

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

No. 4:17-cv-2662

**Brief of *Amici Curiae* Jews for
Religious Liberty and Congregation
Torah Vachesh Supporting
Plaintiffs' Renewed Motion for
Preliminary Injunction**

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Nature and Stage of Proceedings

On September 12, 2017, Plaintiffs Harvest Family Church, Hi-Way Tabernacle, and Rockport First Assembly of God filed their First Amended Complaint challenging the constitutionality of the Federal Emergency Management Agency's (FEMA) policy of excluding facilities established or primarily used for religious activities from its Public Assistance Program. *See* Dkt. 11. On the same day, Plaintiffs filed its Renewed Emergency Motion for Preliminary Injunction (the "Motion") seeking relief from FEMA's exclusion policy. *See* Dkt. 12. Jews for Religious Liberty and Congregation Torah Vachessed file this brief in support of the Motion.

Interest of Amici

Jews for Religious Liberty is an unincorporated, cross-denominational group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. Jews for Religious Liberty's members have written extensively on the role of religion in public life. Representing members of the legal profession, and as adherents of a minority religion, Jews for Religious Liberty has a strong interest in ensuring that the First Amendment rights of adherents of minority religions are protected and that Free Exercise jurisprudence enables the flourishing of religious viewpoints and practices in the United States. Jews for Religious Liberty is particularly concerned about the impact of FEMA's discriminatory policy given the disproportionate impact of Hurricane Harvey on the Jewish community in Houston.

Congregation Torah Vachessed is located in Meyerland next to Brays Bayou. With around 400 members, the synagogue services the community's religious, cultural, and physical needs. Due to Hurricane Harvey, the synagogue incurred significant flood damage to its floors, roof, appliances, and vehicles. Although affected, it remained operational throughout the flooding and was able to assist over 30 families within and outside of its membership, assisting with nightly

meals, food appliances, financial aid, and other acts of service. Suffering the devastation of Hurricane Harvey firsthand, Congregation Torah Vachesed has a unique perspective on how FEMA's discriminatory policy affects Jewish institutions in Houston.

Summary of Argument

Although this case was brought by a handful of Protestant Christian churches, FEMA's policy implicates much wider concerns. Hurricane Harvey affected all Houstonians, but it was particularly unforgiving to Houston's Jewish Community. Despite this, Jewish institutions have been greatly involved in relief efforts throughout Houston. FEMA's policy against funding otherwise qualifying religious institutions, however, would deny these same institutions equal access to public assistance to repair flood damage.

History is replete with the concerted efforts of governments to bar or deter Jews from the public practice of Judaism. Although less overt or odious than attempts from the past, the pernicious effect of FEMA's policy of explicit discrimination remains the same: to deter and discourage the exercise of the Jewish faith. The fact that this policy serves to also discriminate against and discourage the public practice of other faiths does nothing to lessen its discriminatory impact on Jewish Americans or, in this case, Jewish Houstonians: If the government determines that the primary purpose of a non-profit organization is "Jewish" or that—in the government's view—greater than 50 percent of the programs and activities of that non-profit are "Jewish," that Jewish institution is categorically disqualified from public disaster assistance, even where it would otherwise qualify.

The very existence of this policy both deters non-profits from allowing too many Jewish activities from occurring on their premises and encourages Jews and Jewish organizations to hide or refrain from public practice of the Jewish faith. Host too many kosher community barbeques and you will not qualify for hurricane assistance. In other words, the policy puts Houston's Jewish

institutions to a choice: They may participate in an otherwise available benefit program or remain a Jewish institution. Any policy that requires such a choice violates the First Amendment. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021–22 (2017).

Factual Background

I. HURRICANE HARVEY WREAKED HAVOC ON HOUSTON'S JEWISH COMMUNITY

Hurricane Harvey was no respecter of persons. It flooded homes, businesses, and community institutions irrespective of race, religion, or socio-economic status. All caught in the rising flood waters suffered equally. Because of a confluence of history and geography, however, Houston's Jewish community was disproportionately affected by the biblical flooding of Hurricane Harvey. Meyerland, the center of Houston's Jewish community,¹ was particularly hard hit.² In total, an estimated 71 percent of Houston's Jewish population lived in areas that experienced massive flooding. *Houston Jewish Community Ravaged by Harvey's Torrential Rains*, Jewish Telegraphic Agency (Aug. 29, 2017) (available at <https://www.jta.org/2017/08/29/news-opinion/united-states/houston-jewish-community-ravaged-by-harveys-torrential-rains>).

