Docket No. C17-2893-1

IN THE

Supreme Court of the United States

COWBOY CHURCH OF LIMA,

Petitioners,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY
and 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

PETITIONER'S BRIEF ON THE MERITS

Team No. 35
Counsel for Petitioner
November 20, 2017

QUESTIONS PRESENTED

(I) May a plaintiff attack an allegedly unconstitutional policy promulgated by the Federal Emergency Management Agency before the agency has determined the plaintiff's eligibility for relief under that policy when the policy itself presumes churches are ineligible for FEMA relief?

(II) Does the Establishment Clause create a total bar to granting FEMA Public Assistance funds for facilities that are used for government and secular services simply because they also provide religious services; or, does the Free Exercise Clause require that FEMA practice nondiscrimination in administering aid to all eligible facilities when they meet neutral FEMA criteria?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW ix

STATEMENT OF JURISDICTION ix

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS ix

SUMMARY OF THE ARGUMENT 5

This Lawsuit is Not Barred by the Doctrine of Ripeness 5

FEMA's Existing Policies, While Not Required by the Establishment Clause, Do Violate the Free Exercise Clause 7

STANDARD OF REVIEW 10

ARGUMENT 10

I. The Cowboy Church of Lima's Lawsuit Was Not Barred by the Doctrine of Ripeness and FEMA is Subject to a Lawsuit in This Case Prior to FEMA Determining if the Church is Eligible Under Its Mixed-Use Analysis. 10

A. Whether FEMA's discriminatory mixed-use policy comports with the First Amendment is a question fit for judicial decision. 12

1. Whether the Establishment Clause bars churches from receiving FEMA Public Assistance Program funds is a purely legal question and the policies barring such funding are a final agency action. 13

2. The purely legal question in this case does not require any further factual development or a more concrete setting for a court to deal with it appropriately, and this case is not an improper attempt to effect political change. 15

B. The Church has already suffered significant hardship and will continue to experience future hardship if this Court withholds consideration. 18

1. Petitioner has suffered and will continue to suffer an ongoing legal harm until the question in this case is resolved. 19

2. Petitioner suffered a compounding practical harm with each passing day the courts have withheld consideration. 20

3. Without Court adjudication of the question in this case, Petitioner has been forced to modify its behavior and will be forced to further modify its behavior to avoid adverse future consequences. 21

II. The First Amendment Requires that Petitioner Should be Eligible for FEMA Public Assistance Funds. 23

A. The Establishment Clause does not prohibit granting Public Assistance funds for facilities that otherwise qualify for such funding simply because those facilities are used for religious services. 27

1. Under the traditional Lemon analysis, allowing currently ineligible mixed-use facilities to receive FEMA funding would not violate the Establishment Clause. 28

a. The secular legislative purpose of FEMA's PA program would not change if the Court invalidates the mixed-use religious restriction FEMA currently uses. 29

b. Allowing eligible religious institutions to receive funding without imposing a mixed-use restriction would neither work to advance nor inhibit religion. 30

c. A grant of funds would not create excessive government entanglement in religion. 33

2. Allowing mixed-use facilities to receive PA Program Aid would not violate the Establishment Clause under Justice O'Connor's "endorsement" analysis. 35

a. Allowing mixed-use facilities to receive FEMA funding will not result in a violation of the purpose inquiry, because the Public Assistance program will retain a primarily secular purpose. 35

b. Allowing currently ineligible mixed-use facilities to participate in the Public Assistance Program will not result in a violation of the effect inquiry. 37

i. Granting FEMA aid to Petitioner will not implicate governmental indoctrination. 37

ii. A program that allows granting FEMA aid to Petitioner will not identify its beneficiaries by religion. 38

iii. Holding that FEMA may grant aid to Petitioner will not create an excessive entanglement that offends the Establishment Clause. 40

B. The Free Exercise Clause and the strict scrutiny standard prohibit FEMA's discriminatory treatment of facilities that provide religious services. 42

1. The Free Exercise Clause and the RFRA do not draw a distinction between religious status and religious use; they merely require that the government not burden religion. 44

2. FEMA's mixed-use policy is subject to strict scrutiny because it subjects some facilities to unequal treatment simply because of religious use, and thus is neither facially neutral nor generally applicable. 50

3. Strict scrutiny mandates that only a governmental interest of the highest order can justify such discrimination, and there is no such interest in this case..... 51

CONCLUSION..... 52

APPENDIX A – Constitutional Provisions..... 53

APPENDIX B – Statutory Provisions..... 54

APPENDIX C – Regulatory Provisions 57

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. Const. amend I 23, 24

STATUTES

5 U.S.C. § 551 ..... 13, 14

5 U.S.C. § 701 13

5 U.S.C. § 704 13

28 U.S.C. § 1254 ix

42 U.S.C. § 2000bb-1 ..... 43, 52

42 U.S.C. § 2000bb-2 ..... 43, 51

42 U.S.C. § 5121 ..... 30, 32, 36

42 U.S.C. § 5122 25

42 U.S.C. § 5165c 14

42 U.S.C. § 5172 ..... 24, 25

REGULATIONS

44 C.F.R. § 206.221 26

44 C.F.R. § 206.222 25

44 C.F.R. § 206.223 25

44 C.F.R. § 206.226 25

UNITED STATES SUPREME COURT CASES

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 11, 14, 22

Agostini v. Felton, 521 U.S. 203 (1997) ..... passim

Aguilar v. Felton, 473 U.S. 402 (1985) 40

Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968) 29, 30, 31, 34

Bowen v. Kendrick, 487 U.S. 589 (1988) 41

Bradfield v. Roberts, 175 U.S. 291 (1899) 29

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) 43

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) ..... passim

Cochran v. La. State Bd. of Educ., 281 U.S. 370 (1930) 31, 32

Corp. of the Presiding Bishop of the Church of Latter-day Saints v. Amos, 483 U.S. 327 (1987) 35, 36

Cty. of Allegheny v. ACLU, 492 U.S. 573 (1989) 34

Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59 (1978) 12, 13, 17

Everson v. Board of Education, 330 U.S. 1 (1947) 30, 50

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... passim

Locke v. Davey, 540 U.S. 712 (2004) ..... passim

Lynch v. Donnelly, 465 U.S. 668 (1984) ..... passim

Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 24, 43, 46

Marbury v. Madison, 5 U.S. 137 (1803) 15

McDaniel v. Paty, 435 U.S. 618 (1978) 43

Nat'l Park Hosp. Ass'n v. U.S. Dep't of the Interior, 538 U.S. 803 (2003) 11, 16, 17

Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) 46

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998) 18, 19

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 18

Pennsylvania v. West Virginia (*Pipeline Cases*), 262 U.S. 553 (1923) 11, 15, 16, 18

Reg'l Rail Reorganization Act Cases, 419 U.S. 102 (1974) 11, 16, 18, 21

Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 27

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) 35

See McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005) 28

Sherbert v. Verner, 374 U.S. 398 (1963) 46, 47

Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) 11, 18, 20, 22

Tilton v. Richardson, 403 U.S. 672 (1971) ..... passim

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) .. passim

Wallace v. Jaffree, 472 U.S. 38 (1985) 35

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 24, 27, 29, 30

Watson v. Jones, 80 U.S. 679 (1872) 23

Widmar v. Vincent, 454 U.S. 263 (1981) 38, 39, 48, 52

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 35

Zorach v. Clauson, 343 U.S. 306 (1952) 28, 35

UNITED STATES CIRCUIT COURT CASES

Bettor Racing, Inc. v. National Indian Gaming Commission, 812 F.3d 648 (8th Cir. 2016) 10

Cent. & S.W. Servs. v. U.S. Envtl. Prot. Agency, 220 F.3d 683 (5th Cir. 2000) 18

Garcia v. LumaCorp, Inc., 429 F.3d 549 (5th Cir. 2005) 10

Groome Res. Ltd. v. Par. of Jefferson, 234 F.3d 192 (5th Cir. 2000) 10

In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014) 10

Merchs. Fast Motor Lines, Inc. v. Interstate Commerce Comm'n, 5 F.3d 911 (5th Cir. 1993) 14

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272 (D.C. Cir. 2005) 12, 13

Texas v. United States, 497 F.3d 491 (5th Cir. 2007) 10, 14, 21, 22

United States v. Williams, 340 F.3d 1231 (11th Cir. 2003) 10

UNITED STATES DISTRICT COURT CASES

Nat'l Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan. 1971) 20

ADMINISTRATIVE AND EXECUTIVE MATERIALS

Fed. Emergency Mgmt. Agency, FP 104-009-2, *Public Assistance Program and Policy Guide* (2016) ..... passim

LAW REVIEW ARTICLES

James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990) 28

OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Central District of New Tejas is unreported and is not set out in the record. The Opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but is set out in the record. R. at 2–21.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The First Amendment to the United States Constitution is relevant to this action and is reprinted in Appendix A.

Title 5 U.S.C. §§ 551, 701, and 704, and Title 42 U.S.C. §§ 5122, 5151, 5165c, and 5172 are relevant to this action and are reprinted in Appendix B.

Title 44 C.F.R. §§ 206.2, 206.11, 206.221, 206.222, 206.223, and 206.226 are relevant to this action and are reprinted in Appendix C.

STATEMENT OF THE CASE

Factual Background

On August 13, 2017, Hurricane Rhodes hit the western coast of New Tejas, about 100 miles north of Lima, causing massive damage to the region's infrastructure, including reservoirs and dams. R. at 2-3. Two days after landfall, Flanagan Dam burst, causing the Motta River to flood the Township of Lima. R. at 3. Petitioner is a community center and church called the Cowboy Church of Lima and is located right outside the town. R. at 3.

The Cowboy Church of Lima. The church sits on eighty-eight acres. R. at 3. It has several facilities, including a rodeo arena, an event center, several storage facilities, and a chapel. R. at 3. The event center and chapel are each 2,250 square feet and, together, comprise the main structure on the property for a total size of 5,000 square feet. R. at 4. The organization is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code and has maintained such status since its formation. R. at 3. Additionally, the tract of land is designated as religious exempt property under the New Tejas Property Code and, thus, the organization pays no property taxes. R. at 3.

Since 1998, the property has been the site of significant community events, private events, government services, educational programs, concerts, receptions, dances, meetings of civic clubs, and other miscellaneous activities. R. at 3–4, 7. The event center is a county election polling place, a host for city council meetings, and a designated emergency shelter for the community. R. at 7. According to the head of

the church and grounds manager, Mr. Hudson, the buildings "were open to anyone, anytime." R. at 4. In fact, the church plays such a central role in the life of the town that the community voted down a proposal to construct an additional, publicly-owned community center in 2008 as the citizens felt it was unnecessary. R. at 4. The organization relies on public generosity and an annual bake sale for its funding, and charges no rents or fees for use of the facilities. R. at 3–4.

The flood damage. On August 15, it became clear the waters escaping the Motta River would flood the property. R. at 4. Staff worked to remove items or move them as high as possible. R. at 4. By midnight, water had entered the chapel and event center. R. at 4. The entire facility was flooded by three feet of water, up to forty-two inches in some areas. R. at 5. Drywall, insulation, flooring, doors, furniture, and other materials were completely destroyed. R. at 5.

The floodwaters finally receded by the morning of August 17th, and remediation began the morning of the 18th. R. at 5. The staff removed carpet, wood flooring, marble flooring, drywall, and insulation, as well as all movable personal property. R. at 5. A structural engineer from the community conducted an inspection of the chapel and event center. R. at 5. He concluded that significant structural repair would be necessary for the safety of the community and to prevent future damage. R. at 6.

The application for FEMA funding. Within a few days, the President declared the flooding and storm damage a "major natural disaster," which allowed the Federal Emergency Management Agency to take action in the region. R. at 6. The

next day, Petitioner filed an application for funds under FEMA's Public Assistance Program. R. at 6. Shortly thereafter, Petitioner also filed an application for a loan from the Small Business Administration. R. at 6. Five days after Petitioner submitted the Public Assistance application, a FEMA adjuster completed an inspection of the facility. R. at 6. The adjuster told Hudson that she estimated the community use of the event center to be between forty-five and eighty-five percent of total usage and the community use of the chapel to be between five and fifteen percent. R. at 7. The adjuster further stated that FEMA does not cover assistance for churches and, indeed, she had never heard of FEMA making an exception. R. at 7. She sympathetically said she would "do what she could" to get the church funding, but that he should not "get his hopes up." R. at 8.

The evening of the inspection, a local attorney informed Hudson that he would provide pro bono legal services in a suit against FEMA. R. at 8. Four days later, Petitioner filed the suit below from which this appeal is made. R. at 8. FEMA had already placed Petitioner in the "preliminary denial" category, pending final review. R. at 10. The final report upon which the decision was to be made listed the event center as being used eighty percent of the time for eligible services and the chapel as being used ten percent of the time for eligible services. R. at 10. FEMA put the decision-making process on hold pending the outcome of the case. R. at 8.

