No. C17-2893-1

In the Supreme Court of the United States

COWBOY CHURCH OF LIMA,

Petitioner,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,
W. CRAIG FUGATE, ADMINISTRATOR OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENTS

Team: 24
Counsel for Respondent

QUESTIONS PRESENTED

1. Can the Federal Emergency Management Agency be subject to lawsuits prior to determining whether or not an entity is eligible to receive relief or is such a lawsuit barred by the doctrine of ripeness?

2. Does the Establishment Clause of the First Amendment bar the Cowboy Church of Lima from receiving the public benefit of relief under the Federal Emergency Management Agency's Public Assistance Program?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Administrative Regulations

Miscellaneous

DECISIONS BELOW

The panel opinion of the United States Circuit Court of Appeals for the Fourteenth Circuit, ruling that the Cowboy Church of Lima's lawsuit was barred by the doctrine of ripeness, and that the Establishment Clause barred the Church from receiving relief through the Federal Emergency Management Agency's Public Assistance Program, is unreported but reprinted in the Record at 2–21. The Central District Court of Lima's ruling is unreported, but is discussed in the Fourteenth Circuit Court ruling.

STATEMENT OF JURISDICTION

On October 1, 2017, the United States Circuit Court of Appeals for the Fourteenth Circuit issued its decision finding that the Cowboy Church of Lima's lawsuit was barred by the doctrine of ripeness, and the that Establishment Clause barred them from receiving the public benefit of relief through the Federal Emergency Management Agency's Public Assistance Program. The Cowboy Church of Lima filed a Petition for a Writ of Certiorari, which was granted on October 13, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the interplay between the Establishment Clause and the Free Exercise Clause of the First Amendment. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I

This case also involves several statutory and regulatory provisions related to the Federal Emergency Management Agency's Public Assistance Program providing disaster relief. The relevant provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (1974) (codified as amended in scattered sections of 42 U.S.C.), are 42 U.S.C. §§ 5121–22, 5172 (2016). The relevant implementing regulations describing applicant and facility eligibility are 44 C.F.R. §§ 206.221–.222 (2016).

Finally, the case also involves the requirement under the Administrative Procedure Act of "final agency action" before judicial review is available. 5 U.S.C. § 704 (2016) provides that "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

STATEMENT OF THE CASE

The Stafford Act and FEMA's Public Assistance Program

The Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") provides the statutory authority to the Federal Emergency Management Agency ("FEMA") to administer and carry out the federal response to disasters. *See generally* Pub. L. No. 93-288, 83 Stat. 143 (1974) (codified as amended in scattered sections of 42 U.S.C.).

The Stafford Act authorizes FEMA to provide financial assistance through the Public Assistance Program ("PA Program") to state and local governments, as well as certain qualifying private nonprofit ("PNP") organizations, so that

communities can "respond to and recover from major disasters declared by the President." *See* Fed. Emergency Mgmt. Agency, FP 104-009-2, *Public Assistance Program and Policy Guide* 5–6 (2016) [hereinafter Policy Guide]. Through the PA Program, FEMA provides grants to governments or qualifying PNP organizations for debris removal, emergency assistance, or for the repair and restoration of facilities damaged or destroyed by a disaster. *Id.*; *see also* 42 U.S.C. § 5172(a)(1)(B) (2016).

In order to be eligible for disaster aid, a PNP organization must meet the statutory and regulatory requirements as well as the guidelines contained in FEMA's Policy Guide. The organization must show it has a current letter from the Internal Revenue Service granting it section 501(c), (d), or (e) tax exempt status. 44 C.F.R. § 206.221 (2016). FEMA must also determine whether the PNP organization owns or operates an "eligible facility." Policy Guide at 10; 44 C.F.R. § 206.222(b). An eligible PNP facility is either (1) "A facility that provides a critical service, which is defined as education, utility, emergency, or medical" or (2) "A facility that provides a non-critical, but essential governmental service AND is open to the general public." Policy Guide at 11.

PNP facilities that provide an "essential government service" and are eligible for relief generally include "museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature." See 44 C.F.R. § 206.221(e)(7). PNP facilities "primarily used for political, athletic, religious,

recreational, vocational, or academic training, conferences, or similar activities" are not considered eligible. Policy Guide at 11.

Often, PNP facilities are considered "mixed use" facilities where they are used for both eligible "essential government services" as well as for ineligible purposes. For these "mixed-use facilities," FEMA must determine if the "primary use" of the facility is for eligible services, which means that "*more* than 50 percent of the physical space in the facility is dedicated" to eligible uses. Policy Guide at 16. When the same physical space in a facility is used for both eligible and ineligible services, FEMA must determine if "more than 50 percent of the operating time is dedicated in that shared physical space" to eligible uses. *Id.* If fifty percent or more of the use of the facility is for ineligible services, the PNP is not entitled to relief. *Id.* If more than fifty percent of the facility is used for eligible services, the PNP may receive prorated funding based on the proportion of the facility used for such eligible services. *Id.*[1]

Whether a facility is used for eligible purposes is not the end of the decisionmaking process, however, for FEMA next must determine the type and nature of work to be performed. There are two general categories of work, "Emergency Work" which is needed immediately to save lives or protect public health and safety, or "Permanent Work" to repair and restore facilities to their pre-disaster design and use. *See id.* at 19–20. Furthermore, FEMA must determine the eligibility of the repair costs for which the applicant is seeking reimbursement, to

[1] When a PNP owns several facilities, or a single facility made up of more than one building, FEMA evaluates each building's eligibility separately. Policy Guide at 15.

ensure they are directly tied to the disaster and meet a variety of criteria showing they are "reasonable." *See generally id.* at 21–42. PNP's also must meet other regulatory requirements that they first apply for a Small Business Administration loan, 42 U.S.C. § 5172(a)(3)(A)(ii), and apply for FEMA relief within 30 days of the President's declaration. 42 U.S.C. § 5170.

Hurricane Rhoads Declared a National Disaster and the Cowboy Church of Lima, New Tejas Applies to FEMA

On August 13, 2016, Hurricane Rhodes made landfall one hundred miles north of Lima, New Tejas. R. at 2. Hurricane Rhodes dropped an unprecedented forty-five inches of rainfall in a period of thirty-six hours, causing great stress to the Flanagan Dam, which had been undergoing repairs at the time. R. at 2–3. The dam failed and water overflowed the banks of the Motta River causing catastrophic flooding surges across the region. R. at 3.

The flood surge reached the Cowboy Church of Lima ("Church"), which lies on an 88-acre tract of land on the outskirts of Lima, New Tejas.[2] R. at 4. The head of the Church and manager of the grounds is Chaplain Finn Hudson. R. at 3. The Church property consists of several structures, including a chapel with an attached event center that seats 120 people. R. at 3. The chapel had occasionally been used by the Lima community for some private and civic events as well as city council meetings due to the lack of another large meeting space in town. R. at 3–4. The event center annex was added to the chapel in 2005 to facilitate some of these

[2] The Township of Lima is a small town with a population of approximately 4,150 people, at the center of which is a food processing and packing plant that supplies food for a local state-wide grocery chain. R. at 3.

community uses, such as parties, meetings of community organizations, and large city council meetings, though the event center continued to be used for religious purposes on Sundays. R. at 7. The event center was also designated as an emergency relief shelter. R. at 7.

