Federal Aid for Reconstruction of Houses of Worship: A Legal Analysis

‚name redacted‚
Legislative Attorney

October 19, 2015

Congressional Research Service
7-....
www.crs.gov
R42974

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

In late October 2012, Hurricane Sandy struck the East Coast of the United States, causing severe damage to the mid-Atlantic and northeast regions of the country. The resulting destruction led to major disaster declarations in 12 states and the District of Columbia, making those states eligible for certain federal supplemental assistance to aid in the recovery process. The damage resulting from Hurricane Sandy devastated a wide range of communities, and many individuals and organizations sought federal assistance for recovery, including churches, which, in turn, raised constitutional concerns regarding the provision of federal assistance to religious organizations.

The First Amendment of the U.S. Constitution generally prohibits the government from sponsoring or financing religious activities. The U.S. Supreme Court has interpreted the restrictions on federal aid provided to religious institutions in a number of contexts. In the context of providing aid to fund the construction or maintenance of religious buildings, the Court has permitted such aid if the building is not used for worship or religious instruction in a series of decisions issued in the early 1970s. Over time, however, the focus of the Court's analysis in Establishment Clause cases involving public aid to religious institutions has shifted. More recent cases arguably suggest that neutrality in the eligibility of participants competing for public funds may be paramount. At least one federal court of appeals and the U.S. Department of Justice's Office of Legal Counsel (OLC) have relied on this shift to support conclusions that funding may be permitted to provide assistance to religious facilities in some scenarios, such as urban development, emergency and disaster assistance, and historic preservation.

This report examines the constitutional rules governing federal funding for religious buildings and analyzes the Court's previous decisions on this issue. It also analyzes more recent lower court and administrative opinions that have distinguished the Court's decisions and allowed public funds to be awarded to houses of worship. Finally, the report discusses examples in which Congress has proposed or provided funding related to the construction and maintenance of religious buildings, including the Federal Disaster Assistance Nonprofit Fairness Act (H.R. 3066, 114th Cong.), which would authorize the Federal Emergency Management Agency (FEMA) to provide disaster recovery assistance to houses of worship and other buildings operated by religious organizations.

Contents

Contacts

Introduction

In late October 2012, Hurricane Sandy struck the East Coast of the United States, causing severe damage to the mid-Atlantic and northeast regions of the country. The resulting destruction led to major disaster declarations in 12 states and the District of Columbia, making those states eligible for certain supplemental federal assistance to aid in the recovery process.[1] The damage resulting from Hurricane Sandy devastated a wide range of communities and, as a result, many individuals and organizations sought federal assistance for recovery, including churches, which, in turn, raised constitutional concerns regarding the provision of federal assistance to religious organizations.[2] Congressional interest in these issues has continued in the subsequent years.[3]

This report examines the constitutional rules governing federal funding for religious buildings and analyzes the Court's previous decisions on this issue. It also analyzes more recent lower court and administrative opinions that have distinguished the Court's decisions and allowed public funds to be awarded to houses of worship. Finally, the report discusses examples in which Congress has proposed or provided funding related to the construction and maintenance of religious buildings, including H.R. 3066, which would authorize the Federal Emergency Management Agency (FEMA) to provide disaster recovery assistance to houses of worship and other buildings operated by religious organizations.

Constitutional Requirements Regarding Public Funding Provided to Houses of Worship

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting the establishment of religion."[4] While this generally means that the government cannot finance or sponsor religious activities, the constitutional analysis of public aid to religious organizations differs based on the form of assistance provided. For instance, the Court has distinguished cases involving aid that is provided *directly* to sectarian organizations (e.g., providing funds or materials to a religious organization) and aid that benefits such groups *indirectly* (e.g., providing vouchers that may be used at religious schools to parents of schoolchildren).[5] In a subset of the Court's decisions on direct aid, the Court specifically addressed the constitutionality of providing aid for the construction and maintenance of religious facilities in a series of cases heard during the early 1970s.[6] However, the Court's later Establishment Clause jurisprudence has indicated that the Court may not apply the same standard

[1] Following the damage from Hurricane Sandy, the President declared major disasters in Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Virginia, and West Virginia. *See Disaster Declarations*, Federal Emergency Management Agency, *available at* http://www.fema.gov/disasters. For more information about the disaster declaration process, see CRS Report RL34146, FEMA's Disaster Declaration Process: A Primer.

[2] *See* Sharon Otterman, *For Congregation Leaders, Hurricane is Taking a Toll*, N.Y. TIMES (Nov. 12, 2012), *available at* http://www.nytimes.com/2012/11/13/nyregion/regional-places-of-worship-seek-to-rebuild.html?_r=0.