Homes, however, are not all that were flooded. Jewish institutions were also disproportionately affected by the flood. At least seven major Jewish community institutions were damaged.³ This includes three of the five largest synagogues in Houston, and a Jewish community center (the Evelyn Rubenstein Jewish Community Center). This destruction has prompted some

¹ Heather Nicholson, *Meyerland's Original Appeal Draws New Residents*, Houston Chronicle (March 11, 2010) (available at <http://www.chron.com/homes/article/Meyerland-s-original-appeal-draws-new-residents-1697536.php>).

² *See, e.g., Boat Ride Reveals Flood Devastation in Meyerland Area*, ABC13 Eyewitness News (Aug. 28, 2017) (online at <http://abc13.com/boat-ride-reveals-flood-devastation-in-meyerland-area/2350175>).

³ *See Avital Ingber, On the Ground in Houston*, Jewish Federation of Greater Houston (available at <https://cdn.fedweb.org/fed-45/2/On%20the%20Ground%20in%20Houston%20282%2029.pdf>).

to exclaim that “[n]o other Jewish community in the US has witnessed such widespread devastation.” *Hurricane Harvey: Community Updates*, Jewish Federation of Greater Houston (available at <https://www.houstonjewish.org>) (providing videos chronicling the damage done to Houston’s Jewish institutions).

For example, Beth Yeshurun Congregation, which serves more than 2300 families in Houston, sustained an estimated \$3 million in damages from the flooding. *See* Congregation Beth Yeshurun Welcome Site (available at <https://bethyeshurun.org/welcome-congregation-beth-yeshurun>); Ben Sales, *How Houston’s Synagogues Are Handling the High Holidays after Harvey*, Jewish Telegraphic Agency (Sept. 18, 2017) (available at <https://www.jta.org/2017/09/18/news-opinion/united-states/how-houstons-synagogues-are-handling-the-high-holidays-after-harvey>).

The flood waters rose so high in the Beth Yeshurun Congregation that they covered the first seven rows of the sanctuary. *Id.* It estimates repairs will take over a year. *Id.*

United Orthodox Synagogues, the largest orthodox shul in the southwest, saw flood waters rise up to six feet in places. *See* United Orthodox Synagogues of Houston Welcome Site (available at <http://www.uosh.org>); Sales, *Handling the High Holidays after Harvey*; Jacob Kamaras, *Hurricane Harvey the Peak of a Devastating Three-Year Flooding Trend for Houston’s Jews* (available at <http://www.jns.org/latest-articles/2017/8/29/hurricane-harvey-the-peak-of-a-devastating-three-year-flooding-trend-for-houstons-jews#.Wc0OAOSWxi5=>). It is unclear if the building can ever be completely repaired. *Id.* As the future of the synagogues are decided, the 300 plus families that regularly attend services and activities at the synagogue have been praying, meeting, and eating in a large social hall that avoided most of the flooding.

Congregation Beth Israel, the oldest Jewish congregation in Texas, dating back to 1854, is located on Braes Bayou in Meyerland. *See* Congregation Beth Israel Welcome Site (available at

<http://www.beth-israel.org/about-us>); Sales, *Handling the High Holidays after Harvey*. Its sanctuary, mechanical room, and offices were severely damaged when the Bayou overran its banks during Hurricane Harvey. *Id.* The 1600 member households who worship and attend social, educational, and service activities at the synagogue have implemented short-term, makeshift solutions, but face a long recovery. *Id.*

Large Jewish community institutions were not the only ones to suffer losses. Smaller Jewish institutions, although less publicized, have also suffered flood damage. For example, smaller synagogues, such as Congregation Torah Vachessed on S. Braeswood Blvd in Meyerland, were likewise affected. *See* Congregation Torah Vachessed Welcome Site (available at <http://www.torahvachessed.com/donate.asp>). The synagogue suffered at least \$75,000 in damages due to flooding that requires repairs to its flooring, sheetrock, appliances, vehicles, and the roof. A Houston 501(c)(3) named TORCH, or Torah Outreach Resource Center of Houston, also flooded. *See Hurricane Harvey: Community Updates*, Jewish Federation of Greater Houston (available at <https://www.houstonjewish.org>). TORCH was founded in 1998 to serve the Houston community as a resource for learning and connection through Jewish education and fellowship. *See* TORCH Welcome Site (available at <http://www.torchweb.org/index.php>).

