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House of Representatives

Mr. SMITH of New Jersey.

I thank my good friend, the chair, for yielding. I thank him for his support and for Mr. Rahall. And I want to thank Gracie Meng for her cosponsorship and leadership on this important bill, and all the cosponsors, and to Eric Cantor and the leadership for scheduling it for a vote today. This is extremely important and very timely.

Madam Speaker, Superstorm Sandy inflicted unprecedented damage on communities in the Northeast, including my district in New Jersey. Congress and the President have responded by providing $60 billion in emergency and recovery aid.

Today's debate and vote, however, isn't at all about whether or how much funding Congress appropriates to mitigate the impact of Sandy. We've had that vote.

Rather, it's about those who are being unfairly left out and left behind. It's about those who help feed, comfort, clothe, and shelter tens of thousands of victims now being told they are ineligible for a FEMA grant.

It's unconscionable that foundational pillars of our communities damaged by Sandy--synagogues, churches, mosques, temples and other houses of worship--have been categorically denied access to these otherwise generally available relief funds.

Current FEMA policy is patently unfair, unjustified, and discriminatory and may even suggest hostility to religion. FEMA has a policy in place to aid nonprofit facilities damaged in the storm, but the agency has excluded houses of worship from their support. That is wrong, and it's time Congress ensures fundamental fairness for these essential private nonprofits.

The bipartisan Federal Disaster Assistance Nonprofit Fairness Act will ensure that houses of worship are eligible for Federal funds administered by FEMA.

Madam Speaker, it's worth noting here that FEMA's discriminatory policy of exclusion is not prescribed by any law. Nothing in the Stafford Act or any other law, including the Hurricane Sandy Disaster Relief Appropriations Act, precludes funds to repair and to replace and to restore houses of worship.

Indeed, the congressional precedent favors enacting H.R. 592, as there are several pertinent examples of public funding being allocated to houses of worship. For example, FEMA grants were explicitly authorized by Congress back in 1995 and provided to the churches damaged by the Oklahoma City terrorist attack, as my friend from West Virginia pointed out.

The Homeland Security Department and UASI provides funding to houses of worship for security upgrades. The Interior Department provides funding to grants for historically

significant properties, including active churches and active synagogues. And the SBA provides low interest loans--no hint at all by anyone that there's an Establishment Clause issue.

It's important to note that a controlling Justice Department Office of Legal Counsel memorandum explains in detail the legal principles that make H.R. 592 constitutional. In a 2002 written opinion, the Office of Legal Counsel concluded it was constitutional for Congress to provide disaster relief and reconstruction funds to a religious Jewish school, along with all sorts of other organizations, following a devastating earthquake. The same principles apply to protect religious organizations following a devastating hurricane.

As the Office of Legal Counsel memo concluded:

Provisions of disaster assistance to religious organizations cannot be materially distinguished from aid programs that are constitutional under longstanding Supreme Court precedent, establishing that religious institutions are fully entitled to receive generally available government benefits and services, such as fire and police protection.

The Supreme Court handed down its first modern Establishment Clause decision in the Everson v. Board of Education decision, which involved a program in my own home State of New Jersey. In that case, the Court held that religious institutions are entitled to receive ``general government services'' made available on the basis of neutral criteria. The Court held that the Establishment Clause does not bar, in that case, students attending religious schools from receiving generally available school busing services provided by the government.

As Nathan Diament, Executive Director of Public Policy for the Union of Orthodox Jewish Organizations of America, notes in his excellent legal analysis, which I will include in the *Record*:

Disaster relief is analogous to aid that qualifies as general government services approved by the Court in Everson.

Madam Speaker, the bill before us today simply makes clear and clarifies that Federal disaster relief includes religious entities, along with every other sort of entity.

As the Court later stated in Widmar v. Vincent:

The provision of benefits to so broad a spectrum of groups is an important index of secular, that is, constitutional effect.

As it stated more recently in Texas Monthly v. Bullock:

Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious group organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause.

Significantly, Madam Speaker, when three churches in Detroit received taxpayer-funded grants to repair and spruce up their buildings prior to the 2006 Super Bowl, American Atheists sued the City of Detroit and lost.

In a sweeping decision offered by Judge Sutton, the U.S. Court of Appeals for the Sixth Circuit, unanimously held that the direct assistance to the churches did not violate the Establishment Clause. Judge Sutton said, and I quote, in pertinent part:

Detroit sought to fix up its downtown, not to establish a religion. And as will generally be the case when a governmental program allocates generally available benefits on a neutral basis and without a hidden agenda, this program does not have the impermissible effect of advancing religion in general or any one faith in particular. By endorsing all qualifying applicants, the program has endorsed none of them, the Court

went on to say, and accordingly it has not run afoul of the Federal and State religious clauses ..... In the Establishment Clause context, that means evenhanded neutral laws generally, though not invariably, will be upheld. So long as the government benefit is neutral and generally applicable on its face, it presumptively will satisfy the Establishment Clause.

H.R. 592 exhibits no government preference for or against religion, or any particular religion, since it merely permits houses of worship to receive the same type of generally available assistance.

Again, this legislation permits houses of worship to receive the same type of generally available assistance in picking up the pieces after stunning devastation that many other similarly situated nonprofits receive. Thus, the bill not only passes the test of constitutionality, it passes the test of basic decency.

Indeed, to do otherwise would be to single out churches for adverse treatment, which is in itself constitutionally suspect.

The Supreme Court held, Madam Speaker, in Lukumi Babalu Aye v. City of Hialeah, that ``at a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs."

And in Employment Division v. Smith, the Court held that under the Free Exercise Clause, the State may not ``impose special disabilities on the basis of religious views or religious status."

To continue to single houses of worship out for discrimination does not express government neutrality; it expresses government hostility. And there's no place for government hostility toward religion under our Constitution…

…Mr. Barletta: Madam Speaker, I yield 4 minutes to the gentleman from New Jersey.

Mr. Smith of New Jersey: I thank my good friend for yielding, and I thank the gentlelady from Texas for her very strong and passionate remarks.

I especially again want to thank Congresswoman Meng for her excellent statement and her support and cosponsorship of this important bill.

Let me just say a couple of points to my colleagues. First of all, I will be submitting for the *Record* a very fine analysis by the Becket Fund for Religious Liberty, an outstanding public interest law firm that has done yeoman's work throughout the country on religious liberty.

It's a statement to us as Members of Congress by its leaders. It points out 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.

Eric Rassbach and Daniel Blomberg have authored again a very important contribution to this debate.

