

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

Monifa J. STERLING, Lance  
Corporal (E-3) U.S. Marine  
Corps,

Appellant.

BRIEF OF *AMICUS CURIAE* RABBI  
PHILIP LEFKOWITZ IN SUPPORT OF  
APPELLANT

USCA Dkt. No. 15-0510/MC

Crim. App. No. 201400150

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TO THE HONORABLE JUDGES OF THE UNITED STATES  
COURT OF APPEALS FOR THE ARMED FORCES

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## **INTEREST OF THE AMICUS CURIAE**

*Amicus* Rabbi Philip Lefkowitz<sup>1</sup> is the Rabbi of Agudas Achim North Shore Congregation in Chicago. During his nearly five decades in the Rabbinate, he has led congregations in the U.S., Canada, and the United Kingdom, as well as served as an officer, Executive Committee member, and chair of the Legislative Committee of the Chicago Rabbinical Council.

Rabbi Lefkowitz is a scholar and a speaker on matters of religious—specifically Judeo-Christian—influence on morals and societal function, and therefore the crucial importance of protecting religious liberty. He acts as a public advocate for and is a published author on the subject of religious freedom.

## **SUMMARY OF THE ARGUMENT**

*Amicus* contends that, in addition to creating a new, unsupported legal standard for the Religious Freedom Restoration Act, the lower court also showed a hostility to religious exercise in general that should be firmly rejected by this Court. First, the lower court ignored common cultural knowledge about Judeo-Christian religious traditions, so common as to necessitate judicial notice. Such disregard constitutes clear factual error, regardless of legal standard applied. Second,

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<sup>1</sup> Out of respect for Rabbi Lefkowitz's religious beliefs, this brief will follow the Jewish tradition of placing a hyphen in for the "o" in references to G-d or L-rd.

the lower court chose the worst possible interpretation of Appellant's verse, utterly condescending toward the fortitude and intelligence of members of the Marine Corps. This, too, constitutes clear error, in that it is not only unsupported by the record, but also conjecture unsupported by sensible rationale.

#### **ARGUMENT**

Members of our armed forces give up many liberties, taken for granted by civilians, when they choose to enter a branch of the military and serve our country. One liberty, however, that they are never asked to give up is the right to live their lives in accordance with their chosen faith traditions. They have fought and continue to fight for the liberty of all our people, including religious liberty, and therefore it does them a grave disservice to do anything but protect and honor their own religious freedoms.

Lance Corporal Monifa Sterling placed a constant reminder to herself of what she viewed as her G-d's promise to protect and defend her by displaying a paraphrase of a Bible verse, Isaiah 54:17, "No weapon formed against me shall prosper," in three places at her desk. This action is unquestionably religious, deserving of the full protection of the Religious Freedom Restoration Act.

Nonetheless, the decision of the court below displays a baffling animus toward not only her religious exercise, but religious exercise in general. It arbitrarily created a new legal standard that flies in the face of precedent and found a "valid military purpose" to justify a supervisor's overreach only by accepting the most unfavorable interpretation possible of the verse displayed.

**I. THE RELIGIOUS FREEDOM RESTORATION ACT PROTECTS LCPL. STERLING'S RELIGIOUS EXERCISE IN DISPLAYING A BIBLE VERSE AT HER DESK.**

It is uncontroverted that Congress intended the Religious Freedom Restoration Act, 42 U.S.C. §2000bb, *et seq.* ("RFRA" or the "Act"), to apply to exercises of religion by military service members. *Singh v. McHugh*, --- F.Supp.3d ---, 2015 U.S. Dist. LEXIS 76526, at \*39 (D.D.C. June 12, 2015); *see also* JA271 (S. Rep. No. 103-111, at 12 (1993) ("Under the unitary standard set forth in [RFRA], courts will review the free exercise claims of military personnel under the compelling governmental interest test.")); JA269 (H.R. Rep. No. 103-88 (1993) ("Pursuant to [RFRA], the courts must review the claims of prisoners and military personnel under the compelling governmental interest test.")).

