April 7, 2020

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

Dear Administrator Carranza:

We appreciate the need for the Small Business Administration to quickly implement the programs created and funded by the Coronavirus Aid, Relief, and Economic Security (CARES) Act so that it can offer needed assistance to the many people suffering from the ongoing global pandemic. To this end, we write to offer assistance regarding the existing constitutional parameters that apply to loan forgiveness for houses of worship and faith leaders.

The Paycheck Protection Program allows small businesses, nonprofits, and self-employed individuals to take out loans to cover payroll and other costs. Section 1106 of the CARES Act establishes a loan forgiveness process, funded by the government, up to the full amount of those loans—essentially converting the loans to grants. The Paycheck Protection Program does not explicitly include houses of worship or clergy members among eligible entities, but if they are deemed eligible for loan forgiveness, the rules and guidance must include clear constitutional limitations: taxpayer dollars cannot fund religious activities, including clergy salaries.

We understand that in these unprecedented and difficult times, many people and institutions, including houses of worship, are facing grave human and financial challenges. We also know many people look to their faith for comfort and guidance and that houses of worship play an important role in their communities. But even in the most difficult of times, we must protect everyone's religious freedom and adhere to longstanding First Amendment principles.

The Establishment Clause of the First Amendment Requires Limitations on Government Funding of Religious Activities

A fundamental First Amendment principle is that taxpayer funds may not be used to support religious activities.[1] This is true even when the funding is allocated evenhandedly among religious and secular institutions through neutral selection criteria.[2] This prohibition is most clear when the money would fund the salaries of clergy and other faith leaders who lead worship and engage in other explicitly religious activities. The Supreme Court has explained that the public's "indignation" toward using government funds to pay ministers was what led to the adoption of the Establishment Clause.[3] In fact, Thomas Jefferson's Virginia *Bill for Establishing Religious Freedom* (on which the Establishment Clause is based), was a direct response to efforts to enact a tax to pay ministers and religious teachers.[4]

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[1] *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 840, 857 (2000) (controlling concurring opinion of O'Connor, J.).
[2] *Id.* at 837-42.
[3] *See Everson v. Board of Education*, 330 U.S. 1, 11 (1947).
[4] *See Locke v. Davey*, 540 U.S. 712, 722 n.6 (2004).

Contrary to the claims of some, the Supreme Court case *Trinity Lutheran v. Comer*[5] does not require or even allow such funding. *Trinity Lutheran* says that the government cannot deny a religious entity a grant "solely because of its religious character."[6] But the government can—and sometimes must—refuse to fund a religious organization because of what it proposes to do with the funds.[7] Accordingly, the Court reiterated its earlier ruling in *Locke v. Davey*, which held that a state rule prohibiting the use of state scholarship funds to pursue theology degrees did not violate the Free Exercise Clause.[8] The *Trinity* Court explained that in *Locke*, 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."[9] In fact, *Trinity* noted that it was the governmental "interest in not using taxpayer funding to pay for the training of clergy" that "lay at the historic core of the Religion Clauses."[10]

When forgiving loans under the CARES Act, the government cannot exclude houses of worship from permissible, secular funding because of what they are, but it must prohibit religious uses of the funds.

Prohibitions on Government Funding Protect Religious Freedom, Including for Houses of Worship

Houses of worship and members of the clergy are unique in our country and our Constitution. They are accorded special protections—exemptions, accommodations, and tax deductions. Constitutional limitations on government funding for houses of worship and clergy is also a special protection—these limitations protect the conscience of every taxpayer, safeguard the autonomy of religious institutions and leaders, and provide an equal playing field for all religions by ensuring the government does not play favorites among different faiths and denominations.

When houses of worship accept government funds, they run the risk of being mired in disruptive inquiries into finances and personnel decisions, battles over regulation and accountability, and political debates. This would not benefit religious institutions or the government. Houses of worship will have to abide by the strings that come with government funds. For example, the CARES Act includes important accountability measures that will require organizations applying for loan forgiveness to provide extensive documentation.

