AMERICAN ATHEISTS

May 14, 2020

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

Re: American Atheists Comments on Interim Final Rules Pertaining to Business Loan Temporary Changes; Paycheck Protection Program (RIN: 3245-AH34 & 3245-AH35)

Dear Administrator Carranza:

American Atheists strongly opposes the Small Business Administration's (SBA) actions to set aside its longstanding rules to allow religious organizations to unconstitutionally receive funding for inherently religious activities through the Paycheck Protection Program (PPP). We write in response to the Interim Final Rules pertaining to the Paycheck Protection Program[1] to urge SBA to ensure that PPP distributes government funding consistent with constitutional constraints. We ask that SBA issue new Interim Final Rules to clarify that PPP funding used for inherently religious activities is not eligible for loan forgiveness.

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 opposes efforts to unconstitutionally divert public funding to support inherently religious activities.

As part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act[2] passed by Congress to provide economic stimulus during the coronavirus pandemic, the Paycheck Protection Program (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 Interim Final Rules (hereinafter, "IFR")

[1] SBA, Interim Final Rule, 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, Interim Final Rule, 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.

[2] Public Law No. 116-136, passed Mar. 27, 2020 ["CARES Act"].

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discussed herein were subsequently issued. Similarly, SBA issued guidance for faith-based organizations based on the IFRs and the agency's interpretation of existing regulations.[3]

SBA may not constitutionally provide funding for inherently religious activity by PPP recipients.

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.[4]

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."[5]

While the CARES Act did not specifically indicate that PPP funding[6] may not be provided for inherently religious activity, it was unnecessary for Congress to explicitly state this because 1) the statute should be read to incorporate basic constitutional requirements and 2) SBA already had in place regulations that prevent program funding from going to organizations "principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs."[7]

The IFR states that "Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the Act are eligible." Unfortunately, this vague language fails to clearly indicate whether the standards set forth in in 13 CFR 120.110 are applicable to authorized nonprofit organizations. The guidance issued by SBA was more explicit, stating that funding provided by

[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 https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf [hereinafter, "SBA FAQ"].

[4] 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).

[5] CARES Act, § 18004(c).

[6] While PPP is a loan program, and it is sometimes constitutionally permissible to loan money to religious organizations, by granting automatic forgiveness for up to 100% of the loan, the program transforms these loans into grants. Therefore, we must examine whether the usage of these granted funds is permissible.

[7] 13 CFR § 120.110(k). While this regulation previously applied to "businesses" (as did the entire program), when the program was temporarily expanded to include nonprofits, SBA should have interpreted this restriction to apply equally to these organizations.

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."[8] However, this guidance, as well as the actual implementation of PPP,[9] is incorrect as a matter of law and fails to meet fundamental constitutional requirements.

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.[10] This is true even when the funding is allocated evenhandedly among religious and secular institutions through neutral selection criteria.[11]

This prohibition is the most clear when the money would fund the salaries of clergy members and other faith leaders who lead worship and other explicitly religious activities. The Supreme Court has explained that it was the public's "indignation" toward using government funds to pay ministers that led to the Establishment Clause.[12] In fact, that is why Thomas Jefferson wrote the Virginia *Bill for Establishing Religious Freedom* (on which the Establishment Clause is based).[13] Moreover, just three years ago, the Supreme Court again noted that it was a governmental "interest in not using taxpayer funding to pay for the training of clergy" that "lay at the historic core of the Religion Clauses."[14]

The Establishment Clause was intended to preserve religious freedom by ensuring that taxpayers would not be forced to support religions to which they do not belong and by guaranteeing that houses of worship would not suffer from governmental interference that accompanies public funding. For example, the CARES Act requires organizations applying for loan forgiveness to provide documentation that could raise concerns for houses of worship.