By its terms, RFRA protects *any* exercise of religion, "whether or not compelled by, or central to, a system of

religious belief.” 42. U.S.C. §2000cc-5(7)(A) (defining “religious exercise”). This definition is broad, only limited in that it requires the religious belief underpinning the exercise to be sincere, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014) (noting sincerity requirement and that pretextual religious claims are excluded from RFRA’s protection). The court below arbitrarily decided to change that standard to require, in direct contrast to the plain language of the Act, that religious exercise be “part of a system of religious belief” in order to invoke RFRA’s protections. JA005. The court held that “[p]ersonal beliefs, grounded *solely* upon subjective ideas about religious practices, ‘will not suffice’” and that “...there is no evidence that posting [verses] at her workstation was an ‘exercise’ of that religion in the sense that such action was ‘part of a system of religious belief.’” JA005.

*Amicus* respectfully agrees with and encourages this Court to adopt the argument presented by *Amici Curiae* Aleph Institute, et al., that this capricious standard is pure legal error with dangerous and far-reaching consequences. See *Br. of Amici Aleph Institute, et al.*, at §I. Further, *Amicus* agrees with and encourages this Court to recognize *Amici*’s presentation of religious and theological support for the fact that posting



scripture is well-established, across the religious spectrum, as religious exercise. *Id.* at §I(C).

However, *Amicus* further contends that the court below, in addition to creating this unjustified standard, made a clear error of *fact* in holding that LCpl. Sterling's display of a Bible verse merely counted as religious according "solely [to her] subjective ideas." JA005 (emphasis in original).

In this particular case, LCpl. Sterling's religious interpretation of her actions was not "solely" a subjective personal one. Nor is a detailed investigation into religious history and varied theologies necessary to determine that posting scripture, in particular biblical scripture, is both religious exercise and part of a "system of belief." Neither was it necessary for LCpl. Sterling to prove that element at her trial or on appeal. Rather, the courts below could have, and *ought* to have, taken judicial notice of this fact.

Military Rule of Evidence 201 states that judges may take judicial notice of adjudicative facts, defining such as a "fact that is not subject to reasonable dispute because it (1) is generally known universally, locally, or in the area pertinent to the event; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Mil. R. of Evid. 201(a)-(b); see also *United States v. Paul*, 73

M.J. 274, 278 (A.F.C.C.A. 2014) (citing Mil. R. of Evid. 201; affirming application at any level of review, not just trial level). Further, the judge may *sua sponte* take such notice. Mil. R. of Evid. 201(c)(1).

The United States of America was founded on Judeo-Christian principles and remains a primarily Judeo-Christian population. See, e.g., J. Randy Forbes, *Obama Is Wrong When He Says We're Not a Judeo-Christian Nation*, U.S. NEWS (May 7, 2009, 3:15 p.m.), available at: <http://www.usnews.com/opinion/articles/2009/05/07/obama-is-wrong-when-he-says-were-not-a-judeo-christian-nation> (last accessed Dec. 23, 2015) (detailing historical support for America having been "birthed upon Judeo-Christian principles."); see also Ronald R. Cherry, *The Judeo-Christian Values of America*, AMERICAN THINKER (Sept. 15, 2007), available at [http://www.americanthinker.com/articles/2007/09/the\\_judeochristian\\_values\\_of\\_a.html](http://www.americanthinker.com/articles/2007/09/the_judeochristian_values_of_a.html) (noting Judeo-Christian "foundational" role beginning with the Declaration of Independence). The most recent Gallup poll data shows that a super-majority of Americans—a full 75 percent—consider themselves "Christian," with an additional two percent identifying as Jewish. Frank Newport, *Three-Quarters of Americans Identify as Christian*, GALLUP (Dec. 24, 2014), available at <http://www.gallup.com/poll/180347/three-quarters-americans-identify-christian.aspx> (last accessed Dec. 23, 2015).

