No. C17-2893-1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

COWBOY CHURCH OF LIMA,

Petitioner,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,

W. B. Long, Administrator of the

Federal Emergency Management Agency,

Respondent.

ON WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team 20

Attorneys for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. Whether the doctrine of ripeness permits FEMA to be subject to lawsuits regarding discretionary benefits prior to providing a final determination when the discretionary benefits do not alter the rights or privileges of any entity prior to determination.

II. Whether the Establishment Clause permits FEMA to give tax-payer money directly to a non-profit religious institution to repair a facility when the facility is central to the exercise of religion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

United States Supreme Court Cases

United States Court of Appeals Cases

Constitutional Provisions

Statutes and Regulations

Other Authorities

OPINIONS BELOW

The United States District Court for the Central District of New Tejas granted Summary on the Establishment Clause issue and denied the ripeness issue. (R. at 10). The record does not clarify if this opinion was published. (R. at 10).

The United States Court of Appeals for the Fourteenth Circuit affirmed the Establishment Clause issue and reversed the ripeness issue. (R. at 17). The majority opinion of the Fourteenth Circuit is contained in the record. (R. at 2-17.)

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fourteenth Circuit by Writ of Certiorari. 28 U.S.C. § 1254(1) (2012). The judgment of the Fourteenth Circuit was entered on October 1, 2017. The Petition for a Writ of Certiorari was filed on and granted by this Court on October 13, 2017.

CONSTITUTIONAL INVOLVED

> "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

U.S. Const. art. III, § 2, cl. 1.

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the

> Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

U.S. Const. art. III, § 2, cl. 2.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Hurricane Rhodes (Rhodes) devastated the western coast of New Tejas on August 13, 2016, and it was declared a major natural disaster by President Barack Obama on August 19, 2016. (R. at 2, 6). Among those affected was the Cowboy Church of Lima (the Church), located on the outskirts of the small town of Lima. (R. at 3). The Church sprawls an Eighty-eight-acre complex with several buildings including a Chapel with an Annex (jointly the Facility), open to the public at no cost, and operated as a local and federal tax-free 501(c)3 nonprofit organization. (R. at 3-4).

The Chapel and Annex are one building, equal in size. (R. at 4). The Annex was constructed to accommodate the Church and Lima's needs for a larger gathering space than the Chapel alone could provide for events, (R. at 3-4), and funded through charity events and private donations to the Church. (R. at 4). Lima

voted on a measure to build another Civic Center that failed because voters believed the Annex had crowded the market for an event space in town. (R. at 4). The Chapel began to serve the Lima community at the request of Lima's mayor, Ms. Rachel Berry, to the Church's Chaplain, Mr. Finn Hudson (Chaplain). (R. at 3-4). The Facility held various religious and secular events and meetings like concerts; Bible study; father-daughter dances; Sunday school classes; and church services. (R. at 4, 7). But, the Church sectarian activities were overall the most common use of the Facility's combined space. (R. at 7, 10).

The Facility was flooded with around three feet of water by Rhodes. (R. at 4-5). The flood water brought organic and non-organic debris that required removal of floors and portions of the walls to remediate; the loss of religious and secular equipment, furnishings, and other goods occurred as the Chaplain anticipated when he ordered the removal of some equipment from the Annex to one location and all religious items from the Chapel to another. (R. at 4-5). Any secular items that remained in the Annex were put up off the ground. (R. at 4).

Once the floodwaters receded, the Chaplain began the process of restoring the Facility. (R. at 5). It was determined by the Chaplain's step-brother, a structural engineer, that the structure of the Facility may require repairs in a couple of months. (R. at 5-6). As such, materials and labor were donated to the church to repair the damage sufficiently enough to allow the Church to reopen its doors on July 26, 2017. (R. at 8-9). No other buildings owned by the Church were sufficiently damaged to require repair. (R. at 5). The Facility lacked flood insurance because it

was considered safe from that eventuality. (R. at 6). The evaluation of potential repairs drove the Chaplain to consult the Church's attorney. (R. at 6). The attorney advised the Chaplain to use public benefits available after the President's emergency declaration. (R. at 6, 11). The Chaplain submitted the requisite applications on August 20 and 23, 2016, with the Small Business Administration (SBA) and the Federal Emergency Management Agency (FEMA) respectively, to take advantage of the emergency Federal aid program, and met with an Adjuster from FEMA, Ms. Quinn Fabray, on August 24, 2016. (R. at 6, 11).

The Adjuster toured the Facility, and asked the Chaplain about the services provided to Lima's community. (R. at 7, 10). The Adjuster came away from the conversation with an estimate that the Annex was used for secular activities "45% to 85% of the time," and the Chapel only five to fifteen percent of the time. (R. at 7). The Adjuster then inappropriately spoke of a potential negative determination by FEMA with the Chaplain; although the investigation was incomplete and the decision by the agency was still weeks away, the Adjuster based this conclusion on a personal opinion of why some religious organizations do not receive aid. (R. at 7-8).

Five days later, concerned about the potential consequences of waiting to repair the Facility, the Chaplain, with indignation that aid could be refused and prodded on by the Church's attorney, filed this action in the United States District Court for the Central District of New Tejas on behalf of the Church against FEMA with no final determination on the application for disaster relief. (R. at 8, 10). During the depositions that took place District Court case, the FEMA Regional

Director Mr. Jesse St. James stated that "FEMA does have the ability to make different aid determinations on a case-by-case basis." (R. at 10). James concluded that he was planning on reviewing the file himself and that the event center may have been granted FEMA relief. (R. at 10). According to James, the "final determination" had an internal deadline of September 30, 2016 just 32 days after when the Church filed suit.

II. NATURE OF PROCEEDINGS

A. The District Court

The U.S. Attorney filed two pre-discovery Motions to dismiss the action brought by the Church. (R. at 9). Both were denied on November 2, 2016 by the Honorable Judge Beiste on the basis that after discovery a Motion for Summary Judgment would be better supported. (R. at 9). Depositions of the parties were taken, i.e. the Chaplain, and FEMA Regional Director, Mr. Jesse St. James (the Director), and discoverable writings of the parties in the action were made available.

The FEMA Adjuster investigated documentation regarding the prior use of the Facility, and reported the Annex was used "80% of the time for FEMA eligible services" and the Chapel was used only ten percent of the time for eligible services. (R. at 10). The Director testified that the Church's application was a very close case, and would have been personally reviewed by him to determine whether to grant aid but for the legal claim brought by the Church interrupting the review process. (R. at 8, 10). The Chaplain was unable to say with any specificity what the exact use of

the Facility was, but his testimony was that the Annex was used sixty percent for Church activities. (R. at 9).

Judge Beiste granted the U.S. Attorney's post-discovery Motion for Summary Judgment that the Establishment Clause prohibited the Church's prayer for relief and denied the Church's response based on a Free Exercise theory, but held that the case was ripe for review as argued by the Church, and therefore the Court had Subject Matter Jurisdiction. (R. at 10) Both parties appealed to the United States Court of Appeals for the Fourteenth Circuit (Fourteenth Circuit). (R. at 10-11).

B. The Circuit Court

a. The Ripeness Question

The Fourteenth Circuit reversed the District Court's ruling that the case was ripe for adjudication because the Church failed to establish that the court had "fitness" to review the issue before it, and had failed to prove that it had suffered a hardship. (R. at 14-15).

2. The Balance of the First Amendment

The Fourteenth Circuit affirmed the District Court's summary judgment on the basis that this Court's most recent First Amendment decision did not upset the Circuit's understanding of the "harmony" between the Free Exercise and Establishment Clause. (R. at 15-17).

SUMMARY OF THE ARGUMENT

Article III limits the jurisdiction of federal courts to "cases" or "controversies." The ripeness doctrine invokes this principle by distinguishing premature claims from those that are poised for judicial review. In the administrative agency context,

ripeness aims to prevent the courts from prematurely interfering in the agency's application and administration of policy.

Ripeness is determined by evaluating 1) the fitness of the issue for judicial review, and 2) the hardship to the party in delaying court consideration. Under this analysis, an anticipatory challenge to FEMA's discretionary benefit-conferring rules fails on both prongs.