[3] H.R. 592, 113th Cong. (2013); S. 1274, 113th Cong. (2013); H.R. 3066, 114th Cong. (2015).

[4] U.S. Const. amend. I.

[5] *Compare* Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000) *with* Mueller v. Allen, 463 U.S. 388 (1983); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[6] *See* Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

used in those cases to legal challenges brought today.[7] At least one federal appellate court has distinguished these early cases and permitted churches to receive public funding for renovations.[8]

Supreme Court Decisions Requiring Restrictions on Use of Public Funds for Religious Facilities

In a series of cases heard during the 1970s, the Court considered the constitutionality of providing public funds to religious schools for facility construction and maintenance and ultimately restricted the use of such funds for buildings used for religious worship. In *Tilton v. Richardson*, a decision issued in 1971, the Court largely upheld a federal program that provided grants to colleges, including religiously affiliated colleges, for the construction of needed facilities.[9] The statutory authorization specifically excluded buildings that would be used for religious instruction or religious worship.[10] To analyze whether the grants would violate the Establishment Clause, the Court examined whether the grants had a secular purpose; resulted in a neutral effect that neither advanced nor inhibited religion; and avoided excessive entanglement between the government and religion.[11] This three-pronged analysis would become known as the *Lemon* test.[12]

According to the Court, the challenged grant program advanced a legitimate secular purpose by assisting schools to construct adequate facilities that would accommodate growing numbers of students.[13] The Court rejected "the simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses," noting that long-standing precedent upheld a federal construction grant to a religious hospital.[14] The Court did not find that the benefits resulting from the grant would have a "principal or primary effect" of advancing religion, and explained that financial assistance limited to secular aspects of religious education did not advance religion.[15]

The Court also refuted the argument that grants for construction of non-sectarian buildings controlled by religious institutions would entangle government and religion. The Court distinguished between aid to institutions of higher education compared with elementary and secondary schools because older students were less likely to construe aid for secular purposes as government support of religious principles.[16] The Court also recognized that "government

[7] In addition to its historic reliance on principles of neutrality in Establishment Clause analysis, the Court has continued, and, arguably, heightened the emphasis it places on neutrality in more recent cases. *See* Everson v. Bd. of Edu., 330 U.S. 1 (1946) (explaining that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that constitutionality depends, in part, on whether the government's action has a neutral effect that neither advances or inhibits religion); *Mitchell*, 530 U.S. 793 (plurality opinion) (emphasizing neutral effect prong of Lemon test and upholding provision of secular materials and services to private, including religious, schools).

[8] American Atheists v. City of Detroit Downtown Development Authority, 567 F.3d 278 (6th Cir. 2009).

[9] 403 U.S. 672 (1971).

[10] *Id*. at 675.

[11] *Id*. at 678.

[12] As discussed later in this report, the *Lemon* test was announced in *Lemon v. Kurtzman*, a decision issued on the same day as *Tilton*, involving another challenge to public funding for religious schools. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[13] *Tilton*, 403 U.S. at 678-79.

[14] *Id*. at 679 (citing Bradfield v. Roberts, 175 U.S. 291 (1899)).

[15] *Id*.

[16] *Id*. at 685-86.

entanglements with religion are reduced by the circumstance that, unlike [other cases striking down public funding for religious schools], the Government aid here is a one-time, single-purpose construction grant" that would not establish an ongoing financial relationship between the government and the religious institution.[17]

Although the Court found no Establishment Clause violation with the provision of funds for non-sectarian use, it noted that the "obligation not to use the facility for sectarian instruction or religious worship would appear to expire at the end of 20 years" under the statutory authorization.[18] The Court held that allowing the prohibition on religious use to lapse after 20 years would allow the facilities to be converted to religious purposes and therefore result in the federal funds "in part [having] the effect of advancing religion."[19] Accordingly, the Court upheld the program generally, but struck the 20-year limitation that would allow sectarian use after a waiting period as unconstitutional.

