

In the
Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY
COMPANY; LORIE SMITH,
Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY
MENON; MIGUEL RENE ELIAS; RICHARD
LEWIS; KENDRA ANDERSON; SERGIO
CORDOVA; JESSICA POCOCK; PHIL WEISER,
Respondents.

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

**BRIEF OF THE MODERN MILITARY
ASSOCIATION OF AMERICA AND MINORITY
VETERANS OF AMERICA AS AMICI CURIAE
SUPPORTING RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

The amici curiae are the Modern Military Association of America and Minority Veterans of America. Amici share an interest in policies that enhance the military's readiness and protect the interests of service members, veterans, and their families. Amici respectfully submit this brief to advocate for a ruling that rejects a free-speech carve-out to anti-discrimination laws and to explain how a right to discriminate would harm the military by stigmatizing and otherwise negatively affecting service members and their families.

Modern Military Association of America ("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. MMAA has over 75,000 members. MMAA has 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

¹ 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.

readiness by inhibiting the military’s efforts at recruiting and retention. MMAA and its predecessors also have submitted amicus briefs to this Court in cases that directly affected LGBTQ service members, including *Obergefell v. Hodges*,² *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,³ *Bostock v. Clayton County*,⁴ and *Fulton v. Philadelphia*.⁵

Minority Veterans of America (“MVA”) is a nationwide non-profit organization with a mission to create belonging and advance equity and justice for our nation’s most marginalized and historically underserved veterans—the more than 10.2 million veterans who are women, people of color, LGBTQ-identifying, or who are non-religious or religious minorities. MVA provides direct legal consulting and advising to service members and veterans and advocates before Congress, the Department of

² 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 (filed Mar. 3, 2015).

³ 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 (filed Oct. 30, 2017).

⁴ Amicus Curiae Modern Military Association of America and Transgender American Veterans Association Br., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 et al.), 2019 WL 2915034 (filed July 3, 2019).

⁵ Amicus Curiae Modern Military Association of America Br. *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5020347 (filed Aug. 20, 2020).

Defense, and the Department of Veterans Affairs on issues that affect minority veterans. MVA's central belief is that effectively supporting minority service members and veterans begins by recognizing that social and structural inequities lie at the heart of the problem. MVA's advocacy efforts therefore focus on systemic policy changes that will improve the lives of vulnerable service members and veteran populations. MVA also has joined or submitted amicus briefs to this Court in cases that directly affected minority service members and veterans, including many of those mentioned above.

SUMMARY OF ARGUMENT

Amici agree with respondents that permitting places of public accommodation to deny service on the basis of a customer's sexual orientation is inconsistent with longstanding precedent prohibiting businesses from declining to serve potential customers because of expressive preferences of a business owner or his employees. Amici also agree that a decision for petitioners would undermine anti-discrimination laws far beyond sexual orientation.

Amici do not submit this brief to repeat those arguments. Rather, Amici address the pivotal role that public accommodations laws play in ensuring that LGBTQ service members, and LGBTQ family members of service members, enjoy equal access to goods and services, as well as the serious practical harm that a decision in petitioners' favor would impose on the military. 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. Many of these communities are sparsely populated and far

from the nearest urbanized area, meaning there may be only one or two sources for many key goods and services. LGBTQ service members (and many others) benefit when public accommodations laws require these businesses to serve everyone within the community, without regard sexual orientation. Creating a constitutional opt-out from anti-discrimination laws will disadvantage LGBTQ service members—in many instances depriving them altogether of access to key goods and services. And the discrimination sanctioned by petitioner’s rule would not be limited to LGBTQ service members and their families. Rather, a diverse group of service members would be impacted if stationed somewhere where local businesses were free not to serve individuals because of their race, gender, religion, or military service.

This would burden military recruitment and retention efforts, and undermine important national security goals. As Army Gen. Mark A. Milley, chairman of the Joint Chiefs of Staff, put it: “Equality and opportunity are matters of military readiness, not just political correctness.” *Infra* at 30-31.