Madam Speaker--and Ms. Meng mentioned this earlier and it bears repeating--in letters of support for H.R. 592, Harvard Professor Alan Dershowitz concludes:

Religious institutions may receive government aid if it is in the context of a broadly available program with criteria that are neutral toward religion and pose no risk of religious favoritism.

He states further:

Once FEMA has a policy in place to aid various nonprofit organizations with their building repairs, houses of worship should not

be excluded from receiving this aid on the same terms.

This is all the more appropriate given the neutral role that we have witnessed houses of worship play without regard to religion to those afflicted in the wake of Sandy and countless previous disasters.

Federal disaster relief aid in the form of social insurance and other means of helping battered communities get them back on their feet. Churches, synagogues, mosques, and other houses of worship are an essential part of the recovery process.

Madam Speaker, religious liberty scholar Professor Douglas Laycock of the University of Virginia School of Law wrote a letter endorsing H.R. 592 and said in part:

Charitable contributions to places of worship are tax deductible without significant controversy, though the tax benefits to the donor are like a matching grant from the government. These deductions have been uncontroversial because they're included without discrimination in a much broader category of all not-for-profit organizations devoted to charitable, educational, religious, or scientific purposes. The neutral category here is equally broad; to include places of worship in disaster relief is neutral. To exclude them would be affirmatively hostile. There is no constitutional obstacle to including them.

That is according to Professor Laycock of the University of Virginia School of Law, a preeminent expert on these matters.

Madam Speaker, houses of worship are an integral, irreplaceable part of the contour and fabric of our communities. Like any other private nonprofit organization, their recovery is essential to the recovery of neighborhoods, towns, and States. They should not be excluded from Federal programs that ensure community recovery, especially since they so selflessly provide assistance to all in need.

In conclusion, Madam Speaker, this legislation has been backed by a number of important organizations, including the Union of Orthodox Jewish Congregations of America, the United States Conference of Catholic Bishops, the National Association of Evangelicals.

Just to underscore for my colleagues the broad support that this has, the American Jewish Committee has also supported it, the Family Research Council. As I said earlier, the Becket Fund and so many others have written very extensive remarks in favor of it.

I do hope there will be very strong support for this important legislation. It's a matter of inclusion to stop current-day, present-day exclusion.

Additional Letters in Support of the Smith Bill:

Memorandum
To: Interested Parties
From: Nathan J. Diament, Exec. Director of Public Policy
Date: February 6, 2013
Re Legal Analysis Supporting Including Houses of Worship, Among Private Nonprofit Facilities, Eligible for Federal Disaster Relief Funds Administered by FEMA Under the Stafford Act.

Conclusion: The Establishment Clause does not bar the award of federal grants to houses of worship for the repair of facilities damaged in a natural disaster, in the context of the Stafford Act's ``private nonprofit facility'' aid program.

I.

A. BACKGROUND

The Robert T. Stafford Disaster Relief and Emergency Assistance Act provides that the Federal Emergency Management Agency (FEMA) may provide funding, through its Public Assistance program, to restore facilities

of certain private nonprofit organizations which were damaged in a natural disaster. 42 U.S.C. 5122, 5172.

The private nonprofit organizations eligible for such aid include those which provide ``critical services'' (ie: utilities, hospitals and schools) and those which provide ``essential services'' (ie: museums, community centers, libraries, day care centers and more). The Stafford Act does not explicitly include or exclude houses of worship from eligibility for public assistance. In its regulations and policies, FEMA has imposed restrictions on eligibility for aid to houses of worship. FEMA excludes facilities whose ``primary use'' is religious from eligibility.

It is worth noting an illustrative example of FEMA's unequal policy. One eligible category of nonprofit providing ``essential services'' is community centers. FEMA policy defines these entities as ``a gathering place for a variety of social, educational ..... and community service activities.'' FEMA policy describes a broad array of activities that fit this definition--but excludes a facility that hosts the very same activities if that facility and those activities are in a house or worship in a religious context.

FEMA's exclusion of houses of worship from eligibility cannot be exclusively on constitutional grounds because, as noted, FEMA awards aid to religious entities that operate what it deems to be eligible nonprofits. FEMA's exclusion is also not on statutory grounds as the statute does not explicitly exclude houses of worship.

FEMA's policy is unfair, discriminatory and not required by constitutional jurisprudence.

B. POSSIBLE CONSTITUTIONAL CONCERNS

Those who would contend that providing government funds for the repair of houses of worship is barred by the Constitution would argue that a two-part rule governs direct financial support of religious institutions. First, that direct aid may be given to ``non-pervasively sectarian'' religious institutions, provided the aid is not used to fund specifically religious activity and is channeled exclusively to secular functions. Second, that there are institutions--``pervasively sectarian'' institutions--in which ``religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission.'' (*Hunt* v. *McNair*, 413 U.S. 734, 743 (1973)). The opponents would further contend that, because houses of worship would qualify as ``pervasively sectarian'' institutions, in which the ``secular and religious functions'' are ``inextricably intertwined,'' the government may not provide direct aid to them ``with or without restrictions,'' because the aid will inevitably end up advancing religion. (*Tilton* v. *Richardson*, 403 U.S. 672 (1971), and *Committee for Public Educ.* v. *Nyquist*, 413 U.S. 756 (1973)).

In addition, the opponents of fair inclusion of houses of worship would contend that to the extent that it is possible to distinguish between the religious and secular, any governmental effort to separate out the facilities and functions that engage in exclusively religious activities could well involve the kind of monitoring of a religious entity otherwise prohibited by the Establishment Clause. Opponents would again cite *Tilton* and *Nyquist*, which imposed certain restrictions on the government's provision of construction, maintenance, and repair aid to properties used by religious educational institutions.

As the following discussion will demonstrate however, in the context of disaster response and relief, these contentions are inconsistent with current constitutional jurisprudence.

II

A. GENERAL CONSTITUTIONAL PERSPECTIVE

A proper reading of Supreme Court decisions and jurisprudence developed in the decades since *Tilton* and *Nyquist* clearly lead to the conclusion that providing federal grants to

houses of worship, among many types of nonprofits, as part of a broad disaster relief program, is constitutionally acceptable. Most notably, the Supreme Court's ruling in *Mitchell* v. *Helms*, 550 U.S. 793 (2000), explicitly undermined the continued application of *Tilton* and *Nyquist*.

First, Congress may legitimately conclude that the federal government has a secular interest in aiding a community's recovery from a natural disaster, that repairing damaged private nonprofit facilities is an essential component of that recovery and that houses of worship are among those nonprofit facilities which should be aided.

Second, the public assistance grants are not an isolated initiative designed to aid religion--it is but one part of a much larger legislative effort to assist a disaster stricken region with its recovery. In this critical way, it is quite distinguishable from the targeted aid programs considered in the *Tilton* and *Nyquist* cases.

