INTERFAITH ALLIANCE
PROTECTING FAITH AND FREEDOM

March 11, 2021

The Honorable Tami Perriello
Acting Administrator
Small Business Administration
409 3rd Street, SW
Washington, DC 20416
Via Email: tami.perriello@sba.gov

Dear Administrator Perriello:

Thank you for your service as acting administrator during this time of transition. Now more than ever, the Small Business Administration requires strong leadership to help small businesses struggling as a result of the COVID-19 pandemic. We recognize the need to act quickly in implementing the programs created and funded by the American Rescue Plan so that it can offer much-needed assistance to those affected. To this end, we write to highlight our ongoing concerns regarding 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 Coronavirus Aid, Relief, and Economic Security (CARES) Act established a loan forgiveness process, funded by the government, up to the full amount of those loans, essentially converting the loans to grants. Religious institutions – even those who do not provide secular social services – have been deemed eligible for second draw loans through the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act. Even so, SBA rules and guidance must make the constitutional limitations of that funding clear: taxpayer dollars cannot fund religious activities, including clergy salaries.

In these unprecedented times, religious and secular entities face grave challenges. Members of the public have asked that financial relief is extended to religious institutions despite the serious constitutional implications. We recognize that these circumstances have forced public officials to make difficult choices that impact both our democracy and the people they serve. But it is precisely those who serve in positions of authority that can hold fast to our constitutional principles. Preserving the separation of religion and government, even in times of hardship, ultimately strengthens our democratic institutions over time. We therefore respectfully urge the SBA to honor longstanding First Amendment principles in administering PPP relief funds.

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 that would fund religious teachers.[4]

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 administered through the Paycheck Protection Program, the government cannot exclude houses of worship from eligibility because of who they are. However, as in *Locke*, consideration must be given to the use of federal funds for religious purposes. Adopting a rigorous standard that preserves the separation of religion and government is consistent with Supreme Court precedent, prohibiting taxpayer funding of religious activities. The task before the SBA is to honor this most sacred constitutional principle.

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

Houses of worship and members of the clergy receive unique treatment under federal law, including special protections, accommodations, and tax deductions. They draw their strength from the communities they serve, including financial support for religious costs like the rabbi's salary or new hymnals. These are community decisions that belong to members, not to the government.

But 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. Simply put, with public money comes public oversight.

By focusing taxpayer funds on services that serve the public - without privileging a particular faith or religion as a whole - federal agencies protect the conscience of every taxpayer, safeguard the autonomy of religious institutions and leaders, and provide an equal playing field for all. The SBA has a critical role to play in protecting houses of worship from government intrusion, as a result of accepting and administering taxpayer funds, while simultaneously protecting the agency from overstepping the bounds of the Establishment Clause.

Congress and the 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, current SBA regulations state that businesses "principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs" are not eligible for SBA business loans.[11] Other examples include:

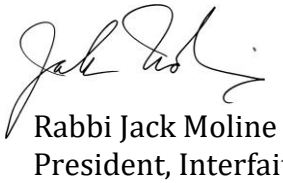
- A national service position under the National Service Trust program is barred from "[e]ngaging in religious instruction, conducting worship services."[12]
- The Substance Abuse and Mental Health Services Act states, "No funds provided under a designated program shall be expended for sectarian worship, instruction, or proselytization."[13]
- The Institutional Aid program that promotes equal opportunity in higher education says funds "may not be used for…any religious worship or sectarian activity."[14]
- Section 18004 of the CARES Act bars "capital outlays associated with facilities related to...sectarian instruction, or religious worship.

The Loan Forgiveness Program Should Incorporate Fundamental Religious Freedom Protections

We applaud the efforts of the SBA to provide support to small businesses suffering in this unprecedented time. As we shift into a new phase of pandemic response and recovery, further guidance is needed to ensure vulnerable small businesses get the aid they need.

Though religious institutions, including houses of worship, may be eligible for second draw PPP loans, we urge you to honor existing federal regulations that limit the use of taxpayer funds by religiously affiliated entities. Any rulemaking or guidance should ensure that PPP funds are not used to advance religious activities in violation of the Establishment Clause. By restricting the use of PPP funds for religious purposes, the SBA can open up much-needed funding for these hard-hit small businesses while honoring longstanding constitutional protections.

Respectfully,



Rabbi Jack Moline
President, Interfaith Alliance

[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).
[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.
[11] 13 C.F.R. § 120.110(k).
[12] 42 U.S.C § 12584a.
[13] 42 U.S.C. §290kk-2.
[14] 20 U.S.C. §1068e.