



September 20, 2017

William B. “Brock” Long
Administrator
Federal Emergency Management Agency, U.S. Department of Homeland Security
500 C Street S.W.
Washington, D.C. 20472
Via Certified U.S. Mail and Electronic delivery to brock.long@fema.dhs.gov

RE: Public Assistance for Religious Private Nonprofit Organizations

Administrator Long:

First Liberty Institute represents Trinity Church, Church on the Rock Katy and Grace Community Church (“Clients”) in the Houston area who are suffering from the devastating impact of Hurricane Harvey. These entities withstood displacement, human suffering, and millions of dollars in flood damage. And, like the neighborhoods and communities they serve, they need immediate aid and relief. However, under the Federal Emergency Management Agency’s (“FEMA”) Public Assistance Program and Policy Guide (“PA Policy Guide”), churches and other religious organizations, including our clients, are ineligible for disaster relief simply because they are churches. President Trump may be the only means by which churches and religious organizations in Texas and Florida obtain the disaster relief they so urgently need.

The PA Policy is not new, and has been re-issued under previous administrations, including two revisions under President Obama’s FEMA Assistant Administrator. But President Trump has publicly declared that churches and religious organizations should be entitled to disaster relief on equal terms as non-religious organizations. And with the stroke of a pen, the Trump Administration can make this a reality, providing much-needed disaster relief to hundreds of religious organizations—who themselves continue to provide relief to tens of thousands of affected citizens throughout Texas and Florida.

On behalf of our Clients, First Liberty Institute requests the Trump Administration immediately rescind the unconstitutional religious ban; specify that churches and religious nonprofit organizations, including our Clients, are eligible to apply for and receive Public Assistance on the same terms as their non-religious neighbors. Further, we request an additional 30 days for affected churches and religious organizations to apply for Public Assistance after President Trump rescinds the unconstitutional FEMA Public Assistance policy. We request this relief as soon as possible, but no later than 10:00 A.M. on September 25, 2017.

FEMA's Public Assistance Program and Policy Guide Unconstitutionally Precludes Churches from Applying for Relief

Undoubtedly, FEMA plays a vital and material role in providing relief to the most vulnerable in the aftermath of disasters. FEMA's core mission is "to support our citizens and first responders to ensure that as a nation we work together to build, sustain and improve our capability to prepare for, protect against, respond to, recover from and mitigate all hazards." In pursuit of this crucial mission, The Robert T. Stafford Disaster Relief and Emergency Assistance Act as Amended ("Stafford Act") authorizes the President to provide Federal assistance for victims of disaster. 42 U.S.C. § 5151 et seq. FEMA's Office of Response and Recovery issues guidance and coordinates relief efforts to reduce suffering, protect citizens and their property, and save lives, in accordance with the Stafford Act.

FEMA provides assistance to private nonprofit organizations as well as State, Territorial, Indian Tribal, and local governments through its Public Assistance Program. FEMA's PA Policy Guide is a comprehensive overview of FEMA's Public Assistance Program, eligibility requirements, application process, and its administration. Specifically, the PA Policy Guide provides the public with information regarding the four layers of relief eligibility after a President declares a state of emergency—applicant eligibility, facility eligibility, work eligibility and cost eligibility. All PA Program Assistance must comply with all applicable statutes, including the governing Stafford Act. 2 CFR § 200.338.

FEMA grants assistance to an array of eligible nonprofit entities who provide "non-critical" services and are open to the general public. PA Policy Guide at 12; 1 Stafford Act § 406(a)(3)(B), 42 U.S.C. § 5172, and 44 CFR § 206.221(e). According to the PA Policy Guide, the list of eligible "non-critical" services includes but is not limited to "museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature," as well as facilities used for educational enrichment, "multi-purpose" programs, community service projects and activities, child care, food assistance programs, libraries, and performing arts centers. PA Policy Guide at 12, 14, 15.

However, FEMA's PA Policy Guide unequivocally excludes one category of nonprofit organizations from applying for and receiving aid—religious entities. In contradiction to the Stafford Act's nondiscrimination provision, the PA Policy Guide provides "[f]acilities established or primarily used for . . . religious . . . activities are not eligible." PA Policy Guide at 12. The PA Policy Guide defines "[r]eligious activities" to include "worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large." *Id.* at 15.

