Case Nos. 14-2386, 14-2387 & 14-2388

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARILYN RAE BASKIN, *et al.*,

Plaintiffs-Appellees,

v.

PENNY BOGAN, *et al.*,

Defendants-Appellants.

Appeal from the Southern District of Indiana (1:14-cv-00355-RLY-TAB)

MIDORI FUJII, *et al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF REVENUE, *et al.*,

Defendants-Appellants.

Appeal from the Southern District of Indiana (1:14-cv-00404-RLY-TAB)

PAMELA LEE, *et al.*,

Plaintiffs-Appellees,

v.

BRIAN ABBOTT, *et al.*,

Defendants-Appellants.

Appeal from the Southern District of Indiana (1:14-cv-00406-RLY-MJD)

BRIEF OF *AMICI CURIAE* OUTSERVE-SLDN AND THE AMERICAN MILITARY PARTNER ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

OutServe-SLDN and the American Military Partner Association are non-profit organizations. Neither organization issues stock and neither organization has a parent corporation.

/s/ Christopher D. Man
Christopher D. Man
Attorney for *Amici Curiae*

August 1, 2014

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INTEREST OF *AMICI CURIAE*[1]

OutServe-SLDN Inc. ("OS-SLDN") and the American Military Partner Association ("AMPA") are non-profit organizations that support lesbian, gay, bisexual and transgender ("LGBT") current and former members of the United States military and their families. OS-SLDN and AMPA submit this brief to highlight the significant implications of the Court's decision in these cases for the well-being of LGBT veterans and members of the armed forces, their families and our nation's military as a whole.

OS-SLDN comprises two formerly separate organizations, which merged in 2012: Servicemembers Legal Defense Network ("SLDN") and OutServe. SLDN was founded in 1993, in response to Congress enacting "Don't Ask, Don't Tell" ("DADT"), to provide free legal services to LGBT service members and veterans affected by DADT. SLDN assisted more than 12,000 active and former service members, and was instrumental in the successful effort to repeal DADT. After DADT's repeal, SLDN assisted veterans discharged under DADT by correcting discharge records and helping those who wished to return to service; supported

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No one other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Consent of the parties to the filing of this brief has been filed with the Clerk of the Court.

transgender military service; helped defend LGBT service members and veterans facing discrimination; and worked to secure equal benefits for LGBT service members, veterans and their families.

OutServe began in 2010 as an underground network of LGBT service members connected via Facebook, and had more than 6,000 members worldwide. During the fight to repeal DADT, OutServe facilitated telling the stories of active duty LGBT service members in the media and at the Pentagon, allowing the voices of those who were serving in silence to be heard.

SLDN sued the United States on behalf of current and former members of the military and their same-sex spouses, alleging Section 3 of the Defense of Marriage Act ("DOMA") and similar prohibitions in three military-related Titles of the United States Code unconstitutionally denied same-sex spousal benefits to active duty members of the military, National Guard members and veterans. *McLaughlin v. Hagel*, No. 1:11-cv-11905-RGS, Dkt. 1 (D. Mass. Oct. 27, 2011) ("*McLaughlin*"). The United States Supreme Court subsequently held Section 3 of DOMA unconstitutional in *United States v. Windsor*, 133 S. Ct 2675 (2013),[2] and

[2] OS-SLDN filed an *amicus curiae* brief with the Supreme Court in *Windsor*, raising similar issues to those raised in this brief.

the District Court in *McLaughlin* held the challenged military Titles unconstitutional (Dkts. 55 & 68).

AMPA was founded by the partners of active duty service members to connect the families of LGBT service members, support them through the challenges of military service, and advocate on their behalf. AMPA began in 2009 as a "Campaign for Military Partners" by Servicemembers United, an organization focused on repealing DADT. When DADT was repealed in 2011, Servicemembers United wound down its affairs and AMPA formed. The military has long recognized the need for support services for military families, and numerous organizations serve that purpose, but none could extend those services to the families of LGBT service members while DADT was in effect. Even with the repeal of DADT and the growing acceptance of LGBT service members and their families by other military family organizations, LGBT service member families continue to face unique challenges. AMPA provides a supportive environment for these families to share their experiences and work together to improve their lives. AMPA also advocates for policy changes to improve the lives of LGBT service members and their families. Today, AMPA has more than 20,000 members and supporters.