While some have argued that PPP is allowable under the Establishment Clause as a form of indirect aid similar to vouchers provided to parents to allow them to select and pay for private education, including religious education. For example, in *Zelman v. Simmons-Harris,*[15] the Supreme Court determined a private school voucher program did not violate the Establishment Clause, because the "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." However, this case is inapplicable. Unlike in *Zelman*, the funds being provided to third party lenders under PPP are subject to continuing oversight and regulation by SBA. Moreover, there is a nondiscrimination requirement[16] that prevents these lenders from choosing not to provide loans to

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[8] SBA FAQ.

[9] 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-protection-program-12000-applied-9000-got/.

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

[11] *Id.* at 837-42.

[12] *See Everson v. Board of Education*, 330 U.S. 1, 11 (1947).

[13] *See Locke v. Davey*, 540 U.S. 712, 722 n.6 (2004).

[14] *Trinity Lutheran v. Comer*, 137 S. Ct. 2012, 2023 (2017); s*ee also Locke*, 540 U.S. at 722-23.

[15] 536 U.S. 639 (2002) [hereinafter "Zelman"].

[16] 13 CFR § 120.176 ("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,

religious organizations. By definition, the inability to reject a religious recipient in favor of a secular one means third party lenders have no genuine, independent choice. Here, *it is the government, not the lender* that is determining that the government aid reaches religious organizations to support inherently religious activities.

SBA implementation of PPP must be brought into compliance with the requirements of the Establishment Clause. Therefore, we urge SBA to issue a new Interim Final Rule providing that loan forgiveness under PPP[17] is not available for any funds used for inherently religious activities. Funds ineligible for loan forgiveness should include 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 approach fulfills the goals of the CARES Act by allowing religious organizations to participate in the Paycheck Protection Program and receive very favorable loans, while preventing the government from unconstitutionally funding religious activities.

The Free Exercise Clause does not require taxpayers to support religious activities.

SBA relies upon a misinterpretation of the *Trinity Lutheran* decision and on two inapplicable Office of Legal Counsel (OLC) analyses to support the proposition that it may provide taxpayer funding for inherently religious purposes. Specifically, the SBA FAQ states that:

> The requirements in certain SBA regulations – 12 C.F.R. §§ 120.110(k) and 123.201(g) – impermissibly exclude some religious entities. Because those regulations bar the participation of a class of potential recipients based solely on their religious status, SBA will decline to enforce these subsections and will propose amendments to conform those regulations to the Constitution.

SBA further explains that:

> The PPP and EIDL loan programs are neutral, generally applicable loan programs that provide support for nonprofit organizations without regard to whether they are religious or secular. The CARES Act has provided those program funds as part of the efforts to respond to the economic dislocation threatened by the COVID-19 public health emergency. Under these circumstances, the Establishment Clause does not place any additional restrictions on how faith-based organizations may use the loan proceeds received through either the PPP or the EIDL loan program.

Firstly, this analysis misstates the constitutional problem here. Merely providing loans to affected religious nonprofits is clearly allowable. However, because PPP loans are granted automatic forgiveness

national origin, religion, sex, marital status, disability or age."); Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691(a) ("It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)."); *see also* 13 CFR Subparts D and E regarding regulation of lenders.

[17] CARES Act, § 1105.

for up to 100% of the loan, the program, in effect, transforms these loans into grants. Therefore, we must examine whether the usage of these granted funds is permissible. And, as described previously, it is not.

The Supreme Court's decision in *Trinity Lutheran* is not relevant to this analysis. The government is never required to fund religious activity on equal terms with secular activity. In this case, a church had been denied a government grant to pay for the resurfacing of a playground. The Supreme Court held that this violated the Free Exercise Clause, emphasizing that the state had "expressly den[ied] a qualified religious entity a public benefit *solely* because of its religious character."[18]

The Court distinguished this with the denial of funds that would be used for religious activities. In an earlier case, *Locke v. Davey*, the Court held that a state rule prohibiting use of state scholarship funds to pursue theology degrees did not violate the Free Exercise Clause.[19] The *Trinity Lutheran* Court explained that the student "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry."[20]

The OLC memos that SBA relies upon are similarly inapplicable. In 2019, OLC issued a slip opinion with concerns about a federal statute that limits the Department of Education's ability to guarantee loans to historically black colleges and universities if the loan would go "to an institution in which a substantial portion of its functions is subsumed in a religious mission."[21] However, even if SBA is correct that the language prohibiting loan funding from going to organizations "principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs"[22] is a prohibited restriction,[23] the agency still has a duty to ensure that the funding is not used for unconstitutional purposes, and so it should have included new regulations, suitable to both small businesses and nonprofits, prohibiting usage for inherently religious activities in the IFR.

