



January 8, 2020

**VIA OVERNIGHT DELIVERY SERVICE**

Dale Harbour, Esq.  
General Counsel  
Army & Air Force Exchange Service  
3911 S. Walton Walker Boulevard  
Dallas, Texas 75236

RE: MRFF Demand Letter Regarding So-called "Jesus Candy"

Dear Mr. Harbour:

On or about January 3, 2020, you received a letter from the Law Firm of Donald G. Rehkopf, Jr., representing the Military Religious Freedom Foundation (MRFF), demanding that a certain product (so-called "Jesus Candy") be removed from AAFES facilities. The MRFF asserted that the display and sale of such candy violated the First Amendment to the United States Constitution as well as a number of DoD and Service regulations. We believe that the MRFF demand is incorrect as a matter of law and is, in fact, fallacious.

**INTRODUCTION**

By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have successfully argued numerous free speech and religious freedom cases before the Supreme Court of the United States. *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities). The ACLJ has also argued numerous such cases before lower federal courts as well as before State courts at all levels.



## DISCUSSION

As you may be aware, Mr. Michael L. “Mikey” Weinstein and his organization, the Military Religious Freedom Foundation (MRFF), take frequent issue with virtually every public expression of religion in the military community. They have complained about a broad range of religious issues, ranging from the presence of religious holiday displays on military installations<sup>1</sup> to the presence of a Bible as part of POW/MIA displays<sup>2</sup> to the erection of a sign invoking God’s blessings on our military.<sup>3</sup> The MRFF’s recent demand letter to you is just such an example—this time asserting that the Constitution was violated by AAFES’ offering of so-called “Jesus Candy” for sale.

As we understand the situation, no one at AAFES pressured—or *intended to pressure*—anyone to purchase the candy that AAFES offered for sale or to respond to any message on the candy’s packaging. Each AAFES customer was free to purchase or refrain from purchasing such merchandise, and each AAFES customer was free to consider or refrain from considering any message, religious or otherwise, on its packaging. That Mr. Weinstein and others find the candy’s display, messaging, and sale offensive is their privilege, but it appears to us that Mr. Weinstein and many of those he purports to represent are hypersensitive, if not downright hostile, to the public display of all things religious and that their goal is the removal *in toto* of all religiously related items from the military, including from AAFES. That is something that the Constitution not only does not require but would not tolerate. *See Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (noting that it is not a difficult concept to understand that the Government “does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis”). AAFES doubtless stocks all manner of items with claims or messages on their packaging that AAFES does not endorse. Despite the MRFF’s attorney’s bombast, *there is no Constitutional violation in what AAFES did*.

Supreme Court Justice Douglas, writing in *Zorach v. Clauson*, clearly and succinctly summarized the role the government plays in protecting *religious* expression and freedom:

We are a religious people whose institutions presuppose a Supreme Being. . . . We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that *lets each flourish according to the zeal of its adherents and the appeal of its dogma*.

343 U.S. 306, 313-14 (1952) (emphasis added). That a manufacturer of candy chooses to use that medium to extend a religious message constitutes a personal, private attempt to broaden

---

<sup>1</sup>See, e.g., MRFF Demand Letter to Brig. Gen. William M. Journey, USMC (Jan. 17, 2017), *available at* [http://www.militaryreligiousfreedom.org/legalfiles/Tobanna\\_William\\_Journey\\_Letter\\_Jan\\_2017.pdf](http://www.militaryreligiousfreedom.org/legalfiles/Tobanna_William_Journey_Letter_Jan_2017.pdf).

<sup>2</sup>See, e.g., MRFF Letter of Complaint to RADM Paul D. Pearigen, USN (Apr. 5, 2018), *available at* <https://www.militaryreligiousfreedom.org/wp-content/uploads/2018/04/5-April-18-Ltr-Complaint-Final-v2.pdf>.

<sup>3</sup>See, e.g., MRFF Demand Letter to Col. Sean C. Killeen, USMC (Sept. 24, 2015), *available at* <https://www.militaryreligiousfreedom.org/2015/09/mrff-blake-page-demand-letter-re-mcb-hawaii-religious-sign/>.

the appeal of his Christian beliefs, his “dogma,” so to speak, and does not implicate Governmental expression or endorsement in any way.

