

# FREEDOM FROM RELIGION *foundation*

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January 31, 2023

**SENT VIA EMAIL & U.S. MAIL: DanGelber@miamibeachfl.gov,  
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The Honorable Dan Gelber  
Mayor, City of Miami Beach  
1700 Convention Center Drive,  
Miami Beach, FL 33139

Re: Unconstitutional funding of eruv maintenance

Dear Mayor Gelber and members of the Miami City Commission:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding serious constitutional concerns over a resolution to approve a grant of \$72,000 to the Miami Beach Eruv Council in order to fund the maintenance of an *eruv* line in the City of Miami Beach. FFRF is a national nonprofit organization with more than 39,000 members across the country, including more than 1,900 members and a local chapter in Florida. Our purposes are to protect the constitutional principle of separation between state and church, and to educate the public on matters relating to nontheism.

A concerned Miami Beach resident has reported that on February 1, 2023, the City Commission will vote on a resolution to grant \$72,000 to the Miami Beach Eruv Council for maintenance and repairs related to an *eruv* line located in Miami Beach. Please see a copy of the resolution attached. The resolution is accompanied by a memorandum from city attorney Rafael A. Paz, which describes this grant of taxpayer funds to a religious organization for the maintenance of a purely religious structure that only benefits a fraction of members of a specific religion as “legally defensible.” Please find a copy of the memorandum attached.

The Jewish Encyclopedia notes the rationale for designating these religious areas: “According to the traditional interpretation of Exodus 16:29,<sup>1</sup> it is forbidden to remove on the Sabbath things from an enclosed space which is private property to an open space which is public property. Likewise it is prohibited to transport objects a distance of more than four cubits within an open space. The only space in which it is allowed to remove things freely is an enclosed space which is the property of an individual.”<sup>2</sup> *Eruvin* extend the “property of an individual” to the *eruv* boundaries, thus enabling Orthodox Jews to break the rule laid out in Exodus 16:29 without

<sup>1</sup> “See! The Lord has given you the sabbath, therefore on the sixth day he gives you food for two days; each of you stay where you are; do not leave your place on the seventh day.” This occurs during the manna from heaven story.

<sup>2</sup> <https://www.jewishencyclopedia.com/articles/5841-erub>

fear of divine retribution. In other words, *eruvim* are designated specifically so that a certain religious sect can avoid adhering to their own onerous rules. *Eruvin* do not seek to alleviate a government-imposed burden; they seek to alleviate a self-imposed religious burden. It is *their* religious belief. If they do not wish to follow the rules of their religion, they need not. If they wish to follow these rules, they ought to have the courage of their convictions, not ask the government for financial assistance.

FFRF wrote to the City of Miami Beach regarding *eruvim* in 2014. At that time, we objected to the City allowing the installation of *eruvim* at all. We explained that the religious significance of *eruvim* is unambiguous and indisputable. They are objects which are significant only to some Orthodox sects of Judaism, as a means to obey religious laws that have no bearing on non-adherents. They have no meaning except as a visual, public communication of a purely religious concept for religious believers of a single faith.

The City Commission is considering paying for the maintenance of this sectarian structure, which provides no benefit to the majority of Miami Beach's residents, and only a minimal benefit to a minority of the City's Jewish population. While we still maintain that it is inappropriate to allow an *eruv* at all, it is clear that expending taxpayer funds to support this sectarian religious practice is unconstitutional.

The government cannot subsidize certain religions or dispense special financial benefits to religious organizations. When reflecting upon the historical practices that led the United States' Founders to pass the federal Establishment Clause, the Supreme Court has noted that "financial support" of a church or religious activity is one of "the three main evils against which the Establishment Clause was intended to afford protection." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). For this reason, government funding specifically targeted solely to aid a religious institution violates the U.S. Constitution. The government "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). The U.S. Supreme Court addressed a similar issue in *Texas Monthly Inc. v. Bullock*, 489 U.S. 1 (1989), when it ruled that an exemption from sales tax solely for religious publications violated the Establishment Clause. Using taxpayer funds for the benefit a small segment of Jewish entities "sends the ancillary message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–310 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). When a city uses its public funds for the support of a religious structure like an *eruv* it is impermissibly forcing taxpayers to support religion.

It is a fundamental principle of Establishment Clause jurisprudence that the government cannot favor religion. The Supreme Court has said, "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary Cnty v. ACLU*, 545 U.S. 844, 860 (2005), (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985)). Requiring the taxpayers of Miami

Beach, who all have their own varied religious and nonreligious practices, to support a religious concept known only to a minority of believers of a single faith, is not neutral.