Given OS-SLDN's and AMPA's unique understanding of LGBT service members' families, their perspective may be of assistance to the Court. They filed

similar briefs with the United States Court of Appeals for the Tenth Circuit in cases concerning the laws of Oklahoma and Utah; the Fourth Circuit in cases concerning the laws of Virginia; the Sixth Circuit in cases concerning the laws of Kentucky, Michigan, Tennessee and Ohio; and the Ninth Circuit in cases concerning the laws of Idaho. *Kitchen v. Herbert* and *Bishop v. Smith*, Nos. 13-4178, 14-5003, 14-5006 (10th Cir. Mar. 3, 2014); *Bostic v. Schaefer,* Nos. 14-1167(L), 14-1169, 14-1137 (4th Cir. Apr. 11, 2014); *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Jun. 16, 2014), *Tanco v. Haslam*, No. 14-5297 (6th Cir. Jun. 16, 2014); *Bourke v. Beshear*, No. 14-5291 (6th Cir. Jun. 16, 2014); *Henry v. Himes*, No. 14-3464 (6th Cir. July 9, 2014); *Latta v. Otter*, 14-35420, 14-35421 (9th Cir. July 21, 2014). In each case, the state laws in question prohibited marriage equality and were held unconstitutional by the District Courts. Already, the Fourth and Tenth Circuits have ruled in the Oklahoma, Utah and Virginia cases, affirming the determination of the District Courts that the marriage bans in these states are unconstitutional. *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014); *Bishop v. Barton*, Nos. 14-5003 & 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014); *Bostic v. Schaefer*, Nos. 14–1167, 14–1169, 14–1173, 2014 WL 3702493 (4th Cir. July 28, 2014); *see also Love v. Beshear*, No. 3:13-cv-750-H, 2014 WL 2957671, at *1 (W.D. Ky. July 1, 2014) ("Since the Supreme Court's landmark decision in *United States v. Windsor*, every federal court to

consider state bans on same-sex marriage and recognition has declared them unconstitutional.") (finding Kentucky's marriage ban unconstitutional).

SUMMARY OF ARGUMENT

The military demands far more from those who serve and their families than a typical employer. To protect our country, service members and their families make difficult sacrifices. Military families accept that their lives frequently will be uprooted by a series of moves that the military deems necessary to protect this country. Those moves require family members to find new jobs, start new schools and make new friends. In addition to these moves, military families often face the strain of separation as service members are deployed. That strain is further magnified when deployment places the service member in harm's way.

The military appreciates that it must compete with the private sector in terms of recruitment and retention. Since the repeal of DADT, the military has sought to recruit and retain gay and lesbian service members. And with *Windsor* and *McLaughlin* eliminating barriers to paying equal benefits, the military is in the process of finalizing policies that should lead to uniform spousal benefits for all military families. Nevertheless, the uneven patchwork of marriage equality from state to state for same-sex couples is hindering the military's progress.

While the strain of frequent moves impacts the recruitment and retention of opposite-sex married couples in the military, that impact is more profound on

same-sex married couples in the military. No legally married couple would look fondly upon a move from a state where the couples' marriage is recognized to a state where their marriage is annulled for state-law purposes.

The unequal treatment of same-sex and opposite-sex married military couples undermines the well-established principle of uniformity, which lies at the heart of military unit cohesion and morale. All married couples receive the same rights under both federal and state law when they reside in a state that provides marriage equality. But when one married couple of the same sex and one of the opposite sex are transferred from a marriage equality state to a non-marriage equality state (e.g., from California to Indiana), the same-sex married couple will not receive the same state law marriage benefits as the opposite-sex married couple. This lack of uniformity undermines unit cohesion and morale.

Finally, the lack of uniform marriage recognition laws from state to state for same-sex married couples poses a threat to veterans and their families. The United States government generally treats a marriage as valid if it was legal where it was celebrated. While most federal statutes follow that approach, Title 38, which confers veterans' benefits, is inartfully drafted and Veterans Affairs ("VA") is struggling to make sense of it. Consequently, veterans' benefits have not yet been forthcoming to all legally married gay and lesbian service members.