First, there are several factors that weigh against a finding of fitness. Namely, FEMA's decision-making process is not complete until a final determination is issued, and judicial intervention in advance of that step is would impede the agency's administration of policy. Additionally, further factual development is required for effective judicial review of FEMA's discretionary functions; facial challenges may lead to an improper exercise of the judicial function.

Second, a plaintiff will not experience any legally recognized hardship by submitting to the challenged regulation and applying for federal aid before seeking reconsideration in federal court. Moreover, the hardship cannot outweigh the institutional interests to both the agency and court in withholding review. Therefore, the doctrine of ripeness provides that FEMA cannot be subject to lawsuits prior to determining whether an entity is eligible to receive aid.

Chapels do more than provide a place for concerts and father-daughter dances. They are the epicenter of religious institutions, where the faithful exercise their most important religious acts, practices, and beliefs. The First Amendment

preserves the profound significance of this structure and prohibited the Government from exercising any action that would directly aid it in its religious purpose to protect religion from the corrosive power of the State.

Over forty years ago, the then members of this Court agreed unanimously on one occasion, and as a majority in another, that direct monetary aid from the Government to construct and rebuild facilities used by a religious institution for the exercise of their religion is unconstitutional. The reason is simple – the historical experience with sponsorship and financial support of religion by the State that includes construction of churches with taxes inevitably leads to an abrogation of religious freedom. President James Madison, the draftsman of the First Amendment, understood this basic principle of the Establishment Clause and vetoed a bill for that reason.

FEMA has advanced a program that helps the greatest number of people by restoring governmental services after a tragedy. The Public Assistance Program (PA program) has met this secular goal not by differentiating between secular and religious beneficiaries; instead, it measures the contribution of all applicants through their facilities to determine who has provided the threshold amount of governmental services such that it is fair to give them tax-payer money. Although some religious institutions will be without assistance, those that do receive funds from FEMA will do so with the blessing of the Establishment Clause because their facility primarily provides governmental services.

For these reasons, this Court should affirm the Fourteenth Circuit's judgment.

ARGUMENT

I. ANTICIPATORY CHALLENGES OF FEMA'S BENEFIT-CONFERRING REGULATIONS ARE BARRED BY THE DOCTRINE OF RIPENESS.

Anticipatory challenges of FEMA's benefit–conferring regulations directly result in policy opinions that are devoid of factual foundations. Therefore, anticipatory challenges are barred by the doctrine of ripeness.

Article III of the Constitution vests the judicial power of the United States to federal courts, but limits it to the adjudication of "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1, 2. This requirement aims to preserve "[the] proper—and properly limited—role of the court in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 491 (1975).

The doctrine of ripeness precludes courts from reviewing agency action unless the effects of the challenged action have "been felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967). This inquiry is primarily prudential, allowing courts to refuse jurisdiction in "hypothetical or illusory disagreements over the policies, programs, and conduct of administrative agencies." *Abbott*, 387 U.S. at 148-149. By restricting unnecessary or premature judicial review, prudential ripeness protects both courts and agencies in their respective spheres of expertise. *Abbott*, 387 U.S. at 148-149.

Agency action is unripe for review unless and until it has been concretely applied to the challenging party. *Lujan v. National Wildlife Federation*, 497 U.S.

871, 891 (1990). This presumption can only be overcome by a showing of immediate and substantial impact of the challenged regulation. In this context, the Court in *Abbott* expressed prudential ripeness as a balance of the individual's interest in prompt resolution against the interests of both the court and agency in withholding review. 387 U.S. at 149. The test for ripeness of pre-enforcement action is two-prong, evaluating: (1) the fitness of the issues for judicial review; and (2) the hardship of the party in delaying court consideration. *Id*. In application, a claim is unripe if the institutional interests in withholding review outweigh the claimant's interests in prompt resolution.

Because this scale will never tip in favor of the potential beneficiary of Federal relief, the doctrine of ripeness bars FEMA from being subject to lawsuits prior to rendering a final determination of eligibility. Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) and the regulations implementing the Public Assistance Program (PA Program), FEMA has been tasked with the discretionary function of granting or denying aid requests on a case-by-case basis. 42 U.S.C. § 5172(a)(1)(B) (2012); 44 C.F.R. § 206.1(a), 206.2(a)(20), 206.226(c) (2016). The Stafford Act's discretionary function exception expressly precludes judicial review of these individual determinations. 42 U.S.C. § 5189a(a) (2012). Federal courts do, however, retain exclusive jurisdiction over constitutional challenges to agency action. 5 U.S.C. § 706(2)(C) (2012). Nonetheless, such claims will be unripe for the Court's consideration until the action is final and its "its effects [are] felt in a concrete way by the challenging party". *Abbott*, 387 U.S. at

148-149. By the very nature of the discretionary benefit program, the adverse effects of the challenged regulation cannot be felt until applicant applies for and receives a final agency determination. At that point, the challenging party is entitled to judicial review of the agency's alleged constitutional violation. Individual interest in pre-enforcement resolution cannot overcome the institutional interests of both the court and agency in withholding review of constitutional challenges to agency action. To conclude otherwise undermine the ripeness doctrine, which aims to prevent courts from "entangling themselves in abstract or political disagreements over administrative policies." *Abbott*, 387 U.S. at 148-149.

Under this analysis, the Fourteenth Circuit correctly held that the Church's claim was premature for adjudication. (R. at 15). First, the court found that the issue was unfit for judicial review because the Church's grievance was contingent on FEMA denying eligibility because of the mixed-use rule. (R. at 15). Until that occurred, the court felt uncompelled to substitute its judgement for FEMA's. (R. at 14- 15). Alternatively, if FEMA did deny eligibility, further factual development would aid the court's analysis of the constitutional issue. (R. at 14). Second, the Fourteenth Circuit found that the hardship to the Church in delaying review, which included structural damage requiring immediate repairs, was insufficient "to deprive FEMA of the ability to fully engage in its administrative functions." (R. at 15). Because the institutional interests in delaying review outweigh the Church's interest in prompt resolution, the Fourteenth Circuit properly exercised its prudential discretion in refusing jurisdiction.

To avoid these difficulties, courts have found actions unripe for judicial review "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Natl. Park Hosp. Ass'n v. Dept. of Int.*, 538 U.S. 803, 808 (2003). To establish this type of concrete action, the regulation must affect the "day-to-day affairs" of the claimant and create some "irreversible harm" from requiring a later challenge. *Reno v. Catholic Soc. Services*, Inc., 509 U.S. 43, 57-58 (1993); *see Lujan*, 497 U.S. at 891 (a controversy concerning a regulation is not ordinarily ripe for review under the Administrative Procedure Act until the regulation has been applied to the claimant's situation by some concrete action).

A. Allowing an Entity to Bypass FEMA's Review Procedures Creates the Risk that Policy Questions and Constitutional Challenges Will Be Decided Prematurely or Incorrectly by the Courts.

FEMA's benefit-conferring rules lack fitness for review unless they are presented in a specific factual context demonstrating immediate and adverse effects on the challenging party. The "fitness" prong focuses on the institutional capacities of the court as well as the timeliness of its interference in administrative action. *Abbott*, 387 U.S. at 149. The analysis encompasses several factors, including: (1) whether the challenged agency action is final, (2) whether the issues presented are purely legal, and (3) whether consideration of the issue would benefit from a more concrete setting. *Abbott*, 387 U.S. at 149-152. Federal courts have jurisdiction over constitutional challenges brought against FEMA; however, such claims will not arise in the context of a case fit for review until the challenging party receives a

final denial of eligibility because of the challenged regulation. 44 C.F.R. § 206.206(b)(1)-(2), (e)(3) (2016).

1. FEMA's decision-making process is not final until an order of denial on appeal, and judicial intervention in advance of this step will impede the agency's effective application and administration of policy.

The APA provides for review of "final agency action for which there is no other adequate remedy in a court." Judicial interpretation provides that an agency's decision is final under the APA if it (1) "marks the consummation of the agency's decision-making process" - it must not be merely tentative or interlocutory;" and (2) "[is] one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177 (1997). The rationale underlying this requirement is that courts "will not interfere with the executive function, whether exercised by executive officials or administrative agencies, by entertaining a lawsuit that challenges an action that is not final." *Natl. Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 693 (D.C. Cir. 1971). , 443 F.2d 689, 693 (D.C. Cir. 1971).

