



June 5, 2020

Jovita Carranza
Administrator
Small Business Administration
409 3rd St. SW
Washington, DC 20416

Re: American Atheists Comments on Interim Final Rule Pertaining to Business Loan Program Temporary Changes; Paycheck Protection Program—Nondiscrimination and Additional Eligibility Criteria (RIN: 3425-AH40)

Dear Administrator Carranza:

American Atheists strongly opposes the Small Business Administration's (SBA) actions to exempt religious organizations from longstanding nondiscrimination rules. We write in response to the Interim Final Rule (IFR) pertaining to the application of nondiscrimination rules in relation to the Paycheck Protection Program (PPP),¹ and we urge SBA to ensure that PPP distributes government funding consistent with constitutional constraints. American Atheists submitted comments to SBA on May 14, 2020, in response to other IFRs² relating to PPP. We continue to hold many of the concerns we raised in our May 14 comment regarding the distribution and use of PPP funds in violation of the Establishment Clause. SBA should immediately issue a new IFR to clarify that PPP funds used for inherently religious activities are not eligible for loan forgiveness. We further ask that SBA rescind its guidance for faith-based organizations,³ as the guidance is unconstitutional and not consistent with SBA's own regulations, including the Nondiscrimination IFR.

¹ SBA, Business Loan Program Temporary Changes; Paycheck Protection Program- Nondiscrimination and Additional Eligibility Criteria, 85 Fed. Reg. 27287 (RIN 3245-AH40, Docket No. SBA 2020-09963) (published May 8, 2020), available at <https://www.federalregister.gov/documents/2020/05/08/2020-09963/business-loan-program-temporary-changes-paycheck-protection-program-nondiscrimination-and-additional> [hereinafter, "Nondiscrimination IFR"].

² SBA, Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811 (RIN 3245-AH34, Docket No. SBA-2020-0015) (published Apr. 15, 2020), available at <https://www.federalregister.gov/documents/2020/04/15/2020-07672/business-loan-program-temporary-changes-paycheck-protection-program>; SBA, Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20817 (RIN 3245-AH35, Docket No. SBA-2020-0019) (published Apr. 15, 2020), available at <https://www.federalregister.gov/documents/2020/04/15/2020-07673/business-loan-program-temporary-changes-paycheck-protection-program>.

³ SBA, Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL), issued Apr. 3, 2020, available at

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for religious liberty and equality, American Atheists supports religious liberty, as guaranteed by the First Amendment, to protect individual beliefs. However, religious liberty does not create special rights for religious individuals and organizations to violate neutral laws or discriminate against groups they disfavor.

As part of the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act⁴ passed by Congress to provide economic stimulus during the coronavirus pandemic, PPP was created to support small businesses and nonprofits by providing time-limited, forgivable loans. SBA was given emergency rulemaking authority to implement PPP. The IFRs discussed in our May 14 comment, along with the Nondiscrimination IFR, were subsequently issued. Similarly, SBA issued an FAQ, providing guidance for faith-based organizations based on the IFRs and the agency’s interpretation of existing regulations.

SBA published the Nondiscrimination IFR to expand upon “certain limitations and exemptions under federal law primarily pertinent to certain faith-based or nonprofit organizations.” This IFR incorporates the religious exemption for coreligionist housing under the Fair Housing Act (FHA) of 1968.⁵ Additionally, the IFR provides that “for purposes of the PPP, SBA regulations do not bar a religious nonprofit entity from making decisions with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such nonprofit of its activities.”⁶ However, as will be explained in more detail below, the nondiscrimination IFR did not rescind the SBA FAQ, creating inconsistencies between the two documents.

The SBA FAQ misstates religious exemption principles regarding longstanding employment nondiscrimination law.

Current SBA regulations require recipients of SBA loans “to reflect to the fullest extent possible the nondiscrimination policies of the Federal Government, as expressed in the several statutes, Executive Orders, and messages of the President dealing with civil rights and equality of opportunity.”⁷ Specifically,

<https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf> [hereinafter, “SBA FAQ”].

⁴ Public Law No. 116-136, passed Mar. 27, 2020 [“CARES Act”].

⁵ 42 U.S.C. § 3607(a).