On August 15, 2016, the flood waters reached the Church and flowed throughout the entire 5,500 square feet of the event center and the chapel (each separately is 2,250 square feet). R. at 4. The record indicates that the flood waters reached a depth of at least three feet throughout both buildings, and caused possible structural damage as well as heavy damage to the buildings' interiors. R. at 5–6.

On August 19, 2016, President Barack Obama declared the floods and storm damage caused by Hurricane Rhodes to be a natural disaster, making FEMA PA Program Funds available. R. at 6. On August 20, 2016, after consulting with an attorney, Chaplain Hudson filled out and online application with FEMA for relief. R. at 6. On August 25, an adjuster contracted by FEMA, Quinn Fabray, inspected the Church grounds to determine the loss suffered as well as assess the uses of the event center and the chapel to determine the facility eligible. R. at 6–7. After the inspection, Ms. Fabray apparently told Chaplain Hudson that she had not heard of FEMA providing relief funds to churches. R. at 7–8.

Based on this conversation with Ms. Fabray, Chaplain Hudson again consulted with an attorney, and on August 29, 2016, the Church filed suit against FEMA and its administrator W. Craig Fugate ("Respondents") in the Central

District Court of Lima. R. at 8. Upon receiving the notice of the suit, FEMA immediately stopped processing the Church's application pending the determination of the legal process. R. at 8.

Procedural History

The Respondents' initial Federal Rule of Civil Procedure 12(b)(6) and 12(b)(1) motion was denied by the district court on November 2, 2016, and the parties moved to discovery. R at 9. During deposition testimony, Chaplain Hudson indicated that the structural damage from the flood waters had led to the collapse of the chapel roof. R. at 9. Chaplain Hudson also testified that members of the Lima community had donated time and money to help with the repairs to the chapel and the event center. R. at 9. Although at the time of his deposition Chaplain Hudson testified that the donations would not be enough to cover the repairs, the Church has in fact since reopened as of July 26, 2017, because of the continued support for the local community and the larger national Cowboy Church network. R. at 8–9.

FEMA Regional Director Jesse St. James also gave a deposition, in which he testified that, although the Church had been placed in a preliminary denial category, he intended to review the file himself due to the close factual question of facility eligibility. R. at 10. Mr. St. James testified that the Church ultimately might have been eligible for FEMA assistance for its event center. R. at 10. As part of the discovery for the trial court, FEMA also released the final report from Ms. Fabray, which concluded that the event center was used eighty percent of the time for

FEMA-eligible purposes, and the chapel was used ninety percent for non-FEMA eligible purposes. R. at 10.

After discovery, FEMA moved for summary judgment on two theories: (1) that the case was not ripe for adjudication due to the lack of a final agency determination, and (2) that the policy of excluding facilities primarily used for religious purposes was rooted in the First Amendment and necessary under the Establishment Clause. R. at 10. The Church responded that religious uses should not be ineligible under the recent *Trinity Lutheran* decision, and that the case was ripe because the failure to act by FEMA amounted to a *de facto* denial. R. at 10. The district court denied the ripeness argument, but granted summary judgment on the basis that the Establishment Clause barred the Church from receiving aid. R. at 10.

The Church appealed to the Fourteenth Circuit Court of Appeals, which affirmed the district court's decision on October 1, 2017. R. at 10–11. The Fourteenth Circuit disagreed with the lower court on Respondents' first argument and held that the case was not ripe for judicial decision, because further factual development was necessary and that there was no undue hardship to the Church in withholding judicial consideration. R. at 13–15. The Fourteenth Circuit also upheld the district court's summary judgment dismissal on the Establishment Clause grounds, concluding that FEMA's policies were "content-neutral" and thus did not implicate the Free Exercise Clause or *Trinity Lutheran.* R. at 15–17

The Church filed a Petition for Writ of Certiorari which was granted on October 13, 2017.

SUMMARY OF THE ARGUMENT

This Court need not even reach the question of whether the Establishment Clause bars the Church from receiving PA Program funds, because the doctrine of ripeness bars the Church from bringing this suit against FEMA prior to the agency making its final decision regarding the Church's eligibility for relief.

Ripeness is a justiciability doctrine based in both Article III restraints on judicial power and the prudential reasons for refusing to exercise jurisdiction. In the administrative context, ripeness is intended to prevent the Court's from becoming entangled in "abstract disagreements about administrative policy" before an agency takes any concrete actions toward the individual claimants. To determine whether administrative action is ripe for review requires the Court to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.

First, the issues in this case are not fit for adjudication primarily because there has been no "final agency action" as required by § 704 of the Administrative Procedure Act. FEMA reached no final determination regarding the Church's application for relief and the Church's argument to the contrary is undermined by the evidence that they may have ultimately been deemed eligible for relief funds. The PA Program Policy Guide and the "mixed use" standard contained therein do not themselves constitute final agency action. Regardless though, this Court's precedent forecloses the Church from seeking wholesale judicial revision of the PA Program Policy Guide before any provisions therein have been specifically applied

to the Church. Instead, the ripeness doctrine requires further factual development to advance this Court's decision making. Specifically, the ripeness doctrine requires a final FEMA determination as to the eligibility of the Church facilities for relief funds before judicial review.

This requirement for a final agency determination toward the Church is even more prevalent considering this Court's holding in *Reno v. Catholic Soc. Servs., Inc.* This Court explicitly held in *Reno* that an individual seeking access to a discretionary statutory benefit would not have a ripe claim until they had taken all the affirmative steps they could take before the agency blocked their path by denying the benefit. In other words, the promulgation of agency regulations themselves did not create a ripe claim until they were actually applied to the applicant in a way that denied them the benefit. The Court's rational in *Reno* is plainly dispositive in this case. The development of the mixed-use standard in the PA Program Policy Guide did not itself give the Church a ripe claim. Rather, because the Church is seeking a discretionary statutory benefit their claim cannot ripen until FEMA has concretely applied the standard to the Church and denied the benefit.

As to the second ripeness factor, there is no significant hardship to the Church in withholding judicial decision in this case. The PA Program Policy Guide is distinguishable from the kinds of administrative regulations that this Court has reviewed because they had a direct and immediate impact on the day-to-day conduct of the regulated entities. In those cases, the regulated entities were faced

with the prospect of costly adjustments to their day-to-day operations to comply with the agency rules or risk severe sanctions. Here though, FEMA does not seek to compel behavior through threat of administrative enforcement, but rather has established guidelines to determine eligibility for a discretionary benefit in the unique circumstances of a major disaster. The standards in the Policy Guide cause no direct and immediate impact that would justify immediate judicial review in the absence of a specific application of those standards to the Church.

Finally, the Church itself has not shown an undue hardship by merely being required to wait for FEMA to reach a final determination as to its eligibility for relief. The question before the Court is not the past hardship the Church experienced at the hands of Hurricane Rhodes, but the future hardship of withholding decision. As of July 2017, the Church has been able to reopen based on the donations of time and money from the Lima community and the larger national network of the Cowboy Church. FEMA funds were not necessary then for the Church to reopen, and indeed PA Program grants are in large part aimed at reimbursement purposes to begin with. The Church then cannot show that they face an immediate undue hardship in merely being asked to wait until FEMA reaches a final decision as to their eligibly.

Because there is no undue hardship, and the issue is not fit for judicial review, the Church's lawsuit is barred by the doctrine of ripeness.