The 2002 OLC opinion SBA relied upon regarding provision of disaster relief is similarly inapplicable.[24] That opinion focused on the even-handed application of a general benefits program provided to religious nonprofits – it did not specifically fund religious activity. Here, PPP funding is specifically intended to pay the salary of clergy members and other inherently religious activities.

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[18] *Trinity Lutheran*, 137 S. Ct. at 2024 (emphasis added).
[19] *Locke*, 540 U.S. at 719.
[20] *Trinity Lutheran*, 137 S. Ct. at 2023.
[21] *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities,* 43 Op. O.L.C. __, *7–15 (Aug. 15, 2019).
[22] 13 CFR § 120.110(k). Note that when proposing this rule, SBA indicated that it was intended to prevent taxpayer support for religious activity, in both secular and religious settings, in violation of the Establishment Clause. SBA, Business Loan Programs, 60 Fed. Reg. 64356, 64360 (Dec. 15, 1995). Therefore, the presumption that this restriction is intended to deny organizations a public solely because of their religious character is clearly incorrect.
[23] *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities* at 6 ("Under the framework set forth in *Trinity Lutheran*, the constitutionality of a religious-funding restriction will turn on whether the restriction is based upon an institution's religious status or whether it is based upon how the federal support would be used.").
[24] *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy*, 26 Op. O.L.C. 114, 122–32 (2002).

SBA guidance 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."[25] Specifically, 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.[26] Moreover, SBA prohibits employment discrimination within an aided business or nonprofit because of race, color, religion, sex, handicap, or national origin.[27] These prohibitions on the basis of sex have been interpreted by courts to include discrimination on the basis of sexual orientation and gender identity.[28]

The CARES Act included strong protections for civil rights, specifically prohibiting the waiver of such laws by federal agencies in multiple contexts.[29] Nevertheless, the IFR published by SBA fails to note these applicable employment nondiscrimination protections, instead focusing on "constitutional, statutory, and regulatory protections for religious liberty," and SBA subsequently issued guidance clarifying 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."[30]

This guidance portrays this religious exemption as significantly broader than SBA's own regulations, which provide that "Nothing in this part shall apply to a religious corporation, association, educational institution or society with respect to the membership or the 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."[31]

In contrast, the Equal Employment Opportunity Commission (EEOC) has clarified that the Title VII exemption, which uses similar language and framing to the SBA exemption, "only allows religious organizations to prefer to employ individuals who share their religion."[32] Moreover, the exemption "does not allow religious organizations otherwise to discriminate in employment on protected bases

[25] 13 CFR § 113.1(a).
[26] 13 CFR § 113.3(a).
[27] 13 CFR §§ 113.3(b) and (c).
[28] *See Oncale 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).
[29] *See, e.g.,* CARES Act, §§ 4221(g) and 4511(b)(2).
[30] SBA FAQ.
[31] 13 CFR § 113.3-1(h).
[32] EEOC Compliance Manual, Section 12 Religious Discrimination, (Jul. 22, 2008), available at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (citing *Killinger vv. 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); *Tirpanlis 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)).

other than religion, such as race, color, national origin, sex, age, or disability."[33] For example, "a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races."

SBA's overly broad interpretation of this religious exemption is especially harmful to LGBTQ people and women, who may face employment discrimination for not adhering to the desired religious practices of loan recipients. We urge the department to withdraw the identified guidance because it is at odds with current SBA regulations, as well as the recently issued Interim Final Rule,[34] which allows religious nonprofits recipients to prefer coreligionists in employment, not to discriminate based on religious practices.

