FIRST LIBERTY

December 3, 2019

Paul Jensen
Director, Army Trademark Licensing Program
200 Stovall Street
Alexandria, VA 22332

Re: Unconstitutional Discrimination Against Shields of Strength

Dear Mr. Jensen:

Kenny Vaughan, founder and president of Shields of Strength (SoS), has retained First Liberty Institute in this matter. Please direct all correspondence on this matter to me at the contact information provided below.

BACKGROUND

SoS is a private, faith-based business that manufactures and sells military-themed items such as replica "dog tags" and jewelry. The first SoS products appeared in stores in 1998. Some SoS products include references to Bible verses,[1] while other products draw upon the Bible as inspiration for encouraging words and phrases.[2]

Following the terrorist attacks of September 11, 2001, U.S. Army Colonel (COL) David Dodd's 86th Signal Battalion was deployed to Afghanistan in support of Operation Enduring Freedom. COL Dodd had seen SoS dog tags and, prior to the 86th's deployment, COL Dodd sought a bulk purchase for his soldiers. SoS donated 500 "shields" to the 86th Signal Battalion, beginning a two-decade long relationship between SoS and the DoD.

Since then, SoS has produced over four million dog tags, and it has donated hundreds of thousands to DoD units and individual service members. According to author and historian Stephen Mansfield, "aside from the official insignias they wear, [the SoS dog tag] is the emblem most often carried by members of the military in Afghanistan and Iraq." SoS's popularity among service members grew exponentially, and by 2002 retailers across the country began selling Shields of Strength products.

Since 2002, it is estimated that more than 90% of the operational units within DoD have received SoS shields. The most popular "shield" among service members was a replica dog tag bearing an American flag and engraved with the words of Joshua 1:9.[3]

[1] For example, "Joshua 1:9."
[2] For example, "I can do all things . . ."
[3] "Have I not commanded you? Be strong and courageous. Do not be afraid; do not be discouraged, for the Lord your God will be with you wherever you go."

Tragically, on April 3, 2003, while serving in support of Operation Iraqi Freedom, Army Captain Russell Rippetoe was killed in action while wearing a SoS Joshua 1:9 dog tag. CPT Rippetoe was the first combat casualty from Operation Iraqi Freedom buried at Arlington National Cemetery. The following month, during the 2003 Memorial Day Ceremony at Arlington National Cemetery, President George W. Bush spoke of CPT Rippetoe's faith, and mentioned the Shield of Strength CPT Rippetoe wore as a source of great encouragement.

In December of 2003, due in part to SoS's growing popularity and ubiquity, the DoD invited Mr. Vaughan to be a guest speaker at an event held at the Pentagon. Following Mr. Vaughan's speech, several DoD employees approached Mr. Vaughan and requested that SoS begin placing its products in Army and Air Force Exchange Service (AAFES) outlets. This further cemented SoS's longstanding relationship with the DoD.

Shields of Strength's License

Prior to 2011, SoS sold Army-themed products without a license, yet the Army did not enforce its license, nor did it communicate to SoS that a license was required. In 2011, the Army first notified SoS it would need to obtain a license in order to continue selling Army-themed products. Accordingly, SoS began the process of obtaining a license from the Army to use Army trademarks ("marks") on SoS products. In an April 18, 2011, email exchange between you and Mr. Vaughan, he asked whether SoS "will be able to use the Army logo or seal on a [dog] tag?" You responded "yes, absolutely. You would be able to use the Army logo, which I have attached." Nevertheless, SoS was not able to immediately obtain a license.

On May 7, 2012, Mr. Vaughan sent you an email asking why the Army might decline to issue a license, and whether there is "something written in the Army license guidelines that excludes this type of item?" Despite your previous assurance that SoS would "absolutely" be able to use the Army logo, you responded:

> "If it's not approved, it would most likely be due to the biblical scripture. There is a big concern in the Army right now, as some religious groups have been challenging the Army on different issues."

At some point thereafter in 2012, the Army granted a license to SoS to feature Army trademarks on its products. Pursuant to its license, SoS has featured Army trademarks on its products since 2012.

The Army's Unconstitutional Discrimination Against Shields of Strength

On August 12, 2019, after seven years without incident or complaint, you sent an email to Mr. Vaughan. The subject of your email was "Negative Press." Within the email, you issued the following directive to Mr. Vaughan:

> "You are not authorized to put biblical verses on your Army products. For example Joshua 1:9. Please remove ALL biblical references from all of your Army products."