"Appendix B: Private Nonprofit Facility Eligibility Examples" of the PA Policy Guide sets forth three hypothetical examples of how would FEMA institutionally discriminate against

religious entities in rendering relief. *Id.* at 171-74. One notable example stated that school buildings operated by a religious institution would only be eligible for aid if “the few religious classes in the curriculum are not significant enough to influence the primary use for secular education.” *Id.* at 171-72. The example goes on to emphasize that the “church’s primary use is an ineligible service...and its peripheral use by the school is not sufficient to establish eligibility. *Id.* In another example, a community center operated by a religious entity may only receive FEMA assistance if it “accepts members without regard to faith and is not used for religious activities.” *Id.* at 173-74.

The FEMA PA Policy Guide Contradicts the Stafford Act

Under the Stafford Act, private nonprofits, whose facilities that are damaged or destroyed by a major disaster, may apply to FEMA “for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses.” 42 U.S.C. § 5172(a)(1)(B). After proof of nonprofit status, the organization must also “own[] or operate[] an eligible facility” to be eligible. PA Policy Guide at 12 (citing 44 C.F.R. § 206.222(b)).

The Stafford Act provides the President of the United States with significant policy-making authority over all relief operations and regulations. However, the Stafford Act maintains one significant and constitutional limitation over this authority. The Stafford Act mandates that these regulations “shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of...religion.” 42 U.S.C.S. § 5151(a).

The FEMA PA Policy Guide Contradicts Supreme Court Precedent

The U.S. Supreme Court very recently held that the Free Exercise Clause of the First Amendment protects religious organizations against unequal treatment. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017) (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 533). The Supreme Court repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion. *Id.*; see *McDaniel v. Paty*, 435 U. S. 618, 628 (1978) (plurality opinion) (quoting *Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972)).

Unless the Trump administration undertakes a change, FEMA’s PA Policy Guide expressly requires religious organizations to abandon their religious mission and identity in order to participate in an otherwise available public benefit program, for which they are otherwise qualified. See *Trinity Lutheran*, 137 S. Ct. at 2024. Such a condition violates the Free Exercise Clause of the First Amendment. *Id.* at 2015. Likewise, the PA Policy Guide leaves little doubt as to its discriminatory purpose, as it facially discriminates on the basis of religion. PA Policy Guide at 12, 14, 15, and 171-74. The “express discrimination against religious exercise here is

not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.” *Trinity Lutheran*, 137 S. Ct. at 2012; *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U. S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993) (“[T]he ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract”).

But for Their Religious Character, Our Clients Would be Eligible to Apply for and Receive FEMA Public Assistance

On August 25, 2017, Hurricane Harvey made landfall in southern Texas at its peak intensity as a Category 4 storm. In less than a week, the hurricane covered 39 Texas counties with between 40 and 51 inches of rain, resulting in catastrophic flooding. The flooding required more than 17,000 rescues, destroyed thousands of homes, and displaced 30,000 individuals. Harvey caused 71 confirmed deaths and its economic losses are preliminarily estimated to be \$200 billion dollars.

In the devastating wake of Hurricane Harvey, President Trump declared 39 Texas counties, including Harris and Jefferson Counties, eligible for Public Assistance. He signed the Hurricane Harvey Major Disaster Declaration on August 25, 2017, adding Harris County on August 27 and Jefferson County on August 30, 2017. <https://www.fema.gov/disaster/4332>.

Like their neighbors, our Clients sustained significant damage from Hurricane Harvey. Grace Houston is located at 14505 Gulf Freeway, Houston TX 77034 in Harris County. During Hurricane Harvey it sustained flood damage to its 250,000 square foot facility. The church’s auditorium flooded several feet at its deepest point. As the water receded, 1300 church volunteers worked for several days to remove wet carpet, damaged sheetrock, insulation, and ruined equipment. Grace Community Church Houston estimates that to cycle the air alone, without any repairs, would cost approximately \$850,000. This represents only part of the cost of repairs for the building. During the aftermath, volunteer teams served more than 600 affected families to date with home evaluations. Church on the Rock Katy initially operated as a shelter to victims of Hurricane Harvey, but was forced to evacuate families when water started to rise. The church flooded with over three feet of water, causing significant damage to the building. Similarly, Trinity Church took on approximately ten inches of water.

