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. Craig Fugate, Administrator of the Federal Emergency Management Agency, Respondents

On Writ of Certiorari
From the United States Court of Appeals
For the Fourteenth Circuit

BRIEF FOR RESPONDENTS

Team No. 28
Counsel for Respondents

QUESTIONS PRESENTED

I. 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?

II. 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?

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OPINIONS BELOW

The opinion of the United States District Court for the Central District of New Tejas is unreported, but is referenced in the record at pages 9–11. The opinion of the United States Court of Appeals for the Fourteenth Circuit is also unreported, but appears in the record at pages 2–21.

STATEMENT OF JURISDICTION

The judgment for the United States Court of Appeals for the Fourteenth Circuit was entered on October 1, 2017. R. at 2. This Court granted a petition for a writ of certiorari in the October Term 2017. R. at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are listed below and reproduced in the Appendix:

5 U.S.C. § 702.

5 U.S.C. § 704.

5 U.S.C. § 706.

42 U.S.C. § 5172.

U.S. Const. amend. I.

STATEMENT OF THE CASE

I. Statement of Facts

In 1990, the Cowboy Church of Lima ("the Church") constructed a chapel outside the Township of Lima. R. at 3. The same year, the Church filed for 501(c)(3) tax-exempt status, which was later granted by the Internal Revenue Service (IRS). R. at 3. The 88-acre Church property was designated Religious Tax Exempt under the New Tejas Property Code. R. at 3. In 2005, an event center was added as an annex to the chapel. R. at 4. The property includes the facility with the chapel with the attached event center annex ("the facility") seating 120 people, a rodeo arena that seats about 500 people, and storage buildings. R. at 3. Property taxes are not collected on any of the property and the Church has complied with tax-exempt reporting requirements ever since. R. at 3.

Twenty-six years later, Hurricane Rhodes made landfall in New Tejas. R. at 2. The floodwaters reached the Township of Lima on August 15, 2016. R. at 3. Flooding at the Church occurred in the facility containing the 2,250 square foot chapel and the 2,250 square foot event center annex, which did not have flood insurance. R. at 4. On August 18th, Chaplain Hudson and the Church staff assessed the building for hurricane damage. R. at 5. Church staff began repairs to the chapel and event center that same day. R. at 5.

President Barack Obama declared Hurricane Rhodes a natural disaster on August 19th, allowing Federal Emergency Management Agency (FEMA) relief to be distributed to the areas of New Tejas affected by the storm. R. at 6. To qualify for

relief, a Request for Public Assistance must be submitted to FEMA within thirty days of the President declaring the disaster. R. at 13. The Chaplain filed an online application for Public Assistance Program ("the Program" or "PA Program") relief on August 20th and three days later submitted the Small Business Administration (SBA) loan application. R. at 6.

Non-profit owners and operators are authorized to receive assistance for natural disaster recovery under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. R. at 11. FEMA's largest grant program under the Stafford Act is the PA Program. R. at 11. The purpose of the Program is "to assist communities responding and recovering from major disasters or emergencies declared by the President." R. at 11. The PA Program offers government assistance to save lives, protect property, and stimulate restoration of community infrastructure affected by a federally-declared natural disaster. R. at 11.

Funding is provided for both "emergency work" and "permanent work." R. at 12. Emergency work is defined as that which is immediately required to "Save Lives; Protect public health and safety; Protect improved property; or Eliminate or lessen an immediate threat of additional damage." R. at 12. Emergency work is further divided into categories of "debri removal" and "emergency protective measures." R. at 12. Permanent work "is work required to restore a facility to its pre-disaster design (size and capacity) and function in accordance with applicable codes and standards." R. at 12.

Eligible facilities that provide non-critical services must apply for a SBA disaster loan prior to seeking aid under the PA program. R. at 13. Non-profits may seek PA Program funds for emergency work irrespective of the outcome of their SBA loan application. R. at 13. PA Program funds are available for permanent work that is not covered by an SBA loan. R. at 13.

Prior to eligibility, the PA Program requires private non-profit organizations to submit proof of IRS tax exempt status under sections 501(c), (d), or (e) of the IRS Code of 1954. R. at 11. Applicants must own or operate an eligible facility that provides a critical service such as "education, utility, emergency, or medical," or a "facility that provides non-critical, but essential governmental services and is open to the general public." R. at 11. Eligible "non-critical" services are defined as "institutes of public utility such as 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." R. at 12.

Eligibility for mixed-use facilities that "provide both eligible and ineligible services" depends on the primary use of the facility. R. at 12. A primary use of the facility under the PA Program means "more than 50 percent of the physical space in the facility is dedicated to eligible services." R. at 12. FEMA pro-rates funding based on percentage of physical space dedicated to eligible services. R. at 12. A finding that more than 50% of a physical space is dedicated to ineligible services will result in ineligibility of the entire facility. R. at 12.

On August 25th, FEMA's contracted adjustor, Quinn Fabray, promptly scheduled a tour of the Church's property to assess the damage. R. at 6. Based on her tour and conversation with Chaplain Hudson, Ms. Fabray determined Sunday activities at the event center included "Sunday school classes, youth group meetings, and adult bible study meetings." R. at 7. Ms. Fabray initially estimated the chapel was used for non-church related activities 45%-85% of the time and was used exclusively for religious services and events on Sundays. R. at 7. On weekdays, a mixture of religious and non-religious events were held including "religious concerts and nonreligious concerts… holiday festivals, bar mitzvahs, bat mitzvahs, father-daughter dances, and receptions after funerals, christenings, and other similar activities," infrequent non-religious meetings, and non-denominational religious weddings. R. at 7.

During the tour, Ms. Fabray identified herself as a member of a church and expressed sympathy for the Chaplain's situation. R. at 7. Ms. Fabray explained it was not likely the PA Program would grant relief to a church. R. at 7. FEMA released Ms. Fabray's report as the result of exhaustive interviewing with community members and a sworn statement by the City Planner of Lima. R. at 10. The report made two conclusions about the Church facility: (1) the event center was used 80% of the time for FEMA-eligible purposes; and (2) the chapel was used over 90% of the time for FEMA-ineligible purposes. R. at 10.

