



The Honorable Christopher Smith
United States House of Representatives
2373 Rayburn House Office Building
Washington, D.C. 20515

RE: FEMA's discriminatory treatment of houses of worship

Dear Congressman Smith,

You and others have asked us to examine the application of the Establishment Clause of the United States Constitution to the disbursement of federal disaster relief funds to houses of worship damaged in severe weather events such as Superstorm Sandy. In particular, you would like us to examine (1) whether the Federal Emergency Management Agency's practice of not funding repairs to houses of worship is justified by the Establishment Clause grounds, and (2) whether your proposed act preventing FEMA's practice would give rise to Establishment Clause problems.

The answer to both questions is no. First, not only does the Establishment Clause provide no support for FEMA's practice of discriminating against houses of worship; that practice itself runs afoul of the First Amendment by discriminating against religious institutions. Second, the bill you have proposed will not lead to Establishment Clause violations because no Act of Congress can purport to repeal the First Amendment. Arguments to the contrary are constitutional scaremongering.

Background

Superstorm Sandy devastated many of the Northeast's coastal cities. The federal government is expected to spend about \$60 billion to help restore

these hard-hit communities.¹ Yet FEMA has categorically denied foundational elements of those communities—synagogues, churches, mosques, and other houses of worship—access to this otherwise generally-available relief funding. A broad range of nonprofit organizations, including zoos and museums, qualify for disaster-relief grants administered by FEMA.² But when religious organizations asked FEMA for the same assistance it provides many other nonprofits, FEMA told them that it considered them ineligible for the grants.³ This leaves houses of worship like All Saints Church of Bay Head, New Jersey, which was built by shipbuilders in 1889 and now has a sinkhole for a sanctuary, without access to the help that is available to the neighborhood zoo.⁴

Despite acknowledging that religious facilities can meet the threshold aid requirement that the facility be “used for a variety of community activities,” FEMA considers “churches, synagogues, temples, mosques, and other centers of religious worship” categorically ineligible simply because of their religious use.⁵ Nor is this a recent problem: the George W. Bush Administration took the same stance after Hurricane Katrina,⁶ based on a federal regulation

¹See U.S. Senate Press Release, *Senate Passes Disaster Assistance Supplemental*, <http://www.appropriations.senate.gov/news.cfm?method=news.view&id=809a3071-46f6-40de-8864-39423d85da58> (last visited Feb. 11, 2013); see also <http://www.gpo.gov/fdsys/pkg/BILLS-113hr152rds/pdf/BILLS-113hr152rds.pdf> (text of bill) (last visited Feb. 11, 2013); see also Avi Schick, *Separation of Church and State, Disaster Edition*, Wall Street Journal (Jan. 24, 2013), <http://online.wsj.com/article/SB10001424127887324039504578261581899619590.html> (last visited Feb. 11, 2013).

²See 44 C.F.R. § 206.221(e)(7) (listing “museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities,[and] shelter workshops” among those nonprofits that may receive FEMA grants).

³See Sharon Otterman, *Houses of Worship Seeking FEMA Grants Face Constitutional Barrier*, N.Y. Times (Jan. 3, 2013), http://www.nytimes.com/2013/01/04/nyregion/houses-of-worship-seeking-fema-grants-face-constitutional-barrier.html?_r=1& (last visited Feb. 11, 2013).

⁴See Sharon Otterman, *For Congregational Leaders, Hurricane is Taking a Toll*, N.Y. Times (Nov. 12, 2012), <http://www.nytimes.com/2012/11/13/nyregion/regional-places-of-worship-look-to-rebuild.html> (last visited Feb. 12, 2013).

⁵See FEMA Publication 9521.1(VII)(3)(1) (identifying “religious facilities” as ineligible); see also 44 C.F.R. § 206.221(e)(1) (specifically excluding religious buildings from the types of educational facilities that are eligible).