The MRFF was simply wrong to assert that stocking and offering for sale such a product constituted promoting a specific religion in violation of the First Amendment and various military regulations. Even though the manufacturer of the product desired its product to induce purchasers of the candy to respond to its religious message, the inclusion of that message in the packaging was the decision of a private individual—*not a Government agent*—and was therefore fully protected by both the Free Speech and Free Exercise Clauses of the First Amendment. *See Mergens*, 496 U.S. at 250 (noting that “there is a crucial difference between government speech endorsing religion, which the Establishment Clause *forbids*, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses *protect*”).

It is our understanding that, following standard business practices, AAFES seeks to stock merchandise that its customers desire and are likely to purchase. If no customers purchase a specific item (for whatever reason), it is not likely to be carried again. Further, one must recognize that some items are seasonal in nature and are stocked only at certain times of the year (like candy canes associated with Christmas). That not all customers desire to purchase the same items is no reason to cease stocking items many customers wish to purchase. Moreover, the fact that the principal faith practiced in the United States (and, hence, in its Armed Forces) is some variant of Christianity merely means that items associated with Christianity will be more numerous than items associated with religions followed by fewer Service Members and their families. It does not mean that the Government (including AAFES) is “favoring” Christianity and its beliefs just because it recognizes and accommodates the desires of active-duty and retired Christians. Further, offering items of merchandise that can be refused (like the purchase of so-called “Jesus Candy”) does not fall into the category of coercive Governmental religious activity that is forbidden by the Constitution.

The MRFF’s counterargument about an expected “uproar” over the sale of “Muslim Munchies,” “Buddhist Bubble-gum,” “Wiccan Wafers,” and the like (MRFF Letter, page 2) is an easily refuted strawman. *First*, let’s assume for sake of argument that there would be some sort of “uproar” with respect to offering items like the foregoing. AAFES cannot accommodate the prejudices of such persons to determine which items AAFES will stock. Moreover, subjective *offense* (MRFF Letter, page 2 (“[this product] is offensive to the many clients of MRFF”)) is an insufficient predicate to establish a Constitutional violation. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 597 (1992) (noting that the Supreme Court did “not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages . . .”).

Further, the claim that AAFES is “promoting only Christian ‘Candy’ products” (MRFF Letter, page 2) is wholly uncorroborated by the MRFF in its Letter. If the MRFF had actually established (1) that “Muslim Munchies,” “Wiccan Wafers” and other similar items exist and (2) that there was actual demand for such items to be carried by AAFES and (3) that such

items were not stocked because the AAFES decision-maker preferred Christian-themed religious Candy over non-Christian-themed religious Candy because of the respective religious messages they conveyed, then the MRFF's argument might be valid. Absent such evidence, the MRFF assertion is mere speculation that cannot form a sufficient legal basis requiring AAFES to comply with its demand.

*Second*, the MRFF conclusion that selling so-called "Jesus Candy" through AAFES "is nothing more than illegal proselytizing" (MRFF Letter, page 2) is also specious. The religious message on the item's packaging was put there solely by the manufacturer and is a message neither sought nor endorsed by AAFES. Hence, Governmental speech is lacking. Moreover, AAFES personnel do not seek to compel anyone to purchase the product because of the message it contains (*or for any other reason*) much less encourage them to read and heed the religious message the package contains. The private message on the product's packaging was selected by private individuals (and is thereby protected by both the Free Speech and Free Exercise Clauses of the First Amendment) and is no more coercive with respect to AAFES customers' beliefs than the phrase "In God we Trust" on the currency AAFES customers use to purchase the candy in question or any other merchandise carried by AAFES.

*Third*, the MRFF's reference to DoDI 1300.17 to support its argument is wholly inapt. The title of DoDI 1300.17 is *Accommodation of Religious Practices Within the Military Services*. The MRFF Letter then states regarding DoD Policy: "The DoD places a high value on the rights of members of the Military Services to observe the tenets of their respective religions *or to observe no religion at all*" (emphasis in the MRFF Letter, page 2). From this, the MRFF erroneously concludes that selling so-called "Jesus Candy" somehow constitutes unlawful proselytizing. The entire argument is a gross *non sequitur*. Selling the candy at issue does not in any way, shape or form interfere with any person's ability to "observe no religion at all."<sup>4</sup> How a package of candy with a passive religious message placed on its packaging by a private citizen and whose purchase is not forced on anyone can interfere with one's ability "to observe no religion at all" is a mystery. Nobody at AAFES compels any customer to purchase the religious candy. Nobody at AAFES compels any customer to read the religious message on the packaging. Nobody at AAFES compels any customer to believe or not believe anything or to change any religious or non-religious observance. In fact, no AAFES customer is compelled to do, say or believe anything *vis-à-vis* such candy. Offering so-called "Jesus Candy" for sale does not violate DoDI 1300.17.