If this Court finds that the Church's claim is ripe for adjudication, their claim fails nonetheless. It is a settled principle that government action that advances or

inhibits religion violates the Establishment Clause. Accordingly, the Church is barred from receiving public benefits under the PA Program because such funding would directly subsidize the Church's religious activities, undercut the secular purpose of the Program, and excessively entangle the government in the internal religious affairs of the Church.

The PA Program is facially constitutional. The Establishment Clause requires FEMA to exclude facilities primarily used for religious purposes from PA Program eligibility, but churches and religious organizations may generally receive funding for facilities primarily used for secular purposes under the program criteria.

The Establishment Clause bars the Church from receiving PA Program funds because the combined chapel and event center facility is primarily used for religious purposes. Providing the Church grants to repair the facility would thus fund religious activity and undercut the neutrality of the PA Program by demonstrating a preference for religious entities over similarly ineligible secular entities.

In addition, providing PA Program funding to the Church would create an excessive entanglement that inhibits religion. The primarily religious character of the Church's facility would require FEMA to increase its surveillance of the Church to ensure secular use of the grant funds. The monitoring necessary under the PA Program would be pervasive and impermissibly involve FEMA in the Church's religious affairs.

Even if the Establishment Clause does not bar the Church from receiving PA Program funds, denial of PA Program benefits to the Church would not violate the Free Exercise Clause. The PA Program does not discriminate against religious entities based on their status. Religious nonprofit organizations like the Church are not categorically barred from participating in the PA Program and may receive grants for their eligible facilities on an equal basis with secular nonprofits.

Further, the PA Program criteria are neutral and generally applicable. Religious entities are eligible nonprofit organizations under the program and are not singled out for distinctive treatment. The exclusion of primarily religious facilities from the program criteria is not based on any animus towards religion, but rather based on a legitimate policy judgment that religious services—like similarly excluded secular services—do not advance the legislative purpose of the Stafford Act.

Moreover, even if the PA Program criteria are not neutral, the government is not required to provide the Church public benefits for its primarily religious facility because the Church remains free to receive benefits under the program for its eligible structures. Accordingly, the government's legitimate policy decision not to subsidize primarily religious facilities does not infringe the Church's free exercise rights.

ARGUMENT

I. The Church's lawsuit against FEMA is barred by the doctrine of ripeness, because the issue is not fit for judicial decision, and the Church does not face significant hardship in the Court withholding consideration.

This Court need not even reach the Establishment Clause question, because the Church's lawsuit against FEMA is barred by the doctrine of ripeness. The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18 (1993).[3] Ripeness is a justiciability doctrine intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

Absent statutory authority for immediate judicial review, an agency regulation is generally not ripe for review under the Administrative Procedure Act ("APA") "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*." *Nat'l Park Hosp. Ass'n*, 803 U.S at 808 (emphasis added) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

[3] Respondents would argue that the Church lacks Article III standing for many of the same reasons this case is not ripe for adjudication. However, the Fourteenth Circuit's holding was based on the prudential requirements of the ripeness doctrine and did not discuss any Article III standing issues that may also exist R. at 13. Respondent's brief will likewise focus on this Court's precedent regarding the prudential requirements under ripeness doctrine.

In order to determine whether administrative action is ripe for judicial review, the Court is required to evaluate both "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* at 807–08 (citing *Abbott Labs.*, 387 U.S. at 149). As the Court of Appeals held, analysis of both of these factors reveals that the Church's claim, brought prior to a final agency determination on their eligibility for relief, is not ripe for judicial review and thus should be dismissed.

A. The issues are not fit for judicial adjudication because there has been no final agency action, and further factual development is necessary.

The clearest indication that the Church's claims before this Court are not fit for adjudication is because there has been no final agency action as required by § 704 of the APA. *See Air Espana v. Brien*, 165 F.3d 148, 152 (2d Cir. 1999) ("The APA explicitly requires that an agency action be final before a claim is ripe for review."); *see also* 5 U.S.C. § 704 (2016). An agency action is considered "final" when two conditions are met: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

As an initial matter, it is not seriously disputed that FEMA never reached a final determination regarding the Church's eligibility for relief funds. The Church's only argument to the contrary in the lower court proceedings was that the failure of

FEMA to act on the application amounted to a *de facto* denial. R. at 10. The Church's application had initially been placed in an internal preliminary denial category. R. at 10. But, FEMA's Regional Director still intended to personally review the Church's application before any final determination was made because of the close factual nature of the issue. R. at 10. A final decision would have been reached at the latest by October 14, 2016, but the process was put on hold when the Church initiated the present suit in August 2016. R. at 8. Thus, FEMA was denied the chance to reach a "consummation of [their] decisionmaking process" regarding the Church's application, nor was there any action from which any "rights or obligations" or "legal consequences" regarding the Church's application would flow. *See U.S. Army Corps of Eng'rs*, 136 S. Ct. at 1813. Indeed, FEMA's Regional Director indicated that the Church may have ultimately been deemed eligible for relief funds, which would have triggered the next steps of the application process of determining the type of work required and costs eligible for reimbursement. R. at 10, 12. Any claim by the Church then that there was "final agency action" regarding their application is simply without merit.

1. The facility eligibility guidelines in FEMA's Policy Guide do not constitute final agency action.

The Church's challenge is not aimed at a particular application of the Stafford Act or its implementing regulations, nor at the statute itself or any individual regulations. Rather, the Church is challenging FEMA's interpretation of that regulatory framework contained in the PA Program Policy Guide. Specifically, the Church is challenging the "mixed-use" and "primary use" guidelines for

determining PNP facility eligibility for relief funds. Fed. Emergency Mgmt. Agency, FP 104-009-2, *Public Assistance Program and Policy Guide* 15–17 (2016) [hereinafter Policy Guide]. However, a broad agency policy or program does not constitute "final agency action" for the purpose of § 704 of the APA. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006) (citing *Lujan*, 497 U.S. at 890–94).

In *Lujan*, for example, a national wildlife preservation group filed suit against the Bureau of Land Management ("BLM") alleging various administrative failures to implement and properly manage the "land withdrawal review program." *See* 497 U.S at 871. The "land withdrawal review program" referred generally to the activities of the BLM under different statutory and regulatory schemes to manage public lands and their uses. *Id.* The claimants alleged generally that the decisions by the BLM to reclassify some lands and open others to the public domain "would open the lands to mining activities, thereby destroying their natural beauty." *Id.* at 879.

However, this Court held that the "land withdrawal review program" was not a "final agency action" for the purposes of § 704 of the APA. *Id.* at 873. Not only did the program involve over one thousand individual and ongoing land use determinations and classifications, but in terms of mining, the BLM would have to take additional steps to approve and permit the activity before any specific mining could take place. *Id.* at 891–92. If and when the BLM took these further individual actions, the Court conceded some individual plaintiff's claims may then ripen, but in

the meantime, the wildlife group could not seek "*wholesale* improvement of this program by court decree." *Id.* at 891, 894 ("Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect.").