II. JEWISH GROUPS PLAYED A SIGNIFICANT ROLE IN HARVEY-RELATED RELIEF EFFORTS

Despite the massive flood damage suffered by Houston's Jewish institutions, these institutions continued to focus their efforts on assisting others in the Houston community throughout Hurricane Harvey and its aftermath. In doing so, they—along with the many other community organizations with which they served—provided services alleviating the suffering and damage to the community, as well as the strain on government resources. For example, United Orthodox Synagogues coordinated boat rescues and met food and housing needs. *See* Jacob

Kamaras, *Hurricane Harvey the Peak of a Devastating Three-Year Flooding Trend for Houston's Jews* (available at available at <http://www.jns.org/latest-articles/2017/8/29/hurricane-harvey-the-peak-of-a-devastating-three-year-flooding-trend-for-houstons-jews#.Wc0OAOSWxi5=>).

The Evelyn Rubenstein Jewish Community Center collected emergency supplies for the community, including bottled water, work gloves, packing supplies, heavy trash bags, heavy-duty razor blades for ripping out wet and damaged carpet, cleaning supplies, and gift cards for home repair and grocery stores. See News Brief, *Houston Jewish Federation Reports Community 'Impacted' by Hurricane Harvey*, Jewish Telegraphic Agency (Aug. 27, 2017) (available at <https://www.jta.org/2017/08/27/news-opinion/united-states/houston-jewish-federation-reports-community-impacted-by-hurricane-harvey>). Despite suffering massive flooding damage itself, the Jewish Community Center immediately began distributing supplies to the community from its Tennis Center, which was largely spared by flooding. See *Evelyn Rubenstein JCC Hurricane Harvey Relief*, Facebook (available at <https://www.facebook.com/events/168948943680199/>).

Since the flooding, the Jewish Community Center has also worked with the Jewish Federation of Greater Houston and Jewish Family Services to coordinate volunteers in cleaning out countless homes in the community. See Jason Dobrolecki, *J Meals on Wheels and Other Programs Are Up and Running*, J Blog (Sept. 6, 2017) (available at <http://www.erjchouston.org/blog/2017/09/06/erjcc-blog/j-meals-on-wheels-and-other-programs-are-up-and-running/>). It has also continued its J Meals on Wheels program, providing American Standard and Kosher meals to the elderly and infirm with the assistance of St. Philip's United Methodist Church, which has lent space to the organization out of which to operate while its facilities are being repaired. *Id.*

Countless other Jewish organizations have volunteered time and resources in assisting in the Hurricane relief, including providing temporary housing (*e.g.*, Union for Reform Judaism’s Green Family Camp),⁴ truckloads of food and supplies (*e.g.*, Chabad-Lubavitch of Texas),⁵ and counseling and support groups (*e.g.*, Jewish Family Services).⁶

III. FEMA’S POLICY EXPLICITLY DISCRIMINATES AGAINST RELIGIOUS GROUPS, INCLUDING JEWS

Despite acknowledging the important role that religious groups play in disaster relief efforts, FEMA does not provide equal access to religious applicants. Since at least 1998, FEMA’s policy guidelines have stated that facilities used for a variety of community activities but “established or primarily used for . . . religious activities are not eligible.” FEMA’s Public Assistance Program and Policy Guide, FP 104-009-2 (April 2017) ([https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf)); *see also* FEMA Publication 9521.1(7)(c)(7) (eff. 1998–2008) (“A facility used for a variety of community activities but primarily established or used as a religious institution or place of worship would be ineligible,” including “churches, synagogues, temples, mosques, and other centers of religious worship.”).

⁴ *See Houston Jewish Community Ravaged by Harvey’s Torrential Rains*, Jewish Telegraphic Agency (Aug. 29, 2017) (available at <https://www.jta.org/2017/08/29/news-opinion/united-states/houston-jewish-community-ravaged-by-harveys-torrential-rains>).

⁵ *See id.*

⁶ *See* Jewish Family Service Welcome Site (available at <http://www.jfshouston.org>).

Argument

I. THE FIRST AMENDMENT BARS FEMA FROM DISCRIMINATING AGAINST GROUPS THAT IT DEEMS TOO JEWISH

The FEMA policy challenged by the Plaintiffs in this case does not merely threaten a handful of small Christian churches. Rather the FEMA policy broadly and explicitly discriminates against any otherwise eligible facilities if “established or primarily used for . . . religious . . . activities”. FEMA Policy Guide at 12. The necessary consequence of this facially discriminatory policy is that no facility “established or primarily used for” Jewish activities—even if otherwise qualified—may receive any funds under FEMA’s PA Program. This policy requires that FEMA discriminate against any facility deemed too Jewish either in purpose or practice. But the First Amendment simply does not allow FEMA to blatantly “single out the religious for disfavored treatment.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2020 (2017).

