>7</sup> Still-frequent discrimination against LGBTQ persons means that generally applicable rules requiring government contractors to treat equally LGBTQ persons are essential to protecting them and their families from harmful discrimination, including when they want to adopt or foster children.

Because areas without such protections may not be accepting environments for LGBTQ families, many families are motivated to relocate to areas that are

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<sup>7</sup> See Movement Advancement Project, *Foster Care Laws & Regulations*, [https://www.lgbtmap.org/equality-maps/foster\\_care\\_laws](https://www.lgbtmap.org/equality-maps/foster_care_laws) (last visited Aug. 11, 2020) (showing statutes, regulations, and/or agency policies prohibiting discrimination in foster care based on sexual orientation and gender identity in 25 states; statutes, regulations, and/or agency policy prohibiting discrimination based on sexual orientation only in 5 states; no explicit protections in 20 states; and 11 states that permit state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBTQ people and same-sex couples, if doing so conflicts with their religious beliefs).



more welcoming or that provide more comprehensive anti-discrimination protections. But this is not an option for LGBTQ military families. Unlike civilians, service members and their families generally cannot choose to where they live. *See supra* 10-11. To support the military's mission, these service members cannot simply move to areas where local attitudes towards LGBTQ people are more accepting. Instead, they are often stationed far from major cities and in more rural or remote areas, where local attitudes towards LGBTQ relationships, marriage, and child raising may be less accepting.

This challenge would be exacerbated by the result advocated for by Petitioners, requiring religious exemptions to anti-discrimination protections. Such a result would be extremely damaging to LGBTQ military families, potentially jeopardizing their access to a wide array of services contracted for by the government and exposing them to harmful discrimination that might prevent them from being able to foster or adopt children at all. And even if service members ultimately are able to access those services, they still would have suffered serious dignity harms that result from facing discrimination. These harms lead to a cascade of problems: LGBTQ service members and spouses would feel unhappy and unsupported; morale would suffer; and this would cause both a retention and a recruitment issue for the military, jeopardizing its ability to carry out its mission and making service less attractive to potential recruits. The result of such discrimination would be to impede the military's ability to meet the numbers and diversity that the military believes best advances its objectives.

**A. Anti-Discrimination Requirements  
Ensure Equal Access And Protect  
LGBTQ Persons, Including Service  
Members, From Discrimination By  
Providers Of A Wide Range Of Critical  
Government-Funded Services**

A decision permitting government contractors to opt-out of anti-discrimination laws will impair LGBTQ service members' access to a variety of vital services, including adoption and foster care services.

Governments provide many vital services through funding to private organizations. "Over a quarter of local government services are now provided to some degree by private entities. And state governments' use of privatization is on the rise." Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 *Cardozo L. Rev.* 2211, 2213 (2013) (footnote omitted). Along with administering foster care, common government-funded services include "disburs[ing] welfare benefits," "operat[ing] utilities," "secur[ing] communities and investigat[ing] crimes." Alfred C. Aman, Jr. & Joseph C. Dugan, *The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management*, 102 *Iowa L. Rev.* 883, 886 (2017). "They have formed corporate entities to manage charter schools," and perform a variety of routine government services such as "build[ing] roads, repair[ing] bridges, collect[ing] trash, and remov[ing] snow." *Id.* Additionally, many important healthcare services are government-funded, such as nursing homes and primary care for Medicaid beneficiaries. Jody Freeman, *The Contracting State*, 28 *Fla. St. U.L. Rev.* 155, 177, 180 (2000). "In 2017, state and local governments spent \$294 billion, or 10 percent of

direct general spending, on health and hospitals.” Urban Institute, *Health and Hospital Expenditures*, <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/health-and-hospital-expenditures> (last visited Aug. 17, 2020).