This Court has held even more focused agency programs, with the potential to directly impact claimants, were nonetheless not "final agency actions" ripe for review. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 726 (1998). In *Ohio Forestry*, the Sierra Club challenged the U.S Forest Service's Land and Resource Management Plan ("Plan") for Ohio's Wayne National Forest as allowing for too much logging activity. *Id.* The Court held the claim was not ripe for adjudication. *Id.* Although the Plan made logging more likely in the forest, it did not itself "authorize the cutting of any trees," and the Forest Service had to take several additional steps for specific site selection and permitting before any logging would begin. *Id.* at 729–30. The Court noted that the Sierra Club was free to bring future claims against individual specific permitting determinations, but the general Plan for the forest was not itself final agency action ripe for review. *See id.* at 734–35. The Court also reasoned that further agency modification to the Plan before it was implemented toward specific sites was likely to occur. *Id.* at 735. Thus, judicial review of the Plan at the general level, as opposed to in terms of a specific application, would get the Court involved in the kind of "'abstract disagreements

over administrative policy' that the ripeness doctrine seeks to avoid." *Id.* at 735–37 (citation omitted) (quoting *Abbott Labs.*, 387 U.S. at 148).

What the petitioner seeks here is the same kind of judicial revision to a broad agency program—a program that has not yet affected them in any concrete way—that this Court explicitly rejected in *Lujan* and *Ohio Forestry.* The "primary use" and "mixed-use" standards are not final agency actions, but the first step in an array of criteria used by FEMA to determine whether PNP's meet the statutory and regulatory requirements to be eligible for relief funds. *See generally* Policy Guide at 10 (discussing the separate eligibly criteria that must be met, i.e., "applicant," "facility," "work," and "cost"). The Church should not be permitted to use the Court to make *wholesale* changes to the PA Program at a "higher level of generality," when the Church itself has not faced any final concrete agency determination. *See Lujan*, 497 U.S. at 891, 894.

Furthermore, in light of this lawsuit and others, FEMA has undertaken a review of its policy regarding PNP facilities that are used primarily for religious purposes. *See FEMA Rethinking Ban on Disaster Aid to Church Buildings*, N.Y. Times (Nov. 7, 2017, 6:39 PM), https://www.nytimes.com/aponline/2017/11/07/us/ap-us-disasters-fema-and-faith.html?_r=0. Thus, the Church is asking this Court to wade into "abstract disagreements over administrative policy" in a complex regulatory scheme currently under review. *See Ohio Forestry,* 523 U.S at 735–37; *Abbott Labs.*, 387 U.S. at 148. Such a review of broad administrative policy is barred by the ripeness doctrine before FEMA has made any specific factual

determination applying the policy to the Church's situation. *See Ohio Forestry,* 523 U.S at 735–37 (observing that judicial review prior to a specific agency action could "interfere with the system that Congress specified for the agency to reach" individual decisions).

Respondents also note that Congress has had several occasions over the years to amend the Stafford Act to explicitly include coverage for the facility uses that the Church seeks to amend into administrative policy by judicial action. *See, e.g.*, Federal Disaster Assistance Nonprofit Fairness Act of 2017, H.R. 2405, 155th Cong. (2017) (proposing to amend the Stafford Act to included "houses of worship" as additional eligible PNP facilities); Federal Disaster Assistance Nonprofit Fairness Act of 2013, H.R. 592, 113th Cong. (2013) (same). This Court should be cautious to resolve a political question that Congress itself has declined to address and that is currently under review at the agency. *See generally Baker v. Carr*, 369 U.S. 186, 210 (1962) (explaining that a primary "function of the separation of powers" is the "nonjusticiability of a political question").

2. Further factual development would advance this Court's decision.

It is true that this Court has sometimes viewed challenges to agency action as ripe for review, even without a concrete action toward a particular party, when the question presented is a "purely legal one." *Abbott Labs.*, 387 U.S. at 149. In *Abbott Laboratories*, several drug companies challenged Food and Drug Administration regulations requiring the "established name" of prescription drugs be included in labels and advertising along with any "trade names." *Id.* at 138–39.

This Court in *Abbott* held that the challenge was ripe for review, in part, because the question was a "purely legal" dispute over whether the Government had exceeded its statutory authority in promulgating the regulations. *Id.* at 149; *see also Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967) ("[T]he issue as [the petitioners] have framed it presents a purely legal question: whether the regulation is totally beyond the agency's power under the statute, [which is] the type of legal issue that courts have occasionally dealt with without requiring a specific attempt at enforcement . . . .").

Regardless of whether a challenged agency action presents a "purely legal" question, this Court has nonetheless found claims were not ripe when "further factual development would 'significantly advance [the Court's] ability to deal with the legal issues presented.'" *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812 (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)). In *National Park Hospital*, the validity of several National Park Service regulations regarding concession contract disputes presented a purely legal question, but the Court held the issue was not fit for review. *Id.* at 804–05. The Court noted that, given the reliance by the petitioners on the factual characteristics of specific contracts that might fall under the regulation, any "judicial resolution of the question" should await a "concrete dispute about a particular contract." *Id.* at 812; *see also Toilet Goods*, 387 U.S. at 164 ("[J]udicial appraisal . . . is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.").

Respondents concede that one of the questions before this Court is a purely legal one: whether the Establishment Clause bars the Church's access to FEMA relief funds, at least for facilities where the primary use is religious. However, in the present case the factual record is incomplete, and further factual development would "advance [this Court's] ability to deal with the legal issues presented." *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 812. The Church's application is still in the queue for relief, and it may yet be eligible for relief funds at the least for a portion of the restoration to their event center. *See* R. at 10. As the lower court noted, the Church is asking this Court to "make a factual determination that they would not qualify for FEMA relief, before FEMA has the opportunity to make that determination." R. at 14. Further factual development is thus necessary to deal with the issues presented, specifically, a final factual determination as to the eligibility of the Church's facilities and a final agency decision as to what funds, if any, the Church may be able to receive. The ultimate decision and any determination of funds is far from certain, and thus the Church's claim cannot be fit for adjudication when "it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *See Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

3. Under this Court's ruling in *Reno v. Catholic Soc. Servs., Inc.*, the Church's lawsuit seeking a discretionary benefit cannot ripen before a final agency decision actually denying that benefit.

Even if this Court views the PA Program Policy Guide and "mixed use" standards therein as final agency actions, or as presenting a "purely legal question,"

the Church's claim is still not ripe under this Court's precedent. This case is unlike *Abbott Laboratories* in a critical aspect: the "rules" at issue here are not ones that impose sanctions on conduct or dictate behavior, but are guidelines for *access to a benefit. See Reno*, 509 U.S. at 58–59.

In *Reno*, a group of undocumented immigrants brought a class action suit against several Immigration and Naturalization Service ("INS") regulations which interpreted the statutory requirements for amnesty. *Id.* at 43. The immigrant groups argued that the INS regulations would unlawfully preclude them from gaining the benefit of amnesty. *Id.*

This Court however, held that challenge was not ripe for adjudication because the identified class members had not actually completed the application process and received a denial. *Id.* at 58. Despite noting the "presumption of reviewability," the Court distinguished the regulations at issue from those in *Abbott Laboratories* and concluded that:

> [The regulations] impose no penalties for violating any newly imposed restriction, but limit access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens. Rather, the Act requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations. . . . In these circumstances, the promulgation of the challenged regulations did not itself give each *CSS* and *LULAC* class member a ripe claim; a class member's claim would ripen *only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him.*

Id. at 58–59 (emphasis added) (footnotes omitted). Until such time that individual class members were specifically denied the benefit they were seeking, their claims were not ripe for judicial review. *Id.*[4]