⁶See Alan Cooperman, *Parochial Schools to Get U.S. Funds for Rebuilding*, Washington Post (Oct. 19, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801622.html> (last visited Feb. 12, 2013) (quoting a

promulgated in 1990 by the George H.W. Bush Administration.⁷ (As noted below, though, the federal government has often departed from this stance to assist houses of worship through neutral and generally available funding programs.)

Analysis

FEMA’s discriminatory policy. To justify its discrimination against houses of worship, FEMA has cited arguments asserting that the Establishment Clause of the United States Constitution prevents houses of worship from having equal access to FEMA disaster assistance grants.⁸ Others make the same claim. For instance, Barry Lynn of Americans United for Separation of Church and State has stated that, “even after the devastation of [Superstorm] Sandy,” the federal government cannot provide relief to destroyed synagogues, churches, and mosques.⁹

But this argument is simply not true. When Lynn recently made a similar argument in an amicus brief to the U.S. Court of Appeals for the Sixth Circuit, the court—in an opinion authored by Judge Sutton—flatly and unanimously rejected the argument.¹⁰ The court noted that long-standing Supreme Court precedent allowed “churches, synagogues, and mosques” to receive “generally available benefits” like “police and fire-protection services” and access to “sewers and sidewalks.”¹¹ The court reasoned that “[i]f a city may save the exterior of a church from a fire,” it could certainly provide equal

Bush Administration official as saying that churches, mosques, and synagogues were not eligible for FEMA aid).

⁷See 55 Fed. Reg. 2308 (proposing 44 C.F.R. § 206.221(a), which included the language banning equal access for religious groups; it was moved by a subsequent amendment to its current placement at subsection (e)).

⁸See FEMA Feb. 12, 2013 Statement on the Federal Disaster Assistance Nonprofit Fairness Act of 2013, at 1 (citing the ACLU’s argument that equal access to generally available disaster relief funding violates the Establishment Clause).

⁹See Margot Adler, *Federal Aid for Religious Institutions in Murky Waters After Sandy*, NPR (Feb. 8, 2013), <http://www.npr.org/2013/02/08/171415610/federal-aid-for-religious-institutions-in-murky-waters-after-sandy> (last visited Feb. 8, 2013).

¹⁰See *American Atheists, Inc. v. City of Detroit Downtown Development Auth.*, 567 F.3d 278 (6th Cir. 2009).

¹¹*Id.*, 567 F.3d at 291.

access to government funds that “help that same church with peeling paint.”¹²

That conclusion is all the more true here, where the problem the government seeks to remedy is not peeling paint but complete devastation. Notably, the Sixth Circuit supported its conclusion by explicitly noting the widespread legal acceptance “*of government programs designed to provide one-time emergency assistance through FEMA . . . to churches devastated by natural disasters.*”¹³

Indeed, the federal government—including FEMA—has repeatedly given disaster relief to religious groups in the past. For instance, after Seattle Hebrew Academy was damaged by a major earthquake in 2002, FEMA awarded a disaster relief grant for repair. Before it did so, FEMA asked the Department of Justice’s Office of Legal Counsel whether that was constitutionally permissible. OLC’s detailed response concluded that “a FEMA disaster grant is analogous to the sort of aid that qualifies as ‘general government services’ approved by the [Supreme] Court” for provision to houses of worship.¹⁴ The OLC letter pointed out that, far from banning equal access to government funding, the First Amendment bans the government from “deny[ing] religious groups equal access to *the government’s own property*,” and “require[s] equal *funding*” of religious expression.¹⁵ The letter ended by noting that an argument could be made that “excluding religious organizations from disaster assistance made available to similarly situated secular institutions would violate the Free Exercise Clause and the Free Speech Clause.”¹⁶

OLC has likewise approved, and the federal government has permitted, the participation of houses of worship in the Save America’s Treasures program, which authorizes matching grants for preservation of properties

¹²*Id.* at 292.