While there remains great diversity among adherents of these two faiths on doctrinal specifics and theological minutia, the basics tenets and practices of each are common knowledge throughout our culture. Further, the practice of displaying scripture as a religious exercise is one known throughout the country, even to those unfamiliar with the specific teachings of these faiths. A simple search for "inspirational wall art quotes" on Amazon.com shows five scriptural results—two of those from the Old Testament, shared by Christians and Jews alike—on the first page. See *Exh. A*, Amazon search results, search conducted Dec. 23, 2015 (including Jeremiah 29:11; 1 Corinthians 10:31; John 14:1; Joshua 24:15; 1 Corinthians 14:4, 7-8; also showing an entire "Home Décor Theme" of "Religious and Inspirational"). The same search on Pinterest brings up an entire category for "Bible Verses" as an initial option to narrow the search. See *Exh. B*, Pinterest search results, search conducted Dec. 23, 2015. On eBay, the same search showed Bible verses as eight of the first 50 listings, including one listing that offered the same sign in a choice of 19 separate verses. See *Exh. C*, eBay search results, search conducted Dec. 23, 2015 (verses listed in results: Joshua 24:15; Philippians 4:13 (and 18 others in specific listing); Matthew 5:8; Haggai 2:7 (two listings); Psalm 150:6; Song of Solomon 3:4; and Job 37:14).

Even a list of best tattoo quotes includes bible verses. 100 Best Tattoo Quotes, [www.tattoo-models.net/100-best-tattoo-quotes/](http://www.tattoo-models.net/100-best-tattoo-quotes/) (last accessed Dec. 23, 2015) (including Genesis 1:1-2 as #24 and Isaiah 1:18-19 as #46).

Whether one is a person of faith or not, whether one is familiar with the particular teachings of Christianity or Judaism or not, these commercial offerings show that it is certainly a fact “not subject to reasonable dispute” and “readily determined” that Christians and Jews commonly display scripture as a religious exercise.

Therefore, the lower court erred in holding that LCpl. Sterling’s display of a Bible verse at her desk did not constitute “religious exercise”—whether part of a “system of belief” or not. As such, the court erred in not applying the rest of the RFRA test to determine if the actions of her superior in ordering her to remove the verse, and punishing her with a court martial for refusing, were justified by a compelling governmental interest and constituted the least restrictive means of achieving that interest.<sup>2</sup>

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<sup>2</sup> The briefs of Appellant and *Amici Curiae* Aleph Institute, et al., fully address how the government fails to meet either half of that standard, so *Amicus* will not take up this Court’s time further by repeating their arguments. Rather, *Amicus* simply urges this Court to agree with their reasoning and find that, once the protection of RFRA is invoked to protect this religious exercise, the government fails to satisfy its burden to

**II. THE COURT BELOW ERRED IN FINDING A VALID MILITARY PURPOSE FOR THE ORDER TO REMOVE THE VERSE BASED ON AN UNSUPPORTED CONCLUSION REGARDING ITS INTERPRETATION.**

The court below also found—without any evidentiary support in the record<sup>3</sup>—that the language of the particular verse displayed “could be interpreted as combative” and thus lead to a “divisive impact” and negatively “impact the morale or discipline of the command.” JA006-007. Theological implications aside (Jews and Christians differ as to who constitutes the promise’s audience), and without any other context, the court’s speculation is wholly unsupported. Rather, the phrase “no weapon formed against me shall prosper” fits squarely within common Marine quotes and mentality.

Even to a civilian, Marines are renowned for their bravery and toughness. Quotes by and about Marines include gems such as:

- “Don’t you forget you’re First Marines! Not all the communists in Hell can overrun you!” (Col. Lewis B. “Chesty” Puller, Korean War). *Quotes about Marines*, available at <http://oldcorps.org/USMC/quotes.html> (last accessed Dec. 23, 2015).

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justify its infringement upon such exercise.

<sup>3</sup> In fact, the Record indicates that other Marines saw the verses and no disruption or divisiveness occurred, undermining the lower court’s hypothetical speculation on what “could” happen. See, e.g., JA065 (“Q: Is there anything about Lance Corporal Sterling’s desk that is unusually distracting? A: No.”). Further, the military judge prohibited questioning on whether LCpl. Sterling or her supervisor, Staff Sergeant Alexander, received any complaints or comments about the verses. JA046, 116.