In determining whether a marriage is valid, Title 38 looks to "the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." 38 U.S.C. § 103(c). Because opposite-sex marriages are recognized by all states, the government does not scrutinize where those couples "resided" when they married or when benefits accrued.

By contrast, the government is struggling with how to administer Title 38 benefits with respect to same-sex married couples. In September 2013, the President ordered Title 38 spousal benefits be paid to married veterans of the same-sex and the U.S. Department of Justice advised a federal court that the Executive Branch "is working expeditiously to implement the *Windsor* decision and the President's determination regarding Title 38 across the federal government." *McLaughlin*, Dkt. 50 at 1. But it took the VA until June 20, 2014 to issue guidance, and that guidance makes clear that the VA will not recognize all legally married couples of the same sex. Dep't of Veterans Affairs, *Important Information on Marriage*, http://www.va.gov/opa/marriage. Providing marriage equality across all states would resolve this problem for same-sex married couples, just as it has for opposite-sex married couples.

ARGUMENT

I. THE UNEVEN PATCHWORK OF STATES PROVIDING MARRIAGE EQUALITY HARMS MILITARY FAMILIES AND UNDERMINES NATIONAL SECURITY

A. The Military Supports The Inclusion Of Gay And Lesbian Service Members, And The Uniform Treatment Of All Service Members, Regardless Of Sexual Orientation

While the road to open service by gay and lesbian service members was long, the repeal of DADT has proven to be a great success. Then-Secretary of Defense Leon Panetta observed: "One of the great successes at the Department of Defense has been the implementation of DADT repeal. It has been highly professional and has strengthened our military community." U.S. Dep't of Defense, *News Release: Statement from Secretary of Defense Leon E. Panetta on the Extension of Benefits to Same-Sex Partners*, No. 077-13 (Feb. 11, 2013). Then-Department of Defense General Counsel Jeh Johnson (now Secretary of Homeland Security) explained the military initiated DADT repeal believing the risk that repeal would harm military effectiveness was low, but the actual repeal went "even smoother and [was] less eventful" than predicted, and there were "almost no issues or negative effects associated with repeal on unit cohesion including within war fighting units." U.S. Dep't of Defense, *News Transcript* (June 26, 2012).

Recently, Secretary of Defense Chuck Hagel emphasized the military is stronger because of the service of gay and lesbian service members:

> Gay and lesbian service members and LGBT civilians are integral to America's armed forces. . . . Our nation has always benefited from the service of gay and lesbian soldiers, sailors, airmen, and coast guardsmen, and Marines. Now they can serve openly, with full honor, integrity and respect. This makes our military and our nation stronger, much stronger. The Department of Defense is very proud of its contributions to our nation's security. We're very proud of everything the gay and lesbian community have [sic] contributed and continue to contribute. With their service, we are moving closer to fulfilling the country's founding vision, that all of us are created equal. It has never been easy to square the words of our forefathers with the stark realities of history. But what makes America unique, what gives us strength is our ability to correct our course. Over more than two centuries, our democracy has shown that while it is imperfect, it can change, and it can change for the better.

U.S. Dep't of Defense, *News Transcript* (June 25, 2013). Indeed, post-DADT repeal, gays and lesbians occupy some of the highest positions in the military. High ranking gays and lesbians in the Department of Defense include Under Secretary of the Air Force (and, until recently, Acting Secretary of the Air Force) Eric Fanning, Air Force Major General Patricia Rose and Army Brigadier General Tammy Smith. Like Major General Rose and Brigadier General Smith, many active duty service members are married to someone of the same sex.

Recognizing the value of gay and lesbian service members, the President, Attorney General, Secretary of Defense and Secretary of Veterans Affairs found no justification for discriminating against gay and lesbian veterans and service

members in the context of providing spousal benefits, and they refused to defend *McLaughlin*. Dkt. 28-2 (letter from Attorney General Holder to Speaker of the House Boehner explaining "[n]either the Department of Defense nor the Department of Veterans Affairs identified any justifications for that distinction" in paying veterans benefits to opposite-sex, but not same-sex, spouses, and explaining the United States would not defend DOMA's application to the military in *McLaughlin*). This decision was consistent with the Administration's decision not to defend the constitutionality of DOMA in *Windsor*. *Id.*