But for their religious character, our Clients meet all eligibility requirements to apply for Assistance. Clients are 501(c)(3) nonprofit organization(s), open to the general public. Each client owns the damaged facilities for which they will request Public Assistance. Each of our Clients offer educational and spiritual classes, serve their communities, and host programs. For example, Church on the Rock Katy offers soccer, ballet and music classes, adult education classes, and partners with Houston Food Bank. Except for their religious nature, Clients activities are indistinguishable from Public Assistance eligible community centers, or facilities used for

educational enrichment, “multi-purpose” programs, community service projects and activities, food assistance programs, and performing arts centers.

Ironically, although FEMA partners with churches to provide shelters and distribute aid to disaster areas, the PA Policy Guide prohibits those same churches from applying for or receiving such relief. PA Policy Guide at 12, 14, 15, and 171-74. Therefore, our Clients are faced with a choice, abandon their religious character or be excluded from applying for Public Assistance. In this way, the PA Policy Guide undermines FEMA’s mission and contradicts both the Stafford Act’s religious discrimination protection and the Free Exercise Clause of the First Amendment. 42 U.S.C.S. § 5151(a).

Our Clients, and religious entities like them, are victims of the same disaster as their nonreligious neighbors. They too withstood the same human suffering, property loss and damage, and displacement as the communities they serve. These churches also need immediate assistance, aid, and services to reconstruct and rehabilitate their devastated facilities. The Stafford Act authorizes President Trump, acting through FEMA, to immediately alleviate this suffering and damage through assistance programs. 42 U.S.C. 5121.

President Trump Can Make Churches Eligible for FEMA’s Public Assistance

Upon hearing that churches are denied equal access to FEMA aid, President Trump publicly declared his support for Texas churches, stating “[c]hurches in Texas should be entitled to reimbursement from FEMA Relief Funds for helping victims of Hurricane Harvey (just like others).” President Trump’s “tweet” echoes his directive in the Presidential Executive Order Protecting Free Speech and Religious Liberty (“Executive Order”), signed on May 4, 2017. The Executive Order provides that “[i]t shall be the policy of the executive branch to vigorously enforce Federal law’s robust protections for religious freedom.” *Id.* at Section 1.

First Liberty Institute proposes a simple and expedient solution to rectifying the PA Policy Guide’s unlawful religious ban. President Trump should direct FEMA to revise and modify its religious ban and bring the policy into compliance with *Trinity Lutheran* and the Stafford Act. The Stafford Act’s nondiscrimination policy sets forth that,

“[t]he President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.” 42 U.S.C.S. § 5151(a).

First Liberty Institute thereby requests FEMA to:

- (1) Amend the PA Policy Guide to clarify that religious private nonprofit organizations are entitled to apply for and receive Public Assistance on an equal basis as non-religious private nonprofit organizations;
- (2) Publicly acknowledge that even though Trinity Church, Church on the Rock Katy, and Grace Community Church are religious private nonprofit organizations, they are entitled to apply for and receive Public Assistance on an equal basis as nonreligious private nonprofit organizations; and,
- (3) Provide a 30-day extension from the date of the revised PA Policy's publication for eligible religious private nonprofit organizations to apply for Public Assistance for relief from Hurricanes Harvey and Irma.

We are hopeful President Trump's administration will provide a pathway for our Clients and other religious entities to have equal access to Public Assistance in the wake of Hurricanes Harvey and Irma. After all, Hurricane Harvey did not distinguish between its religious and nonreligious victims, as President Trump has seen first hand.

First Liberty Institute hopes to discuss the relevant considerations by no later than 10:00 A.M., September 25, 2017. Our request for an expeditious response is due to the impending deadline for Harris County to apply for Public Assistance, September 26, 2017. You may direct your communications on this matter to me, via e-mail at cyouman@firstliberty.org.

Sincerely,

/s/ Chelsey D. Youman

Chelsey Youman
Legal Counsel