

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

SHIELDS OF STRENGTH,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF DEFENSE; LLOYD J. AUSTIN III, in his official capacity as Secretary of Defense; ARMY TRADEMARK LICENSING PROGRAM OFFICE; PAUL JENSEN, individually and in his official capacity as Director of the Army Trademark Licensing Program; U.S. MARINE CORPS TRADEMARK & LICENSING PROGRAM OFFICE; JESSICA O’HAVER, individually and in her official capacity as Director of the Marine Corps Trademark Licensing Office; NAVY TRADEMARK LICENSING OFFICE (OFFICE OF NAVAL RESEARCH); NADINE SANTIAGO, individually and in her official capacity as Director of the Navy’s Trademark Licensing Program; AIR & SPACE FORCES INTELLECTUAL PROPERTY MANAGEMENT OFFICE; and APRIL ROWDEN, individually and in her official capacity as Director of the Air & Space Forces Trademark and Licensing Program,

Defendants.

Case No. 6:21-cv-00484

MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Shields of Strength (“Shields” or “SoS”) respectfully requests that this Court enjoin the branches of the military from continuing to apply a trademark-licensing policy that unconstitutionally targets religious messages for disfavored treatment. For nearly 25 years, Shields has made replica military dog tags and jewelry that American service members have worn around the world. When Army Captain Russell Rippetoe became the first American casualty of Operation Iraqi Freedom, he was wearing a Shields dog tag. And during his funeral at Arlington National Cemetery, President George W. Bush mentioned Captain Rippetoe’s dog tag and read the Bible verse engraved on it. Like Captain Rippetoe, thousands of service members wear Shields dog tags because they symbolize their religious and military identities, facilitate their spiritual growth, and provide comfort during military service. The dog tags inspire soldiers and their families because they combine love of country (a military insignia) with love of God (a religious message).



Until 2011, the Department of Defense and the Service Branches (collectively, “DoD”) allowed Shields to use its insignias without a trademark license. In 2011, that all changed. The DoD gradually tightened its restrictions on SoS’s use of the insignias, requiring a license, limiting, and sometimes outright banning any religious messages on the dog tags. The DoD’s increasing

religious hostility culminated a few months ago when SoS was unable to renew even its limited trademark licenses with the Army and Marine Corps. Because of the DoD's escalating religious hostility, SoS is no longer able to provide replica dog tags even upon request of service members or the military units in which they serve. A preliminary injunction is necessary to correct the DoD's unconstitutional discrimination against religious viewpoints, to stop impeding religious exercise, and to maintain the status quo while this case is pending.

The DoD's trademark licensing policy unconstitutionally targets and discriminates against private religious speech, on its face and as applied to Shields. Pursuant to DoD policy, the military branches broadly grant trademark licenses to private applicants who meet their criteria, both creating a limited public forum and making a benefit available to those who wish to participate in it. However, DoD policy singles out certain viewpoints for disfavored treatment, prohibiting uses "intended to promote ideological movements, sociopolitical change, *religious beliefs (including non-belief)*, specific interpretations of morality, or legislative/statutory change."¹ Notably, the DoD policy permits inspirational topics and quotes but excludes inspirational messages from a Biblical viewpoint. Such government discrimination against religious messages is presumptively unconstitutional viewpoint discrimination. *Shurtleff v. City of Bos.*, No. 20-1800, 2022 WL 1295700, at *3 (U.S. May 2, 2022); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

The DoD also violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, because it places a substantial burden on religious exercise by requiring SoS to remove religious messages from its military dog tags, when creating, selling, and donating these dog tags

¹ DoD Instruction 5535.12, "DoD Branding and Trademark Licensing Program Implementation," Sept. 13, 2013 (emphasis added).

fulfills a religious purpose of Shields and its owner. Similarly, the DoD violates the Free Exercise Clause by targeting religious activity for disfavored treatment. Further, the decades-long history of allowing SoS to distribute its military dog tags without incident demonstrates that the DoD cannot overcome strict scrutiny. Therefore, SoS is likely to succeed on the merits.

As long as the DoD is allowed to enforce its unconstitutional policy, SoS will continue to experience irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). By contrast, the DoD will suffer no harm by allowing SoS's use of the marks, as it has suffered no harm for nearly a quarter century in allowing SoS to use the insignias on dog tags. Accordingly, since "it is always in the public interest to prevent the violation of a party's constitutional rights," *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (citing *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)), a preliminary injunction against the DoD's discriminatory policy serves the public interest.