While courts have allowed for the existence of *eruv* under certain circumstances, no court has supported that *eruv* can be funded and maintained by the government. See *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 396 (2d Cir. 2015) (“...it is undisputed that private parties will finance, install, and maintain the strips...”). In the most prominent case addressing *eruv*, the Third Circuit Court of Appeals held that while it was discriminatory to remove *eruv* markers from utility poles while letting other illegally-affixed items remain, the ordinance prohibiting such postings was “neutral and generally applicable on its face,” so “if the Borough had enforced it uniformly...the plaintiffs’ claim [that the Free Exercise Clause required the Borough to let them put up the *eruv*] would accordingly fail.” *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 167 (3d Cir. 2002). Much as selectively removing *eruv* markers showed bias against Jews in *Tenaflly*, requiring taxpayers to fund the religious practice of *eruv* shows bias in favor of Orthodox Jews.

Mr. Paz’s memorandum describes the maintenance and repair of *eruv* on City right of ways as “entirely secular in nature.” There is nothing secular about helping a religious sect comply with religious law. The *eruv* exists solely for a religious purpose. What do you think the reaction would be if Miami Beach used taxpayer funds to help devout Muslims rope off an area in which to adhere to *Sharia* law, or for Satanists to conduct religious rituals?

Using taxpayer funds to support Orthodox Jews permanently demarcating large areas of public property as a private Jewish household that is “property” of the Orthodox Jewish community forces those of other faiths and no faith to live within an taxpayer-funded Orthodox Jewish religious enclosure, including members of other Jewish denominations who are offended by the Orthodox Jewish elevation of legalistic constructs over what they believe to be the true spiritual values of Judaism. See *E. End Eruv Ass’n, Inc. v. Vill. of Westhampton Beach*, 828 F. Supp. 2d 526, 542 n.1 (E.D.N.Y. 2011) (association of non-Orthodox Jews sought to intervene as defendant in case in which Orthodox Jews challenged removal of *eruv* markers); *Central Conference of Am. Rabbis Responsa – 178, Eruv* (1983) (“Certainly we, as Reform Jews, who are interested in the spirit of the law, would reject this kind of legal fiction for the observance of the *shabbat*.”), available at <https://ccarnet.org/responsa/carr-268-269/>. This is precisely the kind of divisive religious argument in which our government cannot take sides or expend public funds to support.

Using taxpayer funds to maintain an *eruv* demonstrates governmental support for designating the enclosed area, in this case the entirety of Miami Beach, as affiliated with Orthodox Judaism. This imposes Orthodox Judaism on members of the public by surrounding their community with the physical indicia of a religion they do not practice. The *eruv*’s observers also must, according to the group that maintains it, “consider those who reside [in the *eruv*] as one family” in order to allow the otherwise prohibited activities.<sup>3</sup> This is another imposed designation on those who happen to live in the *eruv*. “[T]he preservation and transmission of religious beliefs and worship

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<sup>3</sup> <https://www.miamibeacheruv.org/faq>

is a responsibility and a choice committed to the private sphere.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)).

The First Amendment prohibits “sponsorship, *financial support*, and active involvement of the sovereign in religious activity.” *Walz v. NY Tax Comm’n*, 397 U.S. 664, 668 (1970) (emphasis added); *see also Mitchell v. Helms*, 530 U.S. 793, 819 (2000); *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754–55 (1976). This means that the City of Miami Beach may not use public money to facilitate religious exercise, proselytization, or instruction. *See, e.g., Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 412 U.S. 472, 480 (1973) (“[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.”)

While in recent years government funding to religious groups for secular purposes through neutral grant programs has been upheld, this is a specific subsidy for the benefit of a religious group. In *Wirtz v. City of S. Bend*, a federal court struck down a city’s donation of land to a religious school in exchange for public use of athletic facilities that the school planned to build on the land. 813 F.Supp.2d 1051 (N.D. Ind., 2011). The court explained that “[g]overnmental programs or actions that provide special benefits to specific religious entities are impermissible... [E]ither the state’s payments must reach religious institutions only indirectly through programs of purely private choice or religious institutions must be getting nothing more than [...] secular governmental services or supplies on the same terms and conditions as anyone else as part of a neutral program.” *Id.* at 1059 (internal citations omitted). Here, the City of Miami Beach intends to provide a special benefit to a religious organization directly supporting its religious mission tied to a sectarian religious belief.