ARGUMENT

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

LGBTQ individuals serve in each branch of the Armed Forces and make up a substantial number of overall service members. Despite the “historical and significant barriers to serving openly in the

military,”⁶ as of 2015, 6.1% of service members,⁷ or more than 71,000 military personnel,⁸ identified as LGBTQ. Many others identify as transgender.⁹ In other words, a greater percentage of service members identify as LGBTQ than do members of the general US population—a proportion of approximately 3.4%. *Id.* And the number of military members identifying as LGBTQ is likely to keep rising as members of “Generation Z”—born between 1997 and 2003—are now beginning to fill the ranks, of whom more than 20% identify as LGBTQ.¹⁰ Because the majority of active duty members of the military are less than 30 years old,¹¹ these individuals are sure to make up an ever-growing proportion of the general military population.

⁶ Statement, Department of Justice, Servicemembers and Veterans Initiative Pride Month June 2021 Statement (June 25, 2021), <https://www.justice.gov/opa/blog/servicemembers-and-veterans-initiative-pride-month-2021-statement> (“DOJ Pride Month Statement”).

⁷ Sarah O. Meadows et al., *Department of Defense Health Related Behaviors Survey* at xxx (2015), https://www.rand.org/pubs/research_reports/RR1695.html.

⁸ 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, 1 (2016) (“Goldbach study”).

⁹ Goldbach study at 1.

¹⁰ Jeffrey M. Jones, LGBT Identification in U.S. Ticks Up to 7.1%, GALLUP (Feb. 17, 2022), <https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx>.

¹¹ Department of Defense, 2018 Demographics Report 37, <https://download.militaryonesource.mil/12038/MOS/Reports/2018-demographics-report.pdf>.

Moreover, LGBTQ service members serve in the highest ranks, support military activities of great importance, and are highly decorated. For example, Army Major General Tammy Smith, special assistant to the assistant secretary of the Army for manpower and reserve affairs, and the Army's first out gay general, retired after 35 years of service in summer 2021. See U.S. Army, *Army's First Openly Gay General Retires After Inspiring Others*, (June 1, 2021), https://www.army.mil/article/247068/armys_first_openly_gay_general_retires_after_inspiring_others. At the time of her retirement, Major General Smith was among the military's highest-ranking, openly-gay officers and had served openly since shortly after the repeal of "Don't Ask, Don't Tell." *Id.*

Other highly respected LGBTQ military members include U.S. Air Force Major General Patricia A. Rose, who directed joint logistics for operations Iraqi Freedom and Enduring Freedom¹²; SEAL Team Six special operator Kristin Beck, a transgender woman, who was awarded the Bronze Star for heroic action under fire, the Defense Meritorious Service Medal with an oak leaf cluster, and the Purple Heart¹³; and openly gay Major General Randy S. Taylor, Chief of Staff of U.S. Strategic Command, who has been awarded the Distinguished Service Medal, the Expert Infantryman Badge, the Senior Parachutist Badge,

¹² U.S. Air Force, Major General Patricia A. Rose, <https://www.af.mil/About-Us/Biographies/Display/Article/108523/major-general-patricia-a-rose/>.

¹³ 5 Transgender Service Members Who Are Defying Military Norms, TASK & PURPOSE (Nov. 17, 2015), <https://taskandpurpose.com/military-life/5-transgender-service-members-defying-military-norms/>.

the Air Assault Badge, and the Presidential Service Badge.¹⁴ Across the United States Armed Forces, LGBTQ individuals continue to make their mark at whatever level and whichever branch in which they serve.

