

FREEDOM FROM RELIGION *foundation*

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May 15, 2020

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

Re: Comment on Interim Final Rules

Docket Nos.: SBA-2020-0019

SBA-2020-0015

RINs: 3245-AH35

3245-AH34

Dear Director Carranza:

We are writing on behalf of the Freedom From Religion Foundation, and our members in all 50 states, in response to the request for public comments regarding proposed rulemaking that allows a 12-figure transfer of wealth from the American taxpayers to churches and other houses of worship, in violation of one of this country's founding principles.

FFRF is a national nonprofit organization with more than 32,000 members nationwide. Our purposes are to protect the constitutional principle of separation between state and church, and to educate the public on matters relating to nontheism. Our members object to being forced to support clergy and houses of worship. **The SBA's proposed rules to implement the CARES Act and Paycheck Protection Program amount to a mandatory tithe on every citizen.** The government's coercive taxing power should not be wielded to oblige Muslims to bankroll temples, to coerce Jews to subsidize Christian and Catholic churches, to force Christians to fund mosques, or to compel the nonreligious to support any of the above.

Estimates vary, but *hundreds of billions of taxpayer dollars* could flow to churches¹ through the PPP with the rules SBA has implemented. *Christianity Today* estimates that churches "could easily capture one third of the entire \$350 billion allocation."² Adding in the \$310B

¹ Hereinafter, "churches" means any house of worship or faith-based organization or organization principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whatever the setting.

² Jon Costas, "Here's Why You Shouldn't Take the CARES Act: The Church and the Payroll Protection Program," [Christianity Today](#) (April 14, 2020).

from PPP Round 2, that means **churches could receive \$220 billion from American taxpayers**, every penny of which they can use for sectarian purposes.

According to reports, between 12,000 and 13,000 of the 17,000 U.S. Catholic churches applied for PPP loans and 9,000 received them.³ The Vatican has its own bank, country, priceless collection of art, and more, but **Catholic churches received \$1.5 billion from American taxpayers**.⁴ That's public money flowing to an organization that has institutionalized the rape and abuse of children, covered up those crimes, and done all it can to prevent victims from seeking or receiving justice.⁵

There are at least four major flaws in the interim final rules that SBA has proposed.

1. **Giving taxpayer funds to houses of worship violates the First Amendment.**

One of this country's first religious freedom laws, the Virginia Statute for Religious Freedom, warned that taxing citizens and giving the money to churches is "sinful and tyrannical."⁶ Written by Thomas Jefferson and shepherded through the Virginia legislature by James Madison, the law is admirably clear:

To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern ...

The operative language of the statute is adamant: "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." The right to be free from that

³ Christina Capatides, "More than 12,000 Catholic churches in the U.S. applied for PPP loans - and 9,000 got them," CBS News, May 7, 2020. [Available here](#).

⁴ The average Round 1 loan was \$206,000 and 6,000 Catholic Churches received Round 1 loans for a total of \$1.236B. Round 2 is ongoing and more churches will no doubt receive money, but the average Round 2 loan through May 8 was \$73,000 and 3,000 Catholic Churches received Round 2 loans for a total of \$219M. **That's a grand total, so far, of \$1,455,000,000.** [Round 1 SBA numbers available here](#). [Round 2 SBA numbers available here](#).

⁵ To take but one example from one state, see the 1,356-page report from the Pennsylvania grand jury report: 40th Statewide Investigating Grand Jury: Final Redacted Report and Responses," (December 16, 2019), available at <http://www.pacourts.us/assets/files/setting-6283/file-8307.pdf?cb=30129a>. The report begins, "We, the members of this grand jury, need you to hear this. We know some of you have heard some of it before. There have been other reports about child sex abuse within the Catholic Church. But never on this scale. For many of us, those earlier stories happened someplace else, someplace away. **Now we know the truth: it happened everywhere.**"

⁶ "A Bill for Establishing Religious Freedom, 18 June 1779," Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>. Original source: *The Papers of Thomas Jefferson*, vol. 2, 1777 - 18 June 1779, ed. Julian P. Boyd. Princeton: Princeton University Press, 1950, pp. 545-553.

compulsion is the bedrock of religious liberty. This is one of America's founding principles. That law provided the intellectual and moral foundation for the First Amendment and our godless and secular Constitution.