This Court's holding in *Reno* is dispositive and directly applicable to the case at hand. FEMA's Policy Guide and the "mixed-use" standard do not create "penalties for violating a newly imposed restriction," but rather provide the guidelines for "access to a benefit" created by the Stafford Act and its implementing regulations, a benefit that is not "automatically bestowed" upon all parties affected by natural disasters. *See id.* Just as with the statutory amnesty program, the Stafford Act and its implementing regulations require applicants "to take further affirmative steps" and satisfy several criteria beyond just the facility use standards being challenged here. *Id.* The Stafford Act delegates to FEMA the task of determining "on a case-by-case basis whether each applicant has met all of the Act's conditions, not merely those interpreted by the regulations in question." *Id.*

Thus, the "promulgation of the challenged regulations" and the development of the PA Program Policy Guide does not itself give the Church a ripe claim, just as the INS regulations in *Reno* did not themselves create a ripe claim for the immigrants seeking amnesty. *Id.* It is true that the Church here has at least taken the first affirmative step of filing an application, but as the undocumented worker's

[4] It is true this Court has held in the Equal Protection context that when a party has alleged unequal access to a benefit, it does not need to show they would have been granted the benefit but-for the challenged regulation in order to establish standing. See *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993). However, the current case is not an Equal Protection challenge, and furthermore, *Jacksonville* dealt with Article III injury requirements for standing, as opposed to the prudential requirements of ripeness which is the question before this Court. *Jacksonville* is thus inapplicable here.

claims could not ripen until "the INS blocked [their] path by applying the regulation" to them, the Church's claim cannot possibly ripen before the challenged provisions have been applied and a final determination reached. *See id.*

For all these reasons this under the first factor, this case is not fit for judicial review.

B. The Church does not face undue hardship in the Court withholding decision.

As to the hardship inquiry, the Court of Appeals also correctly held that the Church does not face an undue hardship in the Court withholding decision. R. at 15. The Policy Guide itself creates no direct impact on the Church to necessitate immediate judicial review, and the Church has not demonstrated it will face significant hardship in this Court withholding considering until a final agency determination.

1. The challenged provisions of the Policy Guide have no direct and immediate effect on the Church's day-to-day conduct.

In the absence of a particular agency action toward a claimant, this Court has found claims were ripe for adjudication because of hardship to the parties when the case involved a substantive agency rule which "as a practical matter requires the plaintiff to adjust his conduct immediately." *See Lujan*, 497 U.S at 891, 894 ("[S]uch agency action is 'ripe' for review at once," regardless of any statutory authorization or "concrete action applying the regulation to the claimant's situation.").

In holding the claim ripe in *Abbott Laboratories* for example, the Court relied heavily on the fact that the FDA regulations in that case had a "direct effect on the day-to-day business of all prescription drug companies," as the companies were faced with the choice of undertaking costly action to comply or risk severe sanctions. 387 U.S. at 152. The regulations then carried the "status of law" and their impact was "sufficiently direct and immediate" to make the issue ripe for judicial review. *Id.* Furthermore, in *Gardner v. Toilet Goods Association*, a challenge to different FDA regulations regarding color additives was ripe, because the regulations were "self-executing, and [had] an immediate and substantial impact" on the respondents' "primary conduct" through the threat of severe penalties for non-compliance. *See Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171–72 (1967).

Conversely, even when a challenged agency action was "final" and the question "purely legal" this Court has nevertheless found there was no hardship on the parties and held claims were not ripe when there were no direct adverse consequences on the day-to-day affairs of the regulated party. *See Toilet Goods*, 387 U.S. at 163–64, 165 n.2 (holding challenge to FDA regulations regarding inspection of facilities that manufactured color additives was unripe, where the regulations did not affect the parties' "primary conduct" and the harm was "inconvenience" and "speculative"); *see also Ohio Forestry*, 523 U.S. at 733 (finding no hardship on the parties because the provisions of the resource management plan did not "command anyone to do anything or to refrain from doing anything; they do not 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").

Here, FEMA's approach for determining eligibility for public assistance grants stands in stark contrast to the kind of "self-executing" regulations in *Abbott Laboratories* and *Gardner* which imposed immediate and substantial impacts on the conduct of the regulated entities. The facility use standards in the Policy Guide "do not command anyone to do anything or to refrain from doing anything," nor do they "subject anyone to any civil or criminal liability," and they "create no legal rights or obligations" whatsoever. *See Ohio Forestry*, 523 U.S. at 733. Rather, they are guidelines for evaluating nonprofit facility eligibility for a *discretionary* benefit in the unique circumstance of a natural disaster. It strains credulity to argue that these administrative guidelines for receiving public assistance grants in the event of a natural disaster would have any immediate effect on the day-to-day conduct of private nonprofits like the Church.

Respondents also note a key flaw in the Church's argument in that FEMA does not categorically exclude churches or other religious organizations from receiving aid, just as it does automatically bestow any grants on secular nonprofit organizations. Rather, FEMA determines facility eligibility based on the statutory guidelines in the Stafford Act allowing for funds for organizations that provide "essential government services." Policy Guide at 11; 44 C.F.R. § 206.221(e)(7) (2016). In doing so, FEMA has in fact awarded millions of dollars of grants to religious based organizations. *See FEMA Rethinking Ban on Disaster Aid to Church*

Buildings, *supra*. ("Over the past five years, FEMA has authorized a net of $113 million for about 500 religiously affiliated entities such as schools, medical clinics and community centers after hurricanes, tornadoes, floods and other disasters . . . ."). Thus, there is no substantive rule excluding all churches and religious organizations from relief funds and the Church's claims cannot be ripe in the absence of "concrete action" applying the regulation to their situation. *See Lujan*, 497 U.S at 891.

2. The Church has since reopened based on other sources of relief, thus there is no undue hardship in withholding judicial review.

Respondents do not question the very real and significant damage the Church suffered at the hands of Hurricane Rhodes. But, the past harm does not mean the Church faces a current significant hardship in the Court withholding decision until final agency determination is made. The question before this Court is what current hardship the Church will endure by merely being required to wait until FEMA reaches a final determination.

As the record indicates, the Church has reopened as of July 26, 2017. R. at 8. The Church was able to receive donations of material and labor from both the community in Lima and the larger network of the Cowboy Church to repair the structural damage to the chapel and the event center. R. at 8. While there may be further repairs that are necessary, the ability of the Church to find other sources of relief shows that FEMA funds were not immediately essential to finance repairs. Indeed, FEMA relief grants are generally aimed at *reimbursement* for repair work already performed by the applicants, not to pay for repair work in the first instance.

See Policy Guide at 21–42. The application process can take some time and thus applicants are encouraged not to wait for a final determination before performing the necessary work. Thus, in terms of hardship, there is no significant burden in asking the Church to wait for a final determination before any potential claim is ripe.

The Church has argued that if it had been eligible for relief, it would not have had to rely on the charity of the Lima community and those recourses could have been allocated to others. R at 15. This argument is entirely speculative and depends on contingent events "that may not occur as anticipated, or indeed may not occur at all." *See Texas*, 523 U.S. at 300 (quoting *Thomas*, 473 U.S. at 580–81). Furthermore, any claim by the Church that the mere uncertainty as to the legality of the "mixed use" standard is a cause of hardship is also without merit, as that argument was directly rejected by this Court in *National Park Hospital. See* 538 U.S. at 804 ("Mere uncertainty as to the validity of a legal rule does not constitute a hardship for purposes of the ripeness analysis.").