Indeed, LGTBQ service members have made tremendous contributions to the military and continue to do so. And, these contributions do not go unrecognized by military leadership—even at its highest levels. Former Defense Secretary Ash Carter has publicly recognized that the “readiness and willingness to serve” of “brave LGBT soldiers, sailors, airmen, Coast Guardsmen, and Marines” makes the military stronger and the nation safer. *Department of Defense, LGBT Pride Month Message* (June 7, 2016), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/793510/lgbt-pride-month-message/>. In 2013, then-Secretary of Defense Leon Panetta celebrated the extension of spousal benefits to same-sex partners, declaring this “strengthened our military community.” Press Release, Department of Defense, Statement from Secretary of Defense Leon E. Panetta on the Extension of Benefits to Same-Sex Partners (Feb. 11, 2013), https://www.veteransadvantage.com/blog/military-veterans-news/statement-secretary-defense-leon-e-panetta-extension-benefits-same-sex-partners?community_content=7646. And Rear Admiral Robert Sharp—director of the National Maritime Intelligence-Integration Office and commander of the Office of Naval Intelligence—has publicly remarked that the inclusion of LGBTQ

¹⁴ 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>.

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 (last visited Aug. 18, 2020). Ensuring the continued recruitment of the “best and brightest” is essential for the continued strengthening of our military. And without LGBTQ service members, the Armed Forces would lack individuals integral to its worldwide mission.

II. DISCRIMINATION BY PUBLIC ACCOMMODATIONS BURDENS LGBTQ SERVICE MEMBERS

Permitting public accommodations to deny service to LGBTQ customers would burden LGBTQ service members and hinder the military’s mission. Unlike the general public, service members often lack a say in where they and their families will be stationed. Service members—of all backgrounds—live wherever needed to carry out the military’s mission. But for LGBTQ service members, this lack of choice presents unique risks.

A. Many LGBTQ people choose not to live in places that are unwelcoming to their families

Although the LGBTQ community continues to make gains nationwide in its pursuit of equality, *see, e.g., Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), the lived experience of being openly gay still varies dramatically depending on where an individual lives. *See* Frank Bruni, *The Worst (and Best) Places To Be*

Gay In America, Opinion, N.Y. Times (Aug. 25, 2017) <https://www.nytimes.com/interactive/2017/08/25/opinion/sunday/worst-and-best-places-to-be-gay.html> (“Bruni Op. Ed.”).

Indeed, 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 the Center for 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 creating protections for LGBTQ service members 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.¹⁵

B. LGBTQ service members often lack choice about where to live

Many LGBTQ military members lack choice about where to live. One sacrifice the military demands from service members is moving to live wherever they are needed. Military families move more often than civilian families and have less choice about where they live. A study by the Rand Corporation observed that during a five-year study period, fewer than half of civilian families moved, while that number was 90% for military families. Margaret C. Harrell et al., RAND National Defense Research Inst., *Working Around the Military: Challenges to Military Spouse Employment and Education* 18-19 (2004), https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG196.pdf. And many military moves require relocating long distances. *Id.* at 19.

This is because military members (and their families) are stationed based on national security and military necessity, instead of their own geographic preferences. See Today's Military FAQ, <https://www.todaysmilitary.com/faq> (last visited Aug. 18, 2022) ("With installations all over the globe, it is impossible to predict in advance where a service member could be stationed. Following basic training, service members are given assignments based on

¹⁵ 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>.

Service needs, and their skills and training. As such, there are no guarantees a member will serve close to home.”). As one branch explained, “[t]he needs of the Air Force mission come first in base assignment.” Airforce.com FAQ, <https://www.airforce.com/frequently-asked-questions?tags=airforceAfaqsFlifestyle-locationsFassignment> (last visited Aug. 18, 2022). This no doubt imposes significant burdens on all military families.

But for LGBTQ military families, losing the ability to decide where to live is an even weightier sacrifice—because their ability to live safely and openly with their families may be threatened based on geography. As one LGBTQ writer put it, “[w]e’re at the mercy of our zipcodes.” See Bruni Op. Ed. In places hostile to LGBTQ families, these service members’ access to vital resources may be severely curtailed by local businesses that decide to deny them service.