A. Groups “Established” for Jewish Purposes Need Not Apply

Under FEMA’s policy, any facility “established” for a Jewish purpose is categorically excluded from consideration under the PA Program. Thus, the freedom to exercise a Jewish purpose necessarily “comes at the cost of automatic and absolute exclusion from the benefits of a public program for which [a facility] is otherwise fully qualified.” *Trinity Lutheran*, 137 S.Ct. at 2022. But a Jewish facility should have the “right to participate in a government benefit program without having to disavow its religious character.” *Id.*

The Court need look no further than actual examples of Jewish facilities whose requests FEMA has denied to see that FEMA discriminates against any Jewish group whose activities are religiously motivated. In one case, FEMA denied funds for a community center because review of the organization’s Articles of Incorporation revealed that the Center was “geared to the development of the Jewish faith” and its programs were “based on or teach Torah values and

Jewish tradition, customs and laws.” Final Decision, Chabad of the Space Coast (June 27, 2012), https://www.fema.gov/appeal/219590?appeal_page=letter. FEMA decided that the community center—which otherwise would have qualified for the PA Program—was simply too Jewish to be funded because its programs were motivated and informed by Jewish faith and culture.

There is no question that FEMA’s policy—like Missouri’s unconstitutional policy in *h Lutheran* that impermissibly excluded churches because they were churches—excludes synagogues solely because they are synagogues. For example, the United Orthodox Synagogues of Houston is a “center for worship, learning, and community service in Houston” that “believes in the philosophy of Torah u'Mada, commitment to Torah, halakhah, and the quest for kedushah, holiness and spiritual growth.” <http://www.uosh.org/past-history-and-uos-today.html>. Even though FEMA broadly includes in its definition of eligible “community centers” those facilities engaged in “educational enrichment activities” and “social activities,” the United Orthodox Synagogues of Houston would be ineligible simply because worship and spiritual commitments undergird its established purposes.

B. Groups Whose Facilities Are “Primarily Used For” Jewish “Activities” Need Not Apply

In addition to categorically excluding any facility “established” for a Jewish purpose, FEMA’s policy also categorically excludes any facilities that are “primarily used for” Jewish “activities”—even if those activities would otherwise be considered eligible under the PA Program. History makes plain that Jews have been subject to far worse forms of persecution. But by discriminating against any activity that is religiously motivated, FEMA has implemented an explicit policy of invidious discrimination against Jews because their activities are Jewish in character.

This policy thus encourages applicants to hide the Jewish character of those activities that FEMA would otherwise consider eligible. For example, because “educational enrichment activities” qualify as eligible activities, FEMA’s policy would discourage the Evelyn Rubenstein Jewish Community Center from describing the “cultural and education events” that it offers as being related to a “Jewish journey,” Jewish religious holidays, “explor[ing] Judaism,” or involving “ethical” considerations related to food. <http://www.erjcchouston.org/jewish-learning/jewish-living-and-learning/>. Engaging in too high a proportion of “Jewish” activities would render the center ineligible.

II. THE FIRST AMENDMENT PROHIBITS FEMA FROM ASSESSING WHETHER GROUPS ARE TOO JEWISH.

Not only is FEMA’s policy barred by the Free Exercise Clause, but it also raises grave entanglement concerns under the First Amendment. In order for FEMA to determine whether a Jewish 501(c)(3) is too religious—or in this case, too Jewish—to qualify for hurricane assistance, the government must wade deeply into what constitutes the Jewish faith. First, the government must determine the contours of the Jewish faith, drawing lines to establish where the Jewish faith ends and Jewish culture and tradition begins, since non-religious, cultural or social enrichment activities should not run afoul of FEMA’s policy against religious organizations. Second, the government must then consider *each* activity taking place at the Jewish Community Center or Synagogue and determine whether *that* particular activity impermissibly relates to the Jewish faith.

In practice, however, it is essentially impossible for the government to meaningfully separate Jewish faith from Jewish culture and tradition. The Jewish faith is central to the Jewish sense of identity and community. It permeates Jewish community life, touching in some way every aspect of daily life and activities, from food, to clothing, to social gatherings, to community service. As a result, the government’s inquiry inevitably boils down to a determination of whether

the community activities that occur at the Jewish 501(c)(3) are *Jewish* in character. If they are, the Jewish institution will not qualify for public hurricane assistance.