Governments often have adopted anti-discrimination requirements for the organizations using government funding to provide these services. For example, California, which has 32 military bases<sup>8</sup> and approximately 164,500 military personnel,<sup>9</sup> prohibits state contractors from discriminating in the provision of government services. Cal. Gov’t Code § 12990(c). Among other things, the regulations prohibit “denial or restriction of access to public accommodations (such as housing or businesses), as well as to streets, highways, hospitals, and other public facilities and places, or to programs or activities, as well as a failure to provide reasonable accommodations to permit such access.” Cal. Dep’t of Fair Employment & Housing, *Discrimination: Requirements for Recipients of State Funding*, <https://www.dfeh.ca.gov/statefundedprograms/#:~:text=All%20recipients%20of%20state%20funding,includes%20denial%20or%20restriction%20of> (last visited

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<sup>8</sup> MilitaryBases.com, *California Military Bases*, <https://militarybases.com/california/#:~:text=California%20has%20more%20military%20bases,most%20heavily%20around%20San%20Diego> (last visited Aug. 17, 2020).

<sup>9</sup> Defense Manpower Data Center, Dep’t of Defense, *Report: Military and Civilian Personnel by Service/Agency by State/Country: June 2020*, [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp) (select link for “June 2020” under “Military and Civil Personnel by Service/Agency” for Excel chart) (last visited Aug. 14, 2020).

Aug. 17, 2020) (citation omitted). These regulations protect LGBTQ service members in the state from being denied equal access to government-funded services to which they might otherwise be excluded. For example, Naval Air Weapons Station China Lake—the largest Navy landholding in the world, covering an area larger than Rhode Island—is located in the Mojave Desert, 150 miles northeast of Los Angeles. CNIC, *Naval Air Weapons Station China Lake*, [https://www.cnic.navy.mil/regions/cnrsw/installations/naws\\_china\\_lake.html](https://www.cnic.navy.mil/regions/cnrsw/installations/naws_china_lake.html) (last visited Aug. 17, 2020). The cities closest to China Lake are small, rural locations in Kern County—which less than 10 years ago voted overwhelmingly to pass a constitutional amendment affirmatively stripping the right to marry from LGBTQ couples who already had such a right. County of Kern, *Kern County Election Results, Prop 8 Eliminates Right of Same-Sex Couples to Marry* (Nov. 25, 2008), <http://elections.co.kern.ca.us/elections/results/nov08/>. California’s anti-discrimination rules protect LGBTQ service members in this area from discrimination by government contractors. Granting government contractors an opt-out from generally applicable civil-rights laws would eliminate the protections that California provides to China Lake’s LGBTQ service members and their families.

States like Connecticut, Vermont, and New York have similar anti-discrimination rules for government contractors. See Conn. Gen. Stat. § 4a-60(a)(1); Vermont Center for Crime Victims Services, *Discrimination Procedures: Procedures for Responding to Complaints of Unlawful Discrimination* (eff. Mar. 2019),

<http://www.ccvv.vermont.gov/about/discrimination-procedures>; N.Y. State Exec. Order No. 177 § 3(a) (Mar. 15, 2018), <https://www.governor.ny.gov/news/no-177-prohibiting-state-contracts-entities-support-discrimination>. These anti-discrimination laws are crucial to ensuring that LGBTQ people, including military families, have access to these services despite the risk that individuals who hold unaccepting attitudes towards the LGBTQ community may be unwilling to serve them.

For example, LGBTQ individuals often face discrimination from healthcare providers. Shabab Ahmed Mirza & Caitlin Rooney, Center for American Progress, *Discrimination Prevents LGBTQ People From Accessing Health Care* (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>. In one instance, hospital staff at Trinitas Hospital<sup>10</sup> in New Jersey refused to give an HIV patient his medication or allow his family to visit after he disclosed he had sex with men. National Women’s Law Center, *Health Care Refusals Harm Patients: The Threat to LGBT*

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<sup>10</sup> Trinitas is a private, religiously affiliated hospital that receives government funding, *see* State of N.J., *Governor Murphy, Attorney General Gurbir Grewal, and Former Congresswoman Gabby Giffords Announce Winners of Grants for Nine Hospital-Based Violence Intervention Programs Across New Jersey* (Jan. 29, 2020), <https://nj.gov/governor/news/news/562020/approved/20200129a.shtml>; Daniel J. Munoz, *Here’s what NJ’s largest hospitals got in federal COVID-19 relief aid*, NJ Biz (May 11, 2020), <https://njbiz.com/heres-njs-largest-hospitals-got-federal-covid-19-relief-aid/>; *see also* Trinitas Regional Medical Center, *About us*, [https://trinitasrmc.org/about\\_us.htm](https://trinitasrmc.org/about_us.htm) (last visited Aug. 18, 2020).