The reconstruction process was arduous, and the church found itself lacking sufficient financial resources to rebuild. R. at 9. Volunteers from the community worked to fix the facilities, but the donated materials and labor were not enough for

a full restoration. R. at 8–9. At one point, Hudson stated that without FEMA funding, the organization might fold. R. at 8. Nearly a year later, in late July, 2017, the facility's doors were finally reopened, but not before a collapse of the roof, necessitating further structural work, and a great deal of financial hardship. R. at 8–9.

Procedural History

Petitioner instituted this case below by filing suit in the United States District Court for the Central District of New Tejas on August 29, 2016. R. at 8. The court denied FEMA's motion to dismiss that FEMA had filed under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). R. at 9. Later, the district court entered summary judgment in favor of Respondents, holding the case ripe for adjudication, holding that FEMA's policies were necessary and appropriate under the Establishment Clause, and holding that the Establishment Clause barred Petitioner's receipt of funds under the Public Assistance Program. R at 10. Petitioner timely filed its appeal in the United States Court of Appeals for the Fourteenth Circuit, asking the court to reverse the grant of summary judgment. R. at 10–11. Respondents also timely filed appeal, asking the court to grant dismissal under the ripeness doctrine. R. at 11.

A divided panel heard and ruled on the case, with one judge dissenting. R. at 17. Ultimately, the Fourteenth Circuit held that the case was not ripe. R. at 15. Instead of simply ordering dismissal, however, the court went on to discuss the merits of the case under the Establishment and Free Exercise Clauses. R. at 15–17.

Citing only one case, the circuit court agreed with the district court that the Establishment Clause barred recovery for Petitioner, and additionally held that FEMA's policies do not offend the Free Exercise Clause. R. at 15–17. The Circuit Court affirmed the district court and also ordered the district court to enter judgment dismissing the case for lack of ripeness. R. at 17.

SUMMARY OF THE ARGUMENT

This Lawsuit is Not Barred by the Doctrine of Ripeness

First, this case is ripe because it is both fit for judicial review and Petitioner has suffered hardship as a result of the withholding of judicial consideration. The question in this case is whether FEMA's discriminatory mixed-use policy is required by the Establishment Clause or illegal under the Free Exercise Clause. That question is fit for judicial review because it is a purely legal question, the policies in question constitute a final agency action, the case would not benefit from further factual development, and the case is not an improper vehicle to effect political change.

This case involves a claim that an agency action is contrary to law. That claim is a facial challenge to the validity of the mixed-use policy. As such, the nature of the issue is purely legal. Furthermore, federal statute provides that an agency action is reviewable when it is final. "Agency action" includes the whole or part of an agency statement designed to implement, interpret, or proscribe law or policy. Therefore, the promulgation of the mixed-use policy constitutes an agency action. Rules and policies that are promulgated through the formal note and

comment process, such as the *Public Assistance Program and Policy Guide*, are final actions. The Guide contains the mixed-use policies and, therefore, the policies are a final action.

The issue in this case does not present a political issue, and is not an improper vehicle for political change. It is undoubtedly the responsibility of the judiciary to say what the law is. In this case, the Court must say what the constitutional law is and apply it to the policies in question. Furthermore, no further factual development is needed, because to rule on the issue at the heart of this case, the Court need not look to FEMA's final determination of eligibility. Rather, the Court must look to and evaluate the policies that would inform that determination. This case is not about a unique dispute or set of circumstances; rather, it is a facial attack on the policies in question. Finally, Petitioner has already suffered some harm by being subjected to the traps of the mixed-use analysis itself.

This case is also ripe under the second prong of the doctrine because Petitioner has suffered hardship and will continue to suffer hardship if this Court declines to consider this case. The Court has recognized several kinds of harm that can satisfy the ripeness doctrine, and Petitioner has experienced them all. Furthermore, if an injury is certainly impending, then that will satisfy the doctrine. First, the creation of a legal obligation may constitute a legal harm, and in this case, Petitioner was subjected to the onerous mixed-use analysis and was forced to

cooperate in that process, which results in an ongoing legal harm in instances of future applications.

Second, Petitioner has suffered an ongoing practical harm because the courts have withheld consideration of this case. The proper lens for evaluating the hardship prong is the time that the initial suit is instituted. At that time, Petitioner faced the potential for severe and compounding harm if funding was withheld. Petitioner should not be punished for pursuing alternate routes to obtain the funding and repairs necessary in the meantime. Third, Petitioner has been forced to modify its behavior and will be forced to further modify its behavior in the future if judicial consideration is withheld. Because of the uncertainty surrounding the application for funds and this litigation, Petitioner had to seek private donations and charity to complete the restoration necessary in the facility. Furthermore, without adjudication of the issue in this case, petitioner will have to modify its behavior in the future to ensure compliance with the mixed-use policies.

Because the question in this case is a purely legal issue stemming from a final agency action and would not benefit from further factual development, the question is fit for judicial review. Therefore, and because of the hardships imposed on Petitioner by the withholding of court consideration, this case is ripe for review in this Court.

FEMA's Existing Policies, While Not Required by the Establishment Clause, Do Violate the Free Exercise Clause

The First Amendment requires FEMA to provide aid to Petitioner through the Public Assistance program. First, the Establishment Clause does not bar

churches from competing on equal footing for this kind of funding. And second, the Free Exercise Clause prohibits the kind of discriminatory mixed-use policies currently in place.

Under either the *Lemon* test or the endorsement test for Establishment Clause violations, Petitioner is not constitutionally prohibited from participation in the Program. First, the *Lemon* test requires that a law have a secular purpose. In this case, the program would retain a secular purpose even absent the mixed-use policies because it was established to help communities respond to and recover from major disasters. Furthermore, incidental aid to religious organizations does not negate the primarily secular purpose of the program. Second, the *Lemon* test requires that the program neither advance nor inhibit religion. Where there is a proper public concern underlying a law, benefits to individual interests are only incidental to the primary purpose of safeguarding the common interest. The valuable role of community centers, particularly in small towns, overrides any incidental benefit to religion. Finally, the program must not result in excessive entanglement between church and state. Petitioner's purpose to serve the community in a secular way, the neutral nature of funding for construction, the one-time nature of the funding, and the lack of a need for long-term oversight all go to show that no excessive entanglement will result from a neutral eligibility policy.