Moreover, SBA's reliance in both the IFR and the guidance for faith-based organizations on the Religious Freedom Restoration Act (RFRA)[35] to support its broad interpretation of the narrow religious exemption in its regulations is misplaced. The U.S. Supreme Court had made explicitly clear that RFRA does not allow for discrimination.[36]

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"[37] because the agency has failed to amend its prohibition on employment discrimination to include explicit protection for sexual orientation and gender identity, as provided in Executive Order 11246.[38]

SBA is not obligated to provide funding for organizations that mislead the public and undermine public health.

As a matter of public policy, SBA precludes organizations engaged in certain types of activities from its small business loan programs. For example, loans may not be used to support "pyramid sales distribution plans," "businesses engaged in illegal activity," and "private clubs and businesses which limit the number of memberships for reasons other than capacity."[39] Similarly, in order to effectuate the

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[33] *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)).

[34] 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.

[35] 42 U.S.C. §§ 2000bb-1 and bb-3.

[36] *Burwell v. Hobby Lobby*, 573 U.S. __ (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.").

[37] 13 CFR § 113.1(a).

[38] 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.

[39] 13 CFR § 120.110.

intent of the CARES Act, SBA should consider restricting access to PPP loans for small businesses and nonprofits that deliberately mislead the public and spread inaccurate health information.

For example, the Food and Drug Administration has provided warnings against fake coronavirus tests and cures.[40] These fraudulent products and companies should not be getting federal aid during a pandemic to allow them to deny health care to and harm more people, as this is clearly counter to public policy and the intent of the CARES Act.

In the same way, PPP funding should be denied to crisis pregnancy centers (CPCs), which "regularly use deceptive and manipulative tactics to achieve [the] goal" of dissuading pregnant people from getting an abortion."[41] In December 2019, the Society for Adolescent Health and Medicine and North American Society for Pediatric and Adolescent Gynecology released a joint position statement to "Encourage federal, state, and local governments to only support programs that provide adolescents and young adults experiencing or at risk for unplanned pregnancy with medically accurate, unbiased, and complete health information including comprehensive information about Food and Drug Administration–approved methods of contraception and the full range of pregnancy options, including abortion."[42] CPCs do not fall within these guidelines because they "provide biased, misleading, and, frequently, inaccurate sexual and reproductive health information in service of their goals. [internal citations] For example, CPCs frequently provide inaccurate information about the risks of abortion (e.g., abortion leads to breast cancer and mental health problems) and misinformation about contraceptives (e.g., inaccurate information about condom effectiveness and risks and side effects of contraceptive use), which risk causing harm. [internal citations] They also frequently provide inaccurate information about fetal development and make unfounded claims about fetal pain to discourage abortion. In addition, many centers inform clients that they "have plenty of time" to make pregnancy decisions…" encouraging them to delay and resulting in riskier and more expensive procedures. Especially during this pandemic, when access to accurate and timely health care is critical, SBA should not be funding CPCs because they put pregnant women at risk.

Please take appropriate steps to ensure that these deceptive products and companies are not provided with PPP funding to continue these harmful practices. At a minimum, these small businesses and nonprofits must be ineligible for PPP loan forgiveness.

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[40] FDA, Beware Fraudulent Coronavirus Tests, Vaccines and Treatments, published Apr. 29, 2020, available at https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments.

[41] National Institutes for Reproductive Health, *Addressing the Deceptive Practices of Anti-Abortion Pregnancy Centers*, 2015, available at https://www.nirhealth.org/what-we-do/tracking-trends/crisis-pregnancy-centers/.

[42] Society for Adolescent Health and Medicine and the North American Society for Pediatric and Adolescent Gynecology, *Crisis Pregnancy Centers in the U.S.: Lack of Adherence to Medical and Ethical Practice Standards*, Journal of Adolescent Health, Volume 65, ISSUE 6, P821-824, Dec. 1, 2019, available at https://www.jahonline.org/article/S1054-139X(19)30413-6/fulltext/.

Affiliation exemption rules for religious organizations are overly broad and unconstitutionally favor such organizations.