¹³*Id.* at 299-300 (emphasis added).

¹⁴*See* Published Memorandum Opinion for the General Counsel Federal Emergency Management Agency, *Re: Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy* (Sept. 25, 2002), <http://www.usdoj.gov/olc/FEMAAssistance.htm> (last visited Feb. 12, 2013).

¹⁵*Id.* (citing a long list of Supreme Court decisions, including *Widmar v. Vincent*, 454 U.S. 263, 265 (1981), and *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819 (1995)).

¹⁶*Id.* (citing, among others, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)).

with historical significance.¹⁷ For instance, the OLC approved a National Park Service grant to restore Boston's Old North Church—a church which is currently used by an active Episcopal congregation and was once used to warn Paul Revere of British military plans.¹⁸ Similar grants have been provided for Atlanta's Ebenezer Baptist Church, where Martin Luther King, Jr., preached, the historic Franciscan missions in California, and Touro Synagogue in Rhode Island. All of those houses of worship needed repairs for damage caused by the ravages of time—why would damage caused by the ravages of Sandy be any different?

Several other federal statutes permit federal funding or support for houses of worship that have been damaged or destroyed.¹⁹ Indeed, after the Oklahoma City bombing, Congress specifically authorized FEMA and other agencies to provide disaster relief to damaged churches on the same basis that any other private nonprofit facilities may receive such aid.²⁰

Finally, FEMA's policy of discriminating against houses of worship is itself problematic under the Establishment Clause because it denies religious institutions access to a generally available benefit, solely because they are religious. The Supreme Court has repeatedly held that "[t]he First Amendment mandates governmental neutrality between religion and

¹⁷See <http://www.nps.gov/hps/treasures/> (last visited Feb. 8, 2013).

¹⁸See Published Memorandum Opinion for the Solicitor Department of the Interior, *Re: Authority of the Dept. of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such As the Old North Church* (April 30, 2003), <http://www.usdoj.gov/olc/OldNorthChurch.htm> (last visited Feb. 12, 2013) (concerning the church in which the famous "one if by land, two if by sea" lanterns prompted the midnight ride of Paul Revere).

¹⁹See, e.g., Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121-5206 (generally authorizing federal funding to help repair properties that are damaged during major disasters); see also Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392, at § 4 (authorizing guaranteed loans to nonprofit tax-exempt entities, including churches, that have been damaged as a result of acts of arson or terrorism); and California Missions Preservation Act of 2004, Pub. L. No. 108-420, 118 Stat. 2372 (authorizing grants for the purpose of restoring the Spanish colonial and mission-era churches in California, many of which are currently used for religious services).

²⁰See 141 Cong. Rec. H6607, H6621; see also *id.* at H6635 (explaining that the intent of the bill was to ensure that "to assist downtown churches, one of which was immediately across the street from the blast, so that they too, to the same extent as any other nonprofit group, might receive the assistance to rebuild," and noting that the churches had "rendered emergency assistance and even provided facilities for the morgue that was necessary").

nonreligion.”²¹ Singling out religious institutions for special disfavor is not neutral. Similarly, FEMA’s approach also creates a potential conflict with federal civil rights law, specifically the Religious Freedom Restoration Act, which forbids government imposition of substantial burdens on religious exercise.²² As courts have frequently held, denial of a generally available benefit to religious persons because they are religious constitutes a substantial burden on the exercise of religion.²³

In short, FEMA is wrong to claim that the Establishment Clause—which combats discrimination—justifies its decision to discriminate. It is instead FEMA’s discrimination policy that is more likely to trigger scrutiny under the First Amendment and related civil rights laws.

The proposed bill. For the same reasons, it is our opinion that your proposed bill will not raise Establishment Clause problems. Instead, it will alleviate them by offering a way to stop discrimination against houses of worship in federal disaster relief funding.