On August 29, 2016, the Church filed lawsuit against FEMA in the Central District Court of New Tejas. R. at 11. Upon service of the lawsuit, FEMA

temporarily ceased processing the Church's claim. R. at 8. During depositions, FEMA's Regional Director, Jesse St. James, stated the Church's file was placed in a preliminary denial category. R. at 10. However, Director St. James planned to personally review the Church's file because of the close nature of the issue. R. at 10.

In the interim, the congregation and national network of Cowboy Church groups donated time and materials to make repairs to the chapel and event center. R. at 8-9. The Church reopened less than one year after the hurricane, on July 26, 2017. R. at 8.

II. Procedural History

The Cowboy Church of Lima ("Petitioner") filed lawsuit against FEMA in the Central District Court of New Tejas on August 29, 2016. R. at 9.cUnited States Attorney Sebastian Smythe filed motions against the Church to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. R. at 9. On November 2, 2016, Judge Beiste held a conference to discuss both motions, in which he denied both motions. R. at 9. Depositions were taken and, after discovery, U.S. Attorney Sebastian Smythe filed for Summary Judgment based on the Establishment Clause of the First Amendment, in addition to dismissal due to lack of ripeness. R. at 10. Judge Beiste granted the Motion for Summary Judgment, and denied the request for dismissal due to lack of ripeness. R. at 10.

Petitioner appealed the order of summary judgment. R. at 10-11. FEMA appealed the denial of the dismissal. R. at 11. The United States Court of Appeals

for the Fourteenth Circuit was entered on October 1, 2017. R. at 2. The Appellate Court affirmed the District Court's grant of summary judgment that the Establishment Clause barred Petitioner from receiving relief and ordered dismissal of the case for lack of ripeness. R. at 17. This Court granted a petition for a writ of certiorari in the October Term 2017. R. at 1.

SUMMARY OF THE ARGUMENT

Petitioner's pre-enforcement claim is not ripe because § 704 precludes premature judicial review of an issue until final agency action has been made. The goal of ripeness is to prevent premature adjudication where agencies have not taken final agency action and no concrete harm has occurred to the claimant.

Petitioner's claim is not fit for judicial review because Petitioner seeks review prior to FEMA's final agency determination. In particular, FEMA has made no final decision whether Petitioner's facility would qualify for FEMA relief, therefore, no rights or obligations have been determined and no legal consequences flow from the regulation at this time. Although Petitioner's claim is purely legal, judicial review must await an actual case or controversy where specific factual questions have been answered because further factual development of FEMA's ultimate eligibility determination will aid this Court's decision on the legal issue. Further, Petitioner fails to show that withholding court review at this time would cause hardship because FEMA's regulations do not impact their conduct in a direct and immediate way. Moreover, Petitioner was able to rebuild their facility without FEMA aid. Petitioner's claim should be dismissed for lack of ripeness.

Petitioner is precluded from receiving the public benefit of relief under FEMA's PA Program because the Establishment Clause bars recovery. The Program navigates the line between what government assistance is prohibited under the Establishment Clause and what is required by the Free Exercise Clause. The PA Program does not have the purpose to advance or inhibit religion because it is facially neutral and generally applicable. In addition, there is a strong public interest in support of providing emergency assistance to communities affected by natural disasters.

In effect, the PA Program neither advances nor inhibits religion. Distribution of aid under the Program does not result in governmental indoctrination of religion when any aid ultimately flowing to religious organizations cannot reasonably be attributed to government action. The Program places neutral eligibility requirements for facilities that provide both eligible and ineligible services in order to protect against government advancement of religion. Religious and secular institutions alike must meet this mixed-use standard. Petitioner is unable to show the facility was primarily used for eligible services. While Petitioner is barred from receiving aid based on this secular standard, otherwise eligible religious institutions are not categorically denied from receiving FEMA relief.

The Program does not define its applicants by religious preference since eligibility is not tailored to promote the undertaking of religion. Nor does the Program inhibit the free exercise thereof because benefits are not denied solely on account of religious character. There is no effect of excessive entanglement between

FEMA aid recipients and the State when no further government contact is required to ensure secular use of the funds. Petitioner is prohibited form receiving relief because the facility does not meet FEMA's neutral standards.

STANDARD OF REVIEW

The Appellate Court's order for dismissal of Petitioner's case for lack of ripeness is a question of law, reviewed *de novo. Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 542 (5th Cir. 2008). Reviewing the Appellate Court's grant of summary judgment that the Establishment Clause bars recovery for Petitioner is reviewed *de novo. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasizing summary judgment requires there be no genuine issue of material fact and that mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment).

ARGUMENT

I. Petitioner's claim is not ripe for judicial review because § 704 precludes pre-enforcement review and the claim does not meet the constitutional or prudential requirements of the ripeness doctrine.

The ripeness doctrine is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57, n. 18 (1993). A ripeness inquiry is a particular concern when a petitioner is seeking a pre-enforcement review of an agency regulation. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008). Absent a statutory provision providing for immediate judicial review, a regulation is 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. 5 U.S.C. §§ 702, 706; *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 808 (2003). Ripeness turns on two considerations: the fitness of the issues for determination and the hardship to the parties if the court withholds review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

A. The legislative intent of 5 U.S.C. § 704 precludes pre-enforcement review until FEMA has taken final agency action.

In cases involving pre-enforcement review of agency regulations, this Court initially employs a presumption in favor of review, which can be overcome by clear and convincing legislative intent to preclude review. *Abbott*, 387 U.S. at 142. This approach was later modified when the Court determined Congress has allocated initial review to an administrative body where that intent is fairly discernible in the statutory scheme. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, purpose, legislative history, and whether claims can be afforded meaningful review. *Id.* A pre-enforcement challenge of FEMA's preliminary action is precluded until there has been final agency action.

A party who has suffered a legal wrong or adverse affect from an agency action is entitled to judicial review. § 702. Under § 704, FEMA's agency action is made reviewable by statute and after final agency action for which there is no other adequate remedy in a court. 5 U.S.C. § 704. Only after final agency action may

preliminary, procedural, or intermediate agency action be reviewed. *Id.* In *Thunder Basin*, the Court found implied intent to preclude pre-enforcement review in a statute's provision for administrative review of adverse agency action where the statute was facially silent. 510 U.S. at 208. Unlike the statute in *Thunder Basin*, § 704 states explicitly that action is only reviewable upon final agency action. § 704. Here, there has been no final agency action because FEMA had not made a final eligibility decision on Petitioner's file before the lawsuit was filed. R. at 8. § 704 demonstrates Congress intended to preclude pre-enforcement challenges. Contrary to Petitioner's pre-enforcement challenge, the statute will not allow for review until FEMA has made a final eligibility determination constituting final agency action.