Since SoS satisfies the preliminary injunction standard, it respectfully requests that this Court grant its request to temporarily prohibit the DoD from enforcing its discriminatory trademark licensing policy against SoS.²

STATEMENT OF FACTS

John Kennedy Vaughan founded Shields of Strength in 1996 with a mission to share the love, hope, forgiveness, and power of God's Word with others, and to inspire people to pursue

² Shields does not deny that the government can impose restrictions on licensees. Shields seeks only an order barring the government from enforcing an *unlawful* restriction based on religious viewpoint. As the Supreme Court recently held, Boston can allow the public to use its flagpoles for only holiday flags, but it cannot open its flagpoles for all holiday flags except for religious holiday flags. *See Shurtleff v. City of Bos.*, No. 20-1800, 2022 WL 1295700 (U.S. May 2, 2022). Just so, the DoD cannot open its mark for use by the public to send inspirational messages, except for religious inspirational messages.

victory in life's battles and in a relationship with Jesus Christ. Vaughan Dec. ¶ 3. Shields of Strength fulfills this purpose by selling and donating military themed items such as replica dog tags and jewelry to service members that contain scriptures and military identifiers. The use of these military-related words and insignias are necessary to fulfill SoS's religious purpose because they identify the individuals wearing the tags and convey connection and support of the military, patriotism, and the service-member's religious convictions. Vaughan Dec. ¶ 4. With this in mind, SoS designs each dog tag by thoughtfully placing and arranging the American flag, the name or insignia of the military branch or unit to which the recipient belongs, a cross, and/or a Scripture verse. The verses used most often are Joshua 1:9 and Psalm 91,³ because military members say that these Scripture verses encourage them the most. Vaughan Dec. ¶ 5. In fact, Shields replica dog tags were estimated to be the item "most often carried by members of the military in Afghanistan and Iraq [aside from the official insignias they wear.]"⁴ Since 2001, Shields has sold or donated over four million replica dog tags to the U.S. military and other organizations. Vaughan Dec. ¶ 6.

For more than a decade before 2011, the DoD did not require anyone to obtain trademark licenses to produce and sell military-themed products. In fact, the DoD and service branches acquiesced to—and often affirmatively consented to or encouraged—Shields' sale or distribution of products displaying military words and insignia and Bible verses without a trademark license. Vaughan Dec. ¶ 10. Indeed, in December 2003, DoD invited Mr. Vaughan to speak at the Pentagon, and Shields eventually sold its products in Army and Air Force Exchange Service

³ "He who dwells in the shelter of the Most High will rest in the shadow of the Almighty. I will say of the Lord, 'He is my refuge and my fortress, my God in whom I trust.'" Psalm 91:1–2

⁴ STEPHEN MANSFIELD, *THE FAITH OF THE AMERICAN SOLDIER*, Chapter 2 "Shields of Strength," (Jeremy Tarcher, 1st ed. 2006).

(“AAFES”) outlets. Vaughan Dec. ¶ 9. One of the reasons that Shields’ dog tags have so popular is that the service branches do not offer such dog tags or similar products. Vaughan Dec. ¶ 7-9.

Between 2011 and 2017, though, the Army, Marine Corps, and Air Force independently informed Shields that it would need to obtain trademark licenses before continuing to sell military-themed products for those service branches. Vaughan Dec. ¶ 11. The DoD claims ownership of marks including, *inter alia*, terms comprised of ARMY, NAVY, MARINES, or AIR FORCE, as well as designs and other insignia.⁵ Under 10 U.S.C. § 2260, the Secretary of Defense may “license trademarks, service marks, certification marks, and collective marks owned or controlled by the Secretary . . . to any qualifying company upon receipt of a request from the company.” 10 U.S.C. § 2260 (a); (c). Furthermore, “a qualifying company is any United States company that . . . is determined by the Secretary concerned to be qualified in accordance with such criteria as determined appropriate by the Secretary of Defense.” *Id.* § 2260 (c)(2)(B). Internal instructions within the DoD provide that “DoD marks may not be licensed for any purpose intended to promote ideological movements, sociopolitical change, religious beliefs (including non-belief), specific interpretations of morality, or legislative/statutory change.”⁶

Within the DoD, each of the service branches has its own office for licensing its trademarks, and entities that seek to license DoD Trademarks must apply and negotiate for licenses from each of the offices for the respective service branches. However, the process to obtain trademark licenses has been unpredictable, as the service branches apply the internal instructions inconsistently, as detailed below.

⁵ “DoD Trademark Licensing Guide,” <https://www.defense.gov/Resources/Branding-and-Trademarks/DOD-Trademark-Licensing-Guide/> (last accessed May 6, 2022).

⁶ DoD Instruction 5535.12, “DoD Branding and Trademark Licensing Program Implementation,” Sept. 13, 2013.

ARMY. Between 2012 and 2014, the Army authorized Shields’ a trademark license for use with three specific phrases derived from Bible verses, such as, “I can do all things,” but the Army would not allow Shields to include the whole verse (“I can do all things through Christ who strengthens me.”) or the Scripture reference. (Philippians 4:13). Vaughan Dec. ¶ 14; Ex. 7 “Army Three Phrases Email.”

After 2014, the Army reversed course and found that even reference to a biblical phrase without attribution to its corresponding Scripture verse was unacceptable. That is, the Army deduced that the phrase, “I will be strong and courageous, I will not be afraid” was a “religious” phrase and that if the phrase is typed “into a Google search” the “top two answers are Joshua 1:9, and Deuteronomy 31:6.” Thus, in the Army’s view, the phrase could not be on the dog tags. Vaughan Dec. ¶ 14; Ex. 12 Army Inspiration Denied. Eventually, the Army decided to honor its original promise to allow the three inspirational phrases. Ex. 8 Army License Renewal.