Next, the endorsement test focuses on a dual inquiry: the *purpose* of the law in question and its *effect*. As explained above, the purpose of the Public Assistance Program would be unaffected by a neutral eligibility policy. Furthermore, the

existing policy does not, in reality, work to preserve the sanctity of the First Amendment because many mixed-use facilities already receive funding under the fifty percent rule. This reveals the arbitrary and discriminatory nature of the policy. Under the effect inquiry, the court asks whether the program would result in governmental indoctrination, whether it defines its recipients by religion, and whether it creates an excessive entanglement. First, the program would not result in governmental indoctrination because the program would not convey state approval of a specific religion and would not commit the state to religious goals. Minimal oversight will ensure this outcome. Second, a neutral eligibility policy would not identify its recipients by religion because the program would not establish a financial incentive for organizations to take on a religious character. Finally, as discussed above, the program would not create an excessive entanglement of church and state because it would not require pervasive monitoring to ensure appropriate use of government funds.

Finally, the Free Exercise Clause disapproves of FEMA's discriminatory eligibility policies under the strict scrutiny standard. First, this Court's recent precedent set in *Trinity Lutheran v. Comer* controls this case, rather than the analysis contained in *Locke v. Davey*. Second, the mixed-use policies are not neutral nor generally applicable because the policy discriminates against religious services on its face and because it selectively imposes a burden on conduct motivated by religious belief. Third, strict scrutiny states that only a governmental interest of the highest order can justify a discriminatory law. There is no such interest in this case

because the government's antiestablishment interest is specifically tempered by the Free Exercise Clause and cannot satisfy strict scrutiny.

STANDARD OF REVIEW

Courts of appellate jurisdiction review lower courts' determinations of legal issues, including decisions to grant summary judgment, de novo, with no deference given to the lower court's rulings. *Texas v. United States*, 497 F.3d 491, 491 (5th Cir. 2007) (citing *Garcia v. LumaCorp, Inc.*, 429 F.3d 549, 553 (5th Cir. 2005)); *United States v. Williams*, 340 F.3d 1231, 1238 (11th Cir. 2003). Issues of justiciability, such as ripeness, are legal issues reviewed de novo. *Texas v. United States*, 497 F.3d at 491 (citing *Groome Res. Ltd. v. Par. of Jefferson*, 234 F.3d 192, 198–99 (5th Cir. 2000)). Finally, whether an agency's action violates the constitution is also a matter that courts review de novo. *Bettor Racing, Inc. v. National Indian Gaming Commission*, 812 F.3d 648, 653 (8th Cir. 2016); *see also In re FCC 11-161*, 753 F.3d 1015, 1041 (10th Cir. 2014).

ARGUMENT

I. The Cowboy Church of Lima's Lawsuit Was Not Barred by the Doctrine of Ripeness and FEMA is Subject to a Lawsuit in This Case Prior to FEMA Determining if the Church is Eligible Under Its Mixed-Use Analysis.

The Cowboy Church of Lima, Petitioner in this case, argues that the issue is ripe for review and that this Court should proceed to evaluate the constitutionality of FEMA's regulations. Determining whether an administrative action is ripe for judicial 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. *Nat'l*

Park Hosp. Ass'n v. U.S. Dep't of the Interior, 538 U.S. 803, 808 (2003) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Additionally, the issue of ripeness, at least in part, involves the existence of a live case or controversy under Article III of the United States Constitution. *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). Undergirding the ripeness doctrine is a two-part goal: to prevent the courts from engaging in abstract questions of administrative policy and to protect agencies from judicial interference until an administrative decision has been formalized and its effects are felt in a concrete way. *Abbott Labs.*, 387 U.S. at 148–49. This Court has recognized, however, that an impending adverse action will satisfy the ripeness doctrine. *Pennsylvania v. West Virginia* (*Pipeline Cases*), 262 U.S. 553, 593 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."). Moreover, uncertainty surrounding the constitutionality of a regulatory scheme can also be sufficient to satisfy the ripeness requirements. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581–82 (1985).

Although FEMA had not yet reached a final decision with regard to its mixed-use analysis, that analysis presupposes that the Establishment Clause bars churches and other religious organizations from receiving assistance. Because this presupposition is at the heart of Petitioner's challenge, the lawsuit is ripe for review. First, the question is fit for judicial review, and second, Petitioner can easily demonstrate a hardship resulting from the withholding of court consideration.

A. Whether FEMA's discriminatory mixed-use policy comports with the First Amendment is a question fit for judicial decision.

There are several factors to consider in determining whether an issue is fit for judicial review. Particularly, determining the fitness of an administrative law issue "depends on whether it is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1281 (D.C. Cir. 2005). The court below stated that the Establishment Clause issue is "a purely legal one" and that FEMA's mixed-use policy scheme is a "final agency action." R. at 14. The discussion that followed, however, focused on how further factual development would "significantly advance [the court's] ability to deal with the legal issues presented." R. at 14 (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)).

Although the Fourteenth Circuit's opinion focused on the fact that FEMA had not completed its mixed-use analysis, the analysis itself presupposes that churches are barred from FEMA relief absent some exception. R. at 14; *see generally* Fed. Emergency Mgmt. Agency, FP 104-009-2, *Public Assistance Program and Policy Guide* (2016). As the dissent below points out, this presupposition is at the heart of the question before the Court today. R. at 18. The question is whether allowing a church to receive FEMA funds would violate the Establishment Clause and whether FEMA's discriminatory policy scheme comports with the Free Exercise Clause. These are purely legal issues stemming from FEMA's enactment of certain

regulations and do not require a more concrete setting than the one presented. *See Duke Power Co.*, 438 U.S. at 81–82.

The issue in this case is undoubtedly legal in nature, and the agency action from which the issue arises is undoubtedly final. Furthermore, no further factual development is necessary for this Court, or any other, to "deal with the legal issues presented." R. at 14. Finally, despite the Fourteenth Circuit's concerns, this case is not an inappropriate attempt to "effect political change," whether inadvertent or not. R. at 14.