- "Every Marine is, first and foremost, a rifleman. All other conditions are secondary." (Gen. Gray, Commandant of the Marine Corps). *Id.*
- "C'mon you sons-of-bitches, do you want to live forever!" (GySgt Dan Daley, Battle of Belleau Wood WWI). *Marine Corps Quotes*, available at <http://www.usmchangout.com/military/branches/usmc/misc/quotes.htm#.VntmunarS00> (last accessed Dec. 23, 2015).
- "Retreat, hell we just got here!" (Cpt. Lloyd Williams, Battle of Belleau Wood WWI). *Id.*
- "We're surrounded? Good, now we can kill the bastards in any direction." (Col. Puller; Korean War). *Id.*
- "The safest place in Korea was right behind a platoon of Marines. L-RD, how they could fight!" (Maj. Gen. Frank Lowe, US Army). *Id.*
- "Panic sweeps my men when they are facing the American Marines." (Captured North Korean Major). *Id.*
- "The Marines are careful, brave fighters...they were like hunters, boring in relentlessly without fear. I never heard a wounded Marine moan." (The U.S. Army General Staff). *Id.*

While it is true that LCpl. Sterling testified that she put the verses up as "personal...mental reminder" that she had supernatural "protection...around [her]" in the face of adversity in her workplace, JA114, her subjective reason for displaying the verse is irrelevant to the court's interpretation of whether there was a valid military purpose in demanding its removal. The court below determined that the possible "combative" interpretation "could certainly undercut good order and discipline." JA006-007. Yet, without knowing LCpl.

Sterling's personal interpretation of the quote, any reasonable observer—and certainly any reasonable Marine—would view the quote as one of inspiration and acknowledgement of both the power of the Corps as a whole and of LCpl. Sterling, herself, as a Marine.

Therefore, the lower court's speculation that the text of the Bible verse displayed could cause a "divisive impact to good order and discipline," JA006, is not just unsupported by the record, but unsupported by common sense and reason and is therefore clear error.

#### **CONCLUSION**

For the reasons stated above, *Amicus* Rabbi Philip Lefkowitz urges this Court to reject the religious hostility of the lower court, properly apply the standards of the Religious Freedom Restoration Act to protect any exercise of religion—including that of LCpl. Sterling—and find that LCpl. Sterling's religious exercise was protected and the order of her superior without any valid military purpose sufficient to meet the government's burden.

Respectfully submitted,

/s/ Jocelyn Floyd

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**CERTIFICATE OF FILING AND SERVICE**

I certify that on January 8, 2016, I caused the foregoing to be electronically filed with the U.S. Court of Appeals for the Armed Forces via email to [efiling@armfor.uscourts.gov](mailto:efiling@armfor.uscourts.gov).

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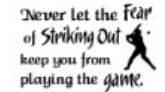
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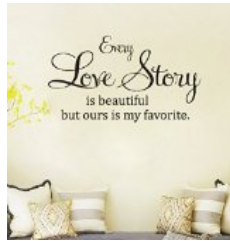
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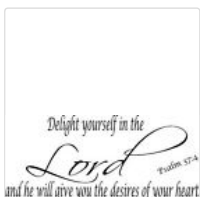
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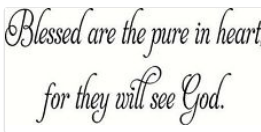
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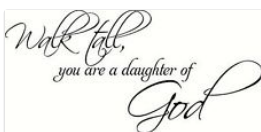
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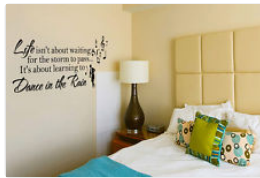




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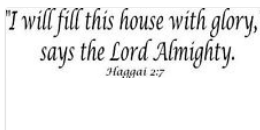


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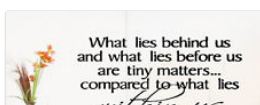
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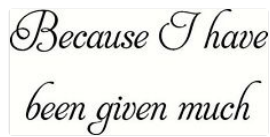
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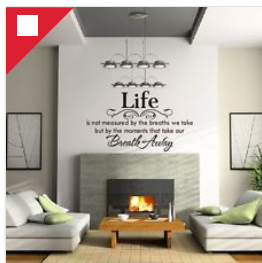
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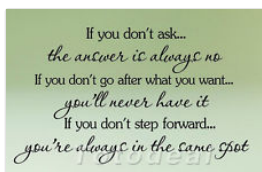


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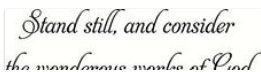
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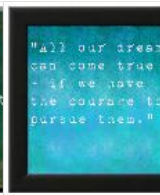
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