

March 31, 2020

Jovita Carranza
Administrator
Small Business Administration
409 3rd St., SW
Washington, DC 20416
VIA EMAIL AND CERTIFIED MAIL

Re: Constitutional Protections for Religious Liberty and the Implementation of the CARES Act

Dear Administrator Carranza:

The undersigned civil rights and religious freedom organizations write during this troubled time to thank you for the important role your agency will play in supporting the economy of the United States and to provide helpful guidance on important issues relating to civil rights and religious equality. Specifically, as the Small Business Administration (SBA) prepares to issue emergency regulations pertaining to the recently passed Coronavirus Aid, Relief, and Economic Security (CARES) Act, pursuant to § 1114, we ask that you do not set aside vital constitutional protections for religious freedom.

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.¹

Even during this emergency, Congress recognized that it is essential to protect our constitutional separation of religion and government by, for example, providing that institutions of higher education receiving funds in the stimulus package may not use such funding for “capital outlays associated with facilities related to... sectarian instruction, or religious worship.”²

Fortunately, SBA already has in place substantial protections for the separation of religion and government, as required by the Establishment Clause. Specifically, SBA regulations provide that, “Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;” are not eligible for SBA business loans.³ Moreover, businesses are not eligible for economic disaster loans that are “Principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular

¹ 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).

² CARES Act, § 18004(c).

³ 13 CFR § 120.11(k).

setting.”⁴ These provisions would apply to § 1102 and § 1110 of the CARES Act, respectively the Paycheck Protection Program and the Emergency Economic Injury Disaster Loans, which both provide loans to small businesses and nonprofits. Similar protections for the separation of religion and government in SBA’s regulations can be found in protections for project property,⁵ the Intermediary Lending Pilot Program,⁶ the Military Reservist Economic Injury Disaster Loan program,⁷ and the Immediate Disaster Assistance Program.⁸

Recently, there has been some confusion about the applicability of the U.S. Supreme Court’s decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*⁹ to various circumstances where the federal government provides a benefit to religious organizations and places of worship. We urge you not to broadly interpret this exceedingly narrow decision, which was explicitly limited to playground resurfacing and did not “address religious uses of funding or other forms of discrimination.”¹⁰ However, even if this decision is understood at its broadest possible interpretation, “that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can only be justified by a state interest ‘of the highest order,’”¹¹ it still does not allow for government funding of religious activity in violation of the Establishment Clause.¹²

SBA has suitable regulations already in place that allow the agency, and the lenders it contracts with to provide services, to ensure that religious organizations do not face discrimination solely on account of their religious identity. For example, existing regulations provide that:

All SBA loans are subject to all applicable laws, including (without limitation) the civil rights laws (see parts 112, 113, 117 and 136 of this chapter), prohibiting discrimination on the grounds of race, color, national origin, religion, sex, marital status, disability or age. SBA requests agreements or evidence to support or document compliance with these laws, including reports required by applicable statutes or the regulations in this chapter.¹³

SBA also provides protection for individual religious observance and practice.¹⁴ SBA grants significant accommodation to funded religious organizations by allowing them to preference members of a particular religion in employment to carry out their religious activities,¹⁵ and providing specific

⁴ 13 CFR § 123.301(g).

⁵ 13 CFR § 314.10.

⁶ 13 CFR § 109.400(b)(11).

⁷ 13 CFR § 123.502(n).

⁸ 13 CFR § 123.702(b)(6).

⁹ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) [hereinafter “Trinity Lutheran”].

¹⁰ *Id.*, Footnote 3.

¹¹ *Id.*, at 2019 (citations omitted).

¹² *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.”).

¹³ 13 CFR § 120.176.

¹⁴ 13 CFR § 113.3-2.

¹⁵ 13 CFR § 113.3-1(g).

exemption from certain civil rights protections that conflict with organizational religious tenets.¹⁶ We caution that any accommodation for religious organizations that SBA provides “must be measured so that it does not override other significant interests;”¹⁷ “impose unjustified burdens on other[s];”¹⁸ or have a “detrimental effect on any third party.”¹⁹

It is critical to understand, however, that prohibiting discrimination on the basis of religion, and prohibiting exclusion of religious organizations *qua* religious organizations, is fundamentally different from and does not mandate providing funding for constitutionally impermissible uses, such as religious proselytization, indoctrination, and worship.

While we understand that you may believe it necessary to clarify some of the regulations outlined above to permit loans to religious organizations,²⁰ we urge you to keep in place prohibitions on loans to places of worship and other nonprofits “principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting,” to ensure that these programs operate in accordance with constitutional requirements.

However, if you should make loans available to all nonprofits, including places of worship and religious nonprofits engaged in inherently religious activities, then it is essential that the regulations and guidance issued to implement the loan forgiveness program, pursuant to § 1106 of the CARES Act, do not result in direct government funding of inherently religious activities. Instead, the loan forgiveness regulations should specifically reduce the amount of loan forgiveness equal to 1) the salary of any clergy or other staff engaged in inherently religious activity, 2) any amount spent on rent or mortgage interest payments for facilities related to sectarian instruction or religious worship, and 3) any utilities costs for facilities related to sectarian instruction or religious worship. This formulation would allow SBA to provide loans to these entities, while maintaining critical protections for the separation of religion and government.

¹⁶ 13 CFR 113.205.

¹⁷ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

¹⁸ *Id.* at 726.

¹⁹ *Id.* at 720, 722; *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”); *United States v. Lee*, 455 U.S. 252 (1982) (“the limits [followers of a particular sect] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”).

²⁰ Further, we recognize that the CARES Act anticipates that SBA will provide loans to nonprofit organizations. *See, e.g.*, CARES Act, § 1102, § 1110, § 2103, and § 2301.

Finally, we would like to offer our assistance if we might be helpful as SBA weighs these important issues and prepares to issue regulations pursuant to the CARES Act. Please do not hesitate to reach out to us if you have any questions. Please contact Alison Gill, American Atheists Vice President for Legal & Policy, who can be reached at 202.588.5935 or by email at agill@atheists.org. Thank you for your time and consideration.

Sincerely,

American Atheists
American Humanist Association
Center for Disability Rights
Center for Inquiry
Freedom From Religion Foundation
National Black Justice Coalition
National Center for Transgender Equality
Secular Coalition for America