*People and Individuals Living with HIV/AIDS* 2 & n.16 (May 2014), [https://nwlc.org/wp-content/uploads/2015/08/lgbt\\_refusals\\_factsheet\\_05-09-14.pdf](https://nwlc.org/wp-content/uploads/2015/08/lgbt_refusals_factsheet_05-09-14.pdf). The doctor at the hospital told the patient's personal doctor, "This is what he gets for going against God's will." *Id.* at 2. In another case, a hospital<sup>11</sup> refused to permit a transgender woman's doctor to perform breast augmentation surgery. *Id.* at 2 & n.19.

Similarly, emergency services providers also have refused to treat LGBTQ individuals, such as when Washington, D.C. rescue workers allegedly stopped treating Tyra Hunter, a transgender woman, who subsequently died. *See* Scott Bowles, *A Death Robbed of Dignity Mobilizes a Community*, Wash. Post (Dec. 10, 1995), <https://www.washingtonpost.com/archive/local/1995/12/10/a-death-robbed-of-dignity-mobilizes-a-community/2ca40566-9d67-47a2-80f2-e5756b2753a6/>; *see also* Jaime M. Grant et al., Nat'l Center for Transgender Equality & Nat'l Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 72-74 (2011), [https://www.thetaskforce.org/wp-content/uploads/2019/07/ntds\\_full.pdf](https://www.thetaskforce.org/wp-content/uploads/2019/07/ntds_full.pdf) (survey detailing discrimination against transgender people by medical providers, including emergency services providers).

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<sup>11</sup> This occurred at Seton Hall Medical Center, a hospital that receives government funding. *See \$20 Million In Funding Approved To Keep Seton Medical Center In Daly City Open*, KPIX 5 CBS (Mar. 11, 2020), <https://sanfrancisco.cbslocal.com/2020/03/11/20-million-in-funding-approved-to-keep-seton-medical-center-in-daly-city-open/>.

In another case,

[a] 39-year old teacher called 911 after experiencing a sudden, severe headache, high blood pressure, and vomiting. Upon entering her apartment, the EMTs who responded to the call assumed she was a lesbian. Then, at the hospital, the EMTs told the nurse that the patient ‘was a lesbian who probably had a spat with her lover and got drunk’ and that it was not a serious call. The patient was then left unattended for over an hour, in violation of hospital protocol. By the time the staff returned to her, she had gone into a coma after having suffered a stroke and, within a week, was dead.

National Women’s Law Center, *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV 1* (Jan. 2013) (footnotes omitted), [https://www.nwlc.org/wp-content/uploads/2015/08/refusals\\_harm\\_patients\\_lgbt\\_hiv\\_1-24-2013.pdf](https://www.nwlc.org/wp-content/uploads/2015/08/refusals_harm_patients_lgbt_hiv_1-24-2013.pdf).

Because of the ongoing threat that service providers might refuse to serve LGBTQ individuals, including service members, anti-discrimination laws and policies are vital to protecting them from being denied access to these vital services. Requiring an opt-out of these anti-discrimination requirements would threaten the ability of LGBTQ service members and their families to access vital government-funded services.

**B. LGBTQ Service Members May Be Stationed In Remote Areas With Few Service Providers, Making It Critically Important That Private Entities Contracting With The Government Cannot Discriminate Against Them**

For many LGBTQ people, local attitudes and anti-discrimination protections are so important that they and their families choose to relocate to areas that are less hostile to them or with such protections in place. See David Leonhardt & Claire Cain Miller, *The Metro Areas With the Largest, and Smallest, Gay Populations*, N.Y. Times: TheUpshot (Mar. 20, 2015), <https://www.nytimes.com/2015/03/21/upshot/the-metro-areas-with-the-largest-and-smallest-gay-population.html>. A 2017 poll by American Progress reported that 19.1% of LGBTQ individuals surveyed had “[m]ade specific decisions about where to live” to avoid discrimination. Sejal Singh & Laura E. Durso, Center for American Progress, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways* (May 2, 2017), <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>. This same study reported that 13.2% of people surveyed had “[m]ade specific decisions about where to work” to avoid discrimination. *Id.* And 11.7% had “[m]oved away from a rural area” for that reason. *Id.* Utah’s experience illustrates this phenomenon. When Utah passed a law prohibiting housing and employment discrimination on the basis of sexual orientation, LGBTQ people from Idaho, Montana, and Wyoming



started moving to Utah to take advantage of the protections. Leonhardt & Miller, *supra*.