After *Windsor* held DOMA unconstitutional, Secretary Hagel announced the Department of Defense "welcomes" that decision. *McLaughlin*, Dkt. 50-2.[3] Since then, it has been "the Department's policy to treat all married military personnel equally." *McLaughlin*, Dkt. 50-3. Secretary Hagel even ordered that same-sex

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[3] Prior to *Windsor*, Secretary Panetta explained: "It is a matter of fundamental equity that we provide similar benefits to all those men and women in uniform who serve their country. . . . Extending these benefits is an appropriate next step under current law to ensure that all service members receive equal support for what they do to protect this nation." U.S. Dep't of Defense, *News Release: Statement from Secretary of Defense Leon E. Panetta on the Extension of Benefits to Same-Sex Partners*, No. 077-13, at 1 (Feb. 11, 2013). President Obama concurred: "As long as I'm Commander-in-Chief, we will do whatever we must to protect those who serve their country abroad, and we will maintain the best military the world has ever known. . . . We will ensure equal treatment for all servicemembers, and equal benefits for their families – gay and straight." State of the Union Address (Feb. 13, 2013).

couples stationed in jurisdictions that do not permit them to marry could obtain non-chargeable leave to travel to a jurisdiction where they can legally marry, and explained the military would treat a marriage that was legal where celebrated as valid regardless of the law of the state where the service member was stationed. *McLaughlin*, Dkt. 50-2.

Clearly, the United States military is committed to the inclusion of gay and lesbian service members and to ensuring they receive equal treatment.

B. Strengthening Military Families Improves National Security

The toll military service exacts is not limited to those who serve, but is shared by their spouses and families:

> The theme of the "military family" and its importance to military life is widespread and well publicized. Military spouses are still expected to fulfill an important role in the social life and welfare of the military community. Child care and management of the family household are many times solely the spouse's responsibility. The military spouse lends a cohesiveness to the family facing the rigors of military life, including protracted and stressful separations. The committee finds that frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection.

S. Rep. No. 97-502, at 6 (1982); *see also* John McHugh & Raymond Odierno, *A Statement on the Posture of the United States Army 2012*, at 12 ("We will not walk away from our commitment to our Families. . . . We must fulfill our moral obligation to the health, welfare and care of our Soldiers, Civilians and Families.").

Recognizing that support from spouses bolsters service members' morale, Congress has long sought to improve the standard of living for military spouses. *See, e.g.*, 10 U.S.C. § 1071 (benefits "maintain high morale"); 127 Cong. Rec. 15,133 (1981) ("[A] spouse who is secure in the knowledge of his or her entitlement to a portion of the member's retirement benefit will be more supportive of the member, encourage the member to participate in the military until retirement age and generally add to the stability of the military family.") (Sen. DeConcini). Family stability fosters troop morale. As President Eisenhower (a former five-star general) said of a law providing medical benefits to military families, knowing one's family will be provided for "removes one of the greatest sources of worry to our servicemen and servicewomen around the world." Statement by the President Concerning the Medical Care Program for Dependents of Members of the Uniformed Services (1956).

When troops know the well-being of their spouses and families is secure, their combat-readiness improves. "Success in modern warfare demands the full utilization of every ounce of both the physical and mental strength and stamina of its participants. No soldier can be and remain at his best with the constant realization that his family and loved ones are in dire need of financial assistance." S. Rep. No. 93-235 (1973). As Congress was recently told:

> For an Army at war, care of our families is critical. The warrior must know that his or her family is safe and is being cared for, and the

> warrior and their families must be confident that if that warrior is injured or ill in the course of their duties that they are going to survive, they are going to return home, and they will have the best chance at full recovery and an active or productive life, either in uniform or out.

The Military Health System: Hearing Before The Mil. Pers. Subcomm. of the H. Comm. on Armed Servs., 111th Cong. 8 (2009) (Lt. Gen. Schoomaker).

Conversely, service members who are distracted with worries about the well-being of their families potentially jeopardize themselves, their comrades and their mission.

> [F]amily care is mission impact. When our men and women are in harm's way, if they are not confident their families are fully cared for, they will not be focused on what is in front of them. And that has mission impact. So family care plays directly into the mission.

Id. at 19 (Vice Adm. Robinson).

