

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee,

- *versus* -

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

USCA Dkt. No. 15-0510/MC

N-MC CCA Dkt. No. 201400150

Date: 2 February 2016

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
IN SUPPORT OF *NEITHER* PARTY**

by

THE MILITARY RELIGIOUS FREEDOM FOUNDATION

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

1. The *Military Religious Freedom Foundation* [“MRFF”], by and through its undersigned counsel respectfully Moves this Court for an Order pursuant to CAAF Rule 26(a)(3) granting leave for MRFF to file an *amicus curiae* Brief in the above-styled case in support of *neither party*.

2. The MRFF further Moves this Court for an Order, for good cause shown, pursuant to CAAF Rule 33, to suspend that portion of CAAF Rule 26(b), so as to allow an out-of-time *amicus curiae* brief to be filed forthwith.

INTEREST OF THE *AMICUS CURIAE*

The MRFF is an IRS 501(c)(3), not-for-profit corporation, located in Albuquerque, NM. It is dedicated to ensuring that all members of the United States Armed Forces receive the Constitutional guarantee of religious freedom to which they and all Americans are entitled by virtue of the First Amendment.

To date, approximately 44,000 active duty, reserve, veteran, and civilian personnel of the United States Armed Forces have come to the MRFF for redress and assistance in resolving or alerting the public to their civil rights grievances. MRFF recognizes that military life requires individual adherence to shared patriotic principles. MRFF also recognizes the need for military personnel to at times temporarily relinquish some Constitutionally granted personal freedoms for the sake of military order, discipline and objectives. Additionally, MRFF adheres strongly to the principle that religious faith is a deeply personal matter, and that no American has the right to question another American's beliefs as long as they do not impermissibly intrude on the public space, privacy or safety of another individual.

MRFF believes that:

- No religion or religious philosophy may be advanced by the United States Armed Forces over any other religion, religious philosophy, or non-religion.
- No member of the United States Armed Forces may be compelled in any way to conform to a particular religion, religious philosophy, or non-religion.

- No member of the United States Armed Forces may be compelled in any way to witness or engage in any religious exercise.
- No member of the military may be compelled to curtail the free exercise of their religious practices or beliefs except in constitutional deference to military circumstances where it directly impacts military discipline, morale, unit cohesion, and the successful completion of a specific military goal, as framed by the Free Exercise clause, RFRA and applicable military regulations.
- No member of the military may be compelled to endure unwanted religious proselytization, evangelization or persuasion of any sort in a military setting or by a military superior or civilian employee of the military.
- The full exercise of religious freedom includes the right not to subscribe to any particular religion or religious philosophy. The so-called “unchurched” cede no Constitutional rights by want of their separation from organized faith.

MRFF’s interest in this case is multifaceted. First, it is clear that Appellant and her *amici curiae* are attempting to judicially “legislate” a broad, religious defense to a basic military offense, disobeying a superior’s orders - a defense which could be (as herein) prejudicial to good order and discipline, to include unit cohesion, unless deferentially applied in the military context.

Second, MRFF has a significant interest in the *effect* that granting Appellant her belated claims for religious accommodation will have. As the record demonstrates, Appellant, an active-duty Marine, posted signs while on duty,¹ at her common work

¹ Those signs all read, “No weapon formed against me shall prosper.” [RoT (continued...)]

area which was open to other personnel at a large military base (Camp Lejeune, NC), which is U.S. Government property. Granting her the relief she requests, raises a clear issue under the Establishment Clause of the First Amendment. As such, whether it was her supervisor and one co-worker exposed to her “signs” or a hundred other Marines coming into her common military work area, they would all be exposed to Appellant’s claimed religious beliefs and proclivities.

Finally, MRFF is concerned that granting Appellant the relief she seeks, will be tantamount to condoning ignoring (or flaunting) a valid Department of Defense Instruction and Secretary of the Navy Instruction that provide an *appropriate* balance between the Free Exercise and Establishment Clauses of the First Amendment, the *Religious Freedom Restoration Act*, 42 U.S.C. § 2000bb *et seq.*, and accommodating individual requests under the Free Exercise Clause. This is so because Appellant failed to comply with the applicable Instructions on seeking command approval for any such religious accommodations so that her Command could ensure compliance with relevant DoD and DON policy - policies that Appellant did not challenge below.