Third, the aid to houses of worship is within the context of the Stafford Act's broader provision of aid to nonprofit entities. In this respect, inclusion of houses of worship is consistent with many existing and past examples of inclusion of religious institutions in broader infrastructure improvement and federal aid programs. Notable examples of such programs include:

i) the Interior Department's ``Save America's Treasures'' program provides grants for the repair and maintenance of historically significant properties, which have included the Boston's Old North Church and Newport's Touro Synagogue;

ii) FEMA awards disaster relief grants to repair facilities under the Stafford Act, 42 U.S.C. 5121-5206, damaged in natural disasters to religious institutions including, for example, a Seattle parochial school;

iii) following the Oklahoma City bombing, Congress authorized FEMA and other federal agencies to provide disaster relief funds to houses of worship on the same basis as all other nonprofit facilities;

iv) the California Missions Preservation Act, P.L. 108-420 (Nov. 30, 2004), authorizes federal grants for restoring colonial era missions in California, many of which are still used for religious worship;

v) Congress has overwhelmingly authorized grants for security upgrades for nonprofits, including houses of worship, under the Department of Homeland Security's UASI program;

and many other examples abound.

Therefore, a federal disaster relief program which includes houses of worship among its eligible grantees cannot be materially distinguished from other aid programs that are constitutional under longstanding precedents establishing that religious institutions are fully entitled to receive widely available government benefits and services.

B. DISASTER RELIEF AND REPAIR GRANTS ARE ``GENERAL GOV'T SERVICES''

It is highly significant that eligibility for FEMA's public assistance grants extends to a broad class of beneficiaries, defined without reference to religion and including both public and private institutions. Ever since 1947, the year of its decision in *Everson*, the Supreme Court has indicated that religious institutions are entitled to receive ``general government services'' made available on the basis of neutral criteria. 330 U.S. at 17. *Everson* held that the Establishment Clause does not bar students attending religious schools from receiving generally available school busing services provided by the government. In reaching its decision, the Court explained that even if the evenhanded provision of busing services

increased the likelihood that some parents would send their children to religious schools, the same could be said of other ``general state law benefits" that were even more clearly constitutional because they were equally available to all citizens and far removed from the religious function of the school. *Id.* at 16. As examples, the Court cited ``such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," concluding:

``cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."

Id. at 17-18. *See also id.* at 16 (``[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. ..... [W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.").

Federal disaster aid is analogous to aid that qualifies as ``general government services" approved by the Court in *Everson.*

As the Supreme Court explained in *Widmar* v. *Vincent,* 454 U.S. 263, 274 (1981), ``[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Accord Zobrest* v. *Catalina Foothills Sch. Dist.,* 509 U.S. 1, 8 (1993) (``we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet,* 512 U.S. 687, 704 (1994) (``we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"). Thus, the aid here is closely analogous to the provision of ``general" government aid like that sanctioned by the Court in *Everson*. *See also* Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392

(creating a program that provides low-income reconstruction loans to nonprofit organizations, including churches, destroyed by arson motivated by racial or religious animus). As Justice Brennan expressed the point in *Texas Monthly:* ``Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." 489 U.S. at 14-15 (plurality opinion) (footnote omitted).

When viewed in the context of disaster response, *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), strongly supports this conclusion. There the Court rejected an Establishment Clause challenge to a property tax exemption made available not only to churches, but to several other classes of nonprofit institutions, such as ``hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 673; *see also id.* at 667 n.1. In upholding the tax exemption, the Court relied in part upon its breadth: the exemption did ``not single[] out one particular church or religious group or even churches as such," but rather was available to ``a broad class of property owned by nonprofit, quasi-public corporations." *Id.* at 673. As the Court stated in reference to *Everson*, if ``buses can be provided to carry and policemen to protect church school pupils, we fail to see

how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the Religion Clauses." *Id.* at 671. Thus, just as a broad category of beneficiary institutions was sufficient to sustain the inclusion of religious institutions in the tax benefit in *Walz*--which, after all, substantially benefitted churches' *property*--the breadth of programs funded in the Stafford Act weighs heavily in favor of the constitutionality of including houses of worship.

C. NO RISK OF PERCEIVED ENDORSEMENT OF RELIGION

No reasonable observer would perceive an endorsement of religion in the government's evenhanded provision of funds to repair a house of worship damaged in a natural disaster such as Hurricane Sandy. *See Mitchell,* 530 U.S. at 842-44 (O'Connor, J., concurring in judgment). While it is true that in a narrower direct aid program one could argue that if a school ``uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement," *Id.* at 843, that is not the case in the context of this broader disaster relief effort. A presumption of governmental endorsement is not present where the aid is provided to a wide array of public and private entities for the sake of recovery from a disaster and where the government is indifferent to the religious or secular orientation of the facility's function. Moreover, we think a reasonable observer--one informed about the purpose, history, and breadth of the program, *see Zelman,* 536 U.S. at 655--would understand that the federal government is not paying for religious activity; it is paying to help devastated communities recover. That is not an endorsement of religion.

D. DISTINCT FROM TILTON AND NYQUIST

Opponents will contend that the Supreme Court's decisions in *Tilton* and *Nyquist,* which involved construction and maintenance aid to religious schools, should be read to support the conclusion that FEMA aid to houses of worship violates the Establishment Clause. We disagree.

In *Tilton,* the Court sustained the provision of federal construction grants to religious colleges insofar as the program at issue barred aid to facilities ``used for sectarian instruction or as a place for religious worship," but invalidated such grants insofar as the program permitted funding the construction of buildings that might someday be used for such activities. *See* 403 U.S. at 675, 683 (plurality opinion) (citations omitted). The Court concluded that a 20-year limitation on the statutory prohibition on the use of buildings for religious activities was insufficient because ``[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id.* The Court therefore held that the religious use restriction had to run indefinitely. *Id.*

Similarly, *Nyquist* involved a program that provided maintenance and repair grants to religious elementary and secondary schools. The grants at issue were limited to 50 percent of the amount spent for comparable expenses in the public schools, but the Court invalidated the program. ``No attempt [was] made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes," the Court stated, and the 50 percent restriction would not necessarily prevent rehabilitation of entire religious schools. 413 U.S. at 774. The Court thus concluded that such aid would have the effect of advancing religion, in violation of *Lemon*'s second prong. *Id.*

These holdings have been severely undermined and limited. See Mitchell v. Helms, 530 U.S. 793, 856-57 (2000) (O'Connor, J., concurring in judgment).