In 1973, the Court issued two more decisions related to construction and maintenance funds for religiously affiliated buildings. In *Hunt v. McNair*, the Court echoed the analysis it applied in *Tilton* to uphold a state revenue bond program that financed the construction of facilities at institutions of higher education, including those with a religious affiliation.[20] Like the grant program in *Tilton*, the state bond program explicitly excluded buildings that would be used for religious instruction or worship.[21] The Court applied the *Lemon* test, finding that the state program had a secular purpose similar to that in *Tilton*; did not advance sectarian activity; and did not constitute excessive entanglement. The Court highlighted that its analysis considered that "every lease agreement [under the bond program] must contain a clause forbidding religious use" and that this satisfied the Court's requirement that proposed funding would not have a primary effect of advancing or inhibiting religion.[22]

The Court's third case involving construction and maintenance funding for religious institutions, *Committee for Public Education and Religious Liberty v. Nyquist*, narrowed the possibility of religious institutions to receive public funding.[23] Although the Court had recognized the possibility of religious institutions receiving funds for construction and maintenance in two cases involving post-secondary religious schools, it held that it was unconstitutional to provide such funding without restriction to religiously affiliated elementary and secondary schools. Again relying on the *Lemon* test, the Court noted that the authorized grants had a legitimate secular purpose to maintain and repair school facilities for the health and safety of students.[24] However, the Court noted that the grants did not include restrictions on the use of funds, and found the program unconstitutional:

> Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in

[17] *Id*. at 688.

[18] *Id*. at 683.

[19] *Id*.

[20] 413 U.S. 734 (1973).

[21] *Id*. at 736.

[22] *Id*. at 744-45.

[23] 413 U.S. 756 (1973).

[24] *Id.* at 773.

> that it subsidizes directly the religious activities of sectarian elementary and secondary schools.[25]

The Court distinguished *Tilton* and *Hunt* because any religious benefits received by schools in those cases were "indirect and incidental."[26]

Other Judicial Approaches to the Provision of Funds to Buildings Used for Religious Activities

Although these Supreme Court decisions indicate a constitutional prohibition on the use of public funds for construction or maintenance of buildings used for religious activities such as worship or sectarian education, it is important to note the development of the Court's Establishment Clause jurisprudence in the subsequent decades since the building and repair cases of the early 1970s. In 1971, simultaneous with its *Tilton* decision, the Court announced the tripartite *Lemon* test.[27] Although it became the traditional test used for Establishment Clause decisions, several Justices have questioned the continuing relevance of the *Lemon* test and offered modified versions or alternative standards of review for Establishment Clause cases in later decades. For example, Justice O'Connor proposed a modification of the *Lemon* test to consider whether the purpose and effect of a particular government action amounted to an endorsement of religion.[28] In another example, the Court has relied on a neutrality test to determine whether the government is acting neutrally both between religions and between religion and non-religion.[29] As recently as 2005, Court decisions have reflected disagreement among the Justices regarding the applicability of the *Lemon* test. In a pair of cases challenging public displays of the Ten Commandments, the Court issued diverging decisions, with the majority opinion in one relying on the endorsement version of the *Lemon* test and the plurality opinion in the other relying on other considerations.[30]

Citing the range of other standards that may be used in current Establishment Clause jurisprudence, one federal appellate court distinguished the Supreme Court's holdings from the building and repair cases in a recent decision.[31] In 2009, the U.S. Court of Appeals for the Sixth Circuit upheld the provision of public funds to religious institutions for building repairs, holding that a city could provide funds to local property owners, including churches, as part of a plan to boost economic growth and revitalize its downtown area.[32] The city offered all property owners in a designated section of the city to participate in a program that offered reimbursement of up to half of the costs incurred to refurbish building exteriors and parking lots. Because the city administered the grant program without consideration of the religious nature of the applicant, the court held that the program's neutrality indicated a secular purpose.[33] According to the court, a

[25] *Id.* at 774.

[26] *Id.* at 775 (explaining that aid restricted to secular purposes may make the schools more marketable to incoming students or allow other funds available for religious purposes but that such effects were only indirect and incidental benefits to the religious mission of the school).

[27] *Lemon*, 403 U.S. 602.

[28] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[29] *See* Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968). *See also Mitchell*, 530 U.S. 793.

[30] *Compare* McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005) *with* Van Orden v. Perry, 545 U.S. 677 (2005).

[31] *American Atheists*, 567 F.3d 278.