C. The Military And Military Families Are Harmed By States That Refuse To Provide Marriage Equality

Military families know the needs of the military are always changing and frequent moves are required. Each move comes with pluses and minuses, but one concern that never arises for opposite-sex married couples is a concern over whether their marriage will be recognized in any state where they move. While state marriage requirements vary with respect to age or the permissible degree of consanguinity, states overwhelmingly respect marriages that were legally celebrated in other states. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflicts*

of Law, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965, 1968-71 (1997) (explaining states generally recognize a marriage as valid if it was valid where celebrated and exceptions from this rule are narrow and rarely used). But a military family headed by a married couple of the same-sex face the prospect that a move may mean that their marriage will be annulled for state law purposes, with a consequent loss of all marital advantages under state law.

For many married gay and lesbian couples, the prospect of moving to a state where their marriage would be ignored and dignity affronted will be too high a price to pay for joining or staying in the military. There also are many gay and lesbian married couples living in states where their marriages are not currently recognized, who are enduring with the hope that marriage equality will soon come to their state. If this Court were to dash that hope, that certainly would create more pressure for those families to leave the military and move to states where their marriages and families would be respected.

The implications are significant for the military. If the military does not force a move that it believes is in the best interest of our nation's defense, then the military is not making the best use of its resources and our defense suffers. But if the military compels gay and lesbian married couples to live in states where their marriages and families will be disrespected, the military also can expect to suffer falling rates of recruitment and reenlistment. Those gay and lesbian married

couples who do make the move to a state that refuses to recognize their marriage (or who are required to stay in such a state) also may suffer, which places a strain on the military family. And a strain on the military family is a strain on the military that undermines our national security.

1. Refusing To Recognize A Marriage Is An Affront To The Dignity Of The Married Couple And Their Children

The harm that a lack of recognition of a marriage inflicts on a family cannot be understated. Like opposite-sex married couples, married couples of the same sex chose to marry for a reason. Marriage matters to them. And as the Supreme Court explained in *Windsor*, when one government has legally married a couple and another government refuses to recognize that marriage, "[t]he differentiation demeans the couple." *Windsor*, 133 S. Ct. at 2694. Even worse, "it humiliates tens of thousands of children now being raised by same-sex couples[,]. . . . mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives." *Id.*; *see Kitchen*, 2014 WL 2868044, at *17 (finding this language from *Windsor* applicable to Utah's ban on marriage equality); De *Leon v. Perry*, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014) (finding Texas' ban on marrying couples of the same sex "causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted"); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) (finding Virginia's ban on

marrying couples of the same sex was "needlessly stigmatizing and humiliating children who are being raised by loving couples"). No married military couple wants to be demeaned or have their children stigmatized or humiliated – particularly by a state government the military family is making enormous sacrifices to protect.

2. Refusing To Respect Valid Marriages Places The Military At A Competitive Disadvantage In Recruitment And Retention

Our armed services must compete with the private sector in recruiting and retaining well-qualified employees. One reason the plaintiffs brought the *McLaughlin* suit was that the military's failure to extend spousal benefits comparable to those offered by the private sector risked the military losing qualified candidates and troops. *See Anderson v. United States*, 16 Cl. Ct. 530, 535 n.10 (Ct. Cl. 1989) ("It is recognized that the federal government must compete with private industry for the recruitment and retention of overseas employees. Employees who are dissatisfied or believe they are being treated unfairly are more inclined to leave the government than those who are satisfied or believe otherwise."); 127 Cong. Rec. 21,378 (1981) ("Morale, motivation, and reenlistment of our armed services depend on more than take-home pay. Long-range benefits which insure the future financial security of both partners in a military marriage will improve morale and increase reenlistment.") (Sen. DeConcini); 10 U.S.C. § 1071 ("The purpose of this chapter is to create and maintain high morale in the

uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents."); Don Jansen, *CRS Report for Congress: Military Medical Care*, at 1-2 (2008) ("[R]ecruitment and retention are supported by the provision of health benefits to military retirees and their dependents."); *see also Sierra Mil. Health Servs., Inc. v. United States*, 58 Fed. Cl. 573, 585 (Fed. Cl. 2003) (noting the "public interest in maintaining the morale of our military personnel by providing improved health care benefits to dependents").