This is not theory; this is how FEMA actually implements its policy. It is instructive to consider once again FEMA's denial of the Request for Public Assistance for damages to the Chabad Jewish Community Center. *See* Final Decision, Chabad of the Space Coast (June 27, 2012), https://www.fema.gov/appeal/219590?appeal_page=letter. In assessing whether the Jewish Community Center could qualify for the neutral benefit program, the government considered the nature of each of the Center's social, educational enrichment, and service programs and determined that they were too Jewish to qualify for assistance: "[T]he Center's activities appeared to be geared to the development of the Jewish faith and all the programs offered are based on or teach Torah values and Jewish tradition, customs, and laws." In other words, because *the government* found that the programs offered by the Community Center were "based on or [taught] . . . *Jewish tradition, customs, and laws*," it was excluded from publicly available, disaster assistance to which it would otherwise have been afforded.

First Amendment issues continued on administrative appeal, where the government placed the burden on the State and the Center to *prove* that over 50 percent of the space within the Center was dedicated to non-Jewish community activities. Because the Center could not prove to the government's satisfaction that the majority of the programs were not related to Jewish tradition or customs, it affirmed FEMA's denial of disaster assistance. But the religious status of a community institution cannot be resolved by a calculator, just as the religious status of a minister "is not one that can be resolved by a stopwatch." *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 193 (2012).

This policy of religious line-drawing by the government has a real, tangible effect on the exercise of Jewish community member's First Amendment rights, and the ability of Houston's Jewish community to obtain hurricane assistance. As described in detail above, one of the institutions damaged by the hurricane was the Evelyn Rubenstein Jewish Community Center in Meyerland, which is located on Braes Bayou. Whether this community institution qualifies for hurricane assistance will depend entirely on the government's finding as to whether the social, educational, and service activities that take place there are primarily Jewish.

Under FEMA's policy, the government will have to make countless determinations as to which programs or activities are Jewish. Is the provision of kosher meals to the disabled and the infirm through J Meals on Wheels based on "Jewish tradition, customs, and laws" and, therefore, disqualifying? What about Hebrew classes? Are these permissible "educational enrichment activities" according to FEMA, or impermissibly Jewish? See *Grussgott v. Milwaukee Jewish Day School Inc.*, CA No. 16-CV-1245-JPS, 2017 WL 235573, at *57 (E.D. Wis. May 30, 2017) (refusing to determine whether the study of Hebrew is secular or religious). And Bat Mitzvahs that take place at its Merfish Teen Center? Are they permissible social and cultural community events, or impermissible religious events? Are they to be treated differently than a quinceañera? Is the outcome based entirely on the government official's experience and understanding of Jewish faith and culture, or the motives of each individual participant at these events?

This type of religious line-drawing impermissibly entangles the government with religion. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring in judgment) ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis.

This results in considerable ongoing government entanglement in religious affairs.”).⁷ As a result, the First Amendment proscribes FEMA’s inquiry into the religious motivation and character of otherwise eligible facilities.

III. GROUPS SHOULD NOT HAVE TO WAIT FOR FEMA’S ASSESSMENT OF WHETHER THEY ARE TOO JEWISH BEFORE VINDICATING THEIR CONSTITUTIONAL RIGHTS

The Court should not require a would-be applicant for the PA Program to await a determination by FEMA that it is too religious before granting relief. On a practical level, hurricane victims need relief now and should not be forced to jump through unnecessary hoops, particularly when it is already known that they will be denied relief because of their religious mission and motivation. There is no telling when FEMA would even decide on these futile applications. Applicants could face the same fate as Mt. Nebo Bible Baptist Church, whose application was denied by FEMA because the facility had to be demolished before FEMA could conduct an onsite, visual inspection.

Conclusion

For the foregoing reasons, the Court should grant Plaintiffs’ Motion for Preliminary Injunction. A flooded synagogue has no time to spare to file a claim that FEMA has already made clear is doomed. FEMA’s policy explicitly discriminates against any otherwise eligible facility if it is “established or primarily used” for religious purposes. Put simply, any group that is too Jewish need not apply. The government has no business entangling itself in this kind of religious line-drawing. This Court should not delay in providing necessary relief.

⁷ See also *id.* at 345 (“Nonprofit activities therefore are most likely to present cases in which characterization of the activity as religious or secular will be a close question. If there is a danger that a religious organization will be deterred from classifying as religious those activities it actually regards as religious, it is likely to be in this domain. This substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization.”).

Dated: September 29, 2017

Respectfully Submitted,

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