Finally, the IFR pertaining to exemption from affiliation rules[43] for religious organizations is so overly broad that it favors religious organizations over their secular counterparts, in violation of the Establishment Clause. Specifically, the IFR provides that:

> SBA's affiliation rules… do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion. This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization's determination.

SBA bases this extraordinarily broad exemption on a RFRA analysis of the general SBA affiliation rules, asserting that the application of general affiliation rules would "burden those organization's religious exercise." However, this interpretation is flawed. RFRA does not give SBA the authority to adjudicate claims it anticipates might happen and create blanket exemptions. Rather, RFRA requires a "careful, individualized, and searching review,"[44] based on an actual assertion that a sincerely held religious belief has been substantially burdened.[45] SBA cannot assume this constitutional safeguard is a substantial burden on grantees' religious exercise. Blanket exemptions to rules, by their nature, are not individualized reviews.

Moreover, SBA failed to consider the impact of this religious accommodation on third parties. The Establishment Clause requires the consideration of any impact an accommodation or religious exemption would have on third parties. The First Amendment bars the government from crafting "affirmative" accommodations within its programs if the accommodations would harm any program beneficiaries.[46] The Constitution commands that "an accommodation must be measured so that it does

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[43] 13 CFR part 121.

[44] *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 427 (9th Cir, 2019).

[45] Determining whether there is a substantial burden on religious exercise is not up to individual claimants, however. *See California*, 941 at 428 (RFRA does not authorize government to "impose a blanket exemption for self-certifying religious objectors."); *see also Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.,* 867 F.3d 338, 358 & n.23 (3d Cir. 2017); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018).

[46] U.S. Const. Amend. I; *Cutter v. Wilkinson*. 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

not override other significant interests;"[47] "impose unjustified burdens on other[s];"[48] or have a "detrimental effect on any third party."[49] Therefore, any regulations established by SBA to accommodate religion must do so without significantly burdening third parties.

The effect of this exemption is to allow smaller subunits of large, often wealthy religious organizations to seek and receive PPP funding, resulting in the exclusion of other small businesses and nonprofits. For example, reporting shows that more than 9,000 Catholic churches received PPP funding.[50] SBA ignored the undeniable harm this accommodation would cause to other potential recipients. And in fact, the accommodation has resulted in untold harm to small businesses who have been unable to receive funds through the program and, subsequently, have had to close.[51]

Instead of a blanket exemption, SBA should have created a process to allow religious organizations to apply for exemptions individually. Such organizations should only qualify if they can demonstrate that they are financially independent of their parent entity for purposes of payroll. We urge SBA to issue a new IFR that requires religious organizations either to qualify under the normal affiliation rules like their secular counterparts or to open their financial records to show that the organization itself pays for wages rather than a larger entity. This would allow SBA to meet any burden under RFRA while acting in accordance with the Establishment Clause.

Conclusion

The IFRs and guidance issued by SBA unconstitutionally provide taxpayer support to inherently religious activities, including clergy salary, and they create broad and unjustifiable religious exemptions to PPP loan requirements. We recognize that these rules were issued quickly to meet a national emergency, but SBA now has an opportunity to correct the constitutional deficiencies and misstatements of law in areas relating to funding for inherently religious activity, applicability of nondiscrimination rules, and affiliation exemptions for religious organizations. We urge SBA to issue new IFRs as described herein to better balance the needs of program beneficiaries, of the American public, and the agency's duties under the U.S. Constitution.

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[47] *Cutter v. Wilkinson*, 544 U.S. at 722.

[48] *Id.* at 726.

[49] *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.").

[50] 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-protection-program-12000-applied-9000-got/.

[51] *See, e.g.,* Pofeldt E., Fear and desperation on Main Street as small businesses struggle to survive despite PPP and other federal loan programs, CNBC, May 11, 2020, available at https://www.cnbc.com/2020/05/11/small-businesses-struggle-to-survive-despite-federal-loan-programs.html.

If you should have any questions regarding American Atheists' opposition to the IFRs 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