A broad reading and application of *Tilton* and *Nyquist* does not apply here for several reasons. First, *Tilton* and *Nyquist* are in considerable

tension with a more recent line of cases holding that the Free Speech Clause does not permit the government to deny religious groups equal access to *the government's own property*, even where such groups seek to use the property ``for purposes of religious worship or religious teaching." *Widmar* v. *Vincent*, 454 U.S. 263, 265 (1981). *See Lamb's Chapel* v. *Center Moriches Sch. Dist.*, 508 U.S. 384, 394 (1993); *Capital Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753 (1995); *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98 (2001); *see also Westside Community Bd. of Educ.* v. *Metgens*, 496 U.S. 226 (1990). Providing religious groups with access to property is a form of direct aid, and allowing such groups to conduct worship services plainly ``advances" their religious mission. The Court, however, has consistently refused to *permit* (let alone require) state officials to deny churches equal access to public school property on the basis of these officials' argument ``that to permit its property to be used for religious purposes would be an establishment of religion." *Lamb's Chapel*, 508 U.S. at 394.

The Supreme Court's Establishment Clause jurisprudence has greatly evolved since the Court's decisions in *Tilton* and *Nyquist* were rendered, and many of the legal principles that supported those decisions have been discarded. In 1985, for example, the Court struck down programs under which the government provided religious and other schools with teachers who offered remedial instruction to disadvantaged children. *See Aguilar* v. *Felton*, 473 U.S. 402 (1985); *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985). The Court reasoned that teachers in the program might ``become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." *Ball*, 473 U.S. at 385. In *Agostini* v. *Felton*, 521 U.S. 203, 223 (1997), however, the Court overruled *Aguilar* and substantial portions of *Ball*, explaining that the Court had abandoned the presumption that placing public employees in religious schools ``inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." Similarly, in the 1970s the Court held that the state could not provide any ``substantial aid to the educational function of [religious] schools" reasoning that such aid ``necessarily results in aid to the sectarian school enterprise as a whole." *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975); *accord Wolman* v. *Walter*, 433 U.S. 229, 250 (1977). In *Agostini* and *Mitchell*, however, the Court expressly abandoned that view, overruling *Meek* and *Wolman*. *See Agostini*, 521 U.S. at 225; *Mitchell*, 530 U.S. at 808, 835-36 (plurality opinion); id. at 837, 851 (O'Connor, J., concurring in judgment). In addition, other portions of *Nyquist* have been substantially narrowed or overruled. As the Court stated in *Zelman*, ``[t]o the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662.

Perhaps more important, recent Supreme Court decisions have brought the demise of the ``pervasively sectarian" doctrine that comprised the basis for numerous decisions from the 1970s, such as *Tilton* and *Nyquist*. As noted above, that doctrine held that there are certain religious institutions in which religion is so pervasive that *no* government aid may be provided to them, because their performance of even ``secular" tasks will be infused with religious purpose. That doctrine, however, no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell*, *see* 530 U.S. at 825-29 (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, *see id*. at 857-58 (O'Connor, J., concurring in judgment, joined by Breyer, J.) (requiring proof of *actual* diversion of public support to religious uses to invalidate direct aid to schools and explaining that ``presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause"). *See also Columbia Union College* v. *Oliver*, 254

F.3d 496, 502-04 (4th Cir. 2001) (explaining that the pervasively sectarian test is no longer valid in light of the holdings of six Justices in *Mitchell*). Justice O'Connor rejected the view that aid provided to religious primary and secondary schools will invariably advance the schools' religious purposes, and that view is the foundation of the pervasively sectarian doctrine.

Such was the reasoning and conclusion reached by a federal district court in a current case highly analogous to the FEMA aid program--*American Atheists Inc.* v. *City of Detroit* DDA, 503 F.Supp.2d 845 (2007). There, plaintiffs challenged Detroit's ``Fac 9ade Improvement Plan'' under which the city provided funds to buildings in a particular section of downtown in order to improve their appearance for the Superbowl which was to be held in the city. Three churches received such grants and this was challenged in the lawsuit. The federal court concluded that the program was available to a broad array of buildings and its grant criteria were religion neutral and the FIP was thus constitutional.

For all of these reasons, *Tilton* and *Nyquist* do not control the question at issue in the case of FEMA's public assistance aid to private nonprofit facilities, including houses of worship.

E. SINGLING OUT FAITH-RELATED ENTITIES FOR EXCLUSION RUNS COUNTER TO A PROPER APPLICATION OF THE ESTABLISHMENT CLAUSE

In recent years, Justice Breyer has insightfully invoked the balanced and practical approach to the Establishment Clause previously championed by Justices Goldberg and Harlan. In *Van Orden* v. *Perry*, 545 U.S. 677 (2005), Justice Breyer wrote that ``the Court has found no single mechanical formula that can accurately draw the constitutional line in every case. See *School Dist. of Abington Township* v. *Schempp*, 374 U.S., at 306 (1963) (concurring opinion). Where the Establishment Clause is at issue, tests designed to measure ``neutrality'' alone are insufficient, both because it is sometimes difficult to determine when a legal rule is ``neutral,'' and because ``untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.'' Ibid. In proceeding to rule that a display of the Ten Commandments on the grounds of the State of Texas' capitol was acceptable, Justice Breyer argued that, in so many of these cases, context matters. Thus, ``to reach a contrary conclusion here [and declare the display to violate the Establishment Clause], based primarily upon on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.''

If we apply Justice Breyer's principled pragmatism to the issue at hand, if Congress and the President decide to appropriate billions of dollars to help private nonprofits rebuild after a natural disaster, but also determine to deliberately exclude houses of worship when they otherwise meet the relevant criteria, such a decision would be the very exhibition of hostility toward religion that the Justices have inveighed against pursuing in the name of the Establishment Clause.

In the wake of Hurricane Sandy and every major disaster within recent memory--churches, synagogues and other houses of worship have been essential in a community's recovery and response effort. Even while the church may have its HVAC system destroyed it will welcome the homeless. Even while the synagogue may have been flooded, it will feed the hungry.

Basic fairness and principles of nondiscrimination, let alone compassion, should compel Congress and the Executive Branch to change policy and declare houses of worship eligible for disaster relief assistance administered by FEMA.

United States Conference of Catholic Bishops, Ad Hoc Committee for Religious Liberty

Washington, DC, February 11, 2013.
Hon. Chris Smith,
House of Representatives, Rayburn House Office Building, Washington, DC.

Dear Representative Smith: As the House of Representatives prepares to consider H.R. 592, the Federal Disaster Assistance Act, we write in support of the legislation, which would ensure the fair and equal treatment for houses of worship damaged in a natural disaster.