---

<sup>4</sup>The MRFF Letter appears to apply the word "observe" to mean "to notice or perceive something," while DoDI 1300.17 is using the word to mean to "fulfill or comply with some sort of obligation." In context, DoD places a high value on Service Members' rights to meet their religious or philosophical/non-religious obligations when it supports their rights "to observe the tenets of their respective religions or to observe no religion at all." The MRFF, on the other hand, suggests that the fact that AAFES customers may notice or perceive (i.e., "observe") a religious message such customers may disagree with (like the religious message on the packaging of the so-called "Jesus Candy") is sufficient to require that such message be removed. That is nonsense. Merely observing a message on an item of merchandise in a Government run store with which one disagrees does not convert such message into prohibited Governmental speech which violates the Constitution, U.S. law, or military regulations. Such a view reflects the goal of freedom *from* religion as opposed to freedom *of* religion, which is the actual Constitutional standard.

Fourth, the MRFF then cites to AFPD 52-2, *Accommodation of Religious Practices in the Air Force*. Para 1.1 of AFPD 52-2 mirrors the language of DoDI 1300.17 about following the tenets of one's religion "or to observe no religion at all." The MRFF continues by citing para 2.12 of AFI 1-1, which reads:

***Balance of Free Exercise of Religion and Establishment Clause.*** Leaders at all levels must balance constitutional protections for their own free exercise of religion, including individual expressions of religious beliefs, and the constitutional prohibition against governmental establishment of religion. ***They must ensure their words and actions cannot reasonably be construed to be officially endorsing or disapproving of, or extending preferential treatment for any faith, belief, or absence of belief*** (emphasis in MRFF letter).

The key phrase here is the phrase "cannot reasonably be construed to be officially endorsing or disapproving . . . ." Justice O'Connor aptly noted the following regarding a "reasonable observer":

There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing . . . simply because a particular viewer of a display might feel uncomfortable. *It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [activity] appears.*

*Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (emphasis added).

Service Members and retirees are deemed to be "reasonable observers." As such, they are deemed to know that many different faith groups are represented in the U.S. military, that adherents of different faith groups express their faith in different ways, that it is common to see widely differing religious symbols and hear differing sentiments expressed, that different religious groups have different religious holidays and practices in celebrating them, that the military does not endorse one religious sentiment over another merely because it permits such sentiments to be expressed, and so on. This also means that they are deemed to know that different foods are eaten at different times. Christmas-related candy which celebrates the birth of Christ certainly falls within that category. The MRFF's analysis is once again specious *vis-à-vis* so-called "Jesus Candy," and AAFES should reject such complaints.

The MRFF Letter ends with an appeal to inclusion. The letter cites to AFI 36-7001, titled *Diversity and Inclusion*. Para 2.22 reads:

***All Airmen, military and civilian, are responsible for creating an inclusive organizational culture*** and do so as a reflection of the Air Force's core values of Integrity First, Service Before Self, and Excellence in All We Do. ***Airmen at all***

*levels should strive to understand the individual, organizational, and operational value of diversity and inclusion, and ensure mutual respect for all* (emphasis in MRFF Letter).