B. Petitioner's claim is not ripe for judicial review because FEMA had not granted or denied relief and Petitioner did not suffer hardship by withholding review.

Ripeness has both constitutional and prudential elements. *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 70 (2003). The goal of ripeness is designed to prevent the courts from "entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott*, 387 U.S. at 148-49. Benefit rules are generally not ripe for judicial review until the agency receives an application and takes final agency action *Reno*, 509 U.S. at 59-60 (finding that each alien desiring the benefit must submit an application and does not have a claim ripe for review until the Immigration and Naturalization Service (INS) makes a final

agency action that would impose a hardship). Ripeness requires the Court to evaluate the fitness of the issues for judicial decision and the hardship to the parties withholding consideration. *Abbott*, 387 U.S. at 149.

1. *Petitioner's claim is not fit for judicial review because FEMA had not made a final decision determining eligibility of Petitioner's claim, therefore, further factual development of FEMA's eligibility determination would aid the Court in dealing with the legal issue.*

In the fitness inquiry, both constitutional and prudential concerns involve finality, definiteness, and the extent to which resolution of the challenge depends on facts that may not yet be sufficiently developed. *McInnis-Misenor*, 319 F.3d at 70. The fitness factor determines if further administrative proceedings are expected in the decision-making process, and whether the issue presented is purely legal. *Abbott*, 387 U.S. at 149. A claim is not ripe for adjudication if it rests upon contingent future events that may or may not occur. *Texas v. United States*, 523 U.S. 296, 300 (1998); *see also Lopez v. City of Houston*, 617 F.3d 336, 342 (2010) (concluding that an event that may not occur as anticipated or indeed may not occur at all, means that the claim is merely abstract or hypothetical, and thus too speculative to be fit for judicial review).

Petitioner's claim before this Court is contingent upon a speculative chain of events that assumes they will be denied the public benefit of FEMA relief. R. at 7-8. This is uncertain to occur because FEMA has not made a final agency determination of whether Petitioner's facility will qualify for relief. The Appellate

Court was correct in finding the issue not fit for judicial review because the claim was merely abstract.

a. Petitioner has not been affected by final agency action because FEMA was still reviewing Petitioner's file at the time of the lawsuit.

In order for agency action to be final, FEMA's actions must mark the consummation of the agency's decision-making process, and the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." § 704; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Franklin v. Mass.*, 505 U.S. 788, 797 (1992) (finding that the "core question" in final agency action is "whether the agency has completed its decision-making process, and whether the result of that process is one that directly affects the parties"). Here, Petitioner seeks to involve this Court in speculation and ask for judicial intervention before FEMA had taken final agency action. R. at 10.

An adjuster's final report does not constitute final agency action because it is only "the ruling of a subordinate," or "tentative." *Franklin*, 505 U.S. at 797. In *Franklin*, the Secretary of Commerce prepared a report to the President. *Id.* at 792. The Court stated because the Secretary's report carried no direct consequences for the reapportionment, it was like the ruling of a subordinate official. *Id.* at 797. The Court also held the report was formally submitted to the President by the Secretary, but was not considered final agency action because the President could still request revisions. *Id.* at 788; *see also Abbott*, 387 U.S. at 151 (stating agency action is not final if it is only "tentative").

Like the subordinate Secretary in *Franklin*, Ms. Fabray was serving as a subordinate because she was contracted by FEMA as an adjustor. R. at 6. Ms. Fabray's tour of the damaged facility resulted in her producing a report to FEMA. R. at 10. The report was subject to further review by FEMA's Regional Director once it was put into Petitioner's file. R. at 10. Petitioner also cannot rely on Ms. Fabray's statement she made during the tour to Chaplain Hudson that she "hated that FEMA did not cover monetary assistance for churches" for two reasons. R. at 7. First, the statement was made before any review of the file had begun, and second, Ms. Fabray did not have the final say as a contracted adjustor because FEMA's Regional Director could review her reports within the file to aid in FEMA's final agency decision. R. at 7, 10.

The report carried no direct and immediate consequences because Ms. Fabray's final report also served as tentative action. Petitioner filed this lawsuit on August 29, 2016. R. at 8. FEMA still had approximately thirty-six days until the final determination deadline of the application and approximately fifty days until the probable extended final determination deadline. R. at 10. FEMA released the contracted adjustor's final report and placed Petitioner's file in the preliminary denial category. R. at 10. Because of the close nature of the factual issue, FEMA's Regional Director was planning to review Petitioner's file himself before the final eligibility determination was made. R. at 10.The status of the file shows that FEMA had not completed its decision-making process and, therefore, there was no final agency action. R. at 10. Since FEMA's final agency decision pends on the future

determination to be made by FEMA's Regional Director, Ms. Fabray's final report serves as a tentative recommendation for FEMA and was not FEMA's final agency decision. R. at 10.

FEMA's actions through the PA Program do not create legal rights or obligations and do not create adverse effects of a strictly legal kind. *See Nat'l Park*, 538 U.S. at 809 (finding the Department's legal position on the applicability of the Contract Disputes Act did not impose any duties or obligations on the concessioners, cause any change in their behavior, or prohibit them from resorting to the Contract Disputes Act). Similar to *Nat'l Park*, Petitioner is not being required to perform anything or refrain from performing anything because of the PA Program. R. at 11-12. During the eligibility review period, Petitioner had not been burdened with any new obligations or lost any rights it otherwise enjoyed because FEMA had not applied final agency action granting or denying relief. R. at 10. Therefore, no legal consequences affected Petitioner.

FEMA's decision-making actions do not mark the consummation of the agency's decision-making process, and the action is not one by which "rights or obligations have been determined," or from which "legal consequences will flow" because it has not affected, or even been applied, to Petitioner.

b. Without further factual development, this Court is not in a position to decide what the outcome of FEMA's action should be.