Your legislation is consistent with Supreme Court jurisprudence, which recognizes the right of religious institutions to receive public financial aid in the context of a broad program administered on the basis of religion-neutral criteria. The bill is not asking for special treatment, just equal treatment that conforms to constitutional protections.

It should be noted that in the aftermath of a natural disaster houses of worship often play an irreplaceable role in the recovery of a community. Discrimination that treats houses of worship as ineligible for federal assistance in the wake of a natural disaster, beyond being a legal violation, hurts the very communities most affected by the indiscriminate force of nature.

The best approach to address questions of eligibility for houses of worship is a permanent clarification of federal law. For this reason we support your bill and ask that it be adopted by Congress.

Sincerely,

Most Reverend William E. Lori,
Archbishop of Baltimore, Chairman, USCCB Ad Hoc Committee for Religious Liberty.

Most Reverend Denis J. Madden,
Auxiliary Bishop of Baltimore, Chairman, USCCB Committee for Ecumenical and Interreligious Affairs.

Union of Orthodox Jewish Congregations of America, Institute for Public Affairs

Dear Representatives Smith and Meng: We write to express our strong support for the Federal Disaster Assistance Nonprofit Fairness Act of 2013. Your legislation will ensure the fair and equal treatment for houses of worship damaged in Hurricane Sandy and future natural disasters.

The Stafford Act provides that private nonprofit entities--such as schools, hospitals, museums and community centers--damaged in a natural disaster may receive financial grants from FEMA to repair their buildings. The Act does not list houses of worship among its list of examples of nonprofits so eligible; neither does the Act exclude houses of worship in any way.

In the aftermath of Sandy, as with so many other natural disasters, churches, synagogues and other houses of worship have been places offering essential response services to people in need--even while the church or synagogue itself is damaged.

It is, therefore, entirely appropriate for FEMA's aid program for private nonprofits to assist houses of worship with their rebuilding needs. Moreover, if houses of warship are excluded from this otherwise religion neutral program--that unfair treatment would be improper anti-religious discrimination.

Current Supreme Court jurisprudence makes clear that religious institutions may receive government financial aid in the context of a broad program administered on the basis of religion neutral criteria. This is why houses of worship and other religious nonprofits can, for example, currently receive grants from DHS to

improve their security and the Interior Department for historic preservation.

Your legislation clarifying the Stafford Act is consistent with these precedents and policies and we urge the House of Representatives to pass this measure as soon as possible.

Thank you,

Yehuda Neuberger.

Nathan Diament.

NJ STATE ASSOCIATION OF JEWISH FEDERATIONS

February 11, 2013.
Hon. Christopher H. Smith,
House of Representatives,
Washington, DC.

Dear Congressman Smith: The N.J. State Association of Jewish Federations and its eleven constituent federations and their network of affiliated and beneficiary agencies are pleased to acknowledge your leadership in introducing H.R. 592, the Federal Disaster Assistance Nonprofit Fairness Act. We support the legislation which would authorize those houses of worship impacted and devastated by Hurricane Sandy to receive assistance through the recently enacted Sandy relief funding.

Our houses of worship, as with other faith based institutions, play a crucial role every day providing stability, comfort and serving as a community resource. With the hurricane's impact still very much in evidence for our state, we have needed houses of worship more than ever to ease the path of recovery for community and each of their individual members. Even though the church, mosque, temple or synagogue may have been physically damaged, houses of worship continue to provide essential response services to people in need.

Jewish Federations in those areas that suffered most from Sandy's might assisted their synagogues and congregants to overcome the immediate crisis through financial aid, respite and relief while securing dozens of volunteers to help rebuild damaged buildings in the greater local community. The Jewish Federation of Monmouth County, as one of the communities hardest hit by the hurricane, the relief funding provided by it and its partner Federations in the state have enabled Monmouth to meet a wide array of human service needs in the county. Their approach has been strategic, identifying both short-term and long-term needs and dislocations following the storm, empowering our partners in their efforts to respond, and connecting those who could most benefit to these resources. Most importantly, the Federation has been proactive in spreading word throughout Monmouth County that the Jewish community is here to help in storm recovery efforts.

Jewish Family and Children Service organizations replaced lost clothing, provided gift cards for food, counseled Sandy victims easing their anxiety and emotional pain and made available flexible repayment loans to help families and businesses recover. The Jewish Federation of Greater Metro West has provided $50,000 to JFS agencies to assist with the medium and long term needs. Chabad of Hoboken received $5,000 for counseling assistance, while federation is also developing a partnership with Union Beach, a community outside their catchment area and will provide $10,000 toward relief efforts there.

Many of our synagogues suffered severe damage and lack the resources to rebuild. Jewish Federations, while helping houses of worship serve individuals in need, do not have the resources to support capital needs. Assistance from the Jewish Federation of Monmouth County helped ``Chabad of the Shore'' roof and carpet repaid, as well as providing plywood to cover vulnerable windows. Temple Shalom in Aberdeen had roof damage which was repaired through Federation assistance. There were a

number of other similar actions of relief provided by the Monmouth federation.

This is not only the Jewish community experience, but one shared with houses of worship of all religions. It is entirely appropriate for FEMA's aid program for private nonprofits to assist houses of worship with their rebuilding and community outreach needs.

For all the reasons stated, herein, the passage of H.R. 592 will bring equity in a time of crisis and will recognize the unselfish sacrifices made by our houses of worship in response to an event that left devastation in its wake and tragic consequences for its victims. Accordingly, the NJ State Association of Jewish Federations is pleased to support the enactment of the Federal Disaster Assistance Nonprofit Fairness Act.

Sincerely,

Ruth Cole,
President.

Jacob Toporek,
Executive Director.

DIOCESE OF TRENTON
Trenton, NJ, February 11, 2013.

Hon. CHRIS SMITH,
Rayburn House Office Building, House of Representatives, Washington, DC.

DEAR CONGRESSMAN SMITH: I understand that you will soon be presenting a bill to Congress which would provide federal funding in the form of grants to houses of worship which were devastated by the hurricane last October.

I applaud your efforts and offer my full support for this bill. Volunteers from the Catholic churches as well as other denominations were on the front line with food, clothing, shelter and other basic necessities as soon as the storm passed. They were surely the first responders and just as surely will be there as long as they are needed. To exclude houses of worship from which these volunteers have come is a grave injustice.

On behalf of the clergy, religious and lay people who live and work within the Diocese of Trenton, I thank you for being our advocate and for taking the initiative to introduce this bill on behalf of all faith communities.

Sincerely,

Most Reverend David M. O'Connell, C.M.,
Bishop of Trenton.