In July 2019, though, the Army reversed course again. In response to complaints from the Military Religious Freedom Foundation (“MRFF”), a private activist organization,⁷ the Army sent Shields a cease-and-desist email with subject, “Negative Press,” insisting that SoS “remove ALL biblical references from all of your Army products” [emphasis in original]. The email included a link to an article highlighting the MRFF complaints. Vaughan Dec. ¶ 14; Ex. 2 “Negative Press Email.” In 2020, SoS responded to the Army by citing its license agreement and requested to include the scriptures and Bible verses on the products with a disclaimer that the Army did not endorse the messages. Vaughan Dec. ¶ 16; Ex. 8 “Army License Renewal.” The Army rejected the request, citing DODI 5535.12 and its restriction on religious messages. Vaughan Dec. ¶ 17;

⁷ This organization sent a letter that threatened “administrative and litigation complaints” to “compel compliance” unless those offices prohibited Shields from selling DoD licensed items that include religious references. Ex. 3 “Friendly Atheist Article.”

Ex. 8 “Army License Renewal.” In September 2021, Shields’ Army trademark license expired, and the Army refused to renew the license unless Shields agreed to remove religious messages. Vaughan Dec. ¶ 18. Ex. 8 “Army License Renewal.”

MARINE CORPS. In 2017, after much negotiation, the Marine Corps agreed to give Shields a trademark license. In an email accompanying the license, though, the Marine Corps stated that Shields, “would need to keep the chapter and verse reference out of the product designs,” and the Marine Corps “couldn’t allow for the Marine Corps branded products with more controversial passages that may offend some.” The Marine Corps did not define “controversial.” Vaughan Dec. ¶ 19; Ex. 10 “USMC Controversial Email.”

In July 2019, in response to the MRFF’s complaint letter discussed above, the Marines Corps also sent Shields a cease-and-desist notice. Despite the Marine Corps previous agreement that Shields may use some religious expression without the Bible verses [*see* Ex. 10], this notice prohibited religious expression was prohibited on Marine-Corps licensed products. Vaughan Dec. ¶ 20; Ex. 5 “USMC C&D Notice.” The notice further stated that SoS’s “conduct in the coming weeks will have a bearing on whether or not the USMC in fact terminates your company’s license, as we are strongly considering doing so.” Vaughan Dec. ¶ 20; Ex. 5 “USMC C&D Notice.”

Shields’ trademark license with the Marines Corps expired in August 2021. The Corps declined to renew the license stating that the dog tags were not generating enough revenue, *see* Ex. 6 “USMC Marine Reports Emails,” but the economic reasons the Corps cited were a direct result of the Corps licensing restrictions on SoS’s products. Vaughan Dec. ¶ 21. Ultimately, the Marine Corps refused to license Shields products because of its religious messaging.

AIR FORCE. In 2017, after further pressing, the Air Force eventually agreed to license Shields’ products with inspirational phrases. Vaughan Dec. ¶ 22; Ex. 9 “USAF Inspiration

Request; Ex. 11 “USAF Inspiration Allowed.” However, in 2019, one day after the MRFF’s letter, the Air Force sent SoS an email demanding that Shields “review all [its] USAF-branded merchandise and verify [they] are using inspiration quotes instead of quoted scripture.” Vaughan Dec. ¶ 23; Ex. 4 “USAF Inspiration Email.” The Air Force stated that SoS must submit all its products for review, and that “the language on Air Force-branded merchandise can be inspiration, but please avoid quoting any religious work – including in the product description.” Vaughan Dec. ¶ 23; Ex. 4 “USAF Inspiration Email.” Shields is currently unsure how the DoD policy prohibiting religious messages impacts the current status of its license with the Air Force or Shields’ ability to renew that license. Vaughan Dec. ¶ 24.

NAVY. The United States Navy never approved SoS’s application for a trademark license. In 2019, the Navy cited the DODI 5535.12 policy restricting its trademark for use with religious messaging as the basis for its refusal. Vaughan Dec. ¶ 25.

* * *

Shields continues to regularly receive requests from members of the military who are deployed or in various dire situations around the world. These members desire the spiritual comfort and courage provided by the SoS dog tags and it violates SoS’s religious beliefs to continuously decline these requests. Vaughan Dec. ¶ 26. However, as a direct result of the DoD’s facially discriminatory policy against religion and the DoD’s inconsistent application of the policy, Shields is unable to renew its trademark licenses with the Army and Marine Corps, its ability to license with the Air Force is at risk, and it cannot to obtain a license from the Navy.

ARGUMENT

A movant seeking a preliminary injunction must establish: “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued,

(3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.”

Byrum, 566 F.3d at 445. Shields satisfies each of these factors.

I. Shields Is Likely to Succeed on the Merits of Its First Amendment and RFRA Claims Against the Department of Defense.

A. By prohibiting Shields from receiving a trademark license because of its religious viewpoint, the DoD engages in unconstitutional viewpoint discrimination under the Free Speech Clause.