Our nation's experience with DADT was instructive. By some estimates, approximately 4,000 service members voluntarily chose not to reenlist each year due to DADT, while it was in effect. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 951-52 (C.D. Cal. 2010), *vacated as moot following DADT repeal*, 658 F.3d 1162 (9th Cir. 2011) (noting the General Accounting Office estimated it cost $95 million to replace and train soldiers who left service due to DADT). DADT repeal improved these numbers substantially, but there was no doubt that denying equal benefits was undermining recruitment and retention, particularly when same-sex spousal benefits were available in the private sector, including from defense contractors that recruit top military talent.

OS-SLDN and AMPA applaud the military for the steps it has taken to make the military a more attractive place for gay and lesbian Americans to choose to

work. The repeal of DADT and the extension of spousal benefits post-*Windsor* and *McLaughlin* have done much to level the playing field for gays and lesbians deciding whether to enlist or reenlist in the military, or to instead seek private sector employment.

But the uneven patchwork of marriage rights for gay and lesbian couples poses a unique problem for the military. The private sector provides gay and lesbian married couples with the ability to find stable employment in states where their marriages and families are respected. A career in the military may very well lead to gay and lesbian military families being relocated to states where their marriages will not be respected. For example, Indiana is home to Naval Surface Warfare Center Crane Division which employs nearly 3,500 people. This facility is the third largest of the U.S. Navy's military bases. Indiana also is home to Camp Atterbury, which at one time hosted four army infantry divisions. Grissom Air Reserve Base, also located in Indiana. In recent years it has become the home of a large secondary force of reservists who continue to make it an important military installation. OS-SLDN and AMPA members unsurprisingly have conveyed that a move to a state where they would lose the recognition of their marriage and the accompanying myriad state-law benefits is a definite disincentive to service.

The United States Supreme Court has recognized that marriage typically triggers a host of benefits under both state and federal law. *Turner v. Safely*, 482

U.S. 78, 96 (1987) ("[M]arital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock)."); *see also Bourke v. Beshar*, No. 3:13-CV-750-H, 2014 WL 556729, at *3 (W.D. Ky. Feb. 12, 2014) (striking down the Kentucky law barring the recognition of marriages by couples of the same sex and noting, under Kentucky law, those couples would lose tax benefits and rights under intestacy, tort and workmen's compensation laws). In addition, "[l]ike opposite-sex couples, same-sex couples may decide to marry partly or primarily for the benefits and support that marriage can provide to the children the couple is raising or plans to raise." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013). The denial of marriage-related benefits harms these families. *See, e,g.*, *Deboer v. Snyder*, 973 F. Supp. 2d 757, 771 (E.D. Mich. 2014) (finding Michigan's ban places children of same-sex parents "in a legally precarious situation and deprives then of 'social capital'"); *De Leon*, 975 F. Supp. 2d at 653 (finding Texas' ban "denies children of same-sex parents the protections and stability they would enjoy if their parents could marry"); *Obergefell v. Wymyslo*, 962 F. Supp.2d 968, 979-80 (S.D. Ohio 2013) (same with Ohio's ban); *Golinski v. OPM*, 824 F. Supp. 2d 968, 992 (N.D. Cal. 2012) ("The denial of recognition and withholding of marital benefits to same-sex couples does nothing to support opposite-sex

parenting, but rather merely serves to endanger children of same-sex parents".); *Pederson v. OPM*, 881 F. Supp. 2d 294, 336-37 (D. Conn. 2012) (marriage non-recognition limits "the resources, protections, and benefits available to children of same-sex parents").

Among the more important state law benefits to military spouses is license portability. State law requires many professionals to hold a license to practice in their chosen profession and, historically, this has thwarted employment opportunities for military spouses who must go through the time and expense of getting re-licensed as the military moves their families from state to state. A recent push for states to enact military spouse license portability measures is underway, and now 44 states, including Indiana, have enacted laws making it easier for military spouses licensed in one state to receive a license in the state where they have moved. Ind. Code 25-1-17(5) (2014). Another recent push has been to provide unemployment insurance to trailing unemployed military spouses, and 45 states, including Indiana, and the District of Columbia already have passed such laws. Ind. Code § 22-4-15-1(c)(7) (2014). Indiana's refusal to recognize a same-sex spouse as a "spouse" prevents these benefits from being conferred upon same-sex spouses.