But because service members generally cannot choose where they are stationed, and many military bases are located away from populated areas, military families live in areas where a substantial majority of the local civilian population may not share their cultural background or religious views. Inevitably, therefore, many LGBTQ military families will be stationed in areas where local attitudes towards same-sex relationships, marriage, and child raising may be less accepting than the national mean. See Avichai Scher, *Gay in Rural America: Up to 5 percent of rural residents are LGBTQ, report finds*, NBC News (Apr. 12, 2019), <https://www.nbcnews.com/feature/nbc-out/gay-rural-america-5-percent-rural-residents-are-lgbtq-report-n993936>.

Further, military installations are frequently located in remote areas in which the government may rely on only a few private service providers to provide critical services to the community; if those few service providers can refuse to work with LGBTQ people, the impact on LGBTQ military families will be substantial. Even in places with favorable local attitudes towards LGBTQ persons and families, the risk of discrimination remains acute if the few private entities providing government services do not share those views. As a result, anti-discrimination rules are essential to protect LGBTQ military families from harmful discrimination and ensure they have equal access to services.

**C. The Need For Anti-Discrimination Protections Is Acute In The Adoption And Foster Care Context, Because LGBTQ Families Frequently Suffer Discrimination From Such Service Providers**

**1. *In Many Places, LGBTQ Families Still Face Discrimination In Adoption And Foster Care Services***

The need for anti-discrimination protections like the ones challenged here is particularly acute because in many places, LGBTQ families still face discrimination in their quest to adopt or foster children. “Mounting research evidence suggests that sexual minorities are vulnerable to significant and seemingly unjustified obstacles in their efforts to become foster and adoptive parents.” Abbie E. Goldberg, et al., *LGBTQ individuals’ experiences with delays and disruptions in the foster and adoption Process*, 106 *Children & Youth Services Review* 1 (Aug. 16, 2019), <https://wordpress.clarku.edu/agoldberg/files/2019/09/Goldberg-Frost-Miranda-and-Kahn-2019-CYSR-Disruption-and-delays-LGBTQ.pdf>. A prospective parent’s success at adopting or fostering is highly dependent on social workers who may possess negative attitudes towards LGBTQ individuals or believe that LGBTQ families cannot create a suitable environment to raise children. *Id.* at 1-2. LGBTQ families may have their applications rejected or may simply not be notified about children who need a placement. *Id.* at 2. In fact, in a “2011 national survey of 158 gay and lesbian adoptive parents, nearly half of respondents reported experiencing bias or discrimination from a child welfare worker or birth family member during the

adoption process.” Frank J. Bewkes, et al., Center for American Progress, *Welcoming All Families; Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children* (Nov. 20, 2018), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/11/20/461199/welcoming-all-families/>.

**2. *Permitting An Opt-Out Of Anti-Discrimination Laws And Policies On The Basis Of Religious Views Will Be Acutely Felt By LGBTQ Military Families***

The likelihood of such discrimination is even more acute in areas where there are not multiple agencies that the government contracts with to provide services. This makes LGBTQ service members and their families particularly vulnerable if government contractors can opt-out of anti-discrimination rules. Because many remote areas where such families may be stationed are served by only a few entities, the unwillingness of those entities to serve LGBTQ families would impede the ability of military families to access such services at all, imposing significant burdens on them.