You then included a URL to an article on the "Friendly Atheist" website that discussed a purported "Cease and Desist" letter from the Military Religious Freedom Foundation (MRFF) to the U.S. Navy and the U.S. Marine Corps. The MRFF letter threatened "administrative and litigation complaints" to "compel compliance" unless the SoS stopped including religious references on its DoD-licensed products.

Thus, it appears your office used the "negative press" resulting from the MRFF's demands as the impetus to direct SoS to remove all biblical references from its Army-licensed products.

Just as with the MRFF's demands, your directive is unsupported by the law, and is, in fact, unconstitutional. We request you immediately rescind your unlawful directive and take immediate steps to clarify your policy to comport with the United States Constitution and federal law.

LEGAL ANALYSIS

The First Amendment's Establishment Clause forbids the government from formally establishing religion, and from coercing Americans to follow it.[4] It prohibits the government from officially favoring or *disfavoring* particular religious viewpoints or expression.[5] Your directive that SoS remove all biblical references from its products demonstrates precisely the type of government hostility towards religion that the Establishment Clause forbids.

The First Amendment's Free Exercise Clause also protects private entities from impermissible government interference with religious exercise. This includes the prohibition against government censorship of religious expression by a private, for-profit corporation, such as SoS.[6] When private entities engage in religious expression, they are fully protected by the Free Exercise and Free Speech Clauses. The United States Supreme Court ("Supreme Court") has affirmed this fundamental principle repeatedly.[7] SoS's use of biblical references on its products is therefore protected by the Free Exercise and Free Speech Clauses.

Moreover, government censorship of certain speakers or banning speech solely on the basis of religious character or "connotations," constitutes a form of unlawful discrimination called "viewpoint discrimination." The Supreme Court has repeatedly

[4] *See Town of Greece, NY v. Galloway*, 134 S. Ct. 1811, 1819-20 (2014); *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 115 (2001).
[5] *See Town of Greece*, 134 S. Ct. at 1824; *Larson v. Valente*, 456 U.S. 228, 244-46 (1982).
[6] *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770-73 (2014).
[7] *See, e.g., Capital Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.").

forbidden viewpoint discrimination.[8] Your censorship of SoS's religious expression amounts to unconstitutional viewpoint discrimination because your directive to SoS censors or bans only its religious speech, solely because it is religious.

The Supreme Court very recently reinforced these principles. In *The American Legion v. American Humanist Association*, the Court, in a 7-2 decision, upheld the constitutionality of a cross-shaped veterans memorial on government property.[9] Notably, Justice Alito warned that "[a] government that roams the land . . . scrubbing away any reference to the divine will strike many as aggressively hostile to religion."[10] Your directive that SoS remove any biblical references from its products likewise appears to be aggressively hostile to religion.

The government also cannot "regulate speech based on its substantive content or the message it conveys."[11] Consequently, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[12] Such principles apply "even when the limited public forum is one of [the government's] own creation,"[13] such as with a licensing scheme. Once the Army decided to allow non-federal entities to use its marks, it "must respect the lawful boundaries it has itself set" and cannot "discriminate against speech on the basis of its viewpoint."[14] Stated differently, the fact that the Army has a licensing scheme does not absolve it from the obligation to avoid viewpoint discrimination, quite the opposite.

Viewpoint Discrimination Applies to Trademarks

At least one federal court recently held that once the government creates a forum for private entities to use government trademarks, the trademark regime is subject to viewpoint discrimination principles.[15] In other words, once the Army creates a limited public forum via a trademark licensing regime and allows private entities such as SoS to obtain licenses, the Army cannot "discriminate against speech on the basis of its viewpoint" in the administration of the trademark licensing regime.[16] The Army is therefore prohibited from discriminating against SoS because of its inclusion of biblical references on its products, in its advertisements, or on its website.

[8] *See Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819 (1995) ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Id*. at 846); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993).
[9] *The Am. Legion v. Am. Humanist Ass'n*, 588 U.S. ___, 139 S. Ct. 2067 (2019).
[10] *The Am. Legion*, slip op. at 27.
[11] *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).
[12] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). To determine whether content-based discrimination occurred, a court must examine whether "the government demonstrates that its regulation is narrowly drawn and is necessary to effectuate a compelling state interest." *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).
[13] *Rosenberger*, 515 U.S. at 829.
[14] *Id*.
[15] *Gerlich v. Leath*, 861 F.3d 697, 701 (8th Cir. 2017).
[16] *Gerlich*, 861 F.3d at 705, 707 (citing *Rosenberger*, 515 U.S. at 829 (internal quotation marks omitted)).