C. Many military bases are located in areas with unfavorable attitudes towards LGBTQ people

LGBTQ military families may find themselves in remote, rural areas, and in communities with hostile attitudes for their community. Take, for example, the story of transgender Staff Sgt. Alleria Stanley. See Sonner Kehrt, *“Don’t Go Here. They’ll Kill You.”—LGBTQ Troops, Families Face Mounting Discrimination With New Laws*, The Warhorse (June 9, 2022), <https://thewarhorse.org/lgbtq-military-troops-families-face-growing-discrimination-with-new-laws> (“Kehrt article”). The first week after Staff Sgt. Stanley reported to Fort Leonard Wood in Missouri, three separate people approached her to offer advice: For her own safety, she should avoid

certain areas near base where her fellow service members thought she might be at risk of being attacked. *Id.* Last November, Staff Sgt. Stanley says she woke to find bullet holes in her car at her off-base home. *Id.* Sgt. Stanley additionally reported that strangers regularly take pictures of her when she's out, that she's been followed, and has even been denied service at businesses. *Id.* And Sgt. Stanley's story is not unusual.

Many military installations are found in remote areas, where local attitudes may be hostile to LGBTQ families. The Naval Air Weapons Stations China Lake in the Mojave Desert, 150 miles northeast of Los Angeles—and the largest Navy landholding in the world, covering an area larger than Rhode Island.¹⁶ The cities closest to China Lake are small, rural locations in Kern County—which in 2008 voted overwhelmingly to pass a constitutional amendment affirmatively stripping the right to marry from LGBTQ couples.¹⁷ Currently, California's public accommodation law ensures that China Lake's businesses treat LGBTQ service members and LGBTQ dependents of service members equally to their fellow citizens. *See* Cal. Civ. Code § 51(b). California's public accommodation law, therefore,

¹⁶ 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/enrsw/installations/naws_china_lake.html (last visited Aug. 18, 2020).

¹⁷ 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/>.

safeguards LGBTQ military families access to vital resources—and as a result—helps the military fulfill its mission.

Or consider the United States Coast Guard’s (“USCG”) and the Army National Guard’s installations in Juneau, Alaska. The USCG runs its Northwest operations primarily out of Juneau and employs over 2,000 active duty and reserve Guardsmen and Guardswomen, while the Army National Guard also maintains a significant presence in the city.¹⁸ While Juneau is a city that currently protects LGBTQ service members and their families from discrimination through public accommodations laws,¹⁹ the city is located in a state where many individuals have historically maintained less favorable attitudes about same-sex marriage and LGBTQ identity. Indeed, nearly 20 years ago, a supermajority of Alaskans voted to preemptively ban same-sex marriage—the first state in the nation to do so.²⁰

¹⁸ Juneau Coast Guard Base in Juneau, AK, <https://militarybases.com/alaska/juneau/> (last visited Oct. 26, 2017).

¹⁹ Compiled Laws of the City and Borough of Juneau, Alaska, ch. 41.05.020 – Discrimination in public accommodations, https://library.municode.com/ak/juneau/codes/code_of_ordinances?nodeId=PTIICOOR_TIT41EQRI (prohibiting discrimination on the basis of, inter alia, sexual orientation and gender identity).

²⁰ Saeed Ahmed, Judge overturns Alaska’s same-sex marriage ban that dates to 1998, CNN (Jan. 2, 2015), <http://www.cnn.com/2014/10/13/us/alaska-same-sex-marriage/>; Election Summary Report, State of Alaska 1998 General

D. Military installations are often located in remote areas with few options for goods and services available

Once stationed in remote and isolated areas, LGBTQ military families have few available options for goods and services—highlighting the importance of the anti-discrimination statutes upon which these families rely. The DOD maintains “hundreds of installations in the United States to help support the different missions of the military services.” *See* U.S. Government Accountability Office, *Military Installations: DOD Should Consider Various Support Services when Designating Sites as Remote or Isolated*, at 30 (July 29, 2021), <https://www.gao.gov/assets/720/716007.pdf>.