In *Trinity Lutheran Church of Columbia v. Comer*, the Court made clear that disqualification of a church from receiving an otherwise publicly available benefit “solely because of [its] religious character . . . imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.” 137 S. Ct. 2012, 2021 (2017). But the Court carefully explained that *Trinity Lutheran*, in which a Missouri church was denied participation in a state program to resurface its school playground, hinged on the fact that funding was not going to an “essentially religious endeavor.” *Id.* at 17 (citing *Locke v. Davey*, 540 U.S. 712, 721 (2004)). Here, rather than providing funds through a neutral city program for a secular purpose, the City intends to provide a specific donation to the Miami Beach Eruv Council for the explicit purpose of maintaining a religious structure that only exists for the exercise of religion.

Furthermore, as Mr. Paz’s memorandum notes, there are no cases “involving a government entity’s financial grant for maintenance of an *eruv* line on public property.” The reason for this lack of jurisprudence is that there is no historical practice of funding *eruvim* nor is there or any historical understanding that government funds can be used for the explicit purpose of maintaining a religious structure.

In order to show your support for the principle of separation between state and church and to protect the rights of *all* members of the Miami Beach community, we ask that you reject this resolution. There is no need for an *eruvim* on public property surrounding parts of the City of

Miami Beach, and if *erubin* are to remain they must be funded by those requiring their existence and not by the taxpayers of Miami Beach. Thank you in advance for your time and attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Chris Line", with a long horizontal flourish extending to the right.

Christopher Line  
Staff Attorney  
Freedom From Religion Foundation

Enclosures

RESOLUTION NO. \_\_\_\_\_

**A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING A GRANT IN THE AMOUNT OF \$72,500 TO THE MIAMI BEACH ERUV COUNCIL, INC., FOR THE PURPOSE OF OFFSETTING COSTS RELATED TO THE MAINTENANCE AND REPAIRS OF THE PORTIONS OF THE ERUV LINE LOCATED ON THE CITY'S PUBLIC RIGHT OF WAYS, IN FURTHERANCE OF THE CITY'S INTEREST IN ENSURING THE SAFETY OF STRUCTURES INSTALLED ON PUBLIC RIGHT OF WAYS WITHIN THE CITY; AND FURTHER, AUTHORIZING THE CITY CLERK AND CITY MANAGER TO EXECUTE THE CITY'S STANDARD GRANT AGREEMENT WITH RESPECT TO THE FOREGOING.**

**WHEREAS**, the City has accommodated an Eruv line within the City's territorial limits since as early as the 1970s, if not earlier; and

**WHEREAS**, an Eruv line currently exists not only in Miami Beach, but extends to Surfside, Bal Harbour, Bay Harbour Islands, Aventura, and other municipalities, making the South Florida Eruv one of the largest known Eruvs in the country; and

**WHEREAS**, Eruv lines have been repeatedly upheld by the courts as a government entity's neutral accommodation that facilitates residents and visitors engaging in certain secular outdoor activities on the Sabbath, including activities such as the carrying of items such as medication, or the pushing of a baby stroller. *See, e.g., Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015); and

**WHEREAS**, the City has currently issued a right of way permit to the Miami Beach Eruv Council, Inc., a Florida not-for-profit organization that has assumed responsibility for the installation and continued maintenance of the Eruv in Miami Beach; and

**WHEREAS**, as the City has an interest in ensuring that all structures installed on public property are safe and do not present any risk or hazard of tripping or deterioration, the Mayor and City Commission desire to approve a one-time grant in the amount of \$72,500, for the limited purpose of funding repair and maintenance activities of the Eruv line on public property installed within the City of Miami Beach.

**NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND THE CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA** that the Mayor and City Commission hereby approve a grant in the amount of \$72,500 to the Miami Beach Eruv Council, Inc., for the purpose of offsetting costs related to the maintenance and repairs of the portions of the Eruv line located on the City's public right of ways, in furtherance of the City's interest in ensuring the safety of structures installed on the public right of

way; and further, authorize the City Clerk and City Manager to execute the City's standard grant agreement with respect to the foregoing.