> *1. Whether the Establishment Clause bars churches from receiving FEMA Public Assistance Program funds is a purely legal question and the policies barring such funding are a final agency action.*

A claim that an agency's action is contrary to law presents a purely legal issue. *Nat'l Ass'n of Home Builders*, 417 F.3d at 1281–82. This case poses the simple question of whether FEMA's action in establishing the mixed-use eligibility scheme comports with the Establishment and Free Exercise Clauses of the First Amendment. Furthermore, this case involves a facial challenge to the relevant action and such facial challenges are presumptively legal in nature. *Id.*

Title 5 U.S.C. § 704 provides that an agency action is reviewable when the action is final. 5 U.S.C. § 704. Additionally, § 701(b)(2) of the same title refers to § 551 to provide the definition of agency action. 5 U.S.C. § 701(b)(2). Section 551(13) states that agency action "includes the whole or a part of an agency rule . . ." 5 U.S.C. § 551(13). Finally, § 551(4) defines an agency rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed

to implement, interpret, or prescribe law or policy . . .” 5 U.S.C. § 551(4). Therefore, the promulgation of any rule, as defined by § 551(4), constitutes an agency action.

Furthermore, rules promulgated through the formal notice-and-comment process and published in the Federal Register constitute “final agency action.” *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007). FEMA, pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“the Stafford Act”), adopted the *Public Assistance Program and Policy Guide* through the formal notice and comment rulemaking process. Fed. Emergency Mgmt. Agency, *supra*, 7; 42 U.S.C. § 5165c. This Guide includes FEMA’s mixed-use test for eligibility. Fed. Emergency Mgmt. Agency, *supra*, 16. Therefore, the promulgation and publication of the policies contained in the Guide constitutes a final agency action that the federal courts may review.

Additionally, if resolving an issue will foster effective administration of a statute, then that issue is more fit for judicial review. *Merchs. Fast Motor Lines, Inc. v. Interstate Commerce Comm’n*, 5 F.3d 911, 920 (5th Cir. 1993) (citing *Abbott Labs.*, 387 U.S. at 154–55). As noted, the “mixed use” evaluation is an onerous one, both for FEMA and for the applicant; it requires onsite inspections, tedious estimations regarding use of the facilities, documentation of items and spaces destroyed, and, in some cases, multiple layers of administrative review. R. at 6–10, 11–12. By reaching the question of whether or not the Establishment Clause outright prohibits assistance to churches, the Court may eliminate this onerous process altogether.

2. The purely legal question in this case does not require any further factual development or a more concrete setting for a court to deal with it appropriately, and this case is not an improper attempt to effect political change.

The Fourteenth Circuit found against Petitioner because the court believed further factual development would aid the court in dealing with the legal issues presented. R. at 14. Further, the court noted its concern that this case may inadvertently be a vehicle for improper political change. R. at 14. Given the true heart of the issues in this case, however, there is no further factual development needed. Furthermore, review of potentially constitutional agency actions is not a political act. Rather, it is the "duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In the case at bar, it is the judiciary's responsibility to say what the constitutional law is and whether the policies in question violate that law, for "a law repugnant to the constitution is void." *Id*. at 180.

The lower court stated that Petitioner "is asking us 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. This, however, would be an unnecessary determination. To reach the true issue at the center of this case, the Court need not rely on FEMA's determination. Rather, the focus should be on the constitutionality of the policies that would inform that determination. R. at 18 (Sylvester, J., dissenting). This Court has also held that a party need not await the fulfillment of a threatened injury for a case to be ripe. *Pipeline Cases*, 262 U.S. at 593. In that case, the complainants brought suit only a few days after the statute in

question became effective; thus, the agency had not handed down any order under the statute and the statute had not "been tested in actual practice." *Id.* at 592–93. Nonetheless, the Court found the suit was not premature. *Id.* at 593.

On the other hand, the Court refused to make a similar determination in *Nat'l Park Hosp. Ass'n v. U.S. Dep't of the Interior*, 538 U.S. 803 (2003). In that case, the complainant challenged a National Park Service regulation that purported to remove "concession contracts" from the purview of the Contract Disputes Act. *Id*. at 807. Because the challenge was facial and not predicated on a "concrete dispute" with the National Park Service, the Court questioned the ripeness of the issue for review. *Id*. Because the federal defendants conceded that some concession contracts would come under the Contract Disputes Act despite the regulation, the Court held the question "should await a concrete dispute about a particular concession contract." *Id.* at 812.

In this case, however, there is no such need for further factual development. Petitioner has been subjected to the mixed-use analysis simply because its facility is used, in part, for religious services. *See generally* Fed. Emergency Mgmt. Agency, FP 104-009-2, *supra*. A complainant need not await the consummation of an impending injury. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143. Furthermore, FEMA has already determined how all mixed-use facilities will be analyzed, and the Court's ruling would impact all such similar facilities. In *National Park*, on the other hand, the National Park Service had not determined the outer bounds of applicability of the regulation in question. *National Park*, 538

U.S. at 812. FEMA's treatment of thousands of other mixed-use facilities will be impacted by this Court's evaluation of the Establishment Clause question. Unlike the situation in *National Park*, the question does not pertain to a particular or unique contract, facility, dispute, or set of circumstances.

Finally, Petitioner has already suffered some immediate harm regardless of FEMA's determination under the mixed-use scheme. The fact that FEMA has not fully run the traps of its mixed-use analysis does not prevent the Court from reaching the question of whether such traps are in degradation of the law in the first place. *Duke Power Co.*, 438 U.S. at 81–82 ("we will be in no better position later than we are now to decide this question"). In *Duke Power Co.*, the Court found that the complainants would sustain certain injury without judicial review of the statute in question. *Id.* at 81. The Court held that such immediate injury satisfied the ripeness doctrine. *Id.* In this case, Petitioner will sustain a similar immediate injury — denial of full funding simply because the facility is partially used for religious services. This denial will occur regardless of FEMA's determination under the mixed-use policy because even when funding is granted under that policy, the proportion of non-religious use limits the funding. Thus, the crux of the question has been conclusively determined: whether Establishment Clause requires such a denial in funding. Therefore, Petitioner will surely be denied at least *some* of the funding it would be entitled to were it not a church.

Because the question is a purely legal one, FEMA's action is final, judicial action will foster effective administration of the Stafford Act, no further factual

development is necessary, and this case will not effect inappropriate political change, the Court should hold that the question is fit for judicial decision and that the issue is ripe for review.

B. The Church has already suffered significant hardship and will continue to experience future hardship if this Court withholds consideration.