Congress may not spend public money to build or maintain churches, to pay salaries for priests and preachers, or to fund religious ministries. Doing so is unconstitutional. Doing so forces all citizens, regardless of their religion or lack thereof, to support religions that are not their own.

James Madison, the primary drafter and architect of the U.S. Constitution and Bill of Rights, argued that if churches or religious seminaries receive even "threepence" from the public treasury, then the government is violating the religious liberty of citizens.⁷ SBA's regulations already recognize this fundamental truth. For instance, under normal circumstances, organizations "principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting" are not eligible for any SBA funds.⁸ These rules are in place because the Constitution demands them, because it is tyrannical to force citizens to financially support a religion that is not their own.

The CARES Act made PPP funding available to "any business concern, private nonprofit organization, or public nonprofit organization which employs not more 500 employees."⁹ Other than extending funding to nonprofit organizations, the CARES Act did not amend any regulatory restrictions on SBA small business loans.¹⁰ Nor can a statute be read as permitting the SBA to violate a core constitutional tenet of this republic. In other words, even if legislators intended CARES money to flow to churches, the act does not require it and nor could it require unconstitutional disbursements.

Neither the Religious Freedom Restoration Act nor Supreme Court's decision in *Trinity Lutheran v. Comer* permit the SBA to depart from this founding principle. If the SBA interim rules stand, the PPP program will pay clergy to preach, indoctrinate, instruct, and teach their religion. In *Trinity Lutheran*, the Supreme Court explained that the program at issue did not preach religion, but rather was meant to prevent injury to children.¹¹ The Court did

⁷ James Madison, "Memorial and Remonstrance against Religious Assessments, [ca. 20 June] 1785," Founders Online, National Archives, <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

⁸ Including small business loans, disaster loans, or immediate disaster assistance. *See, e.g.*, 13 CFR §§ 120.11(k); 123.301(g); 123.702(b)(6).

⁹ CARES Act, Sec. 1102(b)(1).

¹⁰ 13 CFR § 120.110.

¹¹ *Trinity Lutheran v. Comer*, 137 S. Ct. 2012, 2024, n3 (2017) ("This case involves express discrimination based on religious identity with respect to playground resurfacing.")

not say that religious freedom requires the government to pay clergy salaries, nor could it. Instead, the Court distinguished and rejected government “funding for an essentially religious endeavor akin to a religious calling as well as an academic pursuit and opposition to such funding to support church leaders lay at the historic core of the Religion Clauses.”¹²

Put simply, American taxpayers cannot be forced to fund churches and clergy, even in a pandemic.

2. **Where taxpayer funds go, there must be accountability and transparency.**
Churches that accept this money must file financial disclosures.

Unlike other 501(c)(3)s, churches file no financial information. They are financial black holes. As part of their public trust, all other 501(c)(3) nonprofits are required to file an annual report, the Form 990, with the IRS that details specific financial information, tracking every penny donated and spent.

Public trust requires public transparency. Without it, the public cannot verify that nonprofits are honoring its trust and that it is not being abused or exploited.

Because they entirely lack financial transparency and accountability, churches are already rife with fraud and abuse.¹³ Yet, according to the SBA’s guidance, churches qualify for CARES Act funds *even if they’ve never registered as a church with the IRS*.¹⁴ Receiving these taxpayer funds could be literally both the first and last time the government ever hears of such churches. Those who feed at the public trough must be accountable to that public.