“A number of these installations are located in areas considered to be remote or isolated.” *Id.* The DOD’s “policies generally rely on communities located near the installations to provide servicemembers and their dependents with support services. Frequently, remote or isolated installations do not have local communities within close proximity to the installation.” *Id.* at 31. Sixty-one installations across the country (including AK and HI) are more than fifty miles from the nearest “urbanized” area, defined as an incorporated area with a population of 50,000 or more. *Id.* at 29. What’s more, in a survey conducted by the GAO, nearly half of service-member respondents indicated they were somewhat or very dissatisfied with the availability of recreation programs and travel services at these installations; nearly half also said they were dissatisfied with the

Election, *Official Results* at 6 (Dec. 1, 1998), <http://elections.alaska.gov/Core/Archive/98GENR/results.pdf>.

quality of these programs. *Id.* at 22. Service officials have also expressed concerns related to remote locations, including higher commuting costs, costs of consumer goods, travel distance, and time needed to reach grocery stores. *Id.* at 33.

LGBTQ military families, therefore, are particularly reliant on communities that are accessible from base. Without anti-discrimination statutes, LGBTQ military families serving in remote areas—who must already travel far to access services—would risk being turned away and having no other options available to choose from.

E. Anti-discrimination laws play a key role in ensuring that LGBTQ service members have access to key goods and services

Anti-discrimination laws play a key role in ensuring service members can access goods and services in remote locations like these. Twenty states along with the District of Columbia explicitly prohibit discrimination based on sexual orientation and gender identity in public accommodations. *See State Discrimination Laws: Public Accommodations, Movement Advancement Project* (2021), <https://www.lgbtmap.org/img/maps/citations-nondisc-public-accom.pdf>.

Anti-discrimination laws play a key role in ensuring service members can access goods and services in remote locations. Among the States explicitly prohibiting discrimination based on sexual orientation and gender identity in public accommodations are Alaska and California. Indeed, an LGBTQ service member stationed at Naval Air Weapons Station China Lake in California, might well be protected from local discrimination when

running errands near the installation by the state's overarching anti-discrimination laws. Similarly, a service member working on an installation near Juneau, Alaska may be protected from suffering discriminatory harms by the city's local LGBTQ protections. LGBTQ service members can confidently serve in these locations, knowing anti-discrimination protections are in place. But without these protections, many LGBTQ service members will be subjected to harmful discrimination.

III. CREATING A CONSTITUTIONAL OPT-OUT TO ANTI-DISCRIMINATION LAWS WOULD EXPOSE LGBTQ SERVICE MEMBERS AND THEIR FAMILIES TO HARMFUL DISCRIMINATION

Creating a constitutional opt-out to anti-discrimination laws would undermine the crucial role these laws play in protecting LGBTQ service members and their families from discrimination.

A. Creating an anti-discrimination opt-out would further limit LGBTQ service members and their families' access to key goods and services

If the few available service providers in remote locations can refuse to work with LGBTQ people, LGBTQ service members and their families may be left without access to vital goods and services. Even in places with more favorable local attitudes towards LGBTQ individuals and their families, the risk of discrimination remains acute if the few individuals providing a particular good or service do not share those views.

Examples of families facing this discrimination are plentiful. In 2014, officials at Fayetteville State

University in North Carolina adopted a policy to deny in-state tuition to same-sex spouses of active duty service members. *NC Gay Military Spouses Denied In-State Tuition Despite Federal Law* (Apr. 17, 2014), https://equalitync.org/news/gay_military_spouse_denied_in_state_tuition_at_fsu/.

That same year, a hotel in Pennsylvania refused to host a same-sex couple's wedding, but hoped they found "somewhere [else] that will fulfill all [their] wedding dreams." David Falchek, *Venue refused to serve gays; sets off social media firestorm*, *The Times-Tribune* (July 11, 2014), <http://thetimes-tribune.com/news/venue-refused-to-serve-gays-sets-off-social-media-firestorm-1.1717180>.

In May 2017, a funeral home in Mississippi refused to cremate an 86-year-old man because he was formerly married to a man. Emanuella Grinberg, *Funeral Home Refused to Cremate Gay Man, Lawsuit Alleges*, *CNN* (May 2, 2017), <http://www.cnn.com/2017/05/02/health/mississippi-funeral-home-gay-couple-lawsuit/>.