⁶ This provision of the Nondiscrimination IFR amends 13 CFR § 113.3-1(h), which provides that “[n]othing in this part shall apply to a religious corporation, association, educational institution or society with respect to the membership or employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.”

⁷ 13 CFR § 113.1(a).

SBA regulations provide that a recipient may not discriminate on the basis of race, color, religion, sex, handicap, or national origin with regard to goods, services, or accommodations.⁸ Moreover, SBA prohibits employment discrimination within an aided business or nonprofit because of race, color, religion, sex, handicap, or national origin.⁹ These prohibitions on the basis of sex have been interpreted by courts to include discrimination on the basis of sexual orientation and gender identity.¹⁰

The SBA FAQ neither complies with SBA's existing regulations nor the newly issued Nondiscrimination IFR. The FAQ states that "no faith-based organization will be excluded from receiving funding because ... employment by the organization is limited to persons who share its religious faith *and practice*."¹¹ In contrast, the nondiscrimination IFR states that "SBA regulations do not bar a religious nonprofit entity from making decisions with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such nonprofit of its activities." Thus, the religious exemption under SBA FAQ is significantly broader than the Nondiscrimination IFR. Especially now that SBA has affirmed its regulations on the matter, we urge SBA to rescind the FAQ to clarify this point: a religious nonprofit may prefer coreligionists in employment, but it may not engage in employment discrimination based on other protected characteristics, even if it calls them "practices."

The Equal Employment Opportunity Commission (EEOC) has clarified that the Title VII religious exemption, which uses similar language and is legally analogous to the SBA exemption, "only allows religious organizations to prefer to employ individuals who share their religion."¹² Moreover the exemption "does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability."¹³ For example, "a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenant of its religious beliefs is not associating with people of other races."¹⁴ The

⁸ 13 CFR § 113.3(a).

⁹ 13 CFR §§ 113.3(b) and (c).

¹⁰ See *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509 (D. Conn. 2016); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

¹¹ Emphasis added.

¹² EEOC Compliance Manual, Section 12 Religious Discrimination, (Jul. 22, 2008) available at <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (citing *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (School of Divinity need not employ professor who did not adhere to the theology advanced by its leadership; *Tsirpanlis v. Unification Theological Seminary*, 2001 WL 64739 (S.D.N.Y. Jan. 24, 2001) (seminary operated by Unification Church cannot be sued for religious discrimination by Greek Orthodox employee who was allegedly terminated for refusing to accept the teachings of the Unification Church)).

¹³ *Id.* (citing *Ziv v. Valley Beth Shalom*, 156 F.3d 1242 (Table), 1998 WL 482832 (9th Cir. Aug. 11, 1998) (unpublished) (religious organization can be held liable for retaliation and national origin discrimination); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (religious institutions may not engage in age discrimination)).

¹⁴ Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program-Nondiscrimination and Additional Eligibility Criteria, 85 Fed. Reg. 27287 (proposed May 8, 2020), available at <https://www.federalregister.gov/documents/2020/05/08/2020-09963/business-loan-program-temporary-changes-paycheck-protection-program-nondiscrimination-and-additional>.

Nondiscrimination IFR states that SBA seeks to “ensure harmony with Section 702 of Title VII” with respect to the religious employer exemption; SBA must rescind the SBA FAQ to achieve such harmony.¹⁵

Additionally, SBA’s reliance in the FAQ on the Religious Freedom Restoration Act (RFRA)¹⁶ to support its broad interpretation of the narrow religious exemption in its regulations is misplaced. The U.S. Supreme Court had made expressly clear that RFRA cannot be used to allow for discrimination.¹⁷

Finally, we note that SBA has failed to “reflect to the fullest extent possible the nondiscrimination policies of the Federal Government, as expressed in . . . Executive Orders . . . dealing with civil rights and equality of opportunity”¹⁸ because the agency has failed to amend its prohibition to include explicit protection for sexual orientation and gender identity, as provided in Executive Order 11246.¹⁹

This IFR improperly incorporated the religious exemption from the Fair Housing Act into the Paycheck Protection Program.