Petitioner's claim is not ripe for judicial review because further factual development would significantly advance this Court's ability to deal with the legal

issues presented. *Duke Power Co v. Carolina Env't*, 438 U.S. 59, 82 (1978); *see also Socialist Labor Party v. Gilligan*, 406 U.S. 583, 587-88 (1972) (stating the record was "extraordinarily skimpy" and offered insufficient evidence of the effect of the law on plaintiff's efforts). FEMA has the ability to make different aid determinations on a case-by-case basis. R. at 10. In Petitioner's case, FEMA never finalized its aid determination of the facility. R. at 10. At the time of the lawsuit, FEMA still had approximately thirty-six days until their original final determination internal deadline. R. at 10. Petitioner would be in a much better position to bring this claim because Petitioner prematurely brought the lawsuit just nine days into FEMA's review of their file. R. at 8. This Court would be in a much better position to determine whether there is concrete action that harms or threatens to harm Petitioner once a final decision has been made by FEMA. It is only at that point will Petitioner and the Court definitively know if the facility would be granted or denied relief under the PA Program. At this point, this Court is not in a position to review the result of FEMA's decision-making process and whether or not the harm would have occurred.

A regulation is not ripe for judicial review under the APA until the scope of controversy is manageable and the regulation is applied to the claimant's situation in a manner that harms or threatens to harm the claimant. *Nat'l Park*, 538 U.S. at 808, (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). In *Nat'l Park*, the Court held that, although the issue was a purely legal one, the applicability of the Contract Disputes Act may depend on the type of contract at issue, suggesting

that review should wait until there was a concrete dispute over a specific contract. *Id.* at 812.

Similarly, the judicial resolution of Petitioner's challenge here should wait for a final determination by FEMA because without final agency action, Petitioner does not know if the regulation will harm them. This was a complex factual issue such that FEMA's Regional Director was planning to review the file himself, and because of the mixed-used standard, the facility was not automatically denied relief. R. at 10.

Petitioner cannot demonstrate that its case is ripe under Article III because it does not satisfy the case-or-controversy requirement since "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300 (holding the case was not ripe because it was too speculative if a magistrate would ever be appointed). FEMA had not determined how each portion of the facility would have been categorized under the PA Program. R. at 10. The injury alleged is merely speculative because no final decision was made to grant or deny relief to Petitioner. R. at 10. Accordingly, this is not an issue that has been reduced to manageable proportions because there is no concrete action applying the regulation that harms Petitioner.

2. *Petitioner will not suffer a hardship by withholding judicial review because no hardship occurs unless the benefit is denied, and the regulation does not affect Petitioner's conduct in an immediate manner.*

The hardship prong is entirely prudential and encompasses the question of whether the plaintiff is suffering any present injury from a future contemplated

event. *McInnis-Misenor*, 319 F.3d at 70. Withholding review of a challenge to denial of a benefit does not cause hardship to parties if the agency has not yet denied the benefit. *Reno*, 509 U.S. at 59-60. In *Reno*, the Court distinguished between rules that govern the potential receipt of benefits and rules that regulate behavior. *Id.* at 58. The Reform Act (Act) did not impose penalties for violating any newly imposed restriction, but instead, limited access to a benefit created by the Act. *Id.* The Act required each alien that applied for the benefit to take further affirmative steps before their claims were ripe. *Id.* Aliens applied for amnesty and only those whose application for the benefit had been front-desked suffered a hardship. *Id.* at 60-62.

Similar to *Reno*, without evidence of denial, Petitioner's mere speculation they will be denied FEMA aid is not sufficient to find a hardship. After Petitioner applied for the benefit, Director St. James stated in the deposition that "ultimately the event center might have been granted FEMA assistance." R. at 10. Withholding judicial review at this time does not cause a hardship to Petitioner because the hardship will not occur until denial of the benefit has been made. The outcome of Petitioner's claim is subject to change dependent upon FEMA's final agency determination of eligibility. For example, if the chapel was denied relief and the event center was granted relief, the claim would differ from a decision that the entire facility was ineligible for relief. Therefore, further factual development is necessary in order to determine the hardship suffered.

Some cases, however, fall on the latter side of the line and do impose penalties for violating newly imposed restrictions. Withholding judgment must

create a 'direct and immediate' dilemma on parties for the hardship prong to be satisfied. *Abbott*, 387 U.S. at 152. To comply with the regulation, the petitioners in *Abbott* were required to change all their labels, advertisements, promotional materials, destroy stocks of printer matter, and invest heavily in new printing type and new supplies, thus constituting a hardship on the petitioner. *Id.* at 152.

Distinguishable from *Abbott*, Petitioner here has not been impacted in a direct and immediate manner. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967) (holding that uncertainty over when and if an inspection would occur did not constitute hardship because it did not affect their day-to-day conduct); *Nat'l Park*, 538 U.S. at 809-10 (holding that uncertainty over the applicability of the Contract Disputes Act, which affected the concessioners' willingness to bid on contracts, was not sufficient hardship).

The PA Program application requirements did not affect Petitioner in a direct and immediate way. The lower court's dissent incorrectly characterizes the burden on Petitioner by stating, "flood victims are constantly bombarded with paperwork and relief opportunities." R. at 19. Here, Petitioner was able to file an online application one day after the President declared the emergency. R. at 6. No further action is required on Petitioner's part once the application is filed because FEMA determines the eligibility of the facility based on use. R. at 11. Withholding judicial review will not cause a hardship because no additional burden was placed on Petitioner by the regulation, R. at 6.

Finally, Petitioner will have ample opportunity to bring its legal challenge at a time when harm is more imminent, concrete, and more certain. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998). In *Ohio Forestry*, environmental litigants alleged that the agency's plan failed to sufficiently control logging and clearcutting in national forests. *Id.* at 731. The Court held the challenge was not ripe for review because it could be more suitably heard when the plan was being applied to particular sites. *Id.* at 737.

Like in *Ohio Forestry*, FEMA still had time to make a final eligibility determination. R. at 10. Petitioner's lawsuit will be more suitably heard when FEMA applies its final agency determination to the Church's file and decides if FEMA relief can be granted. If Petitioner is denied relief, then they will have a concrete and imminent hardship.

Withholding judicial review will not impose a hardship to Petitioner because they have not been denied the public benefit of FEMA aid. The regulation has not affected Petitioner's conduct because it only required Petitioner to apply for aid. FEMA then completes the eligibility determination process. Finally, because Petitioner was able to rebuild the facility without FEMA aid, withholding judgment at this time will not impose a hardship because the challenge can be brought after FEMA makes it final determination.