A discretionary benefit-conferring rule is generally not final until agency receives and denies the challenging party's application. *Reno*, 509 U.S. at 43, 57. In *Reno*, the plaintiff attempted to invalidate the continuous physical presence requirement of the Reform Act. *Id.* at 58-59. However, the Reform Act and the physical presence requirement did not actively create penalties or impose restrictions on the plaintiff; rather, they merely limited access to a benefit "not automatically bestowed on eligible applicants." *Id.* at 58-59. While the promulgation of behavior-regulating rules consummated the agency's decision-making process

with regards to rights or obligations of a claimant, here, INS had the authority to determine eligibility on a case-by-case basis. *Reno*, 509 U.S. at 59.

Based on this reasoning, the *Reno* Court held that the petitioner's challenge would not ripen until he took the affirmative steps necessary to submit the regulation, and only after he received a final order of deportation. *Id.* at 59-60. The Court did, however, note that these same regulations could constitute final agency action by virtue of a pre-filing rejection policy. *Id.* at 63. The procedure manual instructed employees to instantly reject an application that did not satisfy the promulgated requirements. *Id*. at 61-62. Unlike an initial denial, which was subject to internal review, here, a rejection marked the agency's final determination of eligibility benefits. Therefore, the action was sufficiently final for any claimant who had been subject to this treatment. *Id.* at 64.

A benefit-conferring rule may also constitute final action if the agency has issued "a definitive statement of its position, determining the rights and obligations of the parties" despite "the possibility of further proceedings in the agency" to resolve subsidiary issues. *Bell v. New Jersey*, 461 U.S. 773 (1983). After federal auditors in *Bell* determined that certain states had misappropriated federal funds, the Education Appeal Board issued an order establishing the amount of deficiency owed to the government. *Id*. at 777. The Secretary declined to reconsider the Board's assessment, and the order became final. *Id.* at 777. The *Bell* Court held that the Board's determination constitutes final agency action because it represented a definitive statement of the agency's position of rights or obligations, and the

Secretary's subsequent denial of review was a step towards its finalization. *Id.* at 779. Furthermore, the possibility of a further proceeding to determine the method of repayment a subsidiary issue, had no effect on the agency's determination. *Id.* at 779-80.

FEMA's discretionary-benefit conferring rules do not constitute final decisions until the agency receives an application and issues a final denial on appeal. First, even an initial determination marks the beginning, rather than the consummation of the agency's decision-making process. Similar to INS in *Reno*, here, FEMA must decide whether each applicant is eligible based on the requirements of the Stafford Act. *Reno*, 509 U.S. at 58; (R. at 10). In addition to the challenged regulation, FEMA must also determine whether an agency meets additional requirements of the statute. 44 C.F.R. § 206.200-206 (2016). Unlike the Board's order in *Bell*, which represented a definitive statement of the agency's final position, here, the Adjuster's initial estimations of use were interlocutory at best. (R. at 10). According to FEMA's Regional Director, due to the "close nature of the factual issue," he was planning to review the file himself. (R. at 10). Furthermore, unlike *Bell*, where the possibility of a further proceeding had no effect on the agency's final action, here, the Church has access to a meaningful internal review process before seeking judicial review on the merits of a constitutional challenge.

Judicial intervention prior to a final agency decision will impede the effective application and administration of agency policy. Granting declaratory judgements against FEMA will impede instead of foster the "effective enforcement and

administration by the agency." *Placid Oil Co. v. Fed. Energy Reg. Comm'n.*, 666 F.2d 976, 981 (5th Cir. 1982).

Agencies have a significant interest in applying their expertise to the specific facts of a case and making revisions to their policy prior to judicial intervention. "From [the] agency's perspective, immediate review could hinder its efforts to refine its policies through revision of the Plan or application of the Plan in practice." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 727 (1998) (internal citation emitted). The *Ohio Forestry* Court also noted that intervention prior to a specific decision on the part of the agency would prevent the process "Congress specified for the agency to reach . . . decisions." *Id.* This type of review will inevitably "den[y] the agency an opportunity to correct its own mistakes and to apply its expertise." *F.F.T.C. v. Stand. Oil Co. of California*, 449 U.S. 232, 242 (1980).

Here, judicial intervention will have the exact effect predicted in *Ohio Forest*. In *Ohio Forest*, the Forest Service had developed a ten-year plan for logging procedures and amounts. *Ohio Forestry*, 523 U.S. at 727. (internal citation omitted). While this plan was finalized, it required specific logging operations to apply for permits that could be approved or denied according to the overall plan. *Id.*

Here, FEMA procedures for the application of the PA program have been finalized but still require specific facilities to submit applications for aid that could then be approved or denied. (R. at 11). Just as the Forest Service had the discretion to modify the plan as new requests were submitted, here, FEMA reserves the right

to reconsider its decisions before taking any final action that would be subject to judicial review.

2. Further factual development is required for effective review of FEMA's discretionary functions.

While finality evaluates the timeliness of review, the legal question factor considers the "concreteness, definiteness, [and] certainty" of the issues presented. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947). A purely legal question requiring little factual development tends to be fit for judicial review; however, its presence does not establish ripeness as a matter of course. *Abbott*, 387 U.S. at 136, 149; *Toilet Goods Asn'n, Inc. v. Gardner*, 387 U.S. 163 (1967). A claim may be unfit, for example, if the effect of agency action is merely speculative, or if further factual development would significantly aid the court's consideration. *Toilet Goods Asn'n*, 387 U.S. at 163; *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978). Because these conditions exist unless and until FEMA issues a final determination, the prudential interest withholding review is strong.

a. The utility of withholding review is high because pre-enforcement challenges to FEMA regulations are contingent on future events that may never occur.

This Court should be even more wary of providing declaratory relief here because the injury claimed by the Church is not only abstract but may never occur. According to *Continental*, when an agency has not made a final ruling on a matter or may still modify the ruling, there is a strong interest in postponing review. *Contl. Air Lines, Inc. v. C. A. B.*, 522 F.2d 107, 125 (D.C. Cir. 1974). The court in

Continental went on to hold that judicial review of a non-final ruling "wastes the court's time and interferes with the process by which the agency is attempting to reach a final decision." *Id.*

Here, the Court is asked to provide judicial intervention based on an injury which may or may not occur. During the deposition of FEMA Regional Director stated that "FEMA had put the church into a preliminary denial category, but because of the close nature of the factual issue he was planning to review the file himself." (R. at 10). FEMA has the ability to make determinations on a "case-by-case basis" and may still have granted relief to all or part of the church. (R. at 10). Additionally, denial due to the religious nature of the Church organization is far from certain. Rather, the question revolves around whether the Church provides critical or non-critical government services *in addition to religious activities* that do not benefit the community. 42 U.S.C. § 5122 (2012).

FEMA has accepted the applications from religious organizations in the past and can make case-by-case determinations, we cannot say with any reliability that the Church will be denied based on FEMA regulations. To further complicate matters, the PA program has numerous requirements for an application to be accepted. FEMA, *Public Assistance Program and Policy Guide* 10-42 (2016), https://www.fema.gov/media-library-data/1456167739485-75a028890345c6921d8d6ae473fbc8b3/PA_Program_and_Policy_Guide_2-21-2016_Fixes.pdf [hereinafter *PA Guide*]. Therefore, the Church may be denied for reasons totally unrelated to the regulation in question.

Finally, FEMA does not provide aid for damage covered by the SBA loan. *PA Guide* at 17 fig. 8. Therefore, since the church has not yet received the SBA loan and has already repaired a substantial amount of the church through donations, there is a likelihood that the SBA would cover the remainder of the damage. If this happened, it would be yet another reason why the Church may be precluded from receiving FEMA aid that is totally unrelated to the challenged regulation.

Due to the uncertainty over whether the alleged injury will ever actually occur, this Court should not "substitute [its] judgement for FEMA's on what [the Court] think[s] may or even should happen." (R. at 14-15). By doing so it would wade into the "abstract disagreements over administrative policies" that were warned against in *Abbott*. 387 U.S. at 136.

b. Federal courts should not adjudicate political questions or constitutional challenges devoid of a concrete factual context.