And just last year, an accountant refused to assist an LGBTQ couple file their taxes, because he did not recognize their marriage as legitimate. Jo Yurcaba, *A 'troubling rise' in business owners refusing gay couples, advocates say*, *NBC News* (Apr. 21, 2021), <https://www.nbcnews.com/nbc-out/out-news/troubling-rise-business-owners-refusing-gay-couples-advocates-say-rcna735>.

Giving discrimination constitutional protection would lead to a cascade of problems. The routine-but-monumental events of daily life would be made substantially more difficult for LGBTQ service members and their families: a photographer could

refuse to take a family portrait for military families with an LGBTQ member; a chef might refuse to create a celebratory dessert for a lesbian couple enjoying an anniversary dinner; interior decorators and landscaping services could restrict themselves to non-LGBTQ households; a printing service may decline to assist in the creation of a birth announcement or adoption by a gay couple. And, the list goes on and on.

It is no response to argue that petitioners' rule will be limited to "artists" selling their commercial services. There is no principled rule limiting the carve-out to website designers, as opposed to restaurants that host special meals, funeral homes that offer opportunities to celebrate or remember an individual's life, or hotels that offer spaces to hold celebratory events.

Nor can petitioner's rule be limited to those "artists" who objected to serving LGBTQ individuals on the basis that it would imply approval of same-sex marriage. To adopt petitioner's rule would equally allow businesses to decline to provide goods or services to couples of different racial or religious backgrounds because of their disapproval of mixed marriages; deny service to Catholics due to disagreement with the Church's view on abortion; or deny service to military families altogether based on their disagreement with the military's involvement in a particular conflict. This would open the door to widespread discrimination in the provision of basic goods and services to minority service members—

including because of their status as members of the military itself.²¹

Particularly because of the limited alternatives for securing these services at the countless military installations located in smaller, more rural communities, such a result would impose substantial practical burdens on LGBTQ families—and other minority service members—making life more difficult for families that already make tremendous sacrifices in service of their country.

B. This discrimination will also cause dignitary harms on LGBTQ service members and their families

Discrimination also causes irreversible dignitary harms to LGBTQ service members and their families. Even if LGBTQ service members are ultimately able to access necessary goods and services, permitting discrimination causes serious dignitary harms, beyond just the inconveniences of driving farther or waiting longer. 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 dignitary harm inherent in being turned away from public

²¹ The CADA does not provide protected status on the basis of military service, but many other state anti-discrimination laws do. See National Conference of State Legislatures, *State Public Accommodations Laws* (June 5, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>

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’.” Lim & Melling at 712.

Giving public accommodations a right 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), *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, 758-69 (2013), would alienate LGBTQ service members from their local communities and relegate them to being second-class citizens compared to the non-LGBTQ service members alongside whom they serve.

IV. A CONSTITUTIONAL OPT-OUT FROM ANTI-DISCRIMINATION LAWS WOULD PUT MYRIAD OTHER SERVICE MEMBERS AT RISK OF DISCRIMINATION

Under petitioners’ rule, a constitutional opt-out from anti-discrimination laws could not be limited to anti-LGBTQ discrimination, and would put myriad other service members at risk of discrimination based on their race, religion, or gender, and in some locations, military service.

A recent report by Blue Star Families that surveyed service members, veterans, and their

families found that one in three active-duty family respondents of color report experiencing at least one incident of being threatened or harassed in their local civilian community since January 2020. Blue Star Families, *Social Impact Research 2021: The Diverse Experiences of Military and Veteran Families of Color* (Feb. 2022), https://bluestarfam.org/wp-content/uploads/2022/02/BSF_MFC_REI_FullReport_2021-final.pdf. More than half of active-duty family respondents residing in the Midwest, West, and South report fearing for their safety in their civilian community, due to their race or ethnicity at least once since January 2020. *Id.*