CONGREGATION SONS OF ISRAEL

Lakewood, NJ, February 12, 2013.
Hon. *Christopher H. Smith,*
Rayburn House Office Building, House of Representatives, Washington, DC.

Dear Congressman Smith: As the House of Representatives prepares to consider H.R. 592, the Federal Disaster Assistance Nonprofit Fairness Act, we write in support of the important legislation that you have introduced. Thank you for your effort to ensure the fair and equal treatment for houses of worship in the aftermath of this devastating natural disaster.

It is universally acknowledged that houses of worship play a central role in the recovery of a community in the aftermath of any natural disaster. Faith-based volunteers are the first responders providing aid and comfort to those who have lost so much, and they persevere with their efforts as long as help is needed. To exclude the houses of worship from where these volunteers have come from government assistance would be a grave injustice.

Discrimination that treats houses of worship as ineligible for federal assistance in the wake of a natural disaster, beyond being a legal violation,

hurts the very communities most affected by the devastating storm.

We strongly feel that you have identified the best approach to address recurring questions of eligibility for houses of worship by proposing a permanent clarification of federal law. We therefore strongly support your bill and ask that it be adopted by Congress.

With much appreciation for your efforts,

Rabbi Samuel Tendler,
Congregation Sons of Israel.

NATIONAL ASSOCIATION OF EVANGELICALS

February 12, 2013.
Hon. *Chris Smith,*
Hon. *Grace Meng,*
House of Representatives,
Washington, DC.

Dear Representatives Smith and Meng: Thank you for your efforts to correct a misguided policy of the Federal Emergency Management Agency (FEMA) that currently bars houses of worship from receiving federal disaster assistance for rebuilding damaged structures. Your work to insure that government assists private nonprofit entities, including houses of worship, in an evenhanded way is very much appreciated.

In any major natural disaster, churches, synagogues and other houses of worship play indispensable roles in providing comfort and relief to those who have experienced loss. They bring food, water, clothing and other essential supplies to those who are stranded or displaced. They care for the wounded and comfort the bereaved. Our communities are stronger because they are there.

When the houses of worship themselves have been damaged, the effects are often felt far beyond the membership. When an important part of the community infrastructure is damaged, the entire community suffers. Many times, churches continue serving their communities even after their own buildings have been destroyed.

FEMA does not violate the establishment clause when it administers a religion-neutral program of support for the rebuilding of community infrastructure. In fact, if religious organizations are specifically excluded when comparable secular organizations are included, the government's practice would be discriminatory. This is the clear conclusion of Supreme Court jurisprudence, and is consistent with current federal practice in the Department of Homeland Security and the Interior Department.

Thank you for your leadership in working to restore fairness to FEMA disaster assistance.

Sincerely,

Galen Carey,
Vice President, Government Relations.

BAIS KAILA TORAH PREPARATORY HIGH SCHOOL FOR GIRLS

Lakewood, NJ, February 12, 2013.
Hon. Christopher H. Smith,
Rayburn House Office Building, House of Representatives, Washington, DC.

Dear Congressman Smith: I hope that all is well with you and your family. With your introduction of H.R. 592, the Federal Disaster Assistance Nonprofit Fairness Act, we see that you are again taking the initiative to do what is right, especially considering that houses of worship are always at the forefront of the recovery process when communities are hit with natural disasters. It is therefore very appropriate that they be able to participate on an equal footing with other nonprofits in receiving federal

aid, as a means of helping damaged communities get back on their feet.

As I understand it, the Federal Emergency Management Agency is charged with ensuring that communities are prepared for natural disasters, and then responding to facilitate recovery in the wake of such disasters. FEMA has historically provided disaster-related aide to parochial schools damaged by earthquakes. Other examples of federal aid to houses of worship, includes grants for security improvements from the U.S. Department of Homeland Security and historic preservation grants from the U.S. Department of the Interior. Your legislation, H.R. 592, would simply ensure that the Stafford Act is consistent with these policies.

In conclusion, once again we thank you for your leadership and advocacy and we look forward to seeing the passage of H.R. 592.

Sincerely yours,

Rabbi Yisroel Schenkolewski,
Dean.

THE JEWISH FEDERATIONS OF NORTH AMERICA

Washington, DC, February 11, 2013.
Hon. John A. Boehner,
Speaker of the House of Representatives,
Capitol Building, Washington, DC.
Hon. Nancy Pelosi,
House Democratic Leader, House of Representatives, Capitol Building, Washington, DC.

Dear Speaker Boehner and Leader Pelosi: The Jewish Federations of North America (JFNA) is writing to express our support for H.R. 592, the Federal Disaster Assistance Nonprofit Fairness Act. This bill, scheduled to be on the suspension calendar this coming Wednesday, February 13, 2013 and co-sponsored by Representatives Chris Smith (R-NJ) and Grace Meng (D-NY), will ensure the fair and equal treatment for houses of worship damaged in Hurricane Sandy.

JFNA is the national organization that represents and serves 154 Jewish Federations and 300 independent Jewish communities across North America. In their communities, Jewish Federations and volunteers in the central address for fundraising and an extensive network of Jewish health, education and social services. In response to Hurricane Sandy Jewish Federations have raised almost $7 million in direct Sandy-related relief and allocated almost $11 million to Sandy victims in Connecticut, New Jersey and New York.

The Stafford Act provides that private nonprofit entities--such as schools, hospitals and community centers--damaged in a natural disaster may receive financial grants from FEMA to repair their buildings. The Act does not list houses of worship among its list of examples of nonprofits so eligible; neither does the Act exclude houses of worship. To the extent that FEMA has provided aid to eligible programs run by houses of worship, the aid has not been provided on the same terms as the aid provided to other eligible nonprofits.

In the aftermath of Sandy, as with so many other natural disasters, churches, synagogues and other houses of worship are locations where essential response services have been provided to people in need--even while the church or synagogue itself has suffered extensive damage. It is, therefore, entirely appropriate for FEMA's aid program for private nonprofits to assist houses of worship with their rebuilding needs. Moreover, if houses of worship are excluded from this otherwise religion neutral program--that unfair treatment would be improper anti-religious discrimination. Additionally, for almost 30 years, it has been FEMA's mission to lead America to prepare for, prevent, respond to, and recover from domestic disasters. This has led to FEMA's provision of disaster-related aide to parochial schools damaged by earthquakes.

Current Supreme Court jurisprudence makes clear that religious in receive government financial aid in the context of a broad program administered on the basis of religion neutral criteria. This is why houses of worship and other religious nonprofits can, and do, currently receive grants from DHS to improve their security and the Interior Department for historic preservation.

H.R. 592, the Federal Disaster Assistance Nonprofit Fairness Act, would ensure that the Stafford Act is consistent with these policies, and we ask that you vote in favor of this legislation.