Finally, any further claims of hardship by the Church of generalized threats to "religious liberty" for example, must also be rejected out of hand as an abstraction insufficient to support ripeness. *See Texas*, 523 U.S. at 302 ("Texas claims that it suffers the immediate hardship of a 'threat to federalism.' But that is an abstraction . . . which we hold inadequate to support suit unless the person's primary conduct is affected.").

For all the aforementioned reasons, the Church has not demonstrated undue hardship in withholding judicial decision in this case. As there is no undue hardship and the claim is not fit for judicial review, this Court should affirm the Fourteenth Circuit's holding that the case is barred by the doctrine of ripeness.

II. The Establishment Clause bars the Church from receiving funding under the Public Assistance Program because providing public funds to repair the Church's facility would impermissibly advance and inhibit religious activity.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Neutrality is the baseline requirement underpinning the Establishment Clause. *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976) ("Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity."); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . ."). Thus, government regulation must have a "secular purpose" and not have a "primary effect of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997); *see also Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 634 (1971) (holding that regulation also must not create "excessive entanglement" with religion and invalidating state statutes providing salary and materials reimbursements to religious schools due to extensive surveillance and "meddling in church affairs" to ensure secular use of funds); *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (plurality

opinion) (recognizing that *Agostini* "recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect").

Here, the Stafford Act and the PA Program regulations promulgated under it demonstrate the requisite secular purpose. *See* 42 U.S.C. § 5121(b) (2016) ("It is the intent of the Congress . . . to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from . . . disasters . . . ."). The central issue is whether allowing the Church to receive direct PA Program money grants would have the "primary effect of advancing or inhibiting religion." *See Agostini*, 521 U.S. at 222–23; *Lemon*, 403 U.S. at 612–13. It unquestionably would. Providing government funding to the Church impermissibly advances and inhibits religion for two reasons: (1) the funds would directly subsidize the Church's religious activities and undermine the PA Program's neutrality; and (2) the pervasive monitoring required to ensure secular use of the grant funds would create an excessive entanglement that intrudes upon the internal religious affairs of the Church. Accordingly, the Establishment Clause bars the Church from receiving PA Program funding.

A. Providing public funds to repair the Church's facility impermissibly advances religion as it would directly subsidize the Church's religious activities and undermine the neutrality of Respondents' program.

Granting PA Program funding to the Church would constitute a direct subsidy of religious activity and thus impermissibly advance religion. The Establishment Clause requires that the government restrict funds provided to

religious institutions to secular uses to avoid promoting religion. *See Tilton v. Richardson*, 403 U.S. 672, 683–84 (1971) (plurality opinion). In *Tilton*, the Court held that the twenty-year limit on the government's property interest in facilities built with federal funds granted to religiously-affiliated colleges and universities under a federal education grant program violated the Establishment Clause. *Id.*

The program provided federal construction grants to all colleges and universities, but expressly limited the use of funds to facilities that were not used "for sectarian instruction or as a place for religious worship." *Id.* at 675. While upholding the rest of the Act, the Court severed the twenty-year reversionary interest provision, reasoning that it could have "the effect of advancing religion" "[i]f at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests." *Id.* at 683; *see also Hunt v. McNair*, 413 U.S. 734, 744 (1973) (upholding state revenue bond program financing facilities at religious colleges and universities because, *inter alia*, the program excluded worship and religious instruction facilities).

Further, the government must generally narrowly define and sufficiently articulate secular use expenditure restrictions on financial grants to religious institutions so as not to "subsidize and advance the[ir] religious mission." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779 (1973). In *Nyquist*, the Court held that a state statute providing grants to nonpublic schools for "maintenance and repair" violated the Establishment Clause, because the statute made no attempt "to restrict payments to those expenditures related to the upkeep

of facilities used exclusively for secular purposes." *Id.* at 774. Analogizing to *Tilton*, the Court noted that if taxpayer funds could not be used to construct secular college facilities that *might* be used for religious purposes in twenty years, "a fortiori they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use." *Id.* at 776–77 (footnote omitted). In sum, the Court emphatically concluded that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id.* at 777; *see also Roemer*, 426 U.S. at 759–61 (upholding state statute granting annual subsidy to religiously affiliated private colleges and universities provided that colleges did not provide only religious degrees and complied with "statutory prohibition against sectarian use, and . . . administrative enforcement"); *cf. Bowen v. Kendrick*, 487 U.S. 596, 614–15 (1988) (upholding federal grant program expressly recommending religious organization involvement in provision of secular social welfare services but lacking express statutory prohibition on religious use of funds because, *inter alia*, program regulations included monitoring mechanisms such as evaluations of grantee services and reports on grantee fund use to ensure secular use).

But, religious entities are not categorically prohibited from using secular government aid in religious settings. *See Mitchell*, 530 U.S. at 826–28. In *Mitchell*, the Court rejected an as-applied Establishment Clause challenge to education programs where federal funds had been provided to state and local agencies to

purchase secular educational materials, and those agencies in Louisiana had in turn loaned those materials to "pervasively sectarian" Catholic schools in the state. *Id.* at 801–04. Justice Thomas, writing for the plurality, reasoned that the aid was for education, not indoctrination, and thus "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." *Id.* at 827, 829; *cf. Hunt*, 413 U.S. at 743 ("Aid . . . may . . . have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.").

Nonetheless, the use of government aid for specifically religious activities has *only* been allowed where the aid to the religious institution results from "the genuinely independent and private choices of individuals." *Mitchell*, 530 U.S. at 816 (quoting *Agostini*, 521 U.S. at 226). Finding that the aid itself was secular and distributed to schools on a neutral, per capita enrollment basis, the Court in *Mitchell* concluded that this "direct" aid to religious schools was the result of the private choices of the attending students. *Id.* at 829–31. Due to these private choices, "any use of that aid to indoctrinate [could not] be attributed to the government and [was] thus not of constitutional concern." *Id.* at 820. However, the Court still highlighted the "'special Establishment Clause dangers' . . . when *money* is given directly to religious schools." *Id.* at 818–19 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995)).

Facially, PA Program grants to churches for repair of *eligible* facilities do not have the primary effect of advancing religion. *See Tilton*, 403 U.S. at 679–80. The PA Program allows both secular and religious nonprofit organizations to receive grant funds for their facilities that primarily provide "critical" or "essential governmental services," but expressly excludes facilities that primarily provide "religious activities," "religious education," or "religious services." *See* Policy Guide 12–16; *see also* 44 C.F.R. § 206.221(e)(1) ("Educational facilities . . . does not include buildings, structures and related items used primarily for religious purposes or instruction."). Appropriately, the PA Program guidelines are analogous to those in the federal program in *Tilton* that neutrally provided construction grants to both religious and secular colleges and universities but expressly excluded facilities used "for sectarian instruction or as a place for religious worship." *See* 403 U.S. at 675.

The PA Program's fifty-percent primary use thresholds for facility eligibility is likewise in harmony with the Court's recent development of Establishment Clause doctrine. *See Mitchell*, 530 U.S. at 829–31; Policy Guide at 15–16. Similar to how secular aid was provided to the parochial schools in *Mitchell* despite religious instruction occurring there, the PA Program allows grant funds to be used for the repair of the secular spaces in facilities where religious activities take place. *See* 530 U.S. at 829–31. The PA Program merely mandates that eligible facilities provide eligible secular services at least half of the time so that effectively they are "indistinguishable" from primarily secular facilities. *See Tilton*, 403 U.S. at 680, 688

(concluding that since the funded facilities were "religiously neutral," "[t]he risks of Government aid to religion are therefore reduced"); Policy Guide at 12–16.