When the government allows the public to use its property, including military insignias, to express private messages, the government must abide by the Free Speech Clause. *United States v. Alvarez*, 567 U.S. 709, 713 (2012) (holding that the military’s statute controlling speech while wearing military insignias violated the Free Speech Clause). The messages conveyed on the licensed products using DoD insignias constitute private speech and the government cannot censor based on religious viewpoint. Such censorship is a violation of the Free Speech Clause. *Shurtleff v. City of Bos.*, No. 20-1800, 2022 WL 1295700, at *3 (U.S. May 2, 2022); *Alvarez*, 567 U.S. at 713 ; *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–95 (1993); *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

The DoD recognizes that when members of the public seek to use military marks, private individuals are the ones speaking. According to the DoD Trademark Licensing Guide, “We understand that the use of Military Service seals, emblems, logos, and coats of arms by NFEs on products, programs, and through social media is usually intended in good faith to honor and show support of our Armed Forces.”⁸ Shields, for example, seeks to combine inspirational biblical passages with military marks on its dog tags to send a message of hope specifically for service

⁸ DoD Trademark Licensing Guide, *supra* note 5.

members and their families. Vaughan Dec. ¶¶ 3-5.

Any member of the public would perceive Shields dog tags to be expressions of the person wearing the dog tag, not endorsements by the military. *Shurtleff*, 2022 WL 1295700, at *5 (acknowledging that one factor to identify the category of speech is whether the public would think the government is speaking through the relevant medium). No one would attribute a dog tag that reads “Army Mom” or “Marine Sister” and includes a Bible verse as speaking the official message of the Army or the Marines.

History reveals that the messages on the licensed products are private speech, not government speech, because the DoD “does not use its trademark licensing regime to speak to the public.” *Gergich v. Leath*, 861 F.3d 697, 708 (8th Cir. 2017). On the contrary, before 2011, the DoD did not even monitor the messages used with its military insignias and allowed anyone to use the marks in conjunction with any message. *Id.* (citing *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2248 (2015) (concluding that one factor to identify the category of speech is whether the government “has long used the particular medium at issue to speak”); *see also Shurtleff*, 2022 WL 1295700, at *5. Even after establishing the trademark program, the DoD still does not use the program as a medium to speak to the public and currently permits its marks to be used with a wide variety of messages, further demonstrating that the messages on the licensed products are private speech. *Id.*

The government creates a limited public forum when it allows government property to be used by private groups to express private speech. *Rosenberger*, 515 U.S. at 829; *Lamb’s Chapel*, 508 U.S. at 390. Here, the DoD created a limited public forum by licensing a wide range of private messages for use with its trademarks. *See Gergich*, 861 F.3d at 705 (holding a public university “created a limited public forum when it made its trademarks available for student

organizations to use if they abided by certain conditions”). The DoD currently gives licenses to hundreds of private vendors to use its trademarks on a wide variety of products including alcoholic candies, bottle openers, decanter sets, beer tap handles, Christmas cards, Christmas ornaments, face coverings, coins, jewelry, pins, games, souvenirs, furniture, backpacks, canes, mugs, frames, keychains, and much more.⁹ It also allows its trademarks to be associated with private messages that bear literal words or phrases, such as ones that provide encouragement and inspiration, on greeting cards, t-shirts, signs, and other items. *See, e.g.*, Exs. A-E.

Despite the DoD allowing the use of its trademarks for a wide variety of topics and messages, Defendants unconstitutionally targeted and discriminated against private religious viewpoints when they denied licensure to Shields because of the religious perspective on its dog tags. In a limited public forum, in fact in any forum, viewpoint discrimination is forbidden. *Matal*, 137 S. Ct. at 1747; *see Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350 (5th Cir. 2001) (“It is well settled that viewpoint discrimination is a clearly established violation of the First Amendment in any forum.”). And the Supreme Court has repeatedly held that discrimination against religious viewpoints is unconstitutional. *See Good News Club v. Milford Central School*, 533 U.S. 98, 106–107 (2001); *Rosenberger*, 515 U.S. at 831; *Lamb’s Chapel*, 508 U.S. at 393. The government discriminates based on viewpoint when the “specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger*, 515 U.S. at 829 (citing *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983)). Such “[d]iscrimination against speech because of its message is *presumed* to be

⁹ *See* Air & Space Forces Intellectual Property Management, “Current Licensees,” <https://www.trademark.af.mil/Current-Licensees/> (updated Mar. 22, 2022) (listing licensees and products), attached as Ex. F; USMC Trademark Licensing Program, available at <https://www.hqmc.marines.mil/ousmcc/Units/Marine-Corps-Trademark-Licensing-Program/Commercial-Use/> (updated Mar. 2022), attached as Ex. Y.

unconstitutional” under the Free Speech Clause. *Id.* at 828 (emphasis added) (internal citations removed).