These sorts of benefits are incredibly important to military families. Department of Defense statistics show that 77% of military spouses want or need

to work, but despite being better educated on average, their unemployment rate is 26% and they make 25% less than their civilian counterparts. Terri Moon Cronk, *U.S. Dep't of Defense News Article: Military Spouse Hiring Program Gains 30-plus Companies* (Nov. 14, 2012). Assistant Secretary of Defense Frederick Vollrath explains this is due to frequent relocation, and the hardship "compromises the quality of life of military families and the readiness of the military service." *Id.*

3. Refusal To Recognize Marriages Threatens Military Uniformity

Uniformity is a well-established pillar of military culture and a necessary component of an effective, well-prepared national defense. *Hartmann v. Stone*, 68 F.3d 973, 984-85 (6th Cir. 1995) ("[T]he military considers the maintenance of uniformity and the discipline it engenders to be a necessary ingredient of its preparedness. . . ."). To promote uniformity and preserve high morale, the military discourages all inequities and distinctions among its members. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (noting the military's broad discretion to "foster instinctive obedience, unity, commitment, and *esprit de corps*"); *Anderson*, 16 Cl. Ct. at 535 n.9 ("It is not difficult to appreciate the morale problem inherent in the case of two teachers, both recruited in the United States, who work at the same overseas [Defense Department] school, perform the same duties, receive the same salary [yet do not receive the same benefits.]"); S. Rep. No. 86-1647, at 3339-40 (1960) ("The effectiveness of their performance is directly related to the

fairness and wisdom inherent in the policies under which personnel are employed. . . . Morale suffers when two employees arrive at a post together, are booked into the same hotel, pay the same room rate, but receive a different allowance."). The military's repeal of DADT and its commitment to provide equal benefits were important steps toward fostering uniformity.

When the military sends service members to states where some of their marriages will be recognized by the state but others will not, a lack of uniformity results that adversely impact morale. Married couples in states where they are treated equally will understandably be resentful of making a move to a state where they will lose the recognition of their marriage and the protections that go with it, while other married couples in the same unit will have their rights respected. The military seeks to prevent issues of these kinds to preserve morale and unit cohesion. Discriminatory state laws, like Indiana's, directly undermine that effort.

II. THE UNEVEN PATCHWORK OF STATES PROVIDING MARRIAGE EQUALITY COMPLICATES THE PAYMENT OF VETERANS BENEFITS AND HARMS VETERANS

The uneven patchwork of marriage equality in the states has complicated the efforts of the VA to provide veterans benefits under Title 38. On September 4, 2013, the Attorney General advised Congress that the VA would no longer enforce the definitions of "spouse" and "surviving spouse" in Title 38 to exclude married couples of the same-sex because those definitions are unconstitutional.

McLaughlin, Dkt. 50-1. The Attorney General explained that "continued enforcement would likely have a tangible effect on the families of veterans and, in some cases, active-duty service members and reservists, with respect to survival, health care, home loan, and other benefits." *Id.* at 2. That same month, the Department of Justice advised the *McLaughlin* court that the Executive Branch "is working expeditiously to implement the *Windsor* decision and the President's determination regarding Title 38 across the federal government." *McLaughlin*, Dkt. 50 at 1. But no guidance from the VA was forthcoming until June 20, 2014, and that guidance makes clear that the VA will not recognize the marriage of all legally married couples of the same sex. http://www.va.gov/opa/marriage.

The problem in extending veterans benefits lies in an inartfully drafted provision of Title 38 that provides:

> In determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.

38 U.S.C. § 103(c). Most statutes define a marriage as valid if it was valid where it was celebrated (or do not address the issue at all), and it is the policy of the United States to follow that approach wherever possible. Attorney General Holder, *Memorandum: Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples*, at 2 (Feb. 10, 2014) ("Holder Memorandum"). This statute's use

of the term "resided" is peculiar because it looks to two potentially different bodies of law in determining whether a marriage is valid – the law where the parties "resided" at the time they married and the law where the parties "resided" when benefits accrued – but the statute does not clarify what happens when the results under those two bodies of law diverge.