Further, like the federal program in *Bowen* that required grantee services evaluations and fund use reports, the PA Program regulations and policy guidelines likewise include significant monitoring mechanisms to ensure secular use of grant funds by religious organization recipients even though the statutory language does not expressly include restrictions on religious use. *See* 487 U.S. at 614–15; 42 U.S.C. § 5172 (no express references to religion); *see, e.g.,* 44 C.F.R § 206.207(b)(1)(iii) (requiring applicants to assist FEMA in determining program eligibility); 44 C.F.R § 206.207(c) (requiring Federal and non-Federal audits of disaster assistance grants); Policy Guide at 16 ("FEMA prorates funding based on the percentage of physical space dedicated to eligible services. The Applicant is responsible for the balance of costs to restore the facility and must restore the entire facility to receive funding for repairs to the eligible-use portions of the facility."); Fed. Emergency Mgmt. Agency, DAP 9521.1, *Community Center Eligibility* 3 (2008) (recommending FEMA personnel conduct on-site visit to determine "primary use" for facility eligibility when in doubt).

However, as applied to the Church, Justice Thomas's concerns in *Mitchell* regarding direct money payments to religious institutions are critically relevant. *See* 530 U.S. at 818–19. Providing PA Program relief to Cowboy Church would have the direct effect of advancing religion.

First, the mere possibility of providing federal funds for places of religious worship—like the Church's chapel—was an explicit concern that invalidated the reversionary interest provision of the construction grant program in *Tilton*, 403 U.S. at 683, and the school maintenance grant program in *Nyquist*, 413 U.S. at 776–77. Further, unlike in *Mitchell*, where the religious character of the parochial schools was immaterial as the aid was secular and used for educational purposes, "the religious nature" of the Church does not "adequately further the government's secular purpose." *See* 530 U.S. at 827. The PA Program requires grant recipients to provide the specified secular services more often than they provide religious services. *See* Policy Guide at 15–16. Although there is a factual issue as to whether the event center may qualify, on the current record the Church facility, chapel and event center combined, is used no more than forty percent of the time for the requisite secular purposes. R. at 7, 10. As a result, granting PA Program funds to the Church would invariably "fund . . . specifically religious activity," even in the "substantially secular setting" of the event center. *See Hunt*, 413 U.S. at 743.

Second, providing PA Program relief to the Church would undermine the neutrality of the PA Program by demonstrating a preference for religious entities over secular ones. *See Roemer*, 426 U.S. 736, 745–46 ("The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities . . . ."). For example, an athletic center may provide similar amounts of eligible community services as the Church but, while the Church is granted funds despite its primarily religious character, the athletic center is

adjudged ineligible because the majority of its square footage is dominated by a pool. *See* Policy Guide at 165.

Finally, PA Program money grants to churches to repair chapels and other primarily religious structures would not be permissible as cases of "the genuinely independent and private choices of individuals." *See Mitchell*, 530 U.S. at 816. Payment under the PA Program is made directly to the recipients, and is not based on the number of individuals served but whether the recipient's facility provides a "critical" or "essential governmental service." *See id.* at 829–31; 44 C.F.R. § 206.205(a) ("Final payment of the Federal share of these projects will be made to the recipient."); Policy Guide 12–16 (2017). Unlike the government aid in *Mitchell*, where "no . . . funds ever reach the coffers of a religious school," PA Program grants necessarily would subsidize the Church and its house of worship. *See* 530 U.S. at 848 (O'Connor, J., concurring). Such a result clearly flouts the Establishment Clause.

B. Providing public funds to the Church impermissibly inhibits religion because it would create an excessive entanglement that intrudes upon the Church's internal religious affairs.

Further, providing PA Program grants to the Church would create an excessive entanglement with religion. Government aid to religious institutions that creates an "excessive entanglement" with religion has the effect of advancing or inhibiting religion via "pervasive" government involvement in the religious practices of the organization. *Agostini*, 521 U.S. at 232–34. For example, in *Agostini*, the Court found no excessive entanglement with religion where a state

education board used federal education funds to send public school employees into religious schools to provide remedial education to disadvantaged students. *Id.* at 233–34. Reasoning that since the public employees could not be presumed to impermissibly teach religion while in the sectarian setting, the program would not require "pervasive monitoring" of the public employees beyond the random monthly visits from public supervisors. *Id.*

The extent of government measures necessary to ensure that the nature of the aid provided remains secular is a significant factor demonstrating "pervasive" government involvement and resulting excessive entanglement. *See id.* at 232 ("[T]o assess entanglement, we have looked to . . . 'the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" (quoting *Lemon*, 403 U.S. at 615)); *Tilton*, 403 U.S. at 688. In *Tilton*, the Court concluded that the "nonideological character of the aid" to religious colleges and universities for construction of "*facilities that are themselves religiously neutral*" reduced the "need for surveillance." 403 U.S. at 687–88 (emphasis added). Specifically noting, among other things, that the payments were a one-time grant and "no government analysis of an institution's expenditures on secular as distinguished from religious activities" would be required, the Court found no excessive entanglement. *Id.* at 688; *see also Lemon*, 403 U.S. at 620 (concluding that expenditure analysis constitutes "state inspection and evaluation of the religious content of a religious organization" and thus "is a relationship pregnant with

dangers of excessive government direction of church schools and hence of churches").

Even though the funding is a one-time payment, PA Program grants to the Church would result in excessive entanglement since the primarily religious nature of the facility increases the need for pervasive government monitoring. *See Agostini*, 521 U.S. at 232–34; *Tilton*, 403 U.S. at 687–88. In contrast to the reduced oversight required with the religiously neutral facilities in *Tilton*, FEMA personnel would likely need to conduct heightened analysis at each stage of the PA Program process with the Church to corroborate secular use of the funds. *See* 403 U.S. at 687–88. During the process, FEMA works alongside the grant recipient throughout the multiple rounds of expenditure review and negotiation, including: (1) the initial damage assessment (2) the eligibility application; (3) a "Kickoff Meeting" to address the recipient's needs; (4) joint site inspections to detail all damages; (5) developing the scope of work; (6) developing cost estimates; and (8) a final exit briefing. Policy Guide at 123–35. On the other hand, as with the religiously neutral facilities in *Tilton*, the "need for surveillance" is reduced with FEMA-eligible facilities because personnel are likely to be assured of the facility's predominantly secular character after the initial eligibility determination. *See* 403 U.S. at 687–88.

In addition, the expenditure negotiations between FEMA and the Church required by the PA Program process is even more intrusive than the "state inspection and evaluation" of the school's records in *Lemon*; FEMA authorities and Church officials may literally have to debate the religious versus secular aspects of

specific repairs. *See* 403 U.S. at 620. This level of government involvement is a far cry from the random supervisor visits in *Agostini* and poses a substantial risk of inhibiting the Church's religious exercise. *See* 521 U.S. at 233–34.

C. Respondents do not violate the Free Exercise Clause by denying the Church benefits under the PA Program because the program does not discriminate on the basis of religious status.