First, the DoD’s policy discriminates against religious viewpoints on its face and as applied. DoDI 5535.12 prohibits the licensure of its trademarks for uses “intended to promote . . . *religious beliefs (including non-belief).*” In effect, the DoD applies its policy to bar religious viewpoints while allowing equivalent messages from a non-religious perspective. For instance, in an email to SoS, the Air Force demanded that SoS “review all [its] USAF-branded merchandise and verify they are using inspiration quotes instead of quoted scripture.” Vaughan Dec. ¶ 23; Ex. 4. The Air Force conceded in these emails that SoS can speak an inspirational message with its dog tags, but it cannot speak an inspirational message from a Biblical viewpoint. This is viewpoint discrimination. *See Lamb’s Chapel*, 508 U.S. at 394 (concluding that the government engages in viewpoint discrimination whenever it restricts speech based on the speaker’s point of view on an otherwise permissible subject).

A review of approved trademark licenses shows that the DoD allows its trademarks to be associated with private messages that provide encouragement and inspiration, while denying equivalent messages from Biblical perspectives. For example:

Approved ¹⁰	Denied ¹¹
“Courage is not only having the Strength to Go On, Courage is going on when you don’t have the Strength.” ¹²	“I will be strong and courageous. I will not be terrified, or discouraged; for the Lord my God is with me wherever I go.” Joshua 1:9
“Airman, no matter how far apart we have to	“May the Lord watch between you and me

¹⁰ Examples in this column are from licensed vendors. *See supra* note 8.

¹¹ Examples in this column were denied by the Army pursuant to DODI 5535.12. *See Ex. 8.*

¹² Ex. G,

http://www.aandmwholesalegroup.com/Ecommerce/general/GeneralProductDetail.aspx?PROD_CD=46008 (accessed Apr. 5, 2022).

be, you are always in my thoughts.” ¹³	while we are apart.” Genesis 31:49
“Good things come to those who work hard, work together and never give up!” ¹⁴	“I can do all things through Christ who strengthens me” Philippians 4:13
“Good things come to those who work their asses off and never give up.” ¹⁵	
“It was clear the day you were born you were destined for great things.” ¹⁶	
“She believed she could, so she did.” ¹⁷	“But those who hope on the Lord will renew their strength. They will soar on wings as eagles; they will run and not grow weary; they will walk and not be faint.” Isaiah 40:31

DoD’s interactions with Shields also evince viewpoint discrimination because the DoD will approve an inspirational phrase only if Shields excludes the Bible verse reference. For instance, in 2012, the Army authorized SoS’s trademark license for use with three specific phrases derived from Bible verses, such as, “I can do all things,” but the Army would not allow SoS to include the whole verse (“I can do all things through Christ who strengthens me.”) or the Scripture reference. (Philippians 4:13). Similarly, in 2017, the Marine Corps agreed to give SoS a trademark license, but stated in an email that SoS, “would need to keep the chapter and verse reference out of the product designs.” Vaughan Dec. ¶ 19; Ex. 10 “USMC Controversial Email.” Allowing a

¹³ Ex. H, <https://2myherocards.com/buy-military-cards/distance-and-advice-usaf/> (accessed May 9, 2022).

¹⁴ Ex. I, <https://2myherocards.com/buy-military-cards/army-confidence-mixed-pack/> (accessed May 9, 2022).

¹⁵ Ex. J, <https://2myherocards.com/buy-military-cards/work-ass-off-usmc-promotion/> (accessed May 9, 2022).

¹⁶ Ex. K, <https://2myherocards.com/buy-military-cards/usaf-destined-airman/> (accessed May 9, 2022); Ex. L, <https://2myherocards.com/buy-military-cards/soldier-destined-army/> (accessed May 9, 2022); Ex. M, <https://2myherocards.com/buy-military-cards/usmc-12-weeks-mixed-pack/> (accessed May 9, 2022); Ex. N, <https://2myherocards.com/buy-military-cards/sailor-destined-us-navy/> (accessed May 9, 2022).

¹⁷ Ex. O, <https://2myherocards.com/buy-military-cards/she-three-mixed-pack-usmc-4th-battaion/> (accessed May 9, 2022).

license for a phrase only if its Bible verse reference is removed is religious viewpoint discrimination.

Second, the DoD singles out religious viewpoints for increased censorship compared to other non-religious viewpoints. Although DoD policy states that it does not grant licenses for uses that are intended to promote “specific interpretations of morality,” it does permit such uses but excludes religious interpretations of morality. For instance, one product bearing the Marine Corps insignias includes the message, “Bad Ass.”¹⁸ Other products associate the service branches with alcohol consumption, such as alcoholic candies,¹⁹ bottle openers,²⁰ decanter sets,²¹ and beer tap handles.²² Thus, the DoD permits the use of its trademarks alongside “controversial” messages but excludes religious messages.