**PASSED** and **ADOPTED** this \_\_\_\_ day of February, 2023.


**ATTEST:**

\_\_\_\_\_  
Dan Gelber, Mayor

\_\_\_\_\_  
Rafael E. Granado, City Clerk

(Sponsored by Commissioner Laura Dominguez)

APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION

  
\_\_\_\_\_  
City Attorney *PAZ*

*1-24-23*  
\_\_\_\_\_  
Date

# MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, [www.miamibeachfl.gov](http://www.miamibeachfl.gov)

## COMMISSION MEMORANDUM

**TO:** Mayor Dan Gelber and Members of the City Commission

**FROM:** Rafael A. Paz, City Attorney 

**DATE:** February 1, 2023

**SUBJECT: A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING A GRANT IN THE AMOUNT OF \$72,500 TO THE MIAMI BEACH ERUV COUNCIL, INC., FOR THE PURPOSE OF OFFSETTING COSTS RELATED TO THE MAINTENANCE AND REPAIRS OF THE PORTIONS OF THE ERUV LINE LOCATED ON THE CITY'S PUBLIC RIGHT OF WAYS, IN FURTHERANCE OF THE CITY'S INTEREST IN ENSURING THE SAFETY OF STRUCTURES INSTALLED ON THE PUBLIC RIGHT OF WAY; AND FURTHER, AUTHORIZING THE CITY CLERK AND CITY MANAGER TO EXECUTE THE CITY'S STANDARD GRANT AGREEMENT WITH RESPECT TO THE FOREGOING.**

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Pursuant to the request of Commissioner Laura Dominguez, the above-referenced Resolution is submitted for consideration by the Mayor and City Commission at the February 1, 2023 City Commission meeting.

The City has accommodated an Eruv line within the City's territorial limits since as early as the 1970s, if not earlier. An Eruv line currently exists not only in Miami Beach, but extends to Surfside, Bal Harbour, Bay Harbour Islands, Aventura, and other municipalities, making the South Florida Eruv one of the largest known Eruvs in the country. Eruv lines have been repeatedly upheld by the courts as a government entity's neutral accommodation that facilitates residents and visitors engaging in certain secular outdoor activities on the Sabbath, including activities such as the carrying of items such as medication, or the pushing of a baby stroller. *See, e.g., Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015); *Tenaflly Eruv Association, Inc. v. Borough of Tenaflly*, 309 F.3d 14 (3d Cir. 2002); *American Civil Liberties Union of New Jersey v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987). In Miami Beach, for many years, the beloved Rabbi Pinchas Weberman was well-known for being seen riding his ATV weekly on the beach as he checked the status of the Eruv during his long tenure.

The City has currently issued a right-of-way permit to the Miami Beach Eruv Council, Inc., a Florida not-for-profit organization that has assumed responsibility for the installation and continued maintenance of the Eruv in Miami Beach. To date, the maintenance of the Eruv has and continues to be privately funded.

In order to assist with repair and maintenance of the Eruv structures on public property, and in furtherance of the City's interest in ensuring that all structures installed on public property are safe and do not present any risk or hazard of tripping or deterioration, Commissioner Dominguez has



proposed that the City award a one-time grant to the Miami Beach Eruv Council, Inc., for the limited purpose of funding repair and maintenance activities of the Eruv line on public property installed within the City of Miami Beach pursuant to the City-approved right of way permit. As with all City grants, the funding must be used for secular purposes only (in this case, maintenance and repair-related activities only), and may not be used for religious indoctrination or instruction of any kind.

Although there is ample case law supporting the placement of Eruv lines on public property, we are not aware of any case involving a government entity's financial grant for maintenance of an Eruv line on public property. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I. The U.S. Supreme Court has construed the Establishment Clause, in general, to mean that the government is prohibited from sponsoring or financing religious instruction or indoctrination. See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding use of federal funds for schools, including private religiously-affiliated schools, for educational materials and equipment, so long as the aid itself was used for secular purposes). Recent Supreme Court opinions have considerably relaxed the Establishment Clause jurisprudence and have upheld the constitutionality of public funding of certain secular elements of religious organizations, among other accommodations, so long as there may be a "reference to historical practices and understandings" that supports the accommodation. See, e.g., *Carson v. Makin*, 142 S.Ct. 1987 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407 (2022).

In view of the foregoing, the proposed grant is legally defensible, given that the City has a clear interest in the safety of structures placed on public property, the City has previously awarded numerous grants to organizations performing work or holding private events on public property, and the use of funds here would be limited for maintenance and repair activities on City right of ways, activities that are entirely secular in nature.

RAP/ag