Sincerely yours,

William C. Daroff,
Vice President for Public Policy & Director of the Washington office.

THE BECKET FUND FOR RELIGIOUS LIBERTY

Hon. Christopher Smith,
House of Representatives, 2373 Rayburn House Office Building, Washington, DC.
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. 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. 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. 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.

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. Nor is this a recent problem: the George W. Bush Administration took the same stance after Hurricane Katrina, based on a federal regulation promulgated in 1990 by the George H.W. Bush Administration. (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. 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.

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. 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.'' The court reasoned that ``[i]f a city may save the exterior of a church from a fire,'' it could certainly provide equal access to government funds that ``help that same church with peeling paint.''

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.''

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. 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. 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.''

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 with historical significance. 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. 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. 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.

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 nonreligion.'' 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. 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.

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. Finally, concerns about litigation might make some sense if FEMA were run by a tiny village government with a 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. 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. 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.

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,

Eric C. Rassbach,

Daniel Blomberg,
The Becket Fund for Religious Liberty

DIOCESE OF ROCKVILLE CENTRE,
Rockville Centre, NY, February 11, 2013.

Hon. CHRIS SMITH,
House of Representatives,
Washington, DC.

DEAR REPRESENTATIVE SMITH: A few weeks ago I wrote to your office to call your attention to the sad situation of houses of worship that were severely damaged by Hurricane Sandy. At that time I could cite Catholic churches and Jewish synagogues who had been told that FEMA would not offer them grants to re-build their place of worship but only loans.

Today I learned that you plan to offer in Congress a bill that would offer houses of worship the same access to disaster relief as other community centers.

I write to thank you for doing this as well as to add my voice of support for just such a correction of a previous position that surely does not reflect either our traditions or our current realities. Houses of worship have been one of the first centers of response across Long Island. The Sunday after Sandy I visited the four parishes most damaged by the storm where I witnessed in parish halls without heat or electricity two signs of hope: faithful people worshipping and the same faithful people reaching out to one another to share food, clothing and other necessities even when their own homes had been destroyed.

To discriminate against houses of worship would be a mark of sectarianism that denies the generosity of the people who helped one another and narrows the American spirit to an arbitrary sectarianism. Please know that my parishioners, my priests and all the volunteers in our various outreach centers are one with me in support of your bill.

William Murphy,
Bishop of Rockville Centre.

AMERICAN JEWISH COMMITTEE

Washington, DC, February 12, 2013.
Re H.R. 592.

DEAR REPRESENTATIVE: We write on behalf of AJC (American Jewish Committee) to endorse the necessity and constitutionality of legislation to ensure that FEMA provides disaster-relief assistance to houses of worship and other facilities on an equal footing with analogous not-for-profit organizations.

We do not support such legislation lightly, since AJC usually opposes direct government aid to pervasively religious institutions, such as houses of worship. AJC has a long record of opposing aid to pervasively religious institutions as an ingredient of the separation of church and state that is an essential component in the protection of our religious liberties. Nevertheless, we believe disaster relief is constitutionally different.

First, disaster relief, such as the ongoing efforts following Hurricane Sandy, presents special circumstances that do not amount to a transfer of the costs of operating a place of worship from the collection plates to the taxpayer, a core concern of the Framers when they authored the First Amendment's prohibition on government establishment of religion. It is instead a form of social insurance in which society shares the burden of recovering from extraordinary disasters. There is a strong societal interest in aiding those who have suffered damage from such a broad-sweeping event, even institutions that for compelling constitutional and policy reasons would not otherwise be eligible for government assistance.

Second, houses of worship are not uniquely beneficiaries of the aid--a wide variety of not-for-profit institutions are eligible for aid under the existing statutory framework, including zoos and museums. These latter are undeniably important social institutions, but it is clearly the case that houses of worship play at least as important a role in providing essential response services to people in need. Disaster relief is thus available under religiously neutral criteria, which leave no room for discretionary or discriminatory judgments of the sort that generate Establishment Clause concerns.

For these reasons, we support in principle the goal to which H.R. 592 is directed.

We do wish to note how we read the proposed language in Section 3(b), lines 15-16, that makes eligible for aid a ``house of worship and a private nonprofit facility operated by a religious organization ..... without regard to the religious character of the facility or the primary use of the facility." (emphasis supplied) We read this section, as we believe it is intended; as meaning that an otherwise qualified institution is not disqualified from aid merely because it is religious, and that in its implementation, FEMA must apportion aid between secular and religious functions.

Thank you for your consideration of our views.

Respectfully,

Marc D. Stern,
Director of Legal Advocacy.

Richard T. Foltin,
Director of National and Legislative Affairs.

UJA FEDERATION OF NEW YORK,
New York, NY.

Memorandum of Support for H.R. 592
EQUAL TREATMENT OF HOUSES OF WORSHIP

Houses of worship for all faiths are a crucial part of the New York region's fabric and while they have always been beacons of support, comfort and community resources, since Hurricane Sandy New Yorkers have needed these institutions more than ever. These organizations are an essential part of neighborhoods and enable rites of passage, community gatherings, charitable activities and are sources of comfort and prayer. In the face of lost homes and distressed property, disruption of employment opportunities and dislocated families, houses of worship have helped many find stability and fulfillment in an uncertain time. In the aftermath of Sandy, as with so many other natural disasters, churches, synagogues and other houses of worship have been places offering essential response services to people in

need--even while the church, mosque or synagogue itself is damaged.

Toward that end, UJA-Federation is proud to have funded close to $1 million to 76 synagogues to help these institutions support their communities through respite and relief and enlisted dozens of volunteers to help rebuild damaged buildings. Our efforts have made a significant impact at synagogues including West End Temple in Belle Harbor, Queens, Congregation Khal Yeraim in Sea Gate, Brooklyn and The Jewish Russian Learning Center in Staten Island and these houses of worship have helped the Jewish and broader communities in the neighborhoods they are serving.

Each of these synagogues serves as vital hubs of community providing physical, spiritual and emotional shelter for community members. That said, during Hurricane Sandy, many of the synagogues suffered severe damage and lack the resources to rebuild. UJA-Federation while helping houses of worship serve individuals in need does not have the resources to support capital needs.

Many houses of worship function similar to other non-profits by providing day care programming, schooling for children and youth, senior centers and resource centers for immigrants. These services are the lifeblood for communities. Houses of worship have worked closely with elected officials and government on city, state and federal levels to coordinate disaster relief efforts to the benefit of the entire community.