Third, the DoD unconstitutionally discriminates between religious viewpoints by allowing only certain forms of religious speech while censoring others. Government preference between religions or religious messages violates the First Amendment. *Larson v. Valente*, 456 U.S. 228, 244 (1982). For instance, while baring Shields’ use of the trademark, the Marines licensed their mark for use on Guardian Bells, a non-Christian, religious object that comes with a “Legend of the

¹⁸ See Ex. A, <https://2myherocards.com/buy-military-cards/us-marine-corps-christmas-card-humorous-medal-and-cocktail-candies-holiday-applause-gift-set-for-marines/> (accessed May 9, 2022).

¹⁹ *Id.*

²⁰ See Ex. B, <https://4heros.com/products/bottle-openers/> (accessed May 9, 2022); Ex. C, <https://www.amincousa.com/military/us-air-force-black-bottle-opener-keychain-usmaf-bk-702-bk> (accessed May 9, 2022).

²¹ See Ex. D, https://www.bradfordexchange.com/products/134015003_army-glass-decanter-and-american-eagle.html (accessed May 9, 2022).

²² See Ex. E, https://www.bradfordexchange.com/products/918194_fully-sculpted-marines-heirloom-beer-tap.html (accessed May 9, 2022).

Guardian Bell story card” describing the spiritual significance of the object. Exs. P-Q.²³ (explaining the “legend” that bells are “a channel for positive energy” used “to banish evil spirits,” and are “good karma” that “prevents bad energy from entering”).²⁴ Of course, it is religious discrimination to open a forum that preferences one religion over another. Moreover, when the government opens a limited public forum, it may not exclude Shields’ Christian viewpoint while allowing a “generic” Christian viewpoint. *See Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 581 (2014) (“Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.”); *see also Larson*, 456 U.S. at 244. Indeed, all DoD service branches license “generic” religious uses of military trademarks, such as use on Christmas cards,²⁵ Christmas ornaments,²⁶ and Christmas stockings.²⁷ So Hallmark may license a DoD insignia to make a Christmas card to send to soldiers, but Shields may not license a DoD insignia to make a dog tag worn by soldiers in combat.²⁸

²³ *See* Ex. P, <https://www.guardianbell.com/shop/guardian-bells/patriotic/marine/> (accessed May 9, 2022); Ex. Q, <https://www.guardianbell.com/shop/about-the-bells/> (accessed May 9, 2022); Ex. Y (showing Guardian Bells as an official Marine Corps licensee).

²⁴ By contrast, the Air Force would not let Shields “quot[e] any religious work – including in the product description.” Ex. 4.

²⁵ *See* Ex. A; *see supra* note 8.

²⁶ Ex. R, <https://www.kurtadler.com/us-marine-corps-vehicle-with-christmas-tree-ornament-mc2193.html> (accessed Apr. 5, 2022); Ex. S, <https://www.kurtadler.com/usmarine-corp-christmas-tree-ornament-mc2183.html> (accessed Apr. 5, 2022); Ex. T, <https://www.kurtadler.com/u-s-armyr-vehicle-with-christmas-tree-ornament-am2192.html> (accessed Apr. 5, 2022); Ex. U, <https://www.kurtadler.com/us-army-christmas-tree-ornament-for-personalization-am2181.html> (accessed Apr. 5, 2022); Ex. V, <https://www.kurtadler.com/usair-force-christmas-tree-ornament-af2181.html> (accessed Apr. 5, 2022); Ex. W, <https://www.kurtadler.com/us-navy-christmas-tree-ornament-na2181.html> (accessed Apr. 5, 2022); *see supra* note 8.

²⁷ *See* Ex. X, Military Christmas Stocking Collection, <https://www.camosock.com/> (accessed Apr. 5, 2022); *see supra* note 8.

²⁸ As an example of the hostile and arbitrary application of the policy, the Army arbitrarily denied “One Nation Under God” but approved “In God We Trust” despite abundant precedent supporting the constitutionality of both phrases. *Compare* Ex. 13-15, *with Croft v. Perry*, 624 F.3d 157, 164

In sum, the messages conveyed on the licensed products that use the DoD insignias constitute private speech. *E.g.*, *Shurtleff*, 2022 WL 1295700 *3 ; *Alvarez*, 567 U.S. at 713; *Lamb’s Chapel*, 508 U.S. at 393–95; *Matal*, 137 S. Ct. at 1751. Because the service branches denied use of the trademarks or severely limited the trademarks’ use based on SoS’s religious viewpoints, the DoD engaged in unconstitutional viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. *Rosenberger*, 515 U.S. at 828 (internal citations removed).

B. The DoD’s trademark policy violates RFRA by substantially burdening Shield’ religious exercise without a narrowly tailored compelling interest.

The DoD trademark policy also substantially burdens Shields’ religious beliefs and exercise and cannot withstand strict scrutiny. 42 U.S.C. § 2000bb-1. Congress designed RFRA “to provide very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). RFRA states that the government may not substantially burden a person’s exercise of religion unless it demonstrates that application of the burden to the person furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1; *see Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) (“RFRA sought to . . . restore the pre-*Smith* ‘compelling interest test’ by ‘provid[ing] a claim . . . to persons whose religious exercise is substantially burdened by government.’”).