Even where a party establishes an issue fit for judicial determination, the party must still show that hardship will occur if the court withholds consideration. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also Cent. & S.W. Servs. v. U.S. Envtl. Prot. Agency*, 220 F.3d 683, 690 (5th Cir. 2000). In *Ohio Forestry*, the Court discussed three types of harm that may satisfy this element of the ripeness doctrine: (1) adverse legal effects against the party seeking relief; (2) practical harms on the interests advanced by the party seeking relief; and (3) the harm of being forced to modify one's behavior in order to avoid future adverse consequences. *Id*. at 733–34.

The hardship requirement does not require the alleged harm to have actually come to pass. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143; *see also Pipeline Cases*, 262 U.S. at 593. Furthermore, mere uncertainty about the validity of an agency action may be enough to constitute harm. *Union Carbide*, 473 U.S. at 581 (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201–02 (1983)).

In this case Petitioner is suffering a legal harm because its right to access FEMA funds is abridged on the basis of the mixed-use policy. Further, Petitioner suffered a severe practical harm because of the delays in adjudicating the question in this case. Finally, if the Court refuses to address the true question underlying this case, Petitioner will have to alter its future behavior to avoid future adverse consequences.

1. Petitioner has suffered and will continue to suffer an ongoing legal harm until the question in this case is resolved.

First, Petitioner has suffered and will continue to suffer an ongoing legal harm until the question in this case is resolved. This Court has recognized that legal harms include the creation of legal obligations. *Ohio Forestry*, 523 U.S. at 733. Under the existing scheme, Petitioner and others similarly situated have a legal obligation forced upon them because of their religious status. These would-be FEMA aid applicants must facilitate the mixed-use analysis and prove they qualify under this onerous standard simply because they allow religious services in their otherwise-qualified facilities. *See* Fed. Emergency Mgmt. Agency, *supra*, 13. In this case, Petitioner had to inventory or estimate all the uses of its facilities and work to convince the inspector and FEMA that it qualified for funds under the mixed-use standards. R. at 6–8. This harm is ongoing because any future applications for FEMA funding will subject Petitioner to the same tedious and burdensome process.

2. Petitioner suffered a compounding practical harm with each passing day the courts have withheld consideration.

Second, Petitioner has suffered a compounding practical harm as a result of the delay in adjudication. As a result of extreme flooding, the Petitioner faced extensive damage to its facilities. R. at 5. In an assessment of the damage, a structural engineer concluded time-sensitive structural repairs were necessary. R. at 5-6. In fact, the roof collapsed as a result of the damage, and likely, the delay in repairs. R. at 9. This collapse caused escalation of the repair costs and forced Petitioner to resort to donations and the generosity of the community. R. at 8–9. Moreover, the inability to use the facilities during the extended repair period constitutes harm not just to Petitioner, but also to the Lima community at large.

While it is true the Church was able to solicit donations to make the structural repairs necessary, the Church brought this action August 29, 2016, and the structural repairs were not complete until almost a year later. R. at 8–9. As of filing this document, it is nearly fifteen months since the institution of the suit. R. at 8–9. Ripeness seeks to prevent premature adjudication such that the court does not entangle itself in abstract disagreements; thus, the proper lens for the hardship inquiry is when the judicial process is invoked. *Union Carbide,* 473 U.S. at 580 (1985). Petitioner was suffering harm at the time the judicial process was invoked; thus, the availability of judicial review is presumed. *Nat'l Helium Corp. v. Morton*, 326 F. Supp. 151, 154 (D. Kan. 1971). Petitioner faced a choice: take no action until final adjudication of the case, or pursue another route to repair the facilities in the meantime. Parties in situations like this should not be punished later for their

remedial and mitigation efforts. Courts should not punish a bleeding plaintiff when that plaintiff stitches his own wounds.

At the time of the initial suit, Petitioner faced the sincere potential of compounding practical harm. That harm may have resulted in the total loss of its facilities had Petitioner not undertaken to seek out alternative funds for repair from the volunteered time and labor from the greater community. R. at 5–6, 8–9. Certainly, such an impending and imminent threat of harm fulfills the hardship element of the ripeness doctrine. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143.

> *3. Without Court adjudication of the question in this case, Petitioner has been forced to modify its behavior and will be forced to further modify its behavior to avoid adverse future consequences.*

At the time of the initial suit, Petitioner was forced to modify its behavior to avoid immediate adverse consequences. Additionally, if the question in this case is not resolved, Petitioner will have to modify its behavior further to avoid such consequences in the future. This second hardship is the same kind the Fifth Circuit discussed and recognized as valid in *Texas v. United States*, 497 F.3d at 491.

First, Petitioner had to seek private donations to save its buildings and prevent further destruction, if not total loss. R. at 5. This conduct was an alteration of future behavior because without the mixed-use policies, Petitioner could have relied, at least in part, on FEMA funding. Without a ruling on the question in this case, Petitioner could not have been certain FEMA would grant the funds. Even if the grant would not have covered the total cost of the repairs under the prorated

funding rules, Petitioner was required to increase its solicitation efforts to raise more funds. This behavioral shift resulted from uncertainty about the legitimacy of the policies in question, and this Court has found similar issues to be ripe in other cases. *Union Carbide*, 473 U.S. at 581. Finally, the Court should recognize the harm done to the community: if Petitioner was certain FEMA would grant funding, some of the private charity expended on Petitioner's cause would have been rerouted to organizations and individuals not eligible for a FEMA Public Assistance grant.

Second, without a judicial determination on the question in this case, the current FEMA regulations will force Petitioner to alter its behavior in the future. In *Texas v. United States*, had Texas not been permitted to challenge the agency's actions, it would have faced a very similar choice: participate in an allegedly invalid process or "eschew the process entirely with the hope of invalidating it in the future." *Texas v. United States*, 497 F.3d at 499. This second option would have exposed Texas to the risk of significant adverse action if a future court ruled against them. *Id.* This Court has recognized this kind of choice as a cognizable hardship. *See id*. (citing *Abbott Labs.*, 387 U.S. at 152; *Union Carbide*, 473 U.S. at 581).

Here, Petitioner is faced with a choice: continue operations as before and hope to successfully challenge the policy in the event of another tragedy, or modify its behavior to ensure compliance with the mixed-use standards. Petitioner's choice to continue its status quo is equivalent to Texas's choice to eschew the process, and Petitioner's choice to modify its behavior to comply with the mixed-use policy is

equivalent to Texas's choice to comply with the process. Unless the Court rules on the question in this case, the choice will be clear.