And this discrimination directly impacts service members' choices about whether to continue their service. That same report found that 46% of active-duty family respondents of color report they have considered racial/ethnic discrimination in their installation ranking decisions and 42% consider concerns about safety due to their (or their family's) racial/ethnic identity. *Id.* And one in three active duty and Veteran family respondents of color report they considered racial/ethnic discrimination in family conversations regarding whether or not to remain in service. *Id.*

The negative impact of discrimination is not limited to those service members who leave the military altogether. A report from Blue Star Families found some service members are passing up career-advancing moves because they don't want to relocate to certain cities. See Desiree D'Iorio, *For Service Members of Color, Fear of Racism in Military Towns Weighs Heavily in Career Choices*, The American HomeFront Project (Mar. 9, 2022), <https://americanhomefront.wunc.org/news/2022-03->

09/for-service-members-of-color-fear-of-racism-in-military-towns-weighs-heavily-in-career-choices (citing https://bluestarfam.org/wp-content/uploads/2022/02/BSF_MFC_REI_FullReport2021-final.pdf).

The crucial role played by public accommodations laws in protecting members of the military and their families is thus not limited to LGBTQ service members. To the contrary, anti-discrimination protections are critically important to countless members of the military who could face discrimination on the basis of their race, religion, gender, or military service.

V. DISCRIMINATION IMPAIRS MILITARY EFFECTIVENESS BY IMPEDING RECRUITMENT AND RETENTION AND BY DAMAGING MORALE

Knowing they may be stationed in areas where they are treated like second class citizens will cause many qualified candidates to turn away from military service—becoming less willing to join and more likely to leave. Those that continue to serve will suffer dignitary harms that undermine morale. Thus, discrimination will directly impair military readiness.

A. Discrimination hurts military recruitment and retention efforts

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”). “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), <https://apps.dtic.mil/sti/pdfs/ADA554038.pdf>.

But even with that commitment, meeting military recruiting goals can be challenging. Recruiting shortfalls as of 2018 mean that the military may be unable to reach its strength goals for 2022 and 2025. 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/>.

Discrimination by local communities creates one more obstacle to the military's recruitment and retention efforts. Despite joining at higher rates than their straight peers, LGBTQ service members also leave the military at higher rates. Compared to only 13% of non-LGBTQ service members, 20% of cis-gender LGBTQ and 33% of transgender service members plan to leave the military upon completion of their commitment. See Kathleen A. McNamara et al., *Acceptance Matters: Disengagement and Attrition Among LGBT Personnel in the U.S. Military*, 7 *Journal of Military, Veteran, and Family Health* 76 (Sept. 2021), <https://jmvfh.utpjournals.press/doi/epdf/10.3138/jmvfh-2021-0017>. LGBTQ service members are twice as likely to be "undecided as to their military career path." *Id.* And much of this results from LGBTQ service members' lower perception of being accepted or having cohesion with their unit. *Id.*

The military's experience under Don't Ask Don't Tell ("DADT") demonstrated the direct effect disparate treatment has on recruitment and retention. DADT "cause[d] many [LGBTQ 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>. 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.* In its first decade, DADT cost the military \$363.8 million in redundant training to replace LGBTQ service members it otherwise could have retained—resources that could have been directed to other national security objectives. *See Report: 'Don't Ask, Don't Tell' costs \$363M*, USATODAY.com (updated Feb. 14, 2006 7:17 PM), https://usatoday30.usatoday.com/news/washington/2006-02-14-dont-ask-report_x.htm.

And a poll by the Modern Military Association of America, found that more than half of military families with LGBTQ children surveyed have altered their planned military service by declining orders, requesting transfers, or retiring early. *See* Kehrt article. While a spokesperson noted the sample size was small, she said the recent trend in state and local legislation is having an impact. *Id.* "The other statistic that's undeniable is that a hundred percent

of our members are worried about it,” says Cathy Marcello, who coordinates MilPride, the Modern Military Association of America’s program for families with LGBTQ children. *Id.* “Everyone’s hoping that the next set of orders that pops up is not for Texas.” *Id.*

B. Discrimination hurts military morale

In addition to driving service members out of the military, discrimination 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>. When members of the military feel ignored or unimportant morale suffers. Discrimination thus directly impacts morale.