Even apart from discrimination, several factors may limit the availability of adoption or foster agencies to serve service members and their families. As Petitioners themselves acknowledge, an agency might deny service for a variety of reasons, “[f]or example, an applicant might live too far away, or the agency might have a waiting list.” Pet’rs’ Br. 8 (citations omitted). Access to an agency may also be limited for reasons related to a child’s disability or a parent’s race, such as for Native American children and parents. *Id.* at 28. An agency’s willingness to

make a placement may also be geographically limited by state regulation requiring frequent face-to-face meetings. For example, Georgia requires foster agencies to “[m]aintain a minimum of monthly face-to-face contact with the child . . . in the foster home.” Ga. Div. of Family & Children Servs., *Foster Parent Manual* 8 (2017), <http://fostergeorgia.com/wp-content/uploads/2017/09/Georgia-Foster-Parent-Manual-September-2017.pdf>. In areas served by only a few agencies, permitting sexual orientation discrimination on top of these practical obstacles may leave LGBTQ military families unable to adopt or foster altogether.

Because of these limitations, permitting agencies to turn away LGBTQ families may result in those families being unable to find an agency willing to place a child in their area. For example, in geographically large Texas with a large military population, where State law permits the denial of services “under circumstances that conflict with[] the provider’s sincerely held religious beliefs,” Tex. Hum. Res. Code Ann. § 45.004(1) (2017), there are only a few agencies that will serve LGBTQ families, and prospective parents may live far away from them. See Bewkes, *supra* (map of nondiscrimination policies posted online by child placing agencies in Texas). For U.S. Army soldiers stationed at Fort Bliss—the Army’s second-largest base with nearly 40,000 soldiers and over 40,000 family members—near El Paso, the nearest explicitly LGBTQ-affirming child-placement agency is 348 miles away. *Id.* And a family from Del Rio or San Angelo (home of Goodfellow Air Force Base) might have to drive over 150 miles to find an inclusive placement agency in San Antonio. See *id.*

Consequently, because LGBTQ service members are unable to choose to live only in places with tolerant local attitudes, and because of the paucity of options for adoption or foster care services in many areas where service members are stationed, anti-discrimination laws provide them and their families vital protection. Permitting a religious opt-out to generally applicable anti-discrimination laws and government contracts would expose these families to discrimination that may prevent them from building a family and/or assisting a needy child. Indeed, by giving the few or sole entities that provide such services a constitutional right to discriminate based on the characteristic of prospective adoptive or foster parents (be it based on race, gender, religious, sexual orientation, or other protected characteristics), any individuals and couples subjected to discrimination in those locations—including LGBTQ service members—could face insurmountable barriers to adopting or fostering children altogether. The prospect of exposure to this discrimination impairs the military’s ability to recruit and retain the best candidates and harms morale among active-duty service members, consequently hindering the military’s ability to carry out its mission.

**3. *Any Opt-Out Of Anti-Discrimination Laws Or Contractual Provisions Also Causes Irreversible Dignitary Harms To LGBTQ Service Members And Their Families.***

Even for LGBTQ service members who are ultimately able to adopt or foster a child, permitting discrimination by agencies causes serious dignitary harms, beyond just the need to wait longer or drive farther. This Court has consistently recognized “the

harm to dignity that discrimination causes,” that is “distinct from the more ‘tangible’ harm of being unable to access a particular benefit or entitlement.” Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & Pol’y 705, 712 (2014). The Court has recognized the dignity harm inherent in being turned away from public accommodations, most famously in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), “where the Court upheld the constitutionality of the Civil Rights Act’s prohibition of discrimination in public accommodations,” and “affirmed that ‘the fundamental object of Title II [of the Act] was to vindicate ‘the deprivation of personal dignity’.” *Id.* (citing *Heart of Atlanta*). The irreversible nature of dignity harm has been articulated by this Court also in the context of gender,<sup>12</sup> disability,<sup>13</sup> and civil rights generally.<sup>14</sup>

The harms inherent in sexual orientation discrimination are even more devastating when individuals face such discrimination while trying to adopt or foster. As this Court recognized in *Obergefell*

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<sup>12</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (sex discrimination “thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”).

<sup>13</sup> *See Tennessee v. Lane*, 541 U.S. 509, 537-38 (2004) (upholding the Americans with Disabilities Act because the Court recognized the dignity harm suffered by persons with disabilities).

<sup>14</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) (recognizing the civil rights fights and civil war was about dignity as well as equality).

*v. Hodges*, “certain personal choices” are “central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” 135 S. Ct. 2584, 2597 (2015). The choice to take children into one’s home through adoption or fostering is one such personal choice, and being discriminated against in trying to create a fulfilling family life is a serious and irreparable harm to the “individual dignity and autonomy” of LGBTQ individuals.