A claim may be unfit for review if further factual development would significantly aid the court's ability to adjudicate the legal questions presented. *Duke Power Co.*, 438 U.S. at 59, 82. This principle is particularly applicable in a constitutional challenge when the factual record does not permit necessary interest balancing or an evaluation of adverse effects on the challenged party. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 56 (1974). In these situations, withholding review until the issue is presented in a concrete factual context fosters both intelligent analysis and sound decision-making by the court. *W.R. Grace & Co. v. United States EPA*, 959 F.2d 360, 366 (1st Cir. 1992).

Anticipatory and facial constitutional challenges are unfit for judicial review. Rather, a concrete application is "necessary to ensure fair, focused, and intelligent analysis of the issues presented." *Id.* at 365. In *W.R. Grace*, the First Circuit refused to exercise jurisdiction over a Fifth Amendment challenge to EPA's modification procedure advance of its immediate effect on the claimant. *Id.* at 366. The court held that further factual development was required to weigh the competing associational and individual interests at stake. *Id.* at 365.

On the other hand, withholding review may be unnecessary because of the "unequivocal nature of the…regulations at issue" and the prior "application of the regulations" to the challenging party. *Palazzolo v. Rhode Island*, 533 U.S. 606, 619–20 (2001). In *Palazzolo*, the challenging party's use applications had been twice denied by the local government for failing to meet the challenged statutory requirement. *Id.* The *Palazzolo* Court held that the language of the statute amounted to a flat prohibition of the applicant's intended use, "which made it clear that any further petitions were futile." *Id.* Furthermore, the previous denials constituted a sufficient factual record. *Id.* Similarly, in *LaClerc*, five plaintiffs challenged a rule that effectively prohibited nonimmigrant aliens "not entitled to live and work in the United States permanently" from sitting for the bar examination. *LaClerc v. Webb,* 419 F.3d 405, 413-14 (5th Cir. 2005). Only two plaintiffs had been denied eligibility for failure to meet this requirement. *Id.* The Fifth Circuit reasoned, however, that based on the unequivocal nature of the statute, there was no reason to believe that the remaining parties would have

experienced different outcomes. *Id*. Therefore, the claim was equally as ripe for the remaining three plaintiffs because "the aforementioned facts undermine the utility of further factual development." *Id*.

Here, the relationship between FEMA's benefit conferring rule and the First Amendment cannot be intelligently analyzed until it is presented in a concrete factual situation. While the issue raises a legal question, it is crucial to note that FEMA's determinations are highly factual in nature. (R. at 10). Similar to *W.R. Grace*, where a constitutional challenge to EPA's modification procedure was unripe until applied, here, withholding review will allow the Court to properly balance the competing interests involved. This is not a situation where requiring a plaintiff to exhaust internal remedies is futile because of the "unequivocal nature of the . . . regulations at issue" and the prior "application of the regulations" to the challenging party. *Palazzolo*, 533 U.S. at 619-20. Unlike the regulations in *Palazzolo* and *LaClerc*, which unequivocally prohibited a use or condition of the applicant, here the mixed-use standard does not amount to a de-facto denial of religious institutions. Furthermore, a critical fact is missing: that the Church had been previously denied funding, or that similarly-situated religious institutions involved in the current proceeding been previously denied. Absent either of these scenarios, the record will be completely devoid of the factual context necessary for the Court to answer a constitutional question.

B. <u>The extent of the Church's hardships are short-term economic interests and therefore not recognized as legal hardships under the ripeness doctrine or considered under FEMA's long-term reimbursement program</u>.

The Church will not experience any legally recognized hardships from the postponement of judicial intervention. Hardship was defined by the *National Park* Court as "adverse effects of a strictly legal kind." *Natl. Park*, 538 U.S. at 803 (internal quotations omitted). Effects of this type do not occur in a discretionary action until a final decision has occurred. The Church's immediate interest in making repairs is not relevant to any hardship analysis since the PA program is a reimbursement program that was never intended to address immediate economic interests.

1. The hardships experienced by the Church are related to the PA Program process and not as required to the postponement of judicial intervention.

The Fourteenth Circuit was correct in holding that there was no legally sufficient hardship for the Church. The dissent incorrectly correlated the hardship caused by national disaster with the potential effect of postponing judicial intervention. In doing so, the dissent not only misunderstood this Court's precedent on the matter but misunderstood the purpose of FEMA's PA Program.

The PA Program provides both permanent and emergency aid. In this case, the Church is not seeking aid for debris removal or emergency protective services and is therefore seeking permanent work under the PA Program. *PA Guide* at 20.

Under the permanent work category, the PA Program acts as a long-term, economic-recovery program. The permanent work category of the Program is not intended to function as a financial first responder. This is evidenced by the SBA loan requirements, duty to prevent damage to property during the application process, and the extended processing times under the program. Applicants who fail

to make repairs are responsible for any additional damage incurred during the application process. 44 C.F.R. § 206.223(e) (2016); *PA Guide* at 20–21, 84.

In order to receive reimbursement for the "permanent work" required by the Church, FEMA requires a Small Business Loan (SBA). (R. 12-13). After applying for the SBA, FEMA will only reimburse for the portion of repairs not covered by the loan. *PA Guide* at 20–21, 84. Therefore, the role of the PA program and FEMA is not to provide an immediate fix to the economic strains caused by a national disaster. Rather, the role of the PA program is to provide long-term economic investment to get communities back up and running. While the expedient dispersal of aid is, of course, preferred the logistical and administrative challenges of a large-scale disaster limit FEMA's ability to respond quickly.

Extended processing times, complex paperwork, and the economic strain of making repairs prior to an aid determination are an unfortunate part of the reimbursement-focused PA program. These hardships relate to the reality of experiencing a large-scale disaster and not to the postponement of judicial intervention. While FEMA is fully aware of the life-altering hardships created by large-scale disasters, the test is "not whether the[parties] have suffered any 'direct hardship,' but rather whether postponing judicial review would impose an undue burden on them or would benefit the court." *Village of Bensenville v. FAA*, 376 F.3d 1114, 1120 (D.C. Cir. 2004) (quoting *Harris v. FAA*, 353 F.3d 1006, 1012 (D.C. Cir. 2004)). The hardships experienced by the Petitioner relate to the purpose and

process of the PA Program not, as required, to the actual postponement of judicial intervention.

2. *Due to the dictionary nature of benefit grants, Petitioner will not suffer a legal or practical hardship within the definition established by this Court.*

Considering this Court's historic reluctance to intrude on administrative discretion until some concrete action has been finalized, and the long-term nature of the PA program's permanent-work aid, this court must begin to balance the abstract nature of the of the Church's injury with the lack of legally sufficient hardship. *Abbott*, 387 U.S. at 136, 148–49. In other words, we must compare the Court's high utility in postponing review with the very low impact on the Church.

Hardship according to this Court is "whether postponing judicial review would impose an undue burden on them or would benefit the court." *Harris*, 353 F.3d at 1012; *Village of Bensenville*, 376 F.3d at 1120. However, for the burden to qualify as a burden on the party, the hardship must practically or legally force them to immediately alter their primary conduct. *Abbott*, 387 U.S. at 136, 148–49; *Natl. Park*, 538 U.S. at 803, 803–04. A hardship occurs where "the challenged agency action has or will have a direct and immediate impact upon the petitioner." *Placid Oil Co.*, 666 F.2d at 976, 981.

Postponing judicial intervention will not have a direct and immediate impact upon the Church. There is no practical or legal affect that will alter the Church's ability to freely conduct themselves.

a. The Church will not suffer a practical hardship from the postponement of judicial intervention

This Court has held that where a petitioner is "free to conduct its business as it sees" there is no hardship. *Natl. Park*, 538 U.S. at 803, 803–04. The injury must force the petitioner to alter their behavior and while financial concerns can create difficulties they are not recognized as practical hardships. *Abbott*, 387 U.S. at 153 ("It is of course true that cases in this Court dealing with the standing of particular parties to bring an action have held that a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action."). Financial concerns do not create the "adverse effects of a strictly legal kind, which are required for a hardship showing." *Natl. Park*, 538 U.S. at 803, 803–04. Finally, "mere uncertainty" will not create a valid hardship. *Id*. While uncertainty, specifically in the context of disaster recovery, can create difficulties it does not create a legally-sufficient hardship. *Id*. at 803, 811 ("If [the court] were to follow petitioner's logic, courts would soon be overwhelmed with requests for what essentially would be advisory opinions because most business transactions could be priced more accurately if even a small portion of existing legal uncertainties were resolved.").