[32] *Id.*

[33] *Id.* at 282.

program administered with such neutrality could not have an impermissible effect of advancing religion.[34]

The 6th Circuit did not rely on the construction and maintenance line of cases discussed above. Instead, it explained that "[t]he most essential hurdle that a government-aid program must clear is neutrality—that the program allocates benefits in an evenhanded manner to a broad and diverse spectrum of beneficiaries."[35] The court's emphasis on neutrality highlighted two aspects: the neutrality of the eligibility requirements and the neutrality of the assistance provided. Noting that the city's revitalization program "makes grants available to a wide spectrum of religious, nonreligious and areligious groups alike and employs neutral, secular criteria" for selection, the court considered the guiding principles of the *Lemon* test as evidence of the requisite neutrality to justify the constitutionality of the city's program.[36] The court also explained that inclusion of a range of denominations among the various secular grant recipients would not imply to any reasonable observer that the city was endorsing any of the churches' religious views, but that exclusion "would send a far stronger message ... of disapproval [of religion]."[37]

The court also explained that local governments provide a range of public assistance to community groups, including churches.[38] For instance, churches are eligible to receive emergency services like fire and police protection, and churches may benefit from other city maintenance services such as sewers or sidewalks. According to the court, "if a city may save the exterior of a church from a fire, it is hard to understand why it cannot help that same church with peeling paint or tuckpointing—at least when it provides the same benefit to all downtown buildings on the same terms."[39] The court noted the nature of the improvements for which public funds were remitted, explaining that the benefits of the repairs did not include items with religious content.[40] The majority of renovations that were reimbursed included masonry and brickwork, exterior lighting and doors, building trim, gutters, entrance ways, and ramps—all part of the buildings' facades with no religious significance. The court explained that other renovations to the church signs and to storm windows covering stained glass windows did not themselves have religious content.[41]

The 6th Circuit distinguished the Supreme Court's building and repair decisions because of the different circumstances involved in those cases. The court explained that the program challenged in *Nyquist* involved funding for "ongoing basic services designed to sustain the schools' operation."[42] In comparison, Detroit's program involved "a one-time grant limited to exterior, cosmetic repairs."[43] The 6th Circuit also highlighted the development of Establishment Clause jurisprudence since *Tilton*, through which, it said, the Supreme Court has emphasized that

[34] *Id.*

[35] *Id.* at 289.

[36] *Id.* at 290.

[37] *Id.* at 292.

[38] *Id.* at 291-92.

[39] *Id.* at 292.

[40] *Id.* at 292-93.

[41] *Id.* The court noted that the storm windows did not take on any religious significance merely because they clarified the view of religious icons represented in the stained glass windows behind them. *Id.* at 293. The court also explained that the possibility that the church may use its sign to express a religious message did not affect its constitutionality because "the Establishment Clause does not bar a private group from using a government-provided medium to espouse its own message, even a religious message." *Id.*

[42] *Id.* at 298.

[43] *Id.*

religious groups need not be excluded from participation in open-access programs that make public resources generally available regardless of religious status.[44] According to the court, adhering to an absolute restriction on participation of religious groups or buildings in programs generally available to other groups may undermine other governmental interests such as historic preservation of buildings that have cultural and religious significance.[45]

Administrative Decisions Concerning Aid to Houses of Worship and Other Religious Buildings

Aside from construction and maintenance funding for schools and community development projects, questions related to the constitutionality of providing funds for religious buildings generally arise in two contexts: emergency or disaster assistance and historic preservation. Federal assistance for disaster recovery and historic preservation has been controversial when the aid is sought for facilities used for religious worship.

On a number of occasions, FEMA has been faced with questions on the legality of providing aid to religious institutions seeking assistance with recovery after natural disasters.[46] FEMA generally has maintained that it cannot provide disaster assistance under its statutory authority to private nonprofit facilities used primarily for religious purposes.[47] However, in 2002, FEMA requested an opinion from the Office of Legal Counsel (OLC) for the U.S. Department of Justice regarding whether the Establishment Clause would prohibit the agency from providing disaster assistance to a religious school in Seattle that suffered damage from an earthquake in 2001. OLC concluded that the Establishment Clause does not bar religious schools from participating in federal disaster assistance programs.[48] Noting that the disaster relief is distributed based on neutral criteria and that FEMA has exercised its discretion in the program in a neutral manner, OLC explained that providing aid to the school "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."[49] OLC distinguished the Court's decisions in *Tilton* and *Nyquist* based on the nature of the aid being provided, noting that the Court recognized that some public services like fire and police protection are different from construction and repair aid because the former are provided generally to all citizens and are unrelated to the religious function of the recipient.[50]

---

[44] *Id.* at 299 (citing *Widmar v. Vincent*, 454 U.S. 263, 265, 270-75 (1981); *Good News Club v. Milford Central School*, 533 U.S. 98, 113-14, 119 (2001); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394-95 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 839-46 (1995)).