The Stafford Act provides that private nonprofit entities--such as schools, hospitals and community centers--damaged in a natural disaster may receive financial grants from FEMA to repair their buildings. The Act does not list houses of worship among its list of examples of nonprofits so eligible; neither does the Act exclude houses of worship in any way. To the extent that FEMA has provided aid to eligible programs run by houses of worship, the aid has not been provided on the same terms as the aid provided to other eligible nonprofits. It is, therefore, entirely appropriate for FEMA's aid program for private nonprofits to assist houses of worship with their rebuilding needs.

Current Supreme Court jurisprudence makes clear that religious institutions may receive government financial aid in the context of a broad program administered on the basis of religion neutral criteria. This is why houses of worship and other religious nonprofits can, and do, currently receive grants from the Department of Homeland Security to improve their security and the Interior Department for historic preservation.

Numerous houses of worship have suffered financially from this crisis and federal funding would significantly alleviate the effects of building damage and their contents.

Accordingly, UJA-Federation supports passage of H.R. 592.

UNIVERSITY OF VIRGINIA SCHOOL OF LAW
Charlottesville, VA, February 12, 2013.
Re H.R. 592.

Hon. CHRIS SMITH,
Hon. GRACE MENG,
House of Representatives,
Washington, DC.

DEAR REP. SMITH AND REP. MENG: I write to support your efforts to include places of worship in federal relief efforts in response to Hurricane Sandy. As Professor Dershowitz has already explained, there is no constitutional obstacle to including places of worship in this measure, which is entirely neutral and very broadly applicable.

The Supreme Court has permitted government funds to flow without discrimination to broad categories of schools, including religious

schools (Zelman v. Simmons-Harris). And when a university undertook to subsidize publications, the Court has actually required government funds to flow without discrimination to a broad category that included religious publications (Rosenberger v. University of Virginia).

Charitable contributions to places of worship are tax deductible, without significant controversy, even though the tax benefits to the donor are like a matching grant from the government. These deductions have been uncontroversial because they are included without discrimination in the much broader category of all not-for-profit organizations devoted to charitable, educational, religious, or scientific purposes.

The neutral category here is equally broad. To include places of worship in disaster relief is neutral; to exclude them would be affirmatively hostile. There is no constitutional obstacle to including them.

Very truly yours,

DOUGLAS LAYCOCK.

CAMBRIDGE, MA.
Hon. CHRIS SMITH,
Hon. GRACE MENG,
House of Representatives,
Washington, DC.

DEAR REPRESENTATIVES SMITH AND MENG: I write to express my support for your legislation (H.R. 592) which will ensure that churches, synagogues, mosques and other houses of worship damaged in Hurricane Sandy will be eligible to receive federal disaster relief funds to repair their facilities on the same terms as other, similarly situated, private nonprofit organizations.

While the Establishment Clause of the First Amendment properly restricts government funds flowing to religious institutions, this restriction is not absolute. Under precedents of the U.S. Supreme Court, religious institutions may receive government aid if it is in the context of a broadly available program with criteria that are neutral toward religion and pose no risks of religious favoritism. This is certainly the case in the context of FEMA disbursing aid to repair buildings in the wake of a natural disaster.

Once FEMA has the policy in place to aid various nonprofit organizations with their building repairs, houses of worship should not be excluded from receiving this aid on the same terms. This is all the more appropriate given the neutral role we have witnessed houses of worship play, without regard to the religion of those affected, in the wake of Sandy and countless previous disasters. Federal disaster relief aid is a form of social insurance and a means of helping battered communities get back on their feet. Churches, synagogues, mosques and other houses of worship are an essential part of the recovery process.

I hope Congress will move quickly to enact your legislation.

Sincerely,

Alan Dershowitz,

Felix Frankfurter Professor of Law,
Harvard Law School.

AGUDATH ISRAEL OF AMERICA
Washington, DC, February 12, 2013.
Re FEMA Aid and Religious Institutions.

Hon. CHRISTOPHER H. SMITH,
House of Representatives,
Washington, DC.

DEAR REPRESENTATIVE SMITH: On behalf of Agudath Israel of America, a national Orthodox Jewish organization, I write to congratulate you on sponsoring H.R. 592, the Federal Disaster Assistance Nonprofit Fairness

Act of 2013, which is intended to make clear that houses of worship and other religious institutions are eligible to receive FEMA disaster relief on an equal footing with other eligible nonprofits. A vote on the measure is scheduled for this week.

Over the years--most recently, during Hurricane Sandy--Agudath Israel has been engaged in helping to ensure that religious institutions obtain a full measure of FEMA aid for the repair and restoration of their disaster-damaged facilities. Unfortunately, due to unnecessary and unfair limitations placed on how and when disaster assistance may be provided specifically to religious entities--including houses of worship and religious schools--this has been an ongoing challenge. Without the much needed aid, they often face staggering costs that make rebuilding prohibitive.

There is no reason to treat religious entities in this manner. Supreme Court decisions, as well as executive action, in recent years that have allowed federal aid to go to religious institutions when the assistance is made broadly available and is distributed on a religion-neutral basis--as the FEMA program does.

Religious institutions are an integral part of American communities and play an important role in assisting devastated neighborhoods revitalize and rebuild. After natural disasters, they provide both material and nonmaterial help to those in need. They should be treated like other vital nonprofits and receive federal assistance without prejudice or discrimination.

Sincerely yours,

RABBI ABBA COHEN.

THE COUNCIL OF THE CITY OF NEW YORK

New York, NY, February 12, 2013.

DEAR CONGRESS MEMBERS MENG AND SMITH: We are writing in support of H.R. 592, the Federal Disaster Assistance Nonprofit Fairness Act of 2013. This important legislation will ensure that houses of worship affected by Hurricane Sandy will be eligible to receive assistance from FEMA to rebuild their damaged properties. At stake are the interests of New Yorkers in the many neighborhoods that were hit hard by Sandy.

Churches, synagogues and mosques serve as a bedrock for our citizens and our communities. They not only provide places for people to worship but operate after-school programs, food pantries, and other critical services. Many of the churches, synagogues and mosques that were damaged by the hurricane are now facing great difficulty reopening their doors.

Although we understand that some oppose this change due to the constitutional requirement of separation of church and state, in this case we don't agree. Recovery from a natural disaster like Hurricane Sandy isn't a matter of state sponsoring religion. It's a matter of helping those in need after one of the worst natural disasters our country has ever seen.

Under such extraordinary and painful circumstances, houses of worship should be eligible to receive aid on the same basis as all other non-profits damaged by the hurricane. We applaud you for your leadership on this matter and are happy to lend our support to your bill.

Sincerely,

Christine C. Quinn,

Peter F. Vallone, Jr.,

Fernando Cabrera