The Church will face no legally sufficient hardship if judicial intervention is postponed until an actual decision is provided by FEMA. As the lower court dissent acknowledged, the Church will face uncertainty while completing FEMA's application process, and economic hardship, as the Church continues to rebuild. (R. at 19). However, *Abbott* explicitly established that "possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action."

Abbott, 387 U.S. at 153. The uncertainty and complexity of the FEMA application process does not create a sufficient hardship. As the Court in *National Park* pointed out, if uncertainty was a recognizable hardship then virtually every FEMA applicant could challenge the process prior to a final agency decision. *Natl. Park*, 538 U.S. at 808. While the Church will have to contend with the results of a national disaster, FEMA's policies do not force them to modify their primary conduct. Practically, the Church has and will have the ability to continue to conduct normal business operations regardless of the postponement of judicial intervention; the Church has continued normal business operations and reopened their doors as of July 26, 2017. (R. at 8).

b. The Church will not suffer a strictly legal hardship from the postponement of judicial intervention

This Court has consistently held that for a hardship to be legally sufficient, it must alter a person's primary conduct. This Court in *Ohio Forestry*, commented that when regulations do not "command anyone to do anything or to refrain from doing anything . . . grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations" those regulations are insufficient to trigger a showing of hardship required by the ripeness doctrine. *Ohio Forestry*, 523 U.S. at 726, 733. Therefore, where regulations do alter any of the above categories and result in the plaintiff altering his primary behavior there is a hardship. *Food Exp. v. U.S.*, 351 U.S. 40, 43–44 (1956) (finding that exposer to potential criminal sanctions creates a sufficient hardship); *see Columbia Broadcasting System, Inc. v. United States*, 316

U.S. 407, 417–419 (1942) (holding that where a plaintiff must choose between compliance or a risk of loss of license there is sufficient hardship); *see also Gardner v. Toilet Goods Assn., Inc.*, 387 U.S. 167, 171 (1967) (holding that regulations that prevented the plaintiff from freely selling his product in its current form had an "an immediate and substantial impact upon the respondents"). Where the regulations cannot be "felt immediately by those subject to it in conducting their day-to-day affairs" and "no irremediabl[y] adverse consequences flow[ed] from requiring a later challenge" there is no hardship. *Natl. Park*, 538 U.S. at 803, 810.

Here, postponing judicial intervention does not create a hardship for the Church. FEMA's regulations in no way "command [the Church] to do anything or to refrain from doing anything . . . grant, withhold, or modify any formal legal license, power, or authority; they do not subject [the Church] to any civil or criminal liability; they create no legal rights or obligations." *Ohio Forestry*, 523 U.S. at 726, 733. The only inconvenience faced by the church is receiving money that it may or may not be entitled to at a later point, which is in no way a "irremediably adverse consequence." *Natl. Park*, 538 U.S. at 803, 810. Specifically, where an SBA loan can provide intermediate aid and any monetary damages can be awarded upon review at a later date. *Id*. Of course, this uninhibited ability to conduct "day-to-day affairs" is evidenced by the Church returning to normal business and opening their doors. (R. at 10).

FEMA's regulations are discretionary policies that must be applied to factual situations before any challenge against them is ripe. (R. at 10) (noting that FEMA

has the ability to make "different aid determinations on a case-by-case basis). Similarly, in *National Park* the National Park Service (NPS) issued an implementation regulation 36 C.F.R. § 51.3, which established that the Contract Disputes Act of 1978 (CDA) was inapplicable to national park concession contracts. *Natl. Park*, 538 U.S. at 808. An association that represented the concession vendors brought suit arguing that the CDA should apply to their contracts. *Id*. The court found that this challenge was not ripe because this regulation still had to be administered by a separate agency that had the discretion to apply or ignore the regulation. *Id*. The Court distinguished this from the situation in both *Abbott* and *Gardner* where the regulations where "self-executing" and called for immediate changes in conduct with the threat of civil and criminal sanctions. *Id*. Instead the Court found that a challenge to § 51.3 would not be ripe until it was applied since it was discretionary and did not threaten criminal or civil sanctions. *Id*.

A challenge to the FEMA regulation in question will also not be ripe until it is applied because FEMA holds discretion and the regulation does not threaten any criminal or civil sanctions. Similar to the concessioners in National Park under § 51.3, "the regulation here leaves [the Church] free to conduct its business as it sees fit." *Id*.

Because there is no legally recognizable hardship from withholding discretionary benefits, FEMA cannot subject to lawsuits under the doctrine of ripeness prior to a determination of eligibility. Therefore, this Court should affirm.

II. THE FIRST AMENDMENT DOES NOT PERMIT NOR REQUIRE UNCONDITIONAL FEDERAL FUNDS FOR RELIGIOUS BUILDINGS.

The Religion Clauses of the First Amendment protect religious freedom by prohibiting direct aid to religion, and prevents the Government from burdening religious institutions, practices, and beliefs. U.S. Const. amend. I. The Fourteenth Amendment has incorporated both Clauses to the States. U.S. Const. amend. XIV § 1; *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (Free Exercise); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (Establishment). If the Government attempts to restrict religion, the policy must be able to withstand strict scrutiny or be struck down. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 523, 533 (1993). Thus, all levels of Government must shape legislation and policies that places religion at arms-length. *See Everson*, 330 U.S. at 15-16.

The Stafford Act authorizes the President to give aid to "Private Non-Profit" (PNP) owned buildings "damaged or destroyed" by a natural disaster. 42 U.S.C. § 5172(a)(1)(B), (3)(A)-(B) (2012). A PNP owned building must offer "critical services" e.g. public utilities services, "education, and emergency medical care" to be eligible for repair funds. 42 U.S.C. § 5172(a)(1)(B), (3)(A)-(B). Qualifying facilities also include those that offer "essential services of a governmental nature" with an extensive list of services. 42 U.S.C. § 5122(11)(B) (2012). Congress wanted to mitigate the effects of natural disasters by giving aid that would reduce recovery time; help affected groups and individuals; and ease the anguish and harm on a community after a traumatic event. 42 U.S.C. § 5121(a)-(b) (2012).

FEMA interprets and executes the Stafford Act to help "State and local governments" mitigate the harm caused by crises through the administration of the

PA Program. 44 C.F.R. §§ 206.1(a), 206.2(a)(20), 206.3(a). FEMA clarified the scope of governmental services under 42 U.S.C. § 5122(11)(B): with the goal of giving "consistent" criteria for a nationwide program, facilities "whose *primary purpose* [is to give] health and safety services" are eligible based on categories contained in congressional records, and congressional intent that the definition be adaptable but not overly broad. Disaster Assistance; Eligibility of Private Nonprofit Facilities, 58 Fed. Reg. 47992, 47993 (Sept. 14, 1993) (emphasis added). Thus, eligible "governmental service" facilities are a broad category of buildings limited to those that openly provide a community with valuable cultural, health, and safety benefits. 44 C.F.R. 206.221(e)(7) (2016).

FEMA considers whether the primary use of a building provides a ravaged community like Lima, (R. at 6), much needed governmental services. However, buildings and spaces seldom serve one purpose. Therefore, FEMA adopted a "mixed-use" standard to determine eligibility when a physical space offers both governmental and nongovernmental services. FEMA, *Public Assistance Program and Policy Guide* 16 (2016), https://www.fema.gov/media-library-data/1456167739485-75a028890345c6921d8d6ae473fbc8b3/PA_Program_and_Policy_Guide_2-21-2016_Fixes.pdf [hereinafter *PA Guide*]. Thus, FEMA does not categorically deny any eligible PNP merely because their facility has some non-secular use.