OS-SLDN and AMPA had hoped the VA would follow the ordinary course and treat a marriage as valid if it was valid where it was celebrated. The statute uses the term "resided," rather than "domiciled," and "resided" can be interpreted as simply where the parties were present at the time they were married. *See, e.g.*, *Burden v. Shinseki*, 25 Vet. App. 178, 182 (Vet. App. 2012) ("To establish a marriage for VA benefits purposes, the Secretary is required to look to the law of the place where the marriage took place or where the parties resided at the time the right to VA benefits accrued."). The VA could have concluded that satisfying either "resided" clause is sufficient to confer a valid marriage, as that would be in keeping with the government's "policy to recognize lawful same-sex marriages as broadly as possible, to ensure equal treatment for all members of society regardless if sexual orientation." Holder Memorandum at 2.[4]

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[4] The Charlie Morgan Military Spouses Equal Treatment Act, named after a *McLaughlin* plaintiff who died and is survived by her wife and daughter, is

But the VA did not choose to follow that course. Instead, the VA has made clear that it will not recognize even legal marriages of same-sex couples that are perfectly valid where their marriage was celebrated if the spouses travelled to that state while living in states that do not recognize marriage equality. That couple would have to move to a state that would recognize their marriage before the VA would recognize their marriage. http://www.va.gov/opa/marriage.

It is perverse for the government to grant leave to enable a same-sex couple to travel to a state where they can legally marry, for the government to recognize that marriage as valid for however many more years the service member continues to serve, and then suddenly ignore that marriage as soon as the service member retires and obtains veteran's status.[5] Likewise, it would be inequitable to force veterans to move away from their homes to marriage equality states so they and their spouses can get the federal veterans' benefits they earned. For example, Captain Joan Darrah, USN (Ret.), served in the Navy for more than 20 years. She

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pending in Congress and would declare a marriage valid if "valid in the State in which the marriage was entered into." S. 373, 113 Cong. § 2 (2013).

[5] VA benefits are a bit of a misnomer, as some VA benefits provided under Title 38 are available to service members who have not become veterans. *See* Dep't of Veterans Affair, *VA Benefits in Brief*, *available at* http://www.vba.va.gov/pubs/forms/VBA-21-0760-ARE.pdf. Consequently, a construction of Title 38 that makes eligibility dependent on where the married service member lives, may result in some VA benefits disappearing whenever the service member is transferred to a state that will not recognize his or her marriage.

made the decision to leave the Navy shortly after September 11, 2001. Joan attended a briefing that ended seven minutes before American Airlines flight #77 crashed into the section of the Pentagon where she had been in a meeting. Seven of her co-workers who stayed behind died. Although Joan had been with her partner and now wife, Jacqueline Kennedy, for more than a decade at that time, she had to keep that relationship hidden under DADT. It troubled Joan deeply that, had she died that day, Jacqueline would not receive any benefits or even the courtesy of being notified of her death as next of kin, so she made the difficult decision to leave the military. Joan and Jacqueline have been together for 24 years (married for four years), and they have shared their home together in Virginia since 1991. It would make no sense for this couple to uproot themselves from their community and move to a marriage equality state, just so they can receive the veterans' benefits Joan earned over the course of her sacrifices and service to her country for more than 20 years.

In theory, the troublesome questions of what constituted residency at the time of a marriage would have existed for opposite-sex married couples since Section 103(c) was enacted, but the resolution of those questions was avoided because their marriages were recognized everywhere. *See* http://www.va.gov/opa/marriage (noting that questions remain as to how long you must live somewhere to establish residency, and by the fact a person can have

multiple residences). This Court can obtain the same result by recognizing that same-sex couples have the same constitutional right to marry as opposite-sex couples.

CONCLUSION

The military values the service of gay and lesbian service members, and is actively working to recruit and retain them. But so long as married gay and lesbian couples confront the prospect of a force move to a state that will refuse to recognize their marriages, a powerful disincentive to recruitment and retention will remain. The lack of marriage recognition is a strain on these military families, and an unnecessary distraction for service members who all too often find themselves in harm's way while trying to protect this country. Ending this discrimination by requiring states to recognize the right of same-sex couples to marry would protect these families, and best serve the needs of the modern military.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,943 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Times New Roman font in a size equivalent to 14 points or larger.

/s/ Christopher D. Man
Christopher D. Man

August 1, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on August 1, 2014, the foregoing brief was filed with the Clerk of the Court using the Court's CM/ECF system. I further certify that counsel for all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Christopher D. Man
Christopher D. Man

August 1, 2014