Because judicial consideration has been withheld here, Petitioner suffered and will continue to suffer both a legal harm and practical hardship. Furthermore, Petitioner was forced to alter its behavior to avoid further damage, and will be forced to significantly alter its behavior to avoid additional consequences in the future. Therefore, the Court should hold the hardship prong of the ripeness doctrine is satisfied in this case and proceed to the true issue presented.

II. The First Amendment Requires that Petitioner Should be Eligible for FEMA Public Assistance Funds.

In 1872, Justice Miller, writing for the Court, said, "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U.S. 679, 728 (1872). This eloquent statement captures the heart of the doctrine of separation of church and state. Fortunately, facts of this case do not offend this truism, and Petitioner in this matter does not ask the government to support any dogma or establish any sect.

The First Amendment's provisions regarding the freedom of religion are the Establishment Clause and the Free Exercise Clause. The Establishment Clause prohibits any law "respecting an establishment of religion," including covert attempts to establish a state religion. U.S. Const. amend I; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Establishment Clause aims to prevent three main government activities: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664,

668 (1970)). The Free Exercise Clause forbids the adoption of any law "prohibiting the free exercise [of religion]." U.S. Const. amend. I. It "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993)).

The question in this case has a dual nature; on one hand, the Court must consider whether the Establishment Clause prohibits FEMA from disbursing funds to religious institutions under its Public Assistance Program. On the other hand, the Court must determine whether FEMA's existing discriminatory policies maintain neutrality under the Free Exercise Clause, such that the law works no "indirect coercion or penalties on the free exercise of religion." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

In interpreting and implementing the Stafford Act, codified in 42 U.S.C. §§ 5121–5208, FEMA has promulgated a complex system of regulations that determine a facility's eligibility to receive financial assistance in repairs, restorations, and replacements. Title 42 U.S.C. § 5172 authorizes the President to make contributions "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." 42 U.S.C. § 5172(a)(1)(B). The statute further provides that a private nonprofit facility is only eligible if it "provides critical services (as defined by the President)" or if the owner of the facility applied for a

Small Business Administration loan and was denied or received insufficient funds to complete the necessary work. 42 U.S.C. § 5172(a)(3); *see also* 44 C.F.R. § 206.226(c). Section 5122 applies here and includes the following terms in its definition of "private nonprofit facility:"

> (B)Additional facilities
> In addition to the facilities described in subparagraph (A), the term "private nonprofit facility" includes any private nonprofit facility that provides essential services of a governmental nature to the general public (including museums, zoos, performing arts facilities, community arts centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, broadcasting facilities, and facilities that provide health and safety services of a governmental nature), as defined by the President.

42 U.S.C. § 5122(11). Petitioner in this case qualifies under this subsection, as its facilities provide several of these "essential services" defined by the President through FEMA. Fed. Emergency Mgmt. Agency, FP 104-009-2, *Public Assistance Program and Policy Guide* 13 (2016).

FEMA's regulations provide further instruction on eligibility for the program in the C.F.R., and FEMA's *Public Assistance Program and Policy Guide* ("the Guide") contains FEMA's policies and procedures for administering the plan. *Id*. at vii. Under the regulations, an eligible applicant is a private nonprofit organization that owns a private nonprofit facility. 44 C.F.R. §§ 206.222(b), 206.223(b). To receive financial assistance, the assistance must be required as a result of the major disaster event, the facility must be located within a designated area, and the applicant must have legal responsibility of the facility. 44 C.F.R. § 206.223(a).

The regulations also expand on the statutory definition of "private nonprofit facility." 44 C.F.R. § 206.221(e). This regulation provides that "additional facilities" 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. All such facilities must be open to the general public." *Id*. The Guide expands on these terms, listing many services the Petitioner's facility provides. Fed. Emergency Mgmt. Agency, *supra*, 13. The Guide also contains a list of ineligible services, including "religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large." *Id*. at 14.

Finally, the Guide contains the prejudicial "mixed-use" rules. *Id.* at 13. In a facility that provides both eligible and ineligible services, FEMA determines how much of the facility's use is for ineligible services; if that amount exceeds fifty percent, the entire facility is barred from receiving aid. *Id*. at 16. If a specific space is used for eligible services more than fifty percent of the operating time, the mixed-use facility will receive funding in direct proportion to the percentage of eligible services provided. *Id*. For example, if a facility provides eighty percent eligible services, it will receive funding for eighty percent of its restoration costs.

As a result, a facility that is used fifty-one percent of the time for religious functions would be completely denied any Public Assistance funds, despite providing important nonreligious services forty-nine percent of the time. This scheme does not comport with the requirements of the First Amendment. First, the

Establishment Clause does not prohibit institutions from receiving public funds simply because a facility is used for religious services more than fifty percent of the time. Second, the Free Exercise Clause prohibits exactly this type of discrimination because it targets the religious for exclusion. This Court's precedent stands firmly for the proposition that Petitioner is entitled to receive funding from the FEMA Public Assistance program.

A. The Establishment Clause does not prohibit granting Public Assistance funds for facilities that otherwise qualify for such funding simply because those facilities are used for religious services.

The Establishment Clause prohibits laws that work to establish a religion and seeks to prevent three general evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668. The Court has candidly acknowledged that "there is no single constitutional caliper that can be used to measure the precise degree to which these three factors are present or absent" in a government action. *Tilton v. Richardson*, 403 U.S. 672, 677 (1971). So instead of adopting a single "test," the Court determines whether a government action violates the Establishment Clause on the basis of "judicial interpretation of social facts" and "a consideration of the cumulative criteria" developed over the years. *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693–94 (1984) (O'Connor, J., concurring)); *Tilton*, 403 U.S. at 678.

Over time, two analyses of government action have emerged: the *Lemon* test established in *Lemon*, 403 U.S. 602, and the "endorsement test," an analysis

advanced by Justice O'Connor to clarify the Establishment Clause doctrine and Lemon test in *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671, 674 (1990). The Court has emphasized, however, that the endorsement test is not a replacement for the *Lemon* factors. *See McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 861–63 (2005) (refusing to abandon or trivialize *Lemon*, though urged to do so by the petitioners in that case).

In this case, the inquiry is whether the Establishment Clause bars religious organizations from participating in the Public Assistance Program. Stated differently, if this Court strikes down the existing mixed-use test, would the resulting neutral rules for eligibility violate the Establishment Clause? Under either the *Lemon* test or the endorsement test, the answer is no. Neutral eligibility rules for all facilities under the Public Assistance Program would not conflict with the First Amendment's prohibition against state-established religion.