More likely than not is the test used to determine whether a mixed-use building primarily provides governmental services i.e. a facility must have operated,

either spatially or temporally, at least 50% for governmental services; FEMA withholds aid if the building operated 50% or more for nongovernmental services. *Id.* Ineligible services include e.g. recreational activities, political education, vocational training, religious activities, and job counseling. *Id.* at 14. If a facility meets the low 50% threshold, FEMA makes a direct monetary disbursement to the PNP of up to 75% to 90% of qualifying repair costs, prorated to the percentage of governmental services the facility previously gave to the community. *PA Guide* at 3, 16, 137.

Following Rhodes, FEMA began to assist New Tejas in its recovery through the Stafford Act with the PA program. (R. at 6). The Church, an otherwise eligible PNP, (R. at 13), attacked FEMA's interpretation of the Stafford Act, (R. at 8), on the basis that governmental services as defined in the *PA Guide* should include religious activities that their ineligible mixed-use facility provides. (R. at 4, 10).

The Church's desire for unrestrained Federal aid to a primarily religious edifice, (R. at 10), would come at the cost of exacerbated strain between Free Exercise and Establishment principles. Thus, the Fourteenth Circuit properly concluded FEMA's policies protect the dual guarantees of the Religion Clauses, (R. at 16-17); a result that comports with this Court's precedent, our history, and the policy considerations relevant to this case.

A. No Direct Aid for Religious Activities Is a Touchstone Principle of the Establishment Clause That Supports FEMA's Governmental Services Criteria.

This Court has adopted a pragmatic approach to reduce conflict between the Religion Clauses. *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 669-70 (1970).

At its core, the Establishment Clause seeks to prohibit governmental participation in religion, and prevent religion from becoming dependent on the Government as its sponsor and financial backer. *Id.* at 668.

1. Direct unrestricted Government funds for religious buildings has been repeatedly struck down.

FEMA's policy permits the agency to distribute funds to eligible PNP and abide First Amendment principles of constrained Federal interaction with religious institutions.

The test developed by this Court to determine the constitutionality of funding that reaches religious organizations requires that FEMA advance "secular" policies that do not have the "effect" of providing an impermissible "benefit" to the Church. *Lemon v. Kurtzman*, 403 U.S. 604, 612-13 (1971). A third factor i.e. "excessive entanglement" has become part of the "effect" portion of the *Lemon* test, and unnecessary to reach a decision in this case. *See Zelman v. Harris-Simmons*, 536 U.S. 641, 668-69 (2002) (O'Connor, J., concurring).

This Court has twice struck down with the *Lemon* test programs that gave religious institutions direct monetary assistance because the programs lacked a requirement that the aid would only benefit secular buildings and uses. *Comm. for Pub. Ed. and Religious Liberty v. Nyquist*, 413 U.S. 759, 774-79 (1973) (buildings); *Tilton v. Richardson*, 403 U.S. 674, 678-81 (1971) (plurality) (uses). Although a statute has a secular purpose, it is nonetheless unconstitutional if the statute directly gives religious institutions free money that advance their religious activities. *Nyquist*, 413 U.S. at 779-80.

a. FEMA's implementation of the Stafford Act complies with the initial factors of secular purpose and neutrality of this Court's Establishment Clause test

The *Nyquist* Court determined a New York statute had a secular objective because its language sought an expressly governmental purpose entirely unrelated to religion: an educational environment in the best interest of underprivileged children. *Id.* at 773. The statute was also "neutral" under current First Amendment jurisprudence because it determined beneficiaries among all eligible applicants without considering an applicant's status as a religious institution. *Id.* at 768 n.22; s*ee Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 822, 839 (1995) (stating a "significant factor" in Establishment Clause cases is neutrality). Therefore, a law cannot facially give aid to religious institutions based on their status. *See Rosenberger*, 515 U.S. at 840.

The Stafford Act has a secular purpose and is neutral. An express goal of helping communities after a disaster does not implicate religion akin to the statute in *Nyquist* when it assisted underprivileged children. The PNP policy is neutral because PNP eligibility for the Stafford Act does not hinge on the religious identity of the recipient. The implementation of the Stafford act through the PA program does not reject PNPs, including the Church, based on religion; instead eligibility is contingent on being a PNP that owns a building that provided governmental services – a secular and objective prerequisite that does not consider a PNP's religious identity.

b. The governmental service requirement allows aid to religious buildings that withstands judicial review by not directly benefiting religion

The Church disputes that FEMA understands the Establishment Clause with respect to direct aid to a religious building. However, to protect religious institutions like the Church, the *Nyquist* Court determined the First Amendment requires direct aid to religious buildings be carefully managed and targeted to secular use.

The second prong of the *Lemon* test proved fatal to New York's school repair legislation because the statute did not contain any limitations on funds used towards buildings or spaces that were religious. *Nyquist*, 413 U.S. at 774. The *Nyquist* Court scrutinized the direct aid provision by distinguishing it from three prior cases that contained secular use requirements or guarantees; therefore, New York's legislation resulted in a sponsor or financially supportive relationship with religion because the legislation did not contain any language to direct it to secular uses. *Id.* at 772-75.

Nyquist illustrates a simple principle that this Court should consider dispositive to this case: direct aid to a religious institution for equipment and buildings is constitutional only if targeted to non-religious use and "*without providing direct aid to the Churcharian*." *Id.* at 775 (emphasis added).

FEMA has created a program that respects the Establishment Clause. The eligible services requirement is necessary when providing direct aid to the Church's facility because the building intertwines secular and religious uses. Unlike New York's statute that did not attempt to separate aid to secular uses, FEMA channels funds to the secular through its requirement that the building use is more than 50%

in terms of space and/or time for governmental services; the PA program further pinpoints secular use with prorated aid for the percentage of eligible services provided to Lima's community. Thus, the PA program does not bail out the Church or any other PNP because the program directs tax-payer funds to governmental purposes.

c. The Tilton Court unanimously rejected tax-payer money to directly aid religious use of a building

The controlling precedents of *Tilton* and *Nyquist* have endured because they espouse a basic principle at the heart of the Religion Clauses.

The *Nyquist* Court analogized the New York statute to a portion of the Federal grant program struck down in *Tilton*. *Nyquist*, 413 U.S. at 776-77. The program in *Tilton* placed a secular-use restriction to one-time construction grants from the Department of Education for higher education facilities that ended after twenty years; therefore, a religiously-affiliated educational institution could use the constructed building for religious purposes after twenty years for free. *Nyquist*, 413 U.S. at 776-77. The *Tilton* Court Justices were unanimous that the twenty-year provision was unconstitutional because allowing religious institutions to use a building after twenty years for solely religious purposes was a windfall of an asset, paid with Federal taxes, that advanced their religion. *Nyquist*, 413 U.S. at 776-77; *see Tilton*, 403 U.S. at 683 (plurality), 692 (Douglas, J., with Black and Marshall, JJ., dissenting in part), *see also Lemon*, 403 U.S. at 665 n.1 (White, J., concurring in

the judgment of *Tilton*)[1]. Thus, the New York statute similarly subsidized religion because it permitted unrestricted, direct funds to religiously used buildings. *Nyquist*, 413 U.S. at 774, 776-77.

The Church would receive an impermissible benefit from the Government in direct violation of the First Amendment if FEMA categorized religious uses as eligible services. FEMA's policy uses as a proxy past governmental services and prorated aid to ensure buildings for primarily secular purposes receive money; FEMA could reach a similar result by simply not including religious uses as either eligible or ineligible. However, including religious uses as eligible services would permit PNPs like the Church to receive a direct monetary disbursement from FEMA based on their predominantly-religious use of a facility.

Thus, free tax-payer money would repair the Church's building because the PA program pays for qualifying work with a one-time Federal grant. Without any conditions on the PA program for secular purposes, it would be difficult to imagine a more direct example of sponsorship and financial support of the kind struck down in *Nyquist* and *Tilton*.

2. Direct monetary aid directed to secular uses as a basic tenet of the Establishment Clause is routinely declared in educational aid programs

This Court has routinely affirmed the principle found in *Nyquist* and *Tilton*. Many recent decisions on the Establishment Clause have involved public funding

---

[1] *Tilton* and *Lemon* were decided the same day. Justice White wrote one separate opinion for both cases.

that reaches private, religious schools as part of broad benefit programs. *Zelman*, 536 U.S. at 649. In this ambit, three factors have been dispositive that are like the *Lemon* test because the question remains the same: whether a law directly sponsors or financially supports religion. *See Mitchell v. Helms*, 530 U.S. 800, 845 (2000) (plurality) (O'Connor, J., with Breyer, J., concurring in the judgment). Thus, discussion of *Nyquist* and *Tilton* often occurs because educational grant programs are comparable to construction grants. *See e.g. Zelman*, 536 U.S. at 661. Upheld educational aid programs do not provide direct monetary payments to religious institutions and contain secular-use requirements.