¹ (...continued)
308; JA-112]. The Military Judge characterized them as “biblical in nature...”[RoT 362; JA-159]. Appellant now claims that the quotation is from Isaiah 54:17. [Appellant’s Br. at 3, n.1] That claim is not accurate as the correct quotation from the Book of Isaiah reads: “No weapon formed against *thee* [or “you”] shall prosper....”

ISSUES ADDRESSED BY *AMICUS CURIAE*

- I. IS APPELLANT PROCEDURALLY BARRED FROM OBTAINING THE RELIEF SHE NOW SEEKS?**
- II. RFRA’S HISTORY AND CONGRESSIONAL INTENT.**
- III. EVEN IF THE RFRA ISSUE WAS LEGALLY PRESERVED, IT DOES NOT PROVIDE APPELLANT ANY BASIS FOR JUDICIAL RELIEF WHERE THE PUBLIC DISPLAY OF THREE “SIGNS” IN HER COMMON, PUBLIC WORK AREA, ON A MILITARY INSTALLATION PROPERTY OF THE U.S. GOVERNMENT, WAS NOT A *BONA FIDE* FREE EXERCISE OF RELIGION IN THE *MILITARY* CONTEXT.**

IN SUPPORT OF *NEITHER* PARTY

MRFF respectfully seeks *amicus curiae* status herein without supporting either party as a “friend of the Court.” The reasons for this are as follows:

1. MRFF does not support Appellant’s positions herein as we believe that they are contrary to the First Amendment’s “Establishment” and “Free Exercise” clauses, the RFRA, and non-compliant with the applicable DoD Instruction and SECNAVINST – even if Appellant had properly triggered and preserved the issues she now raises. Her Free Exercise/Failure to Accommodate claims were not raised during her court-martial and are an after-the-fact attempt to apply a “religious” defense to a common military offense. Nor did she ever make any pre-trial accommodations requests to her chain-of-command.

2. With respect to the Government’s response *on the merits*, while MRFF is sympathetic to its position in general, the record is unclear what their position was

during Appellant’s court-martial. Was it the government’s position that the Free Exercise clause did not apply; was it that to allow the “signs” would violate the Establishment clause; was it that the signs violated some unspecified policy; or was it that Appellant had never sought any type of religious accommodation from her chain of command, so that she should not be heard to complain about not receiving such?

3. With respect to the *procedural* issues certified to this Court by the Navy TJAG, MRFF would note that we first raised those issues in our *amicus curiae* brief opposing the granting of review herein for those reasons. Thus we argued that this case was not an appropriate vehicle to litigate a fundamental, Constitutional issue. MRFF’s position is now necessarily consistent with our prior arguments and those certified herein.

RELIEF REQUESTED

MRFF respectfully requests that this Court:

- (1) suspend its timing requirement contained in CAAF Rule 26(b); and
- (2) grant leave for us to participate herein as *amicus curiae* and to accept our Brief tendered forthwith.

Due to organizational constraints and the schedule of counsel for the MRFF, we were unable to comply with the 10-day deadline. Neither party is or will be prejudiced by granting such relief.

DATED: 2 February 2016

Respectfully submitted,

/s/ Donald G. Rehkopf, Jr.

DONALD G. REHKOPF, JR.

Attorney at Law

31 East Main Street, Suite 2000

Rochester, New York 14614

(585) 454-2000

drehkopfjr@brennalaw.com

CAAF Bar No. 20564

Counsel of Record for Amicus Curiae
The Military Religious Freedom Foundation

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Sterling*, USCA Dkt. No. 15-0510/MC, was electronically filed with the Court and served upon Appellant's Counsel and Government Appellate Counsel on **2 February 2016**.

/s/ Donald G. Rehkopf, Jr.

DONALD G. REHKOPF, JR.

Attorney at Law

31 East Main Street, Suite 2000

Rochester, New York 14614

(585) 454-2000

drehkopfjr@brennalaw.com

CAAF Bar No. 20564