From what is highlighted in the foregoing paragraph, the MRFF concludes that “the ‘Jesus Candy’ display is the antithesis of inclusivity and promotes disrespect for anyone, military or civilian, who is not of a like mind-set” (MRFF Letter, page 3). Once again, such reasoning is questionable. It wholly fails to recognize that the candy display demonstrates diversity, one of the values highlighted by MRFF in the above paragraph. Moreover, just how a passive display of religiously-themed candy related to the Christmas story “promotes disrespect” for those “who [are] not of a like mind-set” is difficult to discern (*unless one accepts the apparent, underlying MRFF premise that the mere assertion of any religious or non-religious idea contrary to the observer’s belief system constitutes “the antithesis of inclusivity and promotes disrespect of those who are not of the same mind-set,” in which case any religious or non-religious expression that an onlooker finds subjectively offensive would have to be excised from the public arena, which is certainly counter to the Constitution and laws of the United States*). See, e.g., *School District v. Schempp*, 374 U.S. 203, 226 (1963) (“In the relationship between man and religion, the State is firmly committed to a position of neutrality.”); *id.* at 299 (Brennan, J., concurring) (“The State must be steadfastly neutral in all matters of faith, and neither favor *nor inhibit* religion.” (emphasis added)); *Mergens*, 496 U.S. at 248 (“The Establishment Clause does not license government to treat religion and those who teach or practice it . . . as subversive of American ideals and therefore *subject to unique disabilities*.” (emphasis added)); *id.* at 250 (“[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause *forbids*, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses *protect*.” (emphasis added)); see also *id.* (noting that it is not a difficult concept to understand that the Government “does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis”); *Rosenberger*, 515 U.S. at 828-29 (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional. . . .”).

If AAFES were coercing Service Members and retirees to purchase the candy and to read and heed its accompanying religious message, that would be wrong. Yet, even as the MRFF touts the benefits of inclusion and mutual respect, it seeks to *exclude* interested Christians from being able to purchase the Christian candy from AAFES *because the MRFF and its allies object to the message on its packaging*. It seems to us that such exclusion would be an attack on diversity and devalue respect for both Christians and their beliefs in violation of para 2.22 of AFI 36-7001. Diversity and inclusion require tolerance of opposing views as a precursor to mutual respect. We fail to see how *excluding* a Christian message on a product associated with a Christian holiday achieves that goal or demonstrates tolerance and mutual respect. The fact that some MRFF clients were “offended” by the religiously-themed product and its accompanying message indicates that the problem of inculcating inclusion and mutual respect directly implicates the MRFF clients themselves as they seek to exclude religious messages

with which they disagree, hardly a strong indication of *their* commitment to the inclusion and mutual respect they demand of others or of *their* compliance with those same values.

None of the MRFF's arguments justifies the action the MRFF demands of AAFES. Unless and until it can be established that AAFES personnel ordered the Christian candy merchandise with an unconstitutional motivation and for an unconstitutional purpose, there is no Constitutional violation, especially when one considers that the message put on the packaging was done solely via the decisions of private individuals whose religious expression is fully protected by the Free Speech and Free Exercise Clauses of the First Amendment. Further, none of the cited DoD and Air Force regulations supports the MRFF's conclusions of wrongdoing by AAFES. In sum, the MRFF Letter claimed serious violations where none exists. Accordingly, AAFES should reject Mr. Rehkopf's demand to remove the candy from AAFES facilities.

### CONCLUSION

The MRFF has seriously misconstrued—and continues to misconstrue—the Constitutional requirements regarding religious expression in the U.S. Armed Forces (including AAFES). The MRFF seeks to convince the Armed Forces (including AAFES) that virtually all religious expression must be excised from the daily life of Service Members in order to avoid violating the Establishment Clause. That understanding is simply false and represents a view more akin to freedom *from* religion than freedom *of* religion, which is the Constitutional standard.

In light of the foregoing, we respectfully urge you to reject the MRFF's call to remove the so-called "Jesus Candy" from AAFES shelves. It is unreasonable to conclude that any customer (other than the most hypersensitive to religious expression) could conclude that AAFES was *officially* endorsing either the Christian faith or the religious message on the candy's packaging merely by offering the product for sale. Accordingly, the MRFF's allegations are baseless, and they must be treated as such by you.

Should you or any of your associates desire ACLJ assistance in dealing with such a matter or in drafting or reviewing guidelines for AAFES personnel faced with similar or future MRFF demands, we stand ready to assist you.

Respectfully yours,



Jay Alan Sekulow  
Chief Counsel



Robert W. Ash  
Senior Counsel

cc: Michael P. Good, Navy Exchange (NEX) Service Command  
Captain Bruce C. Brown, USCG, Coast Guard Exchange (CGX)