The DoD policy substantially burdens the religious beliefs and exercise of Shields and of the recipients of SoS’s products because the DoD forces Shields to choose between ministering to service members in accordance with its religious conviction and receiving a trademark. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (stating that the government substantially burdens religious

(5th Cir. 2010) (collecting cases upholding constitutionality of “one Nation under God” in Pledge of Allegiance); *New Doe Child #1 v. United States*, 901 F.3d 1015, 1019 (8th Cir. 2018) (collecting cases upholding constitutionality of “In God We Trust” on currency).

exercise when it forces a choice “between following the precepts of [one’s] religion and forfeiting benefits.”); *Hobby Lobby*, 573 U.S. at 686 (acknowledging that the government imposes a substantial burden when it interferes with the ability to conduct business in accordance with one’s religious beliefs); *Thomas v. Rev. Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981) (holding that the government burdens religion when it “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.”). Many service members and their families rely on the SoS dog tags to provide them spiritual strength, courage, and support in a way that binds their religious identity with their connection to the military. SoS was founded for the purpose of enabling this religious exercise and its purpose is protected under the First Amendment. *Katcoff v. Marsh*, 755 F.2d 223, 231–32 (2d Cir. 1985) (upholding the constitutionality of the military providing spiritual support to service members through a chaplaincy program); *see also Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 670 (S.D. Tex. 1997). The DoD’s policy violates the First Amendment because it prevents SoS from fulfilling its religious mission of providing dog tags that connect service members with their specific branches and simultaneously honor the members’ Biblical religious convictions. *Chalifoux*, 976 F. Supp. at 670 (acknowledging using and wearing tangible religious symbols as protected forms of religious exercise under the First Amendment). Because the DoD claims exceptionally broad trademark rights over, not just the service branches’ insignias, but even generic identifying words such as “Navy,” “Army,” “Marine,” and “Air Force,” SoS is prohibited from creating dog tags with terms such as “Army” or “Army Mom” along with an inspirational Bible verse. It is precisely because the military branches do not offer a comparable product that many service members turn to SoS to fulfill their spiritual needs.²⁹

²⁹ “The soldier’s heart, the soldier’s spirit, the soldier’s soul, are everything. Unless the soldier’s soul sustains him, he cannot be relied on.” General George C. Marshall, Speech at Trinity College (June 15, 1941), <https://bit.ly/3mC67uy>.

Because DoD substantially burdens SoS's religious exercise, the DoD's policy violates RFRA unless DoD can prove that the policy withstands strict scrutiny. 42 U.S.C. § 2000bb-1(b); *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("Here the burden is placed squarely on the Government by RFRA"). Notably, this test requires the government to demonstrate not just a generalized necessity of applying its discriminatory trademark policy to all prospective licensees, but rather it must demonstrate that imposing its policy on SoS *specifically* is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000bb-1 (b); *see O Centro*, 546 U.S. at 430-31 ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."). This means that a general interest in the abstract is not compelling. As the Supreme Court confirmed:

RFRA, however, contemplates a more focused inquiry: It requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened. This requires us to look beyond broadly formulated interests and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants—in other words, to look to the marginal interest in enforcing the [religious burden] in these cases.

See Hobby Lobby, 573 U.S. at 726 (internal cites and quotation marks omitted).

Defendants cannot meet this high showing because DoD cannot justify its ban on SoS dog tags using messages that promote "religious belief" by any narrowly tailored compelling government interest. First, DoD does not have a compelling interest in eliminating religious belief from its licensure of trademarks because it allowed SoS to use the service branch's trademarks without a license prior to 2011. Vaughan Dec. ¶ 10. And, after 2011, most of the service branches allowed SoS to print inspirational verses on the dog tags but only prohibited the particular scripture

reference. Vaughan Dec. ¶¶ 14, 19. Second, DODI 5535.12 is not narrowly tailored because DoD could simply require SoS to print a small disclaimer on all packaging indicating that SoS dog tags with DoD trademarked logos do not represent the views of DoD.

C. DoD’s policy discriminates against religion in violation of the Free Exercise Clause.

Similarly, SoS is likely to succeed on the merits of its Free Exercise claims against the DoD. The Free Exercise Clause bars the government from imposing regulations that are hostile to the religious beliefs of individuals, outlawing even “subtle departures from neutrality” on matters of religion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018). Government acts are “not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original). Certainly, “when the government fails to act neutrally toward the free exercise of religion, it ‘can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored.’” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

DODI 5535.12 states that “DoD marks may not be licensed for any purpose intended to promote ... religious beliefs ...” To evaluate the neutrality of the policy, we need look no further than the text, “for the minimum requirement of neutrality is that a law not discriminate on its face.” *Id.* at 533. The exclusion of “religious belief” in DODI 5535.12, while allowing comparable messages from a non-religious perspective renders the policy non-neutral and non-generally applicable, and, as such, it is subject to strict scrutiny. *Id.* at 531.

As explained above, the DoD cannot satisfy strict scrutiny because, before 2011, the DoD did not require licenses, or any form of approval, to use DoD insignias or other identifying markers.