> *1. Under the traditional Lemon analysis, allowing currently ineligible mixed-use facilities to receive FEMA funding would not violate the Establishment Clause.*

In interpreting the Establishment Clause, this Court has recognized that "total separation between church and state . . . is not possible in an absolute sense," and in some instances, the government may engage in "necessary and permissible contacts" with religion to further government initiatives. *Lemon*, 403 U.S. at 614; *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). When that contact does arise, the

Court sometimes uses the *Lemon* test to analyze "governmental action challenged as violative of the Establishment Clause." *Tilton*, 403 U.S. at 678. The "test" is comprised of three elements: first, the challenged law must have a clear secular legislative purpose; second, its primary effect must not advance or inhibit religion; and third, it must not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 602–03 (citing *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243 (1968); *Walz*, 397 U.S. at 674).

a. The secular legislative purpose of FEMA's PA program would not change if the Court invalidates the mixed-use religious restriction FEMA currently uses.

The *Public Assistance Program and Policy Guide* states that the Program's mission "is to provide assistance to . . . local governments . . . and private nonprofit organizations so that communities can quickly respond to and recover from major disasters or emergencies . . ." Fed. Emergency Mgmt. Agency, *supra*, 5. This express purpose would not change if churches received funding through the PA Program. Indeed, this Court long ago rejected the "simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses." *Tilton*, 403 U.S. at 679 (citing *Bradfield v. Roberts*, 175 U.S. 291 (1899)). In *Tilton*, the Court stated that in evaluating federal grants, the "crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Id.*

The Court pointed to *Bradfield v. Roberts*, a case in which a federal construction grant was given to a hospital operated by a religious order. *Id.* The

Court noted that in *Bradfield* and other cases, various forms of government assistance had been upheld, including bus transportation, textbooks, and tax exemptions. *Id.*; *Everson v. Board of Education*, 330 U.S. 1 (1947); *Allen*, 392 U.S. at 236; *Walz*, 397 U.S. at 664. Specifically, the Court stated that "[c]onstruction grants surely aid these [religious] institutions in the sense that the construction of buildings will assist them to perform their various functions." *Tilton*, 403 U.S. at 679. Even so, "judicial concern" about the possibilities of legislative programs being subverted to advance religion "cannot, standing alone, warrant striking down a statute as unconstitutional." *Id.*

Here, FEMA demonstrates a legitimate secular purpose, one that would be maintained regardless of whether qualifying religious institutions received aid to restore their facilities. Though the funds would incidentally aid the Church in its functions — as the financial aid did in *Tilton* and *Bradfield* — Congress' goal of "providing Federal assistance programs for both public and private losses sustained in disasters" would be unchanged. 42 U.S.C. § 5121(b)(6).

> b. Allowing eligible religious institutions to receive funding without imposing a mixed-use restriction would neither work to advance nor inhibit religion.

The Court must next ascertain whether the primary effect of the legislation serves to inhibit or advance religion. *Allen*, 392 U.S. at 243; *Everson*, 374 U.S. at 222; *Tilton*, 403 U.S. at 679. This Court's line of religious education cases provides guidance on this issue, particularly *Allen*, 392 U.S. at 236.

In deciding whether to allow religious schools to receive free textbooks under a New York state statute, the Court noted that "religious schools pursue two goals, religious instruction and secular education." *Id.* at 245. Challengers in *Allen* and similar cases argued that religious and secular education processes were so intertwined that furnishing textbooks essentially aided in teaching religion and did not serve a public purpose. *Id.* at 247–48. The Court rejected this argument, stating that the State's broad interest in education is "a properly public concern: . . . 'Individual interests are aided only as the common interest is safeguarded.'" *Id.* at 247 (citing *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 375 (1930)). Given the "valuable role" of private education in raising community knowledge and experience, and the state interest in secular education, the *Allen* court held that granting textbooks to religious schools did not establish a religion within the meaning of the First Amendment. *Id.* at 247–48.

Similarly, Petitioner also "pursue[s] two goals" in providing both secular and religious services to the local community. Though petitioner is a religious institution, like the schools, it provides a slew of community projects unrelated to the church, including banquets, Rotary Club meetings, Quinceañera celebrations, parties, concerts, rodeo meetings, a polling location for county elections, city council meetings, dances, substance abuse support meetings, and counseling sessions. R. at 7. The City of Lima so heavily relies on Petitioner as a host for its events that a 2008 vote to create a publicly-owned event center failed, "mainly due to citizens' concerns on why the town needed two event centers." R. at 4.

Like the religious schools, Petitioner plays a valuable role in the community, particularly in a small town like Lima. R. at 3. Additionally, Congress has explicitly stated its broad public policy concern in "in expediting the rendering of aid, assistance, . . . and the reconstruction and rehabilitation of devastated areas." 42 U.S.C. § 5121(a)(2). This broad public interest combined with Petitioner's significant contribution to the community make this case similar to *Allen*. Furthermore, the services Petitioner provides are not "so intertwined" that providing funding for the rehabilitation of its facilities necessarily serves to advance religion. To the contrary, Petitioner has to first qualify under FEMA's PA Program as a nonprofit suitable for federal aid, which requires Petitioner to meet certain tax status criteria, apply for specific loans, and engage in specific activities available to the general public. *See* discussion *supra* Section II. Furthermore, as the record states, and FEMA criteria ensure, "the buildings were open to anyone, anytime." R. at 4.

Though restoration of Petitioner's facilities would incidentally serve to benefit religion, as the books did for the schools, individual interests like religious practices are aided only as the common interest — public welfare — is safeguarded. *Cochran*, 281 U.S. at 375. Under Congress' secular purpose, then, the elimination of the mixed-use policies would not advance religion in a manner that implicates a First Amendment violation.

c. A grant of funds would not create excessive government entanglement in religion.

In *Lemon*, the Court stated that whether government's entanglement with religion is excessive looks to the purposes of the institutions benefitted, the nature of the aid provided, and the resulting relationship between the government and religious authority. *Lemon*, 403 U.S. at 615.

In *Tilton*, a case similar to this one, an program provided federal grants to institutions of higher education, including private and religious institutions, for their facilities so long as they met certain criteria. *Tilton*, 403 U.S. at 675. The Court noted that students at the benefitted religious institutions were not required to attend religious services, the schools upheld a practice of academic freedom, and though some theology courses were required, "the courses covered a range