[45] *Id.*

[46] For example, after Hurricanes Katrina and Rita in 2005, a religious school sought FEMA assistance in relocating its campus to the site of a local church. *See, e.g.*, *Memorandum of Agreement Among the Federal Emergency Management Agency, the Louisiana State Historic Preservation Officer, the Advisory Council on Historic Preservation, the Louisiana Governor's Office of Homeland Security and Emergency Preparedness, Holy Cross College, Inc., and the Roman Catholic Church of the Archdiocese of New Orleans Regarding the Construction of Holy Cross School in New Orleans, Louisiana*, *available at* http://www.fema.gov/pdf/plan/ehp/noma/cabrini_church.pdf.

[47] *See id. See also* Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 *et seq.*

[48] U.S. Department of Justice, Office of Legal Counsel, *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, Memorandum Opinion for the General Counsel, Federal Emergency Management Agency*, 26 Op. O.L.C. 114 (September 25, 2002), *available at* http://www.justice.gov/olc/FEMAAssistance.htm (hereinafter OLC Memo for FEMA).

[49] *Id.* at 6.

[50] *Id.* at 9 (citing *Nyquist*, 413 U.S. at 782).

Therefore, OLC concluded, FEMA assistance should be examined as the type of emergency service that the Court analyzes under neutrality principles rather than as the type of educational assistance that the Court analyzed under the principles of the *Lemon* test in the building and repair cases.[51]

In 2003, OLC issued an opinion with respect to the constitutionality of federal funds being used to provide a historic preservation grant to the Old North Church, an active church in Boston made famous during the Revolutionary War.[52] OLC noted that the historic preservation grants posed specific concerns because they were not generally available for all institutions, but rather subject to the possibility of "governmental judgments about the relative value of religious enterprises."[53] Ultimately, however, OLC determined that there was no Establishment Clause violation because the government had a "powerful interest in preserving all sites of historic significance to the nation, without regard to their religious or secular character."[54] Further, it noted that the eligibility for the grants "extends to a broad class of beneficiaries, defined without reference to religion and including both public and private institutions."[55] And finally, it found no basis to conclude that program administrators would act "in a manner that favors religious institutions."[56]

OLC's opinions provide the legal interpretation of the Department of Justice with respect to legal matters within the executive branch and can bind only executive agencies.[57] Courts are not required to defer to OLC's constitutional interpretations, but may consider them as advisory when considering related matters.[58] Thus, OLC's analyses of funding for religious buildings, though controversial, may offer a plausible legal argument reflecting Supreme Court jurisprudence which has broadened the constitutional parameters of federal aid to religious organizations, so long as the aid is not intended for a religious purpose.

Selected Examples of Federal Assistance Programs' Applicability to Religious Facilities

Over the past several years, Congress has considered providing federal funding opportunities to religious institutions. Religious schools were included for eligibility in funding programs for facility repair in the 2009 economic stimulus legislation.[59] Currently, the 114th Congress is considering legislation that would expressly provide eligibility for FEMA recovery funds to houses of worship.[60]

---

[51] *Id.*

[52] U.S. Department of Justice, Office of Legal Counsel, *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, Memorandum Opinion for the Solicitor, Department of the Interior*, April 30, 2003, *available at* http://www.justice.gov/olc/OldNorthChurch.htm.

[53] *Id.* at 8.

[54] *Id.* at 9.

[55] *Id.*

[56] *Id.*

[57] *See* Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988).

[58] *See id.* at 1478 ("The federal Judiciary does not, however, owe deference to the Executive Branch's interpretation of the Constitution.").

[59] American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title XIV, 123 Stat. 115, 279-86 (2009).

[60] Federal Disaster Assistance Nonprofit Fairness Act of 2015, H.R. 3066, 114th Cong. (2015). Substantially similar legislation was introduced initially in the 113th Congress. *See* H.R. 592, 113th Cong. (2013).

The American Recovery and Reinvestment Act of 2009

In 2009, Congress enacted the American Recovery and Reinvestment Act (ARRA), which provided funding for various education programs, including the State Fiscal Stabilization Fund (SFSF).[61] SFSF allocated federal funds to states to support elementary, secondary, and post-secondary education, and authorized states to use funds "for modernization, renovation, or repair of public school facilities and institutions of higher education facilities."[62]

Congress limited the use of money received under the SFSF. Funds distributed under the program are available to only public elementary and secondary schools, but are available to both public and private (including private religious) institutions of higher education.[63] Additionally, funding that is provided to institutions of higher education must not be used for

> modernization, renovation, or repair of facilities –
>
> (A) used for sectarian instruction or religious worship; or
>
> (B) in which a substantial portion of the functions of the facilities are subsumed in a religious mission.[64]

This provision resembles a history of similar statutory restrictions in the provision of funds under other education and social programs.[65]