In the case of discrimination in adoption and foster care, “[t]he specter of stigma can create ongoing anxiety for LGBTQ persons,” including “heightened concerns regarding the security of their placement due to the possibility for discrimination” and “anxiety about the possibility or probability for heterosexist discrimination,” Goldberg, et al., *supra*, at 2. These anxieties accompany discrimination throughout the process of fostering children, even for families that navigate the process successfully.

Permitting agencies to deny service to LGBTQ service members and their families would inevitably subject them to “humiliation, frustration, and embarrassment” experienced on account of their identity. *Heart of Atlanta Motel*, 379 U.S. at 291-92 (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, pt. 1, at 16 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2370). The “injury and indignity” of such discrimination, *United States v. Windsor*, 570 U.S. 744, 768-69 (2013), would alienate LGBTQ service members from their local communities and relegate them to being second-class citizens compared to the heterosexual service members alongside whom they serve.

As explained below, providing constitutional sanction to such discrimination against LGBTQ

service members and their families would not only undermine the ability of these service members to build a strong, supportive family life for themselves or to try to provide a temporary stable home for children in need—it would undermine the long-term national security interests of the United States. Subjecting service members and military families to increased burdens and dignitary harms as the price of military service would harm morale and military readiness, and frustrate recruitment and retention, all at a cost to the military’s important mission.

**D. Permitting An Opt-Out To Any Anti-Discrimination Requirements To LGBTQ Service Members Will Harm Morale And Retention, And Impede The Military’s Mission**

The rule Petitioners propose, which would permit religious organizations providing government services to disregard generally applicable anti-discrimination requirements on the basis of a religious objection, would expose LGBTQ military families to the threat of discrimination in a wide range of services provided through government contracts. Worse, under Petitioners’ rule, cities and states could not refuse to contract with organizations that explicitly provide services in a discriminatory manner.

Requiring an opt out from generally applicable anti-discrimination requirements would have an outsized effect on LGBTQ military families. Faced with discrimination, service member morale would suffer, as would families—the “key element” to military recruitment and retention. Faced with being relocated to areas where discrimination might impede



them from accessing vital services, numerous LGBTQ people are likely to be discouraged from enlisting or continuing their service.

This reality would have a direct effect on military readiness. The military has a compelling interest in recruiting and retaining the best possible service members. *See Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (recognizing that “a highly qualified, racially diverse officer corps is essential to national security”). And LGBTQ members now serve in highest-levels of military: Major General Tammy Smith (first openly gay general officer); Patricia Rose (Major General, U.S. Air Force (Ret.); former highest ranked LGBTQ service member); Maj. Gen. Randy S. Taylor (Chief of Staff, U.S. Strategic Command); and Kristen Beck (former U.S. Navy SEAL).

But knowing they may be stationed in areas where they are treated like second class citizens and unable to access necessary government services, many qualified LGBTQ candidates are likely to turn away from military service—less willing to join, more likely to leave. “The [military] understands that in order to attract and retain top quality soldiers, it must provide a quality of life comparable to that in the civilian community.” Joanne Marshall-Mies, David Westhuis & Richard Fafara, *US Army Morale, Welfare and Recreation (MWR) Programmes: Links to Readiness and Retention* 3, Res Militaris No. 3 (2011), [http://resmilitaris.net/ressources/10144/30/res\\_militaris\\_-\\_us\\_army\\_morale\\_welfare\\_and\\_recreation\\_mwr\\_programmes.pdf](http://resmilitaris.net/ressources/10144/30/res_militaris_-_us_army_morale_welfare_and_recreation_mwr_programmes.pdf). Even with that commitment, meeting military recruiting goals can be challenging. Meghann Myers, *Report: Recruiting challenges might have pushed the Army’s end strength plans back a few years*, *Army Times* (Feb. 7, 2019),

<https://www.armytimes.com/news/your-army/2019/02/07/report-recruiting-challenges-might-have-pushed-the-armys-end-strength-plans-back-a-few-years/> (noting that a recruiting shortfall as of 2018 means that the Army may not be able to meet its 2022 strength goals until 2025). The military's ability to offer a high quality of life to recruits is undermined by the threat that service members will be stationed in areas where they will be discriminated against while trying to access fundamental services.