Even if the Establishment Clause does not bar the Church from receiving benefits under the PA Program, the Free Exercise clause does not *require* the respondents to provide them. The Free Exercise Clause prohibits government from "impos[ing] special disabilities on the basis of religious views or religious *status*." *Emp't Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added) (citing *McDaniel v. Paty*, 435 U.S. 618 (1978)). In the context of government aid, a program that "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" is subject to strict scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (holding that state department violated church's free exercise rights where church was otherwise qualified but categorically denied participation in grant program due to status as a religious entity pursuant to department policy). In contrast, neutral, generally applicable regulations are presumed constitutional under the Free Exercise Clause and are typically only subject to rational basis review. *Smith*, 494 U.S. at 879.

"[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 719 (2004).

Accordingly, there is no Free Exercise violation where the government does not make funding recipients "choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21. In *Locke*, the Court held that a state scholarship program prohibiting recipients from pursuing a devotional theology degree pursuant to the state constitution did not violate the Free Exercise Clause. *Id.* at 715. The Court concluded that while the program was not facially neutral towards religion, it did not "suggest[ ] any animus towards religion," as it allowed students to attend "pervasively religious" accredited institutions as well as enroll in theology courses. *Id.* at 720, 724–25; *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (holding ordinance that criminalized ritual animal sacrifice violated Free Exercise clause as it was not facially neutral and targeted specific religion in its operation).

Further, qualifying scholarship recipients did not have to forego the funds, as they remained free to "use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." *Locke*, 540 U.S. at 721 n.4. In short, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 721; *see also Rust v. Sullivan*, 500 U.S. 173, 196–98 (1991) (holding that federal grant program policy prohibiting advocacy of abortion as a viable method of family planning did not violate recipients' free speech rights as recipients could still receive grant funds for their family planning services that met the program criteria).

Likewise, the PA Program does not violate the Free Exercise Clause. First, the program does not discriminate against religious entities based on their status. Unlike the state program in *Trinity Lutheran*, where the policy's categorical exclusion effectively stated that "[n]o churches need apply," religious institutions—including churches—are eligible to receive PA Program grants if they: (1) are § 501(c), (d), or (e) tax-exempt under the Internal Revenue Code or have evidence of organization as a nonprofit under state law; and (2) own or operate a qualifying facility. *See* 137 S. Ct. at 2024; 44 C.F.R. §§ 206.221(e)–(f), 206.222; Policy Guide at 10–11.

The exclusion of primarily religious facilities from PA Program eligibility does not prevent churches and other religious institutions with eligible facilities from applying for and receiving grants under the program. *See Locke*, 540 U.S. at 720–21, 721 n.4 (noting that scholarship recipients seeking prohibited devotional theology degrees could still receive the funds for secular degrees); Policy Guide at 15–16. Indeed, this is the express position of the Department of Homeland Security, FEMA's parent department, on the PA Program. *See* Nondiscrimination in Matters Pertaining to Faith-Based Organizations, 80 Fed. Reg. 47,284 (Aug. 6, 2015) (codified at 6 C.F.R. § 19 (2016)) ("Religious organizations are able to receive these generally available government benefits and services, just as other organizations that meet the eligibility criteria.").

Second, the PA Program criteria are neutral and generally applicable. A wide swath of religious entities fall within the definition of eligible non-profit

organizations, and as such the law does not single them out for distinctive treatment. *See* 44 C.F.R. § 206.221(f). Unlike the ordinance in *Lukumi* that targeted a religious sect, religious organizations are treated the same as secular organizations under the guidelines, even though the eligible *facility* criteria may reference religion. *See* 508 U.S. at 535; 44 C.F.R. § 206.221(e)(1); Policy Guide at 15–16. For example, the Church cannot receive a grant for its chapel, but the University of Houston likely could not receive a grant for its chapel or religion center either. *See* R. at 10; *A.D. Bruce Religion Center*, Univ. of Hous., http://www.uh.edu/adbruce/ (last visited Nov. 18, 2017).

Moreover, the exclusion of religious facilities from the eligibility criteria is not motivated by any animus towards religion. *See Locke*, 540 U.S. at 720–21, 724–25. The focus of Congressional intent behind the Stafford Act was "assistance . . . to State and local *governments* . . . to alleviate the suffering and damage which result from . . . disasters." 42 U.S.C. § 5121(b) (emphasis added). *See generally Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) ("Federal statutes are to be so construed as to avoid serious doubt of their constitutionality.").

Accordingly, eligible private facilities must serve the community by providing "*essential governmental type services*." *See* 44 C.F.R. § 206.221(e) (emphasis added). Appropriately, FEMA made a legitimate policy judgment that primarily religious facilities—like athletic, vocational training, advocacy group, job counseling, property owner association, and cemetery facilities—do not sufficiently serve the community writ large to make them akin to essential governmental type

services. *See* Policy Guide at 15–16. However, similar to how the scholarship program in *Locke* sought to accommodate religion by allowing recipients to attend accredited religious schools and take theology courses, religious organizations are likewise able to receive grant funds under the PA Program to the extent they provide eligible services. *See* 540 U.S. at 724–25; Fed. Emergency Mgmt. Agency, *Community Center Eligibility*, *supra*, at 5 ("[J]ust because a community center is operated by a religious institution does not automatically make it ineligible. In addition to worship services, many religious institutions conduct a variety of activities that . . . are similar or identical to those performed by secular institutions and local governments.").

Third, even if the program is not neutral, the government is "entitled to define the limits" of the PA Program, and is not required to fund construction grants for primarily religious facilities. *See Rust*, 500 U.S. at 193–94 ("[A] legislature's decision not to subsidize the *exercise* of a fundamental right does not infringe the right." (emphasis added) (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983))); *see also Trinity Lutheran*, 137 S. Ct. at 2023 ("[*Locke* petitioner] was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed to *do*—use the funds to prepare for the ministry.").

Like the funding recipients in *Rust*, who remained free to receive grant funds for all family planning services *except* abortion, churches and religious institutions remain free to receive PA Program grants for all their qualifying structures *except*

primarily religious facilities. *See* 500 U.S. at 196–98; *Locke*, 500 U.S. at 721 n.4 (scholarship recipients may receive funds for all degrees *except* devotional theology degrees). Like the legislature's choice in *Locke* to "merely . . . not . . . fund a distinct category of instruction" in the scholarship program as inconsistent with the government's policies on state-supported clergy, the government here has made a similar decision to not fund repairs on "essentially religious" structures that are inconsistent with the governmental-type services focus of the PA Program. *See* 540 U.S. at 721; *see also Trinity Lutheran*, 137 S. Ct. at 2023 ("The claimant in *Locke* sought funding for an 'essentially religious endeavor' . . . and opposition to such funding 'to support church leaders' lay at the historic core of the Religion Clauses." (quoting *Locke*, 540 U.S. at 721–22)).

Here, the Church is attempting to use the Free Exercise Clause to obtain preferential treatment under the PA Program *because of* its religious status. The Church seeks benefits even if it does not qualify for them; benefits that are similarly unavailable to secular institutions that own religious structures as well as athletic clubs, vocational training schools, and job counseling centers that also likely contribute substantially to their communities. *See* Policy Guide at 12–16. To grant petitioner's Free Exercise Claim on these facts would undoubtedly tilt the delicate balance between the Religion Clauses in the wrong direction.

CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Court to affirm the judgment of the Court of Appeals for the Fourteenth Circuit and find that the

Church's lawsuit is barred by the doctrine of ripeness and also that the Establishment Clause bars the Church from receiving the public benefit of relief under FEMA's PA Program.

Respectfully Submitted,
By: /s/_____
Attorneys for Respondents
Team Number: 24