ARRA's limitation on the use of funds for facilities used for religious purposes reflects the constitutional requirements set forth by the Supreme Court in the building and repair cases of the 1970s. As discussed earlier in this report, the Court held that a religious institution could receive public funds for building and maintaining its facilities without violating the Establishment Clause.[66] However, the Court specifically required that such funds could not be used for facilities that would be used for sectarian instruction or religious worship at any time in the future.[67]

H.R. 3066, the Federal Disaster Assistance Nonprofit Fairness Act of 2015

H.R. 3066, the Federal Disaster Assistance Nonprofit Fairness Act, is intended to provide relief for religious facilities damaged by Hurricane Sandy and would apply to provisions of assistance associated with emergency or disaster declarations made on or after October 28, 2012.[68] The bill would expand the definition of facilities eligible to receive certain FEMA assistance to include tax-exempt houses of worship and would clarify that houses of worship or other facilities

[61] P.L. 111-5, §14002.

[62] *Id.*

[63] *See* P.L. 111-5, §14002(b)(2).

[64] P.L. 111-5, §14004(c)(3).

[65] *See, e.g.*, No Child Left Behind Act of 2002, P.L. 107-110, 115 Stat. 1425 (2002); Workforce Investment Act of 1998, P.L. 105-220, 112 Stat. 936 (1998); National and Community Service Act of 1990, P.L. 101-610, 104 Stat. 3127 (1990); Job Training Partnership Act of 1982, P.L. 97-300, 96 Stat. 1322 (1982); Comprehensive Employment and Training Act of 1973, P.L. 93-203, 87 Stat. 839 (1973).

[66] *Tilton*, 403 U.S. 672; *Hunt*, 413 U.S. 734; *Nyquist*, 413 U.S. 756.

[67] See *Tilton*, 403 U.S. at 683.

[68] H.R. 3066, §3(c).

operated by religious institutions are eligible for funding regardless of their religious character or the primary purpose of the facility.[69]

As discussed above, under current law, the owner or operator of private nonprofit facilities damaged by major disasters may receive financial assistance for the repair, restoration, reconstruction, or replacement of the facility and related expenses.[70] Private nonprofit facilities currently are defined, in part, to include "any private nonprofit facility that provides essential services of a governmental nature to the general public."[71] The definition explicitly lists a number of examples (e.g., museums, zoos, libraries, homeless shelters, etc.), but it currently does not include houses of worship.[72] Although the statutory language does not make clear whether that list is exhaustive or merely illustrative, FEMA regulations and policies state that the term does not include facilities used for sectarian instruction or worship.[73]

Under H.R. 3066, "community centers, including houses of worship exempt from taxation under section 501(c) of the Internal Revenue Code of 1986" would be added to the list of examples of qualified facilities.[74] H.R. 3066 also would clarify that houses of worship and facilities operated by religious organizations may receive funds for repair, restoration, reconstruction, or replacement. The amending language specifically states that "a church, synagogue, mosque, temple, or other house of worship, and a private nonprofit facility operated by a religious organization, shall be eligible for contributions ... without regard to the religious character of the facility or the primary religious use of the facility."[75]

H.R. 3066 would allow federal funds to be distributed to religious institutions for building and repair of facilities damaged by natural disasters without including restrictions (such as the one enacted in ARRA excluding facilities used for religious worship) that the Supreme Court had required when it considered similar cases four decades ago. As discussed earlier, the Court's building and repair cases generally held that religious institutions could receive public funding for construction and maintenance of facilities, but that the aid could not be used for facilities with religious use.[76] Although lower court and administrative opinions have attempted to distinguish these holdings in other cases, those cases do not supersede the Court's decisions in this area.[77]

---

[69] H.R. 3066, §3.

[70] 42 U.S.C. §5172(a)(1)(B).

[71] 42 U.S.C. §5122(10)(B).

[72] *Id.*

[73] *See* 44 C.F.R. §206.221(e)(1) (excluding facilities used for religious purposes or instruction from the definition of private nonprofit facility); *Private Nonprofit Facility Eligibility*, Disaster Assistance Policy 9521.3, Federal Emergency Management Agency, U.S. Department of Homeland Security, *available at* http://www.fema.gov/public-assistance-9500-series-policy-publications/private-nonprofit-facility-eligibility-0; *Community Center Eligibility*, Disaster Assistance Policy 9521.1, Federal Emergency Management Agency, U.S. Department of Homeland Security, *available at* http://www.fema.gov/9500-series-policy-publications/95211-community-center-eligibility.