Section 704 does not allow for pre-enforcement review, but rather indicates judicial review can only occur after FEMA has taken final agency action. Therefore, Petitioner's claim is not fit for judicial review because there was no final agency

action and withholding judicial review at this time will not impose hardship on Petitioner.

II. The Establishment Clause precludes Petitioner from receiving relief because the Church fails to meet FEMA's PA Program eligibility requirements, which do not have the purpose or effect of advancing or inhibiting religion.

The First Amendment, made applicable to the states through the Fourteenth Amendment, says in part," Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). This Court has recognized that there is "play in the joints between what the Establishment Clause permits and what the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017); *Locke v. Davey*, 540 U.S. 712, 718 (2004); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 699 (1970). The Establishment Clause permits some state actions that are not required by the Free Exercise Clause. *Locke*, 540 U.S. at 719. FEMA's PA Program achieves this requisite balance, and a grant of funding to Petitioner would disrupt the constitutional harmony accomplished by the Program.

This Court has acknowledged instances where granting relief in a particular case would be prohibited under an otherwise constitutional statute. *See Bowen v. Kendrick*, 487 U.S. 589, 601 (1988). A denial of funds to Petitioner under the PA Program does not translate into unconstitutionality of the Program. The three-part *Lemon I* test created by this Court applies to determine the validity of a statute with respect to the Establishment Clause of the First Amendment: "First, the statute must have a secular legislative purpose; second, its principal or primary

effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman (Lemon I)*, 403 U.S. 602, 612-13 (1971). The Court in *Agostini v. Felton* concluded the entanglement inquiry is best analyzed as one criterion under the second prong set out in *Lemon I* because the factors used to determine whether a government aid program results in such entanglement are similar to those used to examine "effect." 521 U.S. 203, 232-33 (1997). Thus, the general principles the Court uses to evaluate if government aid violates the Establishment Clause include asking whether the government acted with the purpose of advancing or inhibiting religion and determining whether the aid has such effect. *Id.* at 222-23.

A. FEMA's PA Program does not have the purpose of advancing nor inhibiting religion because the Program is facially neutral and generally applicable, and supported by a strong public interest.

A valid secular purpose exists when a law is neutral on its face and any reference in the text to a religious practice is in the context of a secular meaning discernable from the language or context. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). In *Lukumi Babalu*, the Court held the city ordinances banning animal sacrifice violated the Santeria church members' free exercise of religion because the conduct mostly subject to the ordinances was the religious exercise of the Santeria church members. *Id.* at 535. In assessing the neutrality of the law, the Court first looked to its text to determine its purpose. The court refused to find the words "sacrifice" and "ritual" in the ordinances determinative evidence of facial discrimination against religion when they also have

secular meanings, were not defined in religious terms, and did not refer to religious practices. *Id.* at 534. Next, the Court noted the protections of the Free Exercise Clause apply if the law discriminates against the beliefs or practice of religion because the law was enacted for religious reasons. *Id.* at 532. In considering this historical background, the Court found persuasive that the city residents expressed their concern that "certain religions may propose to engage in practices which are inconsistent with public morals, peace, or safety."*Id.* at 535. It was definitive the only religion city officials contemplated was Santeria. *Id.* For these reasons, the Court concluded the ordinances were drafted with the purpose to inhibit the religious exercise of the Santeria church members and were thus not neutral and generally applicable *Id.*

Unlike the ordinances in *Lukumi Babalu*, the PA Program does not have the purpose to suppress the exercise of religion. R. at 11. The Program operates to "assist communities responding to and recovering from major disasters or emergencies declared by the President." R. at 11. There is no language used in the Program that raises concern that religious practices are being targeted. R. at 11-12. The Program is designed to ensure relief funds are provided to communities needing emergency assistance and permanent restoration aid from major disasters. R. at 11. The purpose of the eligibility requirements are to ensure facilities that provide critical or government essential services receive aid. R. at 11. The criteria set forth in the Program determines recipients who meet the neutral criteria, without reference to religious identity. R. at 11-12.

The strong public interest in the purpose of the statute is an important consideration for whether it has the purpose of aiding or inhibiting religion. *Mueller v. Allen*, 463 U.S. 388, 395 (1983). This Court has consistently found government assistance programs that provide aid in the context of education to have a valid secular purpose. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (finding a valid secular purpose in a program enacted to provide educational assistance to underprivileged children in a demonstrably failing public school system); *Mueller*, 463 U.S. at 395 (holding there was a valid secular purpose for government assistance in the form of a tax deduction for elementary educational expenses to achieve an educated populace); *Meek v. Pittenger*, 421 U.S. 349, 351-52 (1975) (finding a valid secular purpose existed for a statute ensuring educational materials are accessible to children free of charge).

Here, there is a strong public interest in providing emergency assistance to save lives, protect property, and restore communities affected by natural disasters. R. at 11. Furthermore, Congress' motives in passing a statute should not be presumed insincere. *Bowen*, 487 U.S. at 604. Considering the text of the statute, the motives behind the Program can not be found to advance or inhibit religion because there is an express valid purpose.

The PA Program cannot reasonably be viewed to have the purpose of endorsing religion in violation of the Establishment Clause or to inhibit the free exercise thereof because the Program reflects the government's neutrality towards religion and is generally available to eligible nonprofits.

B. Aid distributed under the Program does not have the effect of advancing nor inhibiting religion because the relief does not result in governmental indoctrination, define recipients by religious preference, or create excessive entanglement.

The grant of government aid does not have the effect of advancing or inhibiting religion when: the application of the law is free from governmental indoctrination; the recipients are not defined by religious preference; and the funds do not create excessive entanglement. *Agostini*, 521 U.S. at 234.

There is no effect of governmental indoctrination by distributing PA Program aid because eligibility for relief is determined by the neutral mixed-use criteria. Eligibility under the mixed-use standard attenuates the link between PA relief and use by religious institutions, thus preventing State indoctrination of religion. The PA Program does not encourage a financial incentive to undertake religious indoctrination because the Program does not define its recipients with respect to religion. There is no excessive entanglement created by the PA Program because the nature of aid is tailored to eliminate the need for subsequent government involvement after granting relief.