Moreover, in *Matal v. Tam* the Supreme Court held that the Lanham Act's disparagement clause, which forbids trademarks that meet the definition of "offensive," is unconstitutional.[17] The Court held that although the disparagement clause "applies equally . . . to any mark that is offensive to a substantial percentage of the members of any group," the disparagement clause "is viewpoint discrimination" because "[g]iving offense is a viewpoint."[18]

Indeed, in his concurrence in *Tam* Justice Kennedy defined viewpoint discrimination as "whether—within the relevant subject category—the government singled out a subset of messages for disfavor based on the views expressed."[19] Specifically, Justice Kennedy noted that "the disparagement clause . . . identifies the relevant subject as 'persons, living or dead, institutions, beliefs, or national symbols.' Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination."[20]

More recently, in *Iancu v. Brunetti* the Supreme Court bolstered its holding in *Tam* by striking down the Lanham Act's "immoral or scandalous" clause.[21] In *Brunetti*, the government denied a trademark application for "FUCT," the name of the applicant's clothing line, because it "consist[ed] or compris[ed] of immoral or scandalous matter." Just as it did to the disparagement clause in *Tam*, the Supreme Court invalidated the Lanham Act's "immoral or scandalous" clause as viewpoint discrimination.[22] The Court, finding that the government routinely approves some trademarks referencing the same content as those denied under the "immoral or scandalous" clause, determined the "immoral or scandalous" criterion was viewpoint discriminatory.[23]

Clearly, if a prohibition against trademarking offensive, immoral, or scandalous speech constitutes viewpoint discrimination, then certainly the Army's prohibition against using religious speech in conjunction with its trademark does, too. This is especially true because the Army routinely grants licenses to similar, non-religious speech.

In addition to these recent Supreme Court decisions, certain statutory protections also exist that protect religious expression. The Religious Freedom Restoration Act (RFRA)[24] prohibits the federal government from "substantially burden[ing] a person's

[17] *Matal v. Tam*, 582 U.S. ___, 137 S. Ct. 1744 (2017).
[18] *Id*. at 1763.
[19] *Id.* at 1766 (Kennedy, J., concurring).
[20] *Id.* (Kennedy, J., concurring); *see also id.* at 1760–61 (Alito, J.) ("the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit") (internal quotation marks and citations omitted). Thus, the DoD likely cannot discriminate against SoS just because it is not entitled to a DoD trademark license agreement.
[21] *Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294 (2019).
[22] *See Brunetti*, 139 S. Ct. at 2300 (determining that the government has approved "trademarks referencing drug use, religion, and terrorism . . . all the while, it has approved registration of marks expressing more accepted views on the same topics").
[23] *See, e.g.*, *id.* at 2300–02 (denying trademarks for "Marijuana Cola" and "Ko Kane" beverages but approving "D.A.R.E. to Resist Drugs").
[24] 42 U.S.C. 2000bb *et seq.*

exercise of religion" unless "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest."[25]

RFRA applies even where the burden on religious exercise arises out of a "rule of general applicability" that carries no animus or discriminatory intent.[26] It applies to "any exercise of religion,"[27] and covers "corporations [and] companies."[28] Clearly, RFRA applies to SoS's inclusion of biblical references on its products, and your directive constitutes a substantial burden on SoS's religious exercise. Accordingly, the Army must satisfy RFRA's strict scrutiny standard to justify its censorship.

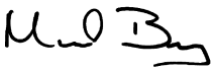
CONCLUSION

Your directive that SoS remove all Biblical references from its Army-licensed products is unconstitutional and violates RFRA. SoS does not relinquish its First Amendment rights by virtue of its status as a license-holder. Indeed, any requirement that SoS subject itself to such censorship as a condition to receiving a license would itself be an unconstitutional condition.

To remedy these violations, we request that you provide us with a written rescission of your directive that SoS remove all Biblical references from its Army-licensed products, and written assurance that SoS will be able to include Biblical references on its Army-licensed products.

We respectfully request a response within 10 business days of your receipt of this correspondence. We desire to resolve this quickly and amicably. But should you refuse or fail to provide the remedy requested herein, we are prepared to take any and all necessary legal action. I am available to answer any questions you may have. Please do not hesitate to contact me at your convenience.

Sincerely,



Michael Berry
Chief of Staff, Director of Military Affairs

[25] *Id.* §2000bb-1(a), (b).
[26] 42 U.S.C. §2000bb-1(a), (b)..
[27] *See id.* §§ 2000bb-2(4), 2000cc-5(7).
[28] 1 U.S.C. § 1.