[74] H.R. 3066, §3(a).

[75] H.R. 3066, §3(b). For purposes of repair, restoration, reconstruction, or replacement assistance, private nonprofit facilities must generally apply for disaster loans from the Small Business Administration before assistance can be provided by FEMA. This limitation does not apply to entities that provide "critical services," defined by the Stafford Act as power, water (including water provided by an irrigation organization or facility), sewer, wastewater treatment, education, communications, and emergency medical care. *See generally* 42 U.S.C. §5172. H.R. 3066 does not appear to categorically designate houses of worship or religiously operated facilities as entities that provide critical services, but also would not appear to prohibit them from qualifying as providers of critical services on a case-by-case basis.

[76] *See Tilton*, 403 U.S. 672; *Hunt*, 413 U.S. 734; *Nyquist*, 413 U.S. 756.

[77] *See American Atheists*, 567 F.3d 278; *OLC Memo for FEMA*, 26 Op. O.L.C. 114.

Because *Tilton* and *Nyquist* have not been overturned and remain valid precedent, there is support for the contention that H.R. 3066 would violate the Establishment Clause.

A number of arguments may be made to distinguish the provision of funds to houses of worship damaged by Hurricane Sandy from the Court's requirements in the building and repair cases of the 1970s. However, a court may not find these arguments to be sufficient to support the constitutionality of the potentially broad-reaching effects that could result from expanding eligibility for houses of worship under H.R. 3066.

The 6th Circuit and OLC opinions justified their departure from the Court's holdings in the building and repair cases based on the subsequent shift in the Court's Establishment Clause jurisprudence toward a heightened emphasis on neutrality. Indeed, the Court has emphasized the importance of neutrality in many of its more recent cases in a variety of contexts. However, it is not clear that this shift would apply to cases involving direct aid provided from the government to religious organizations to repair facilities used for religious purposes. The Court repeatedly has recognized that religious groups must be given the same opportunities to use public resources as are available to nonreligious groups.[78] These decisions often have involved access to meeting spaces provided by public schools, not access to government funding.[79] In cases involving questions of equal access to funding regardless of religious status, the challenges have involved a student group's ability to share student activity funds, not appropriated funds or federal grant programs.[80] These cases, a subset dealing with issues of access to common resources, rather than direct funding to religious entities, involve questions under both the Free Speech Clause and the Establishment Clause.[81] In other words, these cases have not been considered strictly under the Establishment Clause, and it may be premature to assume that the Court would use the same analysis in the line of cases involving equal access as it would in the line of cases involving direct aid.

Court analyses of building and repair funding have noted whether the aid was a one-time grant or ongoing series of payments.[82] Reconstruction grants for disaster recovery likely would be categorized as one-time grants, which would not establish a long-term relationship or support of the religious institution by the government. Both the Supreme Court and the 6th Circuit have ruled favorably in the context of one-time grants, but each opinion indicated that additional considerations must also be satisfied.[83] Even when funding was limited to a single distribution, the Supreme Court nonetheless required that the work resulting from those funds never be used to support religious worship.[84] Likewise, when upholding one-time grants of renovation funds for houses of worship under a different analysis, the 6th Circuit emphasized that the funds would not be used for religious content, but instead would be limited to "exterior, cosmetic repairs."[85] Without such restrictions, it is plausible that funds provided by FEMA to religious organizations seeking to rebuild after Hurricane Sandy may be used to reconstruct sacred parts of the building,

[78] *See Widmar*, 454 U.S. 263; Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990); *Lamb's Chapel*, 508 U.S. 384; *Good News Club*, 533 U.S. 98; *Rosenberger*, 515 U.S. 819.

[79] *Widmar*, 454 U.S. 263; *Westside Community Board of Education*, 496 U.S. 226; *Lamb's Chapel*, 508 U.S. 384; *Good News Club*, 533 U.S. 98;

[80] *Rosenberger*, 515 U.S. 819. *See also* Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010).

[81] Questions relating to equal access involve whether the government can restrict speech in order to comport with the Establishment Clause.

[82] *See Tilton*, 403 U.S. at 688; *American Atheists*, 567 F.3d at 298.

[83] *Id.*

[84] *Tilton*, 403 U.S. 672.

[85] *American Atheists*, 567 F.3d at 298.

such as an altar, or replace religious icons. Such use of public funds, however, would appear to be beyond the scope of even the 6th Circuit's more lenient analysis of providing aid for restoration of religious buildings.