Enacted as Title VIII of the Civil Rights Act of 1968, the Fair Housing Act (FHA) prohibits discrimination in housing based on race, color, religion, national origin, sex, familial status, and handicap.²⁰ FHA contains an exemption for religious organizations:

Nothing in this title shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.²¹

¹⁵ The CARES Act included strong protections for civil rights, specifically prohibiting the waiver of such laws by federal agencies in multiple contexts. *See, e.g.*, CARES Act, §§ 4221(g) and 4511(b)(2).

¹⁶ 42 U.S.C. §§ 2000bb-1 and bb-3.

¹⁷ *Burwell v. Hobby Lobby*, 573 U.S. 682, 733 (2014) (“The principal dissent raises the possibility that discrimination in hiring, for example, on the basis of race, might be cloaked as religious practice to escape legal sanction.... Our decision today provides no such shield.”).

¹⁸ 13 CFR § 113.1(a).

¹⁹ U.S. Department of Labor, Office of Federal Contract Compliance Programs, *Executive Order 11246, As Amended*, available at <https://www.dol.gov/ofccp/regs/statutes/eo11246.htm>.

²⁰ 42 U.S.C. §§ 3601-3631.

²¹ 42 U.S.C. § 3607(a).

Congress intended this exemption to be “read narrowly in light of the overarching purpose of the Act to prohibit discrimination against protected classes.”²² Furthermore, FHA specifically states that the Act must be read to conform with constitutional limitations.²³

The Nondiscrimination IFR improperly incorporates the exemption for coreligionist housing under FHA into the PPP. In doing so, SBA fails to account for the fact that religious organizations normally do not receive federal funding for inherently religious activities and do not receive funding for housing operations under FHA. Thousands of churches have received PPP funding.²⁴ The SBA FAQ explicitly authorizes churches to use these PPP funds for inherently religious activities, such as paying clergy salary.²⁵ Moreover, SBA has clarified that borrowers will be eligible for forgiveness for costs including interest payments on mortgages, rent payments, and utility bills.²⁶ Therefore, unlike with FHA’s application to typical housing scenarios, religious organizations are now receiving taxpayer-funded grants to support their housing operations, while remaining exempt from statutory and regulatory prohibition of discrimination based on religion.

SBA should rescind the FHA exemption because “[w]hen one group is taxed so that another group may be accommodated in their observance, citizens are stratified on the basis of belief.”²⁷ Instead, SBA should follow the Department of Housing and Urban Development (HUD) regulations which explicitly prohibit faith-based organizations from using federal financial assistance to support or engage in explicitly religious activities, “or in any other manner prohibited by law.”²⁸

Whereas it may be constitutionally permissible to exempt religious organizations from nondiscrimination laws in limited circumstances when the religious organizations are not receiving federal funding, the analysis must change now that taxpayer dollars are at stake. It may be one thing to allow a religious organization to use its own funds—voluntarily donated by members—to provide housing exclusively for its own members. However, it is quite another thing to require taxpayers to aid

²² Seng, M. P., *The Fair Housing Act and Religion Freedom*, 11 Tex. J. on C.L. & C.R. 1, 10 (Fall 2005) (citing *United States v. Columbus Country Club*, 915 F.2d 877, 882 (3d Cir. 1990)).

²³ 42 U.S.C. § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”).

²⁴ Capatides C., More than 12,000 Catholic churches in the U.S. applied for PPP loans - and 9,000 got them, CBS News, May 8, 2020, available at <https://www.cbsnews.com/news/catholic-churches-paycheck-protecton-program-12000-applied-9000-got/>.

²⁵ The SBA FAQ states that PPP “can be used to pay the salaries of ministers and other staff engaged in the religious mission of institutions,” and this funding will be provided “without regard to whether nonprofit entities provide secular social services.”

²⁶ SBA, Interim Final Rule, Business Loan Program Temporary Changes; Paycheck Protection Program-Requirements-Loan Forgiveness, 85 Fed. Reg. 33004 (RIN 1505-AC69 & 3245-AH46, Docket NO. SBA 2020-11536) (published June 1, 2020), available at <https://www.federalregister.gov/documents/2020/06/01/2020-11536/business-loan-program-temporary-changes-paycheck-protection-program-requirements-loan-forgiveness>.