While the Program satisfies the requirements of the First Amendment, providing relief to Petitioner will result in the effect of advancing religion in violation of the Establishment Clause. The facility does not meet the eligibility criteria, providing relief to Petitioner will foster an incentive to undertake religion, and a grant of funds will result in excessive entanglement between Petitioner and the State.

1. *The PA Program does not have the effect of governmental indoctrination of religion because any aid ultimately going to religious organizations cannot be reasonably attributed to government action, and such aid does not directly benefit a religion.*

Government aid does not result in indoctrination of religion when that aid cannot reasonably be attributed to governmental decision-making. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (finding no attribution of governmental aid to religious indoctrination so long as eligibility is determined on a neutral basis). When funds are distributed to predominately religiously-affiliated organizations, there is an "unacceptable risk" the aid will be used to "advance the religious mission" of that organization. *Bowen*, 487 U.S. at 612. In *Bowen*, the Court upheld a grant program against an Establishment Clause challenge because the aid was distributed based upon neutral criteria and available to both "sectarian or purely secular institutions." *Id.* at 608. The Adolescent Family Life Act ("AFLA" or "Act") in *Bowen* was available to an "eligible grant recipient" defined as a "public or nonprofit private organization or agency," which shows they are capable of providing the necessary services, allowing various types of organizations to apply and receive funding. *Id.* The Court noted one way direct government aid has the effect of benefiting religious-affiliated organizations is when the benefit is given to institutions that are primarily sectarian and where religion "is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Id.* at 609-10.

Like in *Bowen*, there is no presumption that FEMA relief will be used to advance nor inhibit religion because it is equally available to religious and nonreligious entities alike. The PA Program guards against the risk of primarily benefiting religion through its mixed-use standard that requires applicants to "own or operate an eligible facility." R. at 11. An eligible facility can be one that either provides a critical service such as education, utility, emergency or medical, or a non-critical essential governmental service that is open to the general public. R. at 11. Applicants that operate "mixed-use facilities" that "provide both eligible and ineligible services" are eligible to receive aid if the "primary use of the facility," meaning "more than 50 percent of the physical space" is devoted to eligible services. R. at 12. The PA Program's neutral eligibility requirements protect against impermissible governmental indoctrination.

Governmental indoctrination of religion occurs when the effect of the aid directly benefits a religious institution. *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 486-87 (1986). Conversely, there is no such result where the link between governmental aid and funding a religious institution is attenuated. *Id.* In *Witters*, a student attending a Christian college was allowed to receive funding under a statute that distributed neutrally available assistance to eligible recipients. *Id.* at 484-85. The funds were given directly to students who then paid the institution of their choice. *Id.* at 487. The decision to support religious education was made solely by the individual, not the State. *Id.* at 488. In combination, these factors resulted in an attenuated link between the State and the student's school of

choice. *Id.* There was no governmental indoctrination of religion in violation of the Establishment Clause because the funds ultimately flowing to the religious institution occurred only as a result of the private choice of the recipients, rather than by State direction. *Id.*

PA Program funds are insulated from resulting in governmental indoctrination of religion because the Program's eligibility requirements attenuate the link between the allocation of State funds and religious institutions using those funds. FEMA funds are neutrally available to religious and secular institutions based upon the mixed-use eligibility criteria. R. at 11-12. A neutral criterion of eligibility for funds enables religious and secular institutions to obtain aid for disaster relief without the risk of direct governmental support of religion. Attenuation of the link between Program funds and eligible recipients ensures only eligible institutions, irrespective of their religious status, use those funds. R. at 11. The PA Program criteria create a statutory form of attenuation preventing FEMA aid from having the effect of governmental indoctrination of religion.

A grant of PA Program aid to Petitioner would have the effect of governmental indoctrination because the facility does not meet the neutral eligibility requirements and, therefore, is not attenuated. The event center and the chapel share the same physical space because the event center was added as an annex. R. at 4. The chapel and the event center each equally comprise half of the total square footage of the building. R. at 4. Ms. Fabray's final report, based on her tour of the damaged facility and her discussion with Chaplain Hudson, concluded

the event center was used 80% of the time for FEMA-eligible purposes and the chapel was used over 90% of the time for ineligible services R. at 6-7, 10. When the same physical space is used for both eligible and ineligible services, the primary use is the use which is dedicated more than 50% throughout the shared space. R. at 12. In this case, the facility is ineligible because the primary use of the facility is dedicated to more than 50% FEMA-ineligible services. R. at 10.

That the Church is ineligible to receive funds based on this secular standard does not flatly preclude all religious organizations from receiving aid. *See Bowen*, 487 U.S. at 611 (concluding the possibility that grants from the Act could go to "pervasively sectarian" institutions was insufficient to find that all religious institutions were flatly precluded from receiving grants under the Act). The mixed-use criteria sets forth a neutral basis for eligibility to FEMA aid that is applied equally to religious and secular institutions. R. at 11-12. The 50% primary-use standard serves to preclude pervasively sectarian organizations from receiving aid, as required by the Establishment Clause.

FEMA relief does not result in indoctrination because the mixed-use criteria ensures against any attribution of government funds to advance nor inhibit religion. A grant of FEMA PA funds to Petitioner does not satisfy the safeguard of attenuation because the Church does not meet the neutral eligibility requirements. Because the Church is not eligible to receive aid under the mixed-use standard, the result of a grant of PA Program funds to Petitioner would have the effect of direct aid to religion and constitute governmental indoctrination of religion.

2. *There is no result of governmental indoctrination of religion because applicants to the Program are not defined by religious preference when there is no incentive to undertake religion and generally applicable benefits are not denied on account of religious identity.*

The criteria for allocating aid must not create a financial incentive to undertake religious indoctrination. *Zelman*, 536 U.S. at 650 (upholding an educational assistance program against an Establishment Clause challenge where there was no evidence the State deliberately skewed eligibility requirements in favor of religious schools because recipients were defined only by financial need and residence in a particular school district).