The negative impact of discrimination on morale is borne out by several studies. LGBTQ active-duty service members are nine times more likely to report feeling down, depressed, or hopeless nearly every day over the past two weeks (at 55%), than non-LGBT active-duty service members (at 6%). This is also true of LGBTQ National Guard and reserve personnel, at 22% and 6%. *LGBTQ+ Military Members and Veterans Face Economic, Housing, and Health Insecurities*, <https://www.americanprogress.org/article/lgbtq-military-members-and-veterans-face-economic-housing-and-health-insecurities/> (citing

“Household Pulse Survey Public Use File (PUF), Weeks 34-40,” <https://www.census.gov/programs-surveys/household-pulse-survey/datasets.html>).

The fear of being treated as second class citizens may also cause many LGBTQ service members to hide their sexual orientation. In this way, “[s]exual orientation discrimination harms not only the dignity of the immediate victim of the discriminatory act but also the dignity and autonomy of those who, fearing such discrimination, feel forced to comply with heterosexual norms.” Paul Vincent Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. Penn. L. Rev. 1497, 1534 (2015). And feeling the need to conceal their sexual orientation for fear of facing discrimination will only add to the mental health challenges LGBTQ service members face—service members who feel the need to conceal their sexual orientation experience higher rates of depression and PTSD. Goldbach study at 2. Subjecting a substantial percentage of military forces to discrimination and the associated mental health challenges will negatively impact overall morale.

C. Harms to retention efforts and morale negatively impact the military’s overall effectiveness

By lowering recruitment and retention rates, and hurting morale, discrimination directly impedes the military’s mission. As explained by Army Gen. Mark A. Milley, chairman of the Joint Chiefs of Staff, the U.S. military is a cohesive team consisting of people of different races and genders and religious and sexual orientations working to accomplish their mission and peace in the war, all over the globe.

“Equality and opportunity are matters of military readiness, not just political correctness.” No Place for Racism, Discrimination in U.S. Military, Milley Says (July 9, 2020), <https://www.defense.gov/News/News-Stories/Article/Article/2269438/no-place-for-racism-discrimination-in-us-military-milley-says/>

And as Deputy Defense Secretary Kathleen H. Hicks recently stated: “The department should not and cannot be a place that discourages outstanding LGBTQ+ individuals from a career in DOD because of actual or perceived barriers to entry or hostile workplace conditions.” DOD Pays Tribute to LGBTQ+ Service Members (June 7, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3055525/dod-pays-tribute-to-lgbtq-service-members/>.

In fact, protecting its members from discrimination is so vital that the some branches have made policy changes specifically aimed at protecting military members from local discrimination. The U.S. Air Force recently informed its service members that it will support their families with medical and legal help if they are affected by dozens of new state laws restricting LGBTQ rights, including relocating families if the need arises. Air Force, Press Release (Mar. 24, 2022), <https://www.af.mil/News/Article-Display/Article/2977048/resources-available-for-daf-members-families-affected-by-local-laws/>. As under Secretary of the Air Force Gina Ortiz Jones explained: “The health, care and resilience of our DAF personnel and their families is not just our top priority – it’s essential to our ability to accomplish the mission.” Creating a constitutional opt-out from anti-discrimination laws, as petitioners urge, would undermine that “essential” objective, and hinder the

military's ability to accomplish its mission. The Court should decline to do so.

CONCLUSION

LGBTQ and other minority 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 their families, and consequently the effectiveness of the military overall. By contrast, permitting providers of public accommodations to opt out of serving military families—based on traits such as sexual orientation, race, or gender—impairs those vital goals. To permit such a result would place the government in the position of asking those who have opted to serve their country to submit to being treated as second-class citizens in a number of local communities. This added burden would impair the overall ability of the military to recruit and retain the best people, and frustrate 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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