²⁷ Swartzman, M. et al., *The Costs of Conscience*, 106 Ky. L. J. 781, 787 (2017-2018).

²⁸ 24 CFR 5.109(d)(1).

those organizations in denying housing to those with differing views. “[T]he Constitution does not permit the State to aid discrimination.”²⁹ Where public funds go, public accountability must follow.

The broad exemptions in SBA FAQ with respect to nondiscrimination laws violate the Establishment Clause.

Our historical understanding of religious liberty is built on the idea that government entanglement with religion can be a profound threat to individual rights, too often leading to religious oppression. Grounded in the understanding that freedom of belief is an essential component of religious liberty, the principle of separation between religion and government has deep roots in theology, political philosophy, and in the constitutional framework of our government. A core principle of religious liberty is that the coercive taxing power of the government cannot be used to force citizens to support a religion that is not their own.³⁰

PPP funds may not constitutionally be used for inherently religious activities. SBA has amended rules allowing PPP grants to fund inherently religious activities, resulting in a conflict with nondiscrimination rules. Taxpayer dollars are now supporting inherently religious activities, thereby requiring taxpayers to support discriminatory practices with which they may disagree merely because they are religious. Although the government may give funds to religious organizations to deliver secular services, the Establishment Clause has never allowed public funds to be used to support religious activities. This is true even when funding is allocated evenhandedly among religious and secular institutions through neutral selection criteria.³¹

The SBA’s religious exemptions amply demonstrate the danger of violating the principle of church/state separation. The justification for religious exemptions to nondiscrimination rules—to keep religious organizations and the government independent of one another³²—vanishes once the government provides funds to religious organizations. Exempting religious organizations receiving PPP funds from nondiscrimination laws, while requiring other organizations to still follow those laws, creates and even larger church/state separation issue than the original exemption sought to prevent. Not only is

²⁹ *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).

³⁰ As Thomas Jefferson put it in the Virginia Statute on Religious Freedom, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical....” A Bill for Establishing Religious Freedom, 18 June 1779, *The Papers of Thomas Jefferson*, 2:545-53 (Julian P. Boyd, ed., Princeton University Press, 1950).

³¹ See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 840, 857 (2000) (controlling concurring opinion of O’Connor, J.).

³² See generally *McGowan v. Maryland*, 366 U.S. 420, 465 (1961) (Frankfurter, J.) (“[W]hat Madison, Jefferson and others fought to end, was the extension of civil government’s support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each. The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation.”).

preference being shown for religious grantees over secular ones,³³ but such accommodation also has an impermissible negative impact on third parties such as employees.

SBA's overly broad interpretation of religious exemptions to nondiscrimination rules unconstitutionally harms and burdens third parties. The Establishment Clause requires the consideration of any impact a religious exemption would have on third parties. "At some point, accommodation may devolve into 'an unlawful fostering of religion.'"³⁴ The Constitution commands that any exemption "must be measured so that it does not override other significant interests;"³⁵ "impose unjustified burdens on other[s];"³⁶ or have a "detrimental effect on any third party."³⁷ Therefore, any regulations established by SBA to exempt religious organizations from nondiscrimination laws must not significantly burden third parties. For example, exemptions must not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."³⁸ As explained below, these exemptions seriously harm the LGBTQ community, women, religious minorities, and nonreligious people, who face widespread discrimination in employment and housing, and therefore, they are not allowable.

However, even if SBA retains these exemptions during the limited time period of the PPP, they must not be retained after the program ends. These religious exemptions were only arguably applicable because nonprofits were incorporated into PPP, which is a temporary deviation. Once PPP ends, SBA must rescind any policies that provide funding for inherently religious activities and allow religious organizations to receive federal grants while violating longstanding nondiscrimination rules.

SBA's overly broad interpretations of religious exemptions harm LGBTQ people, women, religious minorities, and nonreligious people.

LGBTQ people, women, religious minorities, and nonreligious people face widespread discrimination in employment and housing. Many members of these groups reject dominant religious beliefs or act inconsistently with religious organizations' interpretations of those beliefs. SBA's overly broad interpretation of religious exemptions allow religious organizations to further discriminate against these groups. Religious organizations must not be allowed to exclude those of their own religion who they deem not to meet their "religious practice," as this accusation is too often employed against LGBTQ people, unmarried pregnant women, people with HIV, women who have had abortions, and many others who would otherwise be protected by nondiscrimination laws.