A split Court determined educational materials loaned to public and private schools as part of a Federal program was constitutional as applied under the Establishment Clause when a State agency administering the program lent equipment to religious schools. *Mitchell*, 530 U.S. at 808 (plurality). The four Justice plurality emphasized neutrality, but Justice O'Connor did not agree with this analysis; instead, Justice O'Connor agreed with the dissent that neutrality should not be the only deciding factor. *Mitchell*, 530 U.S. at 837-40 (O'Connor, J., with Breyer, J., concurring in the judgment).

However, the entire Court agreed that direct monetary aid requires careful judicial scrutiny. The plurality briefly mentions this issue, and admits it is constitutionally significant. *Mitchell*, 530 U.S. at 818-19 (plurality); *accord Zelman*, 536 U.S. at 661 (reaffirming Nyquist's reasoning regarding direct monetary aid, and narrowing its scope). The dissent emphasized the risk of direct monetary payments

stemmed from the possibility of redirection towards religious uses. *Mitchell*, 530 U.S. at 818-19 (Souter, J., with Stevens and Ginsburg, JJ., dissenting).

Justice O'Connor rejected potential redirection as a viable rule in general and under the facts of the case. *Mitchell*, 530 U.S. at 855-57 (O'Connor, J., with Breyer, J., concurring in the judgment). Nonetheless, she agreed that direct monetary aid is a constitutionally critical concern because the Establishment Clause historically has barred such aid. *Id*. at 855-57 (O'Connor, J., with Breyer, J., concurring in the judgment). Thus, whereas the twenty-year provision in *Tilton* was unconstitutional because it removed the secular-use requirement, the program in *Mitchell* did have a constant secular-use requirement. *Id*. at 855-57 (O'Connor, J., with Breyer, J., concurring in the judgment).

Therefore, if not unanimous then a majority of the *Mitchell* Court agreed that a secular-use requirement is necessary to uphold a neutral, direct Federal monetary grant program because the requirement follows the original meaning of the Establishment Clause by guiding tax-payer money towards secular purposes and away from religious uses.

FEMA's position that a facility must be primarily used for governmental services is within its agency discretion to effectuate the Stafford Act, and is consistent with the position of the entire *Mitchell* Court. As a direct monetary grant, the PA program must ensure that religious institutions use the emergency funds towards secular governmental services as discussed in *Mitchell*, *Nyquist*, and *Tilton*. Rather than always denying aid to a building that is an inseparable mix of

governmental services and Churcharian use, FEMA instead chose a reasonable standard that determines if a building has been primarily used for governmental services. Absolute certainty that FEMA's aid will not be redirected to religious use is not required by the Establishment Clause as discussed in *Mitchell*, merely that the funds will more than likely provide secular governmental services. Therefore, if the Church's building cannot meet that low threshold, the Establishment Clause's prevailing concern over direct monetary aid compels FEMA to deny aid because the funds will primarily and directly sponsor and financially support religion.

Thus, the PA program balances the competing interests of the Stafford Act, this Court's precedent, and the overriding concern of the Establishment Clause.

3. The architect of the Religion Clauses vetoed congressional direct aid for a chapel as fundamentally conflicting with the First Amendment

One of the most important political leaders of the Founding, James Madison, understood a basic truth of the Establishment Clause: direct aid to religious institutions needs careful circumscription.

The Establishment Clause is rooted in apprehension of the power of the newly created Federal Government, and the desire to protect religious freedom. *Everson*, 330 U.S. at 8-11. Many colonialists were concerned that Government could exert influence over religion because they had sought refuge in the New World from the prejudice and oppression of the State-run Anglican Church of England. *Id.* at 8-9. Other colonies established the Church of England with taxation for construction of religious edifices as directed in their charters. *Id.* at 9-10. The differing opinions resulted in the adoption of the Religion Clauses – to simultaneously protect

religious freedom, and prevent the influence of any one religion on a national scale by prohibiting the United States from becoming a sponsor and financial backer by building churches or adopting any religion.

James Madison, the principal draftsman of the Establishment and Free Exercise Clause, recognized the Establishment Clause prohibits direct interaction with religion. As President, Madison vetoed a portion of a bill that granted the Baptist church five acres of federal land in the Mississippi Territory intended for a chapel. 22 Annals of Cong. 1104-05 (1811). President Madison explained his veto to the House of Representatives – the First Amendment does not allow the Federal Government to directly support religion. 22 Annals of Cong. at 366.

Further, religious institutions understood and agreed with President Madison that the Establishment Clause protects their liberty, and direct Congressional aid is impermissible. *To James Madison from Jesse Jones and Others, 27 April 1811*, Founders Online, http://founders.archives.gov/documents/Madison/03-03-02-0342 (last visited Nov. 15, 2017). President Madison thanked the Baptist churches for their support of his veto of Congressional legislation to benefit their brethren in Mississippi; he further clarified that the Mississippi Baptists had not requested the parcel of land themselves, but that Congress had decided to appropriate it for them. *Letter from James Madison to Jesse Jones and Others, 3 June 1811*, Founders Online, http://founders.archives.gov/documents/Madison/03-03-02-0377 (last visited Nov. 15, 2017). President Madison reiterated the

importance of the separation between Church and State "as essential to the purity of both" because they are and should remain inherently different. *Id.*

The Court in *Tilton* and *Nyquist*, consistent with President Madison's veto, found a limit FEMA cannot exceed without disregarding the Establishment Clause. The Government at all levels may provide certain aid to religious groups. *See Walz*, 397 U.S. at 668-70. However, the express language of the Establishment Clause, combined with its historical context, limits the scope of the aid, and requires that we separate the earthly from the divine.

Churches are not only institutions but physical buildings, and the buildings are often at the center of religion. Thus, early settlers to our country often established religion by building chapels, like the one at issue here, to set up the state-run religion of England in America. *Everson*, 330 U.S. at 9 n.6. Sociologists have understood for decades that a person places a certain power on an object or place that is part of an organized religion because as humans we place a distinct value on symbols of faith. *See* Emile Durkheim, *The Elementary Forms of the Religious Life* 227-29 (Joseph W. Swain trans., George Allen & Unwin Ltd. 1915). Although structural components of a church may not have religious significance, this Court in *Tilton*, *Nyquist*, and *Mitchell* understood that unrestricted, direct funding for construction and extensive rebuilding of facilities without any secular

use requirement is unconstitutional because it is a gift that would allow the Church to exercise its religious power, education, and practice[2].

Thus, FEMA's determination that a building is not eligible protects religious freedom. President Madison premised his veto on a simple principle; the Government should deny direct aid for a building like Church's facility when it serves as the center of religious activity because it creates the proscribed relationship between Government and religion. Despite the Church's challenge here, churches stood by President Madison's decision to deny a direct benefit to a church of their own Church because the risk of a dependent relationship with Government is too high.

Like President Madison, FEMA must also consider the final use of funds, regardless of the recipient, to exclude religious use because religion could become expectant on the Government for these buildings; create an incentive for secular non-profits to become religious; and to avoid merger of religious buildings with governmental institutions. Thus, the Fourteenth Circuit understood granting relief to the Church results in a relationship foreclosed by the First Amendment, and should be affirmed.

B. The Church Is Not Burdened by a Reasonable Requirement of Governmental Services for Direct Aid That Advances First Amendment Protection of Religion.

---

[2] *American Atheists, Inc. v. City of Detroit Dwtn. Dev. Auth.*, 567 F.3d 278, 292-93 (6th Cir. 2009) (upholding local program providing aid to downtown buildings, including churches, for minor repairs).