It may be noted that Congress has permitted religious organizations to participate in federally funded programs in other cases. For example, faith-based organizations have been eligible to receive federal funding to support their provision of social services.[86] Though so-called faith-based funding programs were particularly controversial initially, they generally have withstood legal challenges to the participation of religious organizations in public programs.[87] Also, there is at least one instance in which Congress has authorized explicitly the provision of aid for the purposes of rebuilding a church. In 1995, Congress authorized funding "to assist property and victims damaged and economic revitalization due to the bombing of the Alfred P. Murrah Federal Building in Oklahoma City."[88] The authorization stated "that notwithstanding any other provision of law, such funds may be used for the repair and reconstruction of religious institution facilities damaged by the explosion in the same manner as private nonprofit facilities providing public services."[89] However, while this authorization provides statutory precedent for allowing the participation of religious organizations in publicly funded programs, it does not connote constitutional permissibility.[90] It is also worth noting, though, in the examples of public aid under faith-based funding programs, Congress has enacted certain restrictions on the use of such funds, effectively prohibiting the use of aid for purposes of worship, religious instruction, or proselytization.[91]

Another issue for consideration is the scope of the expanded definition proposed by H.R. 3066. As mentioned above, the current definition requires that private nonprofit facilities provide governmental services and lists a variety of eligible entities. With the amending language proposed by H.R. 3066, the definition would read, in part,

> [T]he term "private nonprofit facility" includes any private nonprofit facility that provides essential services of a governmental nature to the general public (including museums, zoos, performing arts facilities, community arts centers, community centers, including houses of worship exempt from taxation under section 501(c) of the Internal Revenue Code of 1986, ...)[92]

Including houses of worship in the list of examples broadens the scope of the definition, but does not directly change the requirement that private nonprofit facilities provide essential services of a

[86] See CRS Report R41099, *Faith-Based Funding: Legal Issues Associated with Religious Organizations That Receive Public Funds*.

[87] *Id*.

[88] Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, P.L. 104-19, ch. III, 109 Stat. 194, 253 (July 27, 1995).

[89] P.L. 104-19, 109 Stat 194, 253-54.

[90] Although lower courts have found violations in the implementation of some of the programs, the Supreme Court has not considered a case directly addressing the constitutionality of faith-based funding programs. *See, e.g.*, Americans United for Separation of Church and State v. Prison Fellowship Ministries, 509 F.3d 406 (8th Cir. 2007).

[91] In a variety of faith-based funding programs, Congress enacted provisions commonly referred to as charitable choice provisions. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193, §104 (Aug. 22, 1996), codified at 42 U.S.C. §604a(j). These programs prohibit grantees from using funds received under the programs for sectarian worship, instruction, or proselytization. *Id*. The provision of funds for rebuilding the church damaged by the Oklahoma City attack did not include similar language, but instead stated that the authorization would apply "notwithstanding any other provision of law." *See* P.L. 104-19, 109 Stat. 194, 253.

[92] H.R. 3066, §3(a).

governmental nature in order to be eligible for assistance. Houses of worship that provide such services in addition to sectarian activities would appear to be eligible under this provision. For example, a church that operates a food bank in its basement may qualify as an eligible entity because the food bank may be deemed a governmental service of assistance to the community. However, questions may remain regarding whether facilities that are used solely for worship services would be eligible because worship services are not governmental in nature. Applying a narrow interpretation of the phrase essential services of a governmental nature could limit the extent to which various houses of worship affected by natural disasters could qualify for supplemental assistance.

It is not clear that H.R. 3066 provides FEMA with the discretion to make such distinctions. If congressional intent is to make funding available to all houses of worship, the proposed amendments might be read to be a legislative determination that all houses of worship provide essential services of a governmental nature. If the requirement to provide governmental services is not intended to restrict access to funding to a subset of religious organizations (i.e., those that provide not only religious services, but also social services) similar to the faith-based funding provisions, the bill may be less likely to pass constitutional muster. However, even if the governmental services limitation narrows the scope of the facilities eligible for funding, the houses of worship that do qualify would appear not to be restricted under the current language of H.R. 3066 from using the funds for sectarian purposes. That is, it does not appear that a church that qualified for FEMA assistance in the earlier example because of its food bank would be restricted to using FEMA assistance only to rebuild the part of the facility housing the food bank and not the part of the facility used for worship. Accordingly, even with the narrowing of the definition, H.R. 3066 does not limit the use of funds to construction of nonsectarian elements of the facility, such as the building exterior, as discussed earlier. There appear to be no examples of government funding for sectarian elements of religious facilities in which courts have upheld the government's aid unless it includes restrictions on the use of funds for sectarian purposes.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....