³³ *Everson v. Board of Education*, 330 U.S. 1 (1947) ("The Establishment Clause means at least this: ... Neither [state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.").

³⁴ *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 334-335 (1987) (quoting *Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136, 145 (1987)).

³⁵ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

³⁶ *Id.* at 726.

³⁷ *Id.* at 720, 722.

³⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 537 U.S. 682, 715-16 (2014) (Kennedy, J., concurring).

In the United States, people of color, LGBTQ people, women, religious minorities, and nonreligious people face rampant discrimination in employment. In a nationally representative study of lesbian, gay, and bisexual persons, 42% reported “experie[n]g at least one form of employment discrimination because of their sexual orientation at some point in their lives....”³⁹ The National Center for Transgender Equality has found that more than one in four transgender people surveyed have lost a job due to bias, and more than three fourths have experienced some form of workplace discrimination.⁴⁰ Additionally, in a 2017 Pew Research study of 4,914 adults, nearly half of all “working women” reported experiencing gender-based discrimination at work.⁴¹ Finally, in survey of nearly 34,000 nonreligious people, American Atheists found that nearly one fifth of respondents reported facing discrimination in employment because of their nonreligious identity.⁴² The 2019 survey also found that nonreligious participants were nearly three times more likely to report negative experiences in employment when living in very religious communities.

LGBTQ people, women, and religious minorities also face widespread discrimination when it comes to housing. In 2017, federal agencies charged with handling complaints under FHA received 2,675 complaints of discrimination based on familial status, along with 1,917 complaints for sex discrimination and 383 complaints for religious discrimination.⁴³ As for protections covered at state and local levels, agencies received 153 complaints for sexual orientation, 78 complaints for marital status, and 50 complaints for gender identity.

These troubling statistics demonstrate the rampant discrimination that yet pervades our society and the importance of civil rights enforcement. We therefore urge SBA to withdraw the SBA FAQ and the incorporation of the FHA religious exemption into PPP through the Nondiscrimination IFR. Religious organizations should not be allowed to discriminate in employment and housing because of their beliefs, and taxpayers must not be required to fund such discrimination.

³⁹ Sears, B. & Mallory, C., *Employment Discrimination against LGBT People: Existence and Impact*, in *Gender Identity and Sexual Discrimination in the Workplace: A Practical Guide* (Christine Michelle Duffy, ed., 2014).

⁴⁰ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁴¹ Parker, K. & Funk, C., *Gender Discrimination Comes in Many Forms for Today’s Working Women*, Pew Research Center (2017), available at <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/>.

⁴² Frazer, S., El-Shafei, A., Gill, A.M., *Reality Check: Being Nonreligious in America*, Cranford, NJ: American Atheists (2020), available at <https://static1.squarespace.com/static/5d824da4727dfb5bd9e59d0c/t/5ec6d6d8e8da850b30521353/1590089442015/Reality+Check+-+Being+Nonreligious+in+America>.

⁴³ Abedin, S. et al., *Making Every Neighborhood a Place of Opportunity, 2018 Fair Housing Trends Report*, National Fair Housing Alliance (2018), available at https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf.

Conclusion

Because SBA's interpretation of PPP unconstitutionally provides taxpayer support for inherently religious activities, including clergy salary and rent, mortgage, and utility payments for religious facilities, SBA has created broad and unjustifiable religious exemptions to longstanding nondiscrimination rules with its Nondiscrimination IFR and SBA FAQ. We recognize that these rules were issued quickly to meet a national emergency, but SBA must correct these constitutional deficiencies and misstatements of law. Failure to do so will result in compulsory taxpayer funding of religious activities and harm to third parties in violation of the Establishment Clause. We therefore urge SBA to issue new IFRs to protect the needs of the American public and fulfill the agency's duties under the U.S. Constitution.

If you should have any questions regarding American Atheists' opposition to the Nondiscrimination IFR, the SBA FAQ, and our recommendations for improvement, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,



Alison Gill, Esq.
Vice President, Legal & Policy
American Atheists