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U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

Subj: Ensuring Equal Treatment for Faith-Based Organizations in SBA's Loan and Disaster Assistance Programs, Docket No. SBA-2020-0057, RIN 3245-AH60

Dear Ms. Mills:

On behalf of the United States Conference of Catholic Bishops (USCCB), we respectfully submit the following comments on the Small Business Administration's (SBA) proposed regulations in the above-captioned matter, published at 86 Fed. Reg. 5036 (Jan. 19, 2021).

The proposed regulations would eliminate five regulatory provisions that render certain faith-based organizations ineligible to participate in certain SBA business loan and disaster assistance programs because of their religious status.* We agree with the SBA that these provisions violate the Free Exercise Clause of the First Amendment and should be eliminated.

*Four of the provisions that the SBA proposes to eliminate categorically disqualify "[b]usinesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting." 86 Fed. Reg. at 5038-39. A fifth provision has nearly identical language. *Id*. at 5039.

The SBA has provided a clear and well-reasoned rationale for the proposed changes. As the SBA correctly notes, the regulatory provisions at issue "violate the Free Exercise Clause of the First Amendment" because they "exclude a class of potential participants solely based on their religious status." 86 Fed. Reg. at 5036, citing *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), and *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017). The Free Exercise Clause protects religious organizations "against unequal treatment" as well as "laws that impose special disabilities on the basis of religious status." *Espinoza*, 140 S. Ct. at 2254, quoting *Trinity Lutheran*, 137 S. Ct. at 2021. The disqualification of otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Espinoza* at 2255, quoting *Trinity Lutheran* at 2021. Though some commentators have opposed the proposed regulations on grounds of church-state separation, the Supreme Court has made clear that the interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause … is limited by the Free Exercise Clause" and is therefore insufficient to satisfy strict scrutiny. *Espinoza* at 2260, quoting *Trinity Lutheran* at 2024, and *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

Some commenters have also objected to the use of government funds for religious purposes, but that misses the point. As the SBA observes, "none of [the] exclusions concern religious *uses* of business loan or disaster assistance funds," but instead "prohibit[] an otherwise-eligible applicant from receiving such funds solely on account of its religious activities, *even if it uses the funds for secular purposes*." 58 Fed. Reg. at 5038 (emphasis added). The exclusions thus use an organization's religious activities not as a measure of their use of federal funds but as a proxy for religious status. The SBA continues:

> [A]ny interest in prohibiting religious uses of funds cannot justify such a sweeping status-based exclusion. As the Court held in *Espinoza*, "[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses." 140 S. Ct. at 2256. Moreover, SBA cannot identify any other possible interest underlying the subject provisions, much less one that would pass muster under the "'strictest scrutiny,'" *id*. at 2257 (quoting *Trinity Lutheran*, 137 S. Ct. at 2019), that the Court applies to such religious-status-based exclusions.

We agree. Reduced to its simplest terms, the government may not, consistent with the Free Exercise Clause, declare an otherwise-eligible recipient ineligible for some generally-available benefit simply because of the recipient's religious character. The provisions targeted for rescission do precisely that. The proposed elimination of these constitutionally problematic exclusions in the SBA's own regulations, the SBA correctly notes, will "ensure in [the SBA's] business loan and disaster assistance programs that equal treatment for faith-based organizations that the Constitution requires." 86 Fed. Reg. at 5036.

For these reasons, we urge the SBA to adopt the proposed regulations. Thank you for the opportunity to comment.

Respectfully submitted,

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