Congress, Past Administrations, and the Trump Administration Have Recognized that the Government Cannot Fund Religious Activities

Existing federal statutes, regulations, and policies include numerous safeguards to ensure public funds do not support religious activity. In fact, Section 18004 of the CARES Act bars

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[5] 137 S. Ct. 2012 (2017).
[6] *Id.* at 2024.
[7] *Id.* at 2023 (distinguishing *Locke*).
[8] *Locke*, 540 U.S. at 719.
[9] *Trinity*, 137 S. Ct. at 2023. In 2019, the Department of Justice Office of Legal Counsel explained this distinction: "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." Mem. Op. for the Acting General Counsel, Dept. of Ed., Religious Restrictions on Capital Financing for Historically Black Colleges and Universities at 6 (Aug. 15, 2019), *available at* https://bit.ly/33Wa8QW.
[10] *Trinity Lutheran v. Comer*, 137 S. Ct. 2012, 2023 (2017); s*ee also Locke*, 540 U.S. at 722-23.

"capital outlays associated with facilities related to . . . sectarian instruction, or religious worship." Other examples include:

- A national service position under the National Service Trust program is barred from "[e]ngaging in religious instruction, conducting worship services."[11]
- The Substance Abuse and Mental Health Services Act states, "No funds provided under a designated program shall be expended for sectarian worship, instruction, or proselytization."[12]
- The Institutional Aid program that promotes equal opportunity in higher education says funds "may not be used for…any religious worship or sectarian activity."[13]

The Trump Administration has also recognized the constitutional principle that government should not fund religious activities.[14] For example:

- In January 2020, eight federal agencies proposed regulations for government partnerships with faith-based and other community organizations. The proposed rules prohibit the use of direct funds for "explicitly religious activities (including worship, religious instruction, or proselytization)."[15]
- A July 2019 Department of Education rule on the Elementary and Secondary Education Act's Title I Equitable Services affirms that funded services must be "secular, neutral, and non-ideological."[16]
- In May 2017, President Trump signed an executive order instructing the Attorney General to "issue guidance interpreting religious liberty protections in federal law" in order to "guide all agencies in complying with relevant Federal law."[17] The Department of Justice issued the guidance in October explaining that religious institutions may participate in government aid programs when the aid is not used for "explicitly religious activities such as worship or proselytization."[18]

The Loan Forgiveness Program Should Incorporate Fundamental Religious Freedom Protections

As you develop rules and guidance for the loan forgiveness program, we urge you to honor the federal government's longstanding commitment to this principle. Any guidance should continue to ensure that funds are not used to support explicitly religious activities, such as payroll costs for clergy.

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[11] 42 U.S.C § 12584a.
[12] 42 U.S.C. §290kk-2.
[13] 20 U.S.C. §1068e.
[14] Although we disagree with significant portions of these Trump Administration policies and believe they are constitutionally flawed, they do reflect the appropriate limits on use of funds for explicitly religious activities.
[15] *E.g.*, Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2929 (to be codified at 29 C.F.R. pt. 2).
[16] Title I-Improving the Academic Achievement of the Disadvantaged and General Provisions; Technical Amendments, 84 Fed. Reg. 31,660, 31,665 (July 2, 2019).
[17] Presidential Executive Order Promoting Free Speech and Religious Liberty, Exec. Order 13,798, 82 Fed. Reg. 21,675 (May 9, 2017).
[18] U.S. Dep't of Justice, Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668 (Oct. 26, 2017), *available at* https://bit.ly/2xtbG3H.

Although it may not seem easy in times like these to tell those seeking aid that certain costs are not eligible for loan forgiveness, the bar on the government funding of religious activities is an important limitation that exists to protect religious freedom for all.

Sincerely,

African American Ministers Leadership Council
Americans United for Separation of Church and State
Bend the Arc: Jewish Action
Interfaith Alliance
National Council of Jewish Women
People For the American Way