Our Constitution permits the Government to provide reasonable exceptions to laws permitting individuals to practice their religion; however, the Government cannot provide an exception that would run counter to the one of the most basic prohibitions of the Establishment Clause like the Church has asked this Court to grant. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

Even if we presume *arguendo* that the Establishment Clause does not require a secular-use condition when the Church receives funds in this case, the Free Exercise Clause does not require FEMA to provide funds to the Church. This Court has explored the space between the Religion Clauses i.e. "the play in the joints." *Walz*, 397 U.S. at 669. Thus, where the Establishment Clause does not bar Government aid, the Free Exercise Clause does not require giving aid to religion. *Locke v. Davie*, 540 U.S. 714, 720-21 (2004) (affirming 7-2).

1. FEMA's policy of giving direct aid to buildings that offer government services does not put the Church to a Hobson's Choice.

This Court held denying funds for religious education as an ineligible use of a grant does not affect an individual's Free Exercise right. *Id.* at 715. Washington provided higher education scholarships to all eligible students for the degree of their choice at any college or university, including religiously-affiliated, but excluded degrees in theology required for religious careers. *Id.* at 716. A student, whom received said scholarship and intended to pursue a career as a clergyman, alleged the policy was in violation of the Free Exercise Clause and other claims. *Id.* at 717-18.

The *Locke* Court distinguished *Lukumi* and *McDaniel v. Paty*, 435 U.S. 620, 626-28 (1978) (plurality) (holding the Government cannot disqualify a clergyman from protected political activity because of religious "status, acts, and conduct"). *Locke*, 540 U.S. at 720. The condition on the scholarship was constitutional because religious use of the scholarship was not a crime or offense like *Lukumi*, and in contrast to *McDaniel*, other protected rights were secure. *Id*. at 720. Thus, there was not a Hobson's choice between the scholarship and religious values because Washington merely asked the student not to use the scholarship for a specific program. *Id*. at 720-21.

The Court delineated in *Locke* the space between the Religion Clauses; the Government does not have to follow a strict policy of no financial aid for religion to abide by the Establishment Clause *and* may choose to withhold financial aid because of inherent differences between other college programs and a degree to become a minister. *Id*. at 721.

This Court has expanded on its reasoning in *Locke* to explain the difference between withholding aid for religious uses and denying aid based on religious status. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2016, 2022-25 (2017). Missouri denied an otherwise eligible religious school financial aid to improve their playground because the state constitution barred financial aid to churches. *Id*. at 2017-18. Automatic disqualification for funds based on an organization's identity as a church imposed a burden under the Free Exercise clause because the church had to decide between the funds to improve a playground

and its religious status. *Id.* at 2021-22. This Court emphasized the apparent distinction between status and use; Washington did not fund ministerial education in *Locke*, whereas Missouri denied a church based on its status as a church. *Id.* at 2023.

Thus, the Government can place reasonable limitations on the use of Federal aid, and the Free Exercise Clause does not require the Government to subsidize a specific use merely because the use is religious. *Trinity* stands for the principle that the Church can apply for funding on the same terms as secular organizations, and cannot be disqualified on their status alone. *Trinity* does not stand for the proposition that Free Exercise compels the Government to give the Church funds because they are a church.

The primary use criteria do not put the Church to a choice between aid and religion. FEMA examined the Church's facility because the Church is a PNP whose status as a PNP makes it *preliminarily* eligible for aid. Thus, unlike in *McDaniel* whose status as Minister denied him exercise of another protected right, the Church's status as a religious organization is irrelevant. However, the Church's facility must also be eligible, and where Washington required the scholarship not be used for a specific purpose in *Locke*, the PA Program requires the facility be used to provide governmental services to the community in Lima. Thus, the Church does not have to choose because FEMA's decision is not predicated on any decision to be made by the Church, but instead the past use of their facility determines the outcome.

The policy here does not deny funds to the Church for what it is, but for what it intends to do. In direct contradiction to the FEMA Adjuster's comments, the Church can compete on the same terms as secular PNP, unlike Missouri's blanket denial of eligibility to any church in *Trinity*, because the Church's status is unrelated to the decision to extend aid. But, governmental services, as a practical matter, cannot be of a religious nature – critical or otherwise – because there is an inherent difference between religious and governmental services as was the case in *Locke* between secular and theological degrees.

The potential decision to withhold funds is a rational decision projecting the Facility's use in the future, based on past use for eligible services of less than fifty percent of the time. In this context, as this Court emphasized when discussing use and status in *Trinity*, it is evident FEMA does not condition funding because of the Church's religious status, but for what the Church proposed to do: use tax-payer funds to repair a facility that does not primarily provide governmental services to the people of Lima.

Thus, the Church does not choose between religious faith or funds because FEMA's potential determination does not ask that they change their actions, instead it determines whether their Facility has contributed sufficiently to their community in Lima to justify the expenditure of tax-payer funds.

2. Two compelling governmental interests cause FEMA to regulate aid to religious institutions for secular use

FEMA has carefully designed their policies to prevent unduly burdening religious organizations while providing those organizations with aid to restore

buildings that provide essential services after a natural disaster. *Lukumi* held under the Free Exercise Clause that a law that as-applied restricts religion "must advance [a compelling Government interest] . . . and must be narrowly tailored [to that end][3]." 508 U.S. at 546 (holding unconstitutional facially neutral ordinances that proscribed religious animal sacrifice). However, FEMA in this case has not burdened the Church's practice of religion.

The *Locke* Court expressly rejected extending *Lukumi* because the condition on the scholarship did not create a burden when it did not criminalize any religious act or belief, deny another fundamental right, nor force a Hobson's choice. *Locke*, 540 U.S. at 720. FEMA's policies are similar to Washington's conditions for a scholarship in *Locke* – they do not criminalize religious acts, abrogate rights, or force the Church to choose between religion and funding; therefore, this Court should again refuse to extend the reasoning of *Lukumi* in this case.

Nonetheless, FEMA policy can withstand strict scrutiny by this Court. Laws do not advance a compelling interest where the law constrains only certain religious practices while other acts that similarly affect the stated interest are not. *Lukumi*, 508 U.S. at 546-47. The Governmental services requirement advances *two*

---

[3] The Religious Freedom Restoration Act of 1993 also applies to Federal action, has similar language and is as stringent as *Lukumi*. 42 U.S.C. § 2000bb-1(b) (2012), *see City of Boerne v. P.F. Flores*, 521 U.S. 507, 534 (1997); *see also Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2761 n.3 (2014). The Sect did not rely on the RFRA, and the Fourteenth Circuit did not consider it, instead this case was decided solely on the First Amendment. (R. at 15-17).

compelling governmental interests after a tragedy like Rhodes: aiding local communities by restoring buildings that primarily provide governmental services, and directing scarce tax-payer resources away from non-governmental services.

FEMA's policy reduces diversion to ineligible uses by prorating aid to *all* facilities, not just to the Church or religious PNP in general; activities are governmental services based on whether they have historically been public services or provide health and safety services – the decision is not between secular PNP and the Church or other religious PNP. FEMA has not singled out religious activity like in *Lukumi* as an ineligible service, and has included other categories such as recreational activities, sports, political education, vocational training, and job counseling.

Next, FEMA has narrowly tailored their policy to achieve their goals. A law that is "overbroad or underinclusive" in achieving its stated goals is unconstitutional when it affects religion. *Lukumi*, 508 U.S. at 546-47. The PA program is neither overbroad or underinclusive because it does not exempt *any* organization from a determination of a facility's use for governmental services, and *all* facilities that receive aid have their funds prorated to prevent scarce resources diverted for non-governmental service. Further, the mixed-use test is a low standard of eligibility; every PNP must show it is more probable than not that their facility primarily provided governmental services. This allows as many PNP as possible to qualify for aid to help a community after a disaster. Thus, by directing

funds to where they are most helpful without onerous requirements, FEMA has balanced its two compelling interests with a narrowly tailored program.

It is important to reiterate that the Church has rebuilt their facility as Madison would have intended – not with a bail-out from the Government, but through the strength of the faith that they freely exercised. (R. at 8-9).

A broad interpretation of the Free Exercise Clause, alongside a narrow interpretation of the Establishment Clause, would undermine the former and swallow the latter. Therefore, this Court should affirm the Fourteenth Circuit's decision.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit on both issues.

Respectfully Submitted,

Team 20

Attorneys for Respondent