The PA Program is not tailored to skew eligibility in favor of religious institutions because recipients of the Program are first determined through the mixed-use eligibility criteria. R. at 11-12. PA Program funds must then be used for well-defined disaster recovery efforts, which eliminate the risk of creating an incentive to undertake religious practice. R. at 11-12. The Program provides funds for emergency work and permanent work. R. at 12. Emergency work is that which is needed to "Save Lives; Protect public health and safety; Protect improved property; or Eliminate or lessen an immediate threat of additional damage" as well as "debris removal" and "emergency protective measures." R. at 12. Permanent work is that which is required to "restore a facility to its pre-disaster design...and function in accordance with applicable codes and standards." R. at 12. This standard does not have an incentive to promote religious doctrine because recipients are defined by the use of the facility and the type of work for which the funds can be used.

While the Program does not incentivize the undertaking of religion, the Program neither imposes a penalty on the free exercise thereof because it does not deny a generally available benefit solely on account of religious identity. *But see Trinity Lutheran*, 137 S. Ct. at 2015 (finding the Department's policy discriminated against an otherwise eligible church by expressly prohibiting it from receiving a public benefit solely because of its religious character); *McDaniel v. Paty*, 435 U.S. 618, 627 (1978) (holding a statute violative of the free exercise clause because it conditioned eligibility for office on the basis of having no religious identity). This Court has recognized that neutral and generally applicable laws that incidentally burden religious practice do not run afoul of the First Amendment. *E.g.*, *Lukumi Babalu Aye*, 508 U.S. at 531-32; *Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990). The effect of the PA Program eligibility criteria prevents excessive entanglement between the government and the religious institutions receiving relief because the requirements are facially neutral. Petitioner's ineligibility to receive FEMA relief because it does not meet the Program's neutral criteria does not constitute a penalty on its exercise of religion.

A grant of relief to Petitioner would have the effect of governmental indoctrination and incentivize the undertaking of religion because they do not meet the facially neutral eligibility requirements. As in *Zelman*, granting Petitioner funding would have the effect of incentivizing the undertaking of religion because Petitioner's facility was used for more than 50% FEMA-ineligible services. R. at 10. The likelihood that FEMA funds will be used for the impermissible use of repairing

the ineligible portions of Petitioner's facility increases because Petitioner's facility is used for more ineligible services than not.

The PA Program requirements do not promote the undertaking of governmental religious indoctrination because applicants are not encouraged to modify their religious beliefs in order to obtain benefits. Alternatively, the Program does not inhibit the free exercise of religion because recipients are not determined based on religious status.

3. *Providing relief under the PA Program does not result in excessive government entanglement considering the character and purpose of the institutions applying for aid, the nature of FEMA relief, and the resulting relationship between the facility and the State.*

A government aid program must not result in an excessive entanglement between church and state. *Lemon I*, 403 U.S. at 615. Factors used to determine if excessive entanglement exists include: "the character and purpose of the institutions benefited, the nature of the aid that the State provides, and the resulting relationship between government and religious authority." *Id.*

a. The character and purpose of organizations receiving FEMA aid are not predominantly religious.

A suggestion of excessive entanglement between the State and the institution applying for aid exists when the character and purpose of the institution is predominantly religious. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 748-49 (1976); *Lemon I*, 403 U.S. at 615. Under the Program, organizations applying for FEMA relief are not characterized as primarily religious because they must meet secular applicant requirements. R. at 11. Eligible applicants must operate or own a "private

nonprofit facility" and have current IRS tax exempt status under 501(c), (d), or (e) under the Internal Revenue Code of 1954. R. at 11. Applicants then must meet the neutral eligibility Program requirements. R. at 11-12. The institutions eligible for FEMA aid are categorically not primarily religious, as necessary to avoid government entanglement with religion.

In assessing a program applying for state aid, the Court in *Roemer* considered such factors as the locality of the institution to religious organizations and the amount of religious instruction and activities involved within the institution. 426 U.S. at 748-49. The purpose in determining the locality of the institution applying for government aid to religious facilities is to assess the convenient accessibility for the funds to be used for the benefit of religious exercise. *Lemon I*, 403 U.S. at 615.

In Petitioner's case, other structures located on the 88 acre tract of land are considered in determining the locality of the facility to religious organizations. R. at 3. The grounds include the chapel and attached event center along with a 500-seat rodeo arena and storage buildings for the arena and chapel. R. at 3. Cowboy ministries practice a culturally-specific form of religion, often utilizing cowboy symbolism such as rodeo arenas for religious services. *See* Timothy J. Demy, Paul R. Shockley, Evangelical America: An Encyclopedia of Contemporary American Religious Culture 89-91 (ABC-CLIO) (2017). S*ee also*, John Burnett, *Cowboy Church: With Rodeo Arena, They 'Do Church Different'*, NPR.org, (September 1, 2013) ("a distinguishing feature of a cowboy church is the rodeo arena on the

grounds," and "Conventional churches have family life centers; most cowboy churches have places to rope and ride"); *Schmitz v. Denton Cnty. Cowboy Church*, No. 02-16-00114-CV, 2017 Tex. App. LEXIS 8375, at *8 (Tex. App. Aug. 31, 2017) (concluding the Cowboy Church in Denton County, Texas used rodeo arenas as a form of religious exercise). Petitioner's rodeo arena is considered a religious facility because the Church is a cowboy ministry, and the arena is in close proximity to the event center and chapel. R. at 3.

Religious instruction and activity at the facility is assessed to determine the extent which they are considered a "natural and proper" part of its atmosphere. *Lemon I*, 403 U.S. at 615. Petitioner applied for relief to restore the facility housing the event center and chapel. R. at 6. On Sunday, the event center was used for "Sunday school classes, youth group meetings, and adult Bible study meetings," and during the week it was used for non-church community projects. R. at 7. The chapel was dedicated exclusively for religious instruction including "church services and related religious events on Sundays" R. at 7. Weekday activities at the chapel included: "religious concerts and nonreligious concerts… holiday festivals, bar mitzvahs, bat mitzvahs, father-daughter dances, and receptions after funerals, christenings, and other similar activities." R. at 7. The chapel also hosted non-denominational weddings and occasional non-religious meetings. R. at 7. The general climate of the facility is pervasively sectarian because religious instruction and activities are natural and proper.

Institutions eligible for FEMA relief are not predominantly religious in character or purpose because the eligibility requirements impose secular standards. Petitioner's facility is religious in nature because the locality, instruction, and activities of the chapel and event center are such that the overall character is predominantly religious.

b. The nature of FEMA aid does not require excessive government supervision and control to ensure secular use of the funds.

