FIRST LIBERTY

January 14, 2020

Jessica O'Haver
Director, Marine Corps Trademark Licensing Office
Headquarters United States Marine Corps
Public Affairs (PA) RM 4B548
3000 Marine Corps Pentagon
Washington, DC 20350-3000

**Re: Unconstitutional Discrimination Against Shields of Strength**

Dear Ms. O'Haver:

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

[1] For example, "Joshua 1:9."
[2] For example, "I can do all things . . ."

replica dog tag bearing an American flag and engraved with the words of Joshua 1:9.[3] 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, the Marine Corps did not require SoS to obtain a license in order to sell Marine Corps-themed products. In 2011, the Marine Corps first notified SoS it would either need to obtain a license in order to continue selling Marine Corps-themed products, or alternatively, SoS could sell products so long as it did not promote those products as being licensed by the Marine Corps. Accordingly, SoS began the process of obtaining a license from the Marine Corps to use Marine Corps trademarks ("marks") on SoS products. SoS's path to obtaining a Marine Corps license was long and difficult. The follow are just examples of the many unnecessary obstructions:

> On July 20, 2011, you sent Mr. Vaughan an email stating "we do not feel comfortable licensing religious materials."
>
> On May 15, 2017, you sent Mr. Vaughan an email stating there was a "new" DOD policy issued in 2013 prohibiting DOD licenses "for any purpose intended to promote . . . religious beliefs (including non-belief) . . .."
>
> On June 26, 2017, you sent Mr. Vaughan an email stating that although SoS *could* use the USMC license with biblical passages and references, you "couldn't allow for USMC branded products with more controversial passages that may offend some (hell, brimstone, lake of fire, eternal damnation, etc.)." Thus, you expressly permitted SoS to use its license in conjunction with non-controversial passages, although you did not define what might constitute "controversial."
>
> Finally, on August 16, 2018, your office issued a license to SoS, and it began producing Marine Corps-themed items in accordance with its license

[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."

agreement. Nowhere does the license agreement purport to limit SoS's ability to include religious references on licensed items. Accordingly, some of SoS's Marine Corps-themed products included the aforementioned religious references, yet SoS at all times complied with your June 26, 2017 request to avoid "controversial" passages.

**The Marine Corps' Unconstitutional Discrimination Against Shields of Strength**

On July 8, 2019, the Military Religious Freedom Foundation (MRFF) sent your office a letter threatening "administrative and litigation complaints" to "compel compliance" unless you prohibited SoS from selling Marine Corps-licensed items that include religious references. On July 11, 2019, Mr. Phillip Greene, Trademark Counsel, immediately complied with the MRFF's demands and sent a cease and desist notice to Mr. Vaughan.

Mr. Greene's cease and desist notice referenced multiple conversations between you and Mr. Vaughan during which you allegedly issued guidance prohibiting the inclusion of religious expression on Marine Corps-licensed products. Notably, however, your June 26, 2017 email expressly authorizing SoS to use religious references on Marine Corps-themed items is conspicuously absent from Mr. Greene's cease and desist notice. Moreover, the conversations Mr. Greene references all pre-date the license agreement between your office and SoS.

The License Agreement is dated August 16, 2018, and it does not contain any restriction or limitation on the use of religious words or symbols. Between August 16, 2018, and July 11, 2019, you expressed no concern or issues with SoS products that contain religious words or symbols.

In other words, the last guidance SoS received from your office was an email stating that SoS could produce Marine Corps-themed items so long as they were not controversial, and a license agreement that is silent on the matter of religious references. SoS acted in good faith according to that guidance.

Thus, the MRFF's letter appears to have served as the impetus to your office's actions against SoS. To make matters worse, despite the MRFF's dubious legal claims, your office immediately capitulated to the MRFF's demands.

Just as with the MRFF's demands, Mr. Greene's directive is unsupported by the law, and is, in fact, unconstitutional. We request you immediately rescind the 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] The 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 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.

[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.").
[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.

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 Marine Corps 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 Marine Corps 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 Marine Corps creates a limited public forum via a trademark licensing regime and allows private entities such as SoS to obtain licenses, the Marine Corps cannot "discriminate against speech on the basis of its viewpoint" in the administration of the trademark licensing regime.[16] The Marine Corps is therefore prohibited from discriminating against SoS because of its inclusion of biblical references on its products, in its advertisements, or on its website.

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

[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)).
[17] *Matal v. Tam*, 582 U.S. ___, 137 S. Ct. 1744 (2017).
[18] *Id.* at 1763.
[19] *Id.* at 1766 (Kennedy, J., concurring).

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 Marine Corps's prohibition against using religious speech in conjunction with its trademark does, too. This is especially true because the Marine Corps 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 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 Marine Corps must satisfy RFRA's strict scrutiny standard to justify its censorship.

[20] *Matal*, 137 S. Ct. at 1744. (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.*
[25] *Id.* §2000bb-1(a), (b).
[26] *Id.* §2000bb-1(a), (b)..
[27] *See id.* §§ 2000bb-2(4), 2000cc-5(7).
[28] 1 U.S.C. § 1.

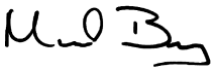
**CONCLUSION**

Your directive that SoS remove all Biblical references from its Marine Corps-licensed products is unconstitutional and violates RFRA. Likewise, your directive on June 26, 2017, that purported to prohibit "controversial passages that may offend some" is unconstitutional. 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 Marine Corps-licensed products, and written assurance that SoS will be able to include Biblical references on its Marine Corps-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

Copy to:
General Counsel of the Navy, The Honorable Robert J. Sander