There are no safeguards built into the CARES Act or into SBA’s rules. It is irresponsible to provide financial support to any organization without requiring transparent accounting. **Taxpayer funds should only be available to nonprofits that file financial information with the IRS**, even if not required to do so by federal law. It would shock the public to know that the SBA is handing out taxpayer money to houses of worship, which have no accountability.

¹² *Id.* at 2023 (internal quotations, citations, and ellipses omitted).

¹³ See, e.g., Andrew L. Seidel, “Clergy Shouldn’t Be Able to Steal Funds for Grindr or Dolls,” *Rewire News*, (Aug. 25, 2019) [available here](#); Seidel, “Churches are financial black holes. Here’s what Congress can do about it,” *ThinkProgress* (Dec. 20, 2018) [available here](#).

¹⁴ SBA, Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program and the Economic Injury Disaster Loan Program (April 3, 2020), [available here](#). (hereinafter “SBA FBO FAQ”).

3. Our money should not support their discrimination.

Current SBA regulations require loan recipients “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.”¹⁵ 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.¹⁶

The CARES Act included strong protections for civil rights and specifically prohibited federal agencies from waiving the requirements of such laws in many contexts.¹⁷ Nevertheless, SBA’s IFR fails to note these applicable employment nondiscrimination protections and instead focuses on “constitutional, statutory, and regulatory protections for religious liberty.” The SBA also issued guidance that casts aside these protections, stating 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.”¹⁸ This guidance incorrectly portrays the religious exemption as significantly broader than SBA’s 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.”¹⁹

Religion is not a license to discriminate. The SBA cannot declare otherwise nor can it make American taxpayers complicit by funding in discrimination in the name of god.

4. There is no valid religious freedom rationale for waiving affiliation rules for churches and doing so will lead to double-dipping.

Churches are able to exempt themselves from affiliation rules under this IFR by simply claiming religious freedom. This amounts to a blanket or automatic exemption. Theoretically, a Catholic school could get a loan, as could the church that runs the school. So the school could get double counted when calculating the loans. Then the local parish could claim both the school and the church in its loan application, triple counting the school and double counting the church. The diocese could get a chunk of funding that includes that parish, the church, and the school. So might the archdiocese, and on up. All each has to do is

¹⁵ 12 CFR 113.1(a).

¹⁶ 13 CFR 113.3(a).

¹⁷ See, e.g., CARES Act, §§ 4221(g) and 4511(b)(2).

¹⁸ SBA FBO FAQ.

¹⁹ 13 CFR 113.3-1(h).

claim that it is exempt from the affiliation rules and it is. This doesn't require any deliberate fraud, the opaque nature of church governance could lead to double- and triple-dipping.

SBA justifies this exemption by relying on the Religious Freedom Restoration Act (RFRA), but its interpretation is flawed. RFRA does not give the SBA the authority to adjudicate anticipatory future claims and create blanket exemptions. Rather, RFRA requires a "careful, individualized, and searching review,"²⁰ based on an actual assertion that a sincerely held religious belief has been substantially burdened.²¹ Blanket exemptions to rules, by their nature, are not individualized reviews. Moreover, SBA cannot assume this constitutional safeguard is a substantial burden on applicants' religious exercise. Nor would requiring applicants to prove or disprove their affiliations be any burden or barrier.

The larger issue is that churches and other religious organizations should not be exempt from this rule at all. Instead, they should only qualify if they could show that they are financially independent of their parent entity for purposes of payroll. The final rule must require that churches either qualify under the normal affiliation rules, or open their financial records to show that local congregants pay for wages rather than a larger entity.

In conclusion, these rules injure taxpayer freedom of conscience and raid taxpayer pocketbooks for an unprecedented and unconstitutional subsidy of pervasively sectarian houses of worship. This give-away of taxpayer monies to houses of worship must be disallowed, to honor and safeguard America's core principle of separation between religion and government.

²⁰ *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 427 (9th Cir, 2019).

²¹ 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).