On the night before your bill was set for a vote, FEMA issued a statement in opposition to the bill. As an initial matter, much of FEMA’s three-page statement does nothing more than lay out existing law and reiterate what we’ve established above: Congress has made similar regulatory fixes before and the OLC has provided legal opinions supporting religious organizations’ equal access to generally available government funds.

FEMA really makes only two complaints against the proposed bill. First, it warns that entities like the ACLU have threatened to sue unless it keeps discriminating against religious organizations. But, as explained above, such threats are meritless and will be met in court by the Becket Fund and other organizations that are happy to defend equal access for houses of worship that have been devastated by natural disasters. Further, it is imprudent to allow such threats to take federal legislation hostage, as giving in to them will only encourage future threats.²⁴ Finally, concerns about litigation might make some sense if FEMA were run by a tiny village government with a

²¹ *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968).

²² 42 U.S.C. § 2000bb-1.

²³ See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (denying generally available benefits to religious person was a substantial burden on religious exercise); *Thomas v. Review Board*, 450 U.S. 707, 717–18 (1981) (same).

²⁴ This position is particularly imprudent since FEMA is likely to face litigation if it persists in discriminating against houses of worship.

small budget that might be intimidated by the prospect of litigating against the ACLU. But given the resources of the Department of Justice, this argument from fear of litigation makes no sense.

FEMA's second complaint is that the bill could require them to choose whether to fund "arks of the covenant [and] prayer books." But, as a factual matter, it appears FEMA is trying to manufacture this particular controversy in order to scare legislators. As Rabbi David Bauman of Temple Israel in Long Beach—which was flooded by up to 14 feet of storm-surge saltwater—explained, no one is asking the government to restore prayer books; they need help with basic structural repairs, just like other buildings in the neighborhood.²⁵ More importantly, the bill cannot repeal the Establishment Clause: FEMA will remain bound by the Constitution. Thus to the extent a religious organization requests funds that would result in a constitutional violation, FEMA will still be bound to turn them down. What the bill actually does is get rid of the artificial and discriminatory standard created by FEMA and replace it with the standard of neutrality required under the First Amendment.

In addition, to the extent that there is any problem it is one of FEMA's own making. As it admits in its statement of opposition, it is FEMA's own regulatory interpretations that would require it to pay for prayer books or other similar items. But neither of the regulations that FEMA cites as forcing it to make the apparently unpalatable choice appear to require any such decision.²⁶ And FEMA can always exercise its interpretive power to avoid a constitutional violation.

Again, no one is asking the government to buy prayer books or Torahs. Instead, synagogues, churches, and mosques are simply asking that they receive the same disaster relief as many other private nonprofits. Doing anything less would not live up to the neutrality required by the Establishment Clause—it would express a blatant hostility to religion that the Establishment Clause rejects.²⁷

²⁵See Adler, *supra* at n. 9.

²⁶See 44 C.F.R 206.201 and 206.221(h).

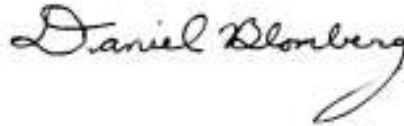
²⁷See, e.g., *American Atheists*, 567 F.3d at 292 (citing *Van Orden v. Perry*, 545 U.S. 677, 699-700 (2005) (Breyer, J., concurring in the judgment)).

Hon. Christopher Smith
February 12, 2013
Page 8

* * *

In conclusion, it is our opinion that FEMA cannot rely on the Establishment Clause to categorically ban houses of worship from competing for disaster relief funds on the same terms as other eligible nonprofits. Your proposed bill will not violate the Constitution but will instead protect it.

Very truly yours,

A handwritten signature in dark ink that reads "Daniel Blomberg". The signature is written in a cursive style with a long, sweeping underline.

Eric C. Rassbach
Daniel Blomberg
The Becket Fund for Religious Liberty
3000 K Street NW, Suite 220
Washington, D.C. 20007-5153
202-955-0095