After 2011, the DoD service branches inconsistently applied the restriction on religious messages, with some Services Branches allowing the verses without the Biblical references. Further, any concerns that the DoD promoted a religious message with the dog tags could easily be addressed with a disclaimer, which Shields was willing to print on the products or packaging.

D. DoD cannot justify its religious discrimination under the Establishment Clause.

While the DoD may argue that the Establishment Clause prohibits licensure of religious messages on DoD licensed products, the opposite is true. First, in the military context, the courts have long recognized that allowing voluntary religious exercise in connection with the armed forces is consistent with the Constitution, and in some cases, may be required under the First Amendment. *See Katcoff v. Marsh*, 755 F.2d at 231–32 (military may violate the Establishment Clause by separating service members from a means to practice their religions); *id.* at 229 (military chaplaincy program and associated religious items are constitutional); *see also Town of Greece, N.Y. v. Galloway*, 572 U.S. at 576 (noting that the First Congress approved chaplaincy programs shortly after “approving language for the First Amendment”).

Second, the Establishment Clause does not only forbid the government from formally establishing religion, it also prohibits the government from officially favoring or *disfavoring* particular religious viewpoints or expression. *See Good News Club*, 533 U.S. at 115. DoD’s internal policy prohibits any trademark licensing of products “intended to promote ... religious beliefs,” and as a result, the service branches directed SoS to remove all Biblical references from its products. Some service branches allowed SoS designs with Biblical phrases, if such verses are used *without* the Biblical citations or references. Vaughan Dec. ¶¶ 14, 19. Clearly, the DoD and its various branches’ reluctance with licensing their trademarks to SoS did not stem from the inspirational language or underlying message of the scripture; instead, their hostility is based on

the product's reference to the Bible, a blatantly anti-religious position. This is precisely the type of government hostility that the Establishment Clause forbids. *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment).

Third, for decades, the DoD allowed SoS to fulfill its religious purpose through the creation and dissemination of dog tags. The DoD's sudden reversal is not a neutral act but is a "manifestation of 'hostility toward religion that has no place in our Establishment Clause traditions.'" *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019) (quoting *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment)).

II. The Remaining Preliminary Injunction Factors Favor Relief

A. Shields suffers irreparable injury because of the DoD's violation of its First Amendment and RFRA rights.

While Shields continues to experience loss of revenue as a direct result of the DoD's actions, it is the deprivation of SoS's constitutional and RFRA rights that imposes irreparable damage to the company. For this reason, Shields easily satisfies the irreparable harm prong for a preliminary injunction. After all, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (plurality opinion). This is also true under RFRA. *Opulent Life Church*, 697 F.3d at 295.

DODI 5535.12 prevents SoS from following its sincerely-held religious calling to manufacture, sell, and donate dog tags and other products that contain both the DoD logos and specific references to Bible verses. As a result, SoS cannot share the love and hope of Jesus Christ with military service members, veterans, their families, and the public in accordance with the organization's and the service member's religious convictions. The DoD's policy is causing Shields irreparable injury.

B. The balance of harms weighs in favor of an injunction.

The balance of harms and public interest strongly favor an injunction against the DoD's discriminatory trademark licensing policy. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of harms tips in SoS's favor, because the DoD will suffer no harm by allowing SoS to make and sell its dog tags with religious references. Prior to 2011, the DoD allowed the unlimited use of its trademarks without licenses and can point to no harm stemming from that open process. However, SoS suffers continuous irreparable injury by the deprivation of its First Amendment and RFRA rights. Further, since Shields has established a substantial likelihood of success on the merits, the harm to the DoD from delaying enforcement of its policy is minimal. *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) ("[G]iven [movant's] substantial likelihood of success on the merits, however, the harm to the [government] from delaying enforcement is slight[.]").

C. The grant of an injunction will serve the public interest.

Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights," *Jackson Women's Health Org.*, 760 F.3d at 458 n.9 (citing *Awad*, 670 F.3d at 1132). Shields continues to receive requests from service members who want the SoS dog tags complete with scripture messages and their respective service branch's insignia or identifier, such as the word "Army." Vaughan Dec. ¶ 26. Not only does it violate SoS's religious rights to have to compromise its convictions to receive a trademark license, but it also deprives the requesting service members of his or her religious exercise as well. *Id.* Thus, the public interest is strongly in favor of a preliminary injunction against the DoD's discriminatory policy.

For nearly a quarter of a century, the DoD allowed SoS to fulfill its religious purpose

through the creation and dissemination of dog tags. Since 2011, the DoD has gradually tightened its restrictions on SoS's use of the trademarks. The DoD's increasing religious hostility culminated last year when Shields was unable to renew even its limited use of the trademark licenses. Shields requests that this Court grant a preliminary injunction to maintain the status quo and allow Shields to continue making, selling, and donating its products with military insignia and words during the pendency of this action.

CONCLUSION

The Court should grant the motion for a preliminary injunction and prevent the DoD and its service branches from enforcing the "intended to promote . . . religious beliefs" language of DODI 5535.12 against Shields of Strength while the case is pending. Oral argument requested.

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