Additionally, discrimination against LGBTQ service members hurts the military's efforts to keep its members mentally and emotionally satisfied, and at the top of their game. Military morale closely aligns with feelings of worth and importance. See, e.g., Ted Thornhill & Associated Press, *America's rusting nuclear arsenal: Behind the blast doors at USAF bases that reveal aging weapons and low morale of missile crews*, Daily Mail (July 8, 2014), <http://www.dailymail.co.uk/news/article-2684493/The-problems-nuclear-Behind-scenes-US-army-bases-reveal-ageing-weapons-low-morale-missileers.html>. As one defense consultant put it, “[o]ne of the reasons for . . . low morale is that [service members] feel unimportant, and they are often treated as such, very openly.” *Id.* The military's experience under DADT demonstrates that disparate treatment—and its consequent effect on morale—has a direct effect on recruitment and retention. DADT “cause[d] many [LGBT veterans] to decide not to reenlist and continue their service when they reach[ed] the end of their tours of duty or, in the case of officers, resign their commissions at the end of their obligated service.” Gary J. Gates, Williams Institute, *Effects of “Don’t Ask, Don’t Tell” on Retention among*

*Lesbian, Gay and Bisexual Military Personnel 1* (Mar. 2007), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Military-DADT-Mar-2007.pdf>. The same study found that while DADT was in place, “an average of nearly 4,000 [lesbian, gay, and bisexual] military personnel each year on active duty or in the guard or reserves would have been retained if they could have been more open about their sexual orientation.” *Id.*

When members of the military feel ignored or unimportant, or that they must hide their sexual orientation, morale suffers. Being forced to live in places where they are at risk of being discriminated against by providers of vital government services will lower morale among LGBTQ service members. And service members who feel the need to conceal their sexual orientation experience higher rates of depression and PTSD. Goldbach Study at 2. LGBTQ people thus will leave the military, or not join, exacerbating personnel strength problems that are already present.

The harms from discrimination and the denial of service are irreparable, as this Court has recognized. *See Heart of Atlanta Motel*, 379 U.S. at 291-92 (Goldberg, J., concurring) (“The primary purpose of [anti-discrimination laws], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” (quoting S. Rep. No. 88-872, pt. 1, at 16, *as reprinted in* 1964 U.S.C.C.A.N. at 2370)). And the indignity of being refused essential services on the basis of sexual orientation<sup>15</sup> is especially acute when

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<sup>15</sup> While this case is about sexual orientation discrimination, it is difficult to see how any ruling permitting an

a service member is discriminated against, not by another private individual, but by an organization acting on behalf of the very government whose principles service members sacrifice to defend. Government contractors located in places that prohibit discrimination should not be allowed to make a family's life more complicated, expensive or less dignified while their spouse or mother or father is deployed. Similarly, a member should not return from the battlefield to find that they and their spouse cannot adopt or foster a child without facing discrimination.

For all these reasons, recognizing a right to discriminate against LGBTQ service members on the basis of their sexual orientation would frustrate pro-family military policies and, as a result, damage morale and discourage recruitment and retention. Being forced to relocate to an area where they have unequal access to basic government-funded services would make it more difficult for even the most committed individuals to carry out their responsibilities, thus impeding military readiness and as a result U.S. national security.

### CONCLUSION

LGBTQ service members and their families are vital to military success. Removing obstacles to building a fulfilling home life improves the well-being of individual service members, and the happiness of

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exception to generally applicable anti-discrimination laws and government contracts could be limited to same-sex marriage or even sexual orientation. A ruling for Petitioners would inevitably subject other service members to discrimination based on race, religion, gender, disability, or even their country of birth.

their families, and consequently the effectiveness of the military overall. By contrast, permitting government contractors to opt out of serving LGBTQ military families impairs those vital goals. When the government can ask Americans to sacrifice for their country but is compelled to authorize its agents to treat some of them as second-class citizens, it impairs the overall ability of the military to recruit and retain the best people, and that affects military readiness and effectiveness. A result in Petitioners' favor would undermine the military and should be avoided.

The judgment of the court of appeals should be affirmed.

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