The nature of the aid provided by the State must not lead to excessive supervision or control over the assistance granted to ensure secular use. *Lemon I*, 403 U.S. at 627. The likelihood of excessive entanglement is lessened when government aid is non-ideological in nature. *Tilton v. Richardson*, 403 U.S. 672, 687 (1971). In *Lemon I*, the Court held the services of state-supported teachers, who were usually Catholic, could not be counted on to be purely secular because the mixture of religious teachings with secular instruction was inevitable. 403 U.S. at 615. This would have required extensive supervision and control over the teaching of religion in secular classes, resulting in impermissible state entanglement with religious affairs. *Id.* Conversely, the Court has allowed church-affiliated schools to "receive government aid in the form of of secular, neutral, or non-ideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend." *Tilton*, 403 U.S. at 687. *See,* e.g., *Everson*, 330 U.S. at 1; *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968). When the aid is

neutral toward religion, the risks of Government aid to religion and the need for supervision is minimal. *Tilton*, 403 U.S. at 688.

The nature of PA Program relief does not require excessive supervision or control to ensure secular use because eligibility and use of funds is neutrally determined prior to distributing aid. R. at 11-12. Neutral and secular criteria are used to determine if the applicant performs critical or essential government services. R. at 12-13. Eligibility for repair work turns on the use of funds, which "must: (1) Be required as a result of the declared incident; (2) Be located within the area designated, with the exception of sheltering and evacuation activities; and (3) Be the legal responsibility of an eligible Applicant." R. at 12. No subsequent oversight of funds is required by FEMA under the Program because the requirements must be satisfied prior to granting relief. R. at 11-12.

Like the state-supported teachers in *Lemon I*, distributing relief under the Program to Petitioner will lead to excessive supervision and control over the use of the funds because the facility is unable to meet the neutral eligibility criteria. R. at 7, 11-12. A grant of aid to an ineligible applicant would require extensive supervision to ensure the funds are used for the secular purpose of disaster relief. There is no assurance FEMA funds will be used only for eligible repair work because the character and purpose of the facility is predominantly religious, increasing the risk of excessive entanglement.

The PA Program does not require further supervision or control once an applicant meets the eligibility requirements because the eligibility and use criteria function as assurance of secular use of FEMA funds.

c. The resulting relationship between recipients of FEMA aid and the State is not excessive.

Interaction between a religious organization receiving a public benefit and the State is inevitable and must be excessive before it violates the Establishment Clause. *See Agostini*, 521 U.S. at 233 (holding unannounced monthly visits by a field supervisor to ensure compliance with a city program providing teachers in parochial schools did not constitute excessive entanglement); *Roemer*, 426 U.S. at 764-65 (finding no excessive entanglement when annual audits are conducted by the State to ensure state grants to religious colleges are not used to teach religion).

The resulting relationship between the PA Program and aid recipients does not result in excessive entanglement because the government contact required to determine eligibility and use of the funds is limited to a brief field investigation. R. at 6-7, 10. FEMA's contracted adjustor is sent to make a determination of the damaged facilities and ask questions to determine eligibility. R. at 6-7. The initial one-time scheduled tour by the adjustor is significantly less cumbersome than the unannounced monthly visits in *Agostini* and the yearly audits in *Roemer*. R. at 6. The single site tour does not create a continuing relationship that results in excessive contact. *See, e.g. Tilton*, 403 U.S. at 688.

In Petitioner's case, granting relief will lead to an excessive relationship with the State because the eligibility requirements are not met. There is little separation

between the predominantly religious nature of the facility and the physical portions of the facility needing funds for repair. Providing relief increases the risk that funds will be used for impermissible purposes, making it necessary to have a continuing relationship. *See Roemer* 426 U.S. at 751 (finding no excessive entanglement when there was "little risk that religion would seep into the teaching of secular subjects, and the state surveillance necessary to separate the two, therefore, was diminished" when the character of the aided colleges were not pervasively sectarian).

Granting relief to eligible applicants under the PA Program does not create excessive entanglement between the recipients and FEMA. The PA Program does not have the effect to advance nor inhibit religion because it does not foster governmental indoctrination of religion, eligibility for relief is not determined by religious character, and the Program does not create excessive entanglement between the recipient and the State.

CONCLUSION

Pre-enforcement review is not allowed by statute until final agency action has been taken. Petitioners are asking the Court to review an inadequate factual record because they could not, and still cannot, prove injuries beyond mere speculation. The issues are not fit for judicial review because no final agency action has been taken, and withholding consideration does not impose hardship on Petitioner at this time. Based on Article III constitutional and prudential ripeness grounds, reviewing Petitioner's claim would require the Court to engage in premature adjudication, which is what the ripeness doctrine seeks to prevent.

Granting aid to eligible recipients does not have the effect of advancing or inhibiting religion because the relief does not directly benefit predominantly religious organizations. Recipients are not defined by religious preference, preventing the incentive to undertake religious practice. Lastly, the funds do not create excessive entanglement between religious-affiliated Program recipients and the State. FEMA's PA program criterion for eligibility navigates the fine line between the competing clauses of the First Amendment. Providing a secular criterion of eligibility respects the Establishment Clause by preventing automatic relief to religious institutions and respects the Free Exercise Clause by allowing religious institutions the same opportunity for relief as any other non-profit.

The facility's inability to meet FEMA's eligibility requirements precludes Petitioner from receiving PA funds. Petitioner must first meet the same criteria as every other non-profit that apply under the Program in order to be eligible for relief. A denial of relief due to failing to meet the FEMA PA program eligibility criterion does not translate to a violation of the Free Exercise Clause because the policies are facially neutral and not discriminatory on the basis of religious identity.

For the foregoing reasons, Respondent respectfully requests this Court to affirm the lower court's grant of summary judgment based on the Establishment Clause of the First Amendment and dismissal of the case for lack of ripeness.

Respectfully submitted,

/s/ Team No. 28

November 20, 2017 Counsel for Respondents

APPENDIX

5 U.S.C. § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 704. Actions Reviewable

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. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court

42 U.S.C. § 5172. Repair, restoration, and replacement of damaged facilities

(a) Contributions

(1) In general, the President may make contributions--

(A) to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government; and

(B) subject to paragraph (3), to a person that owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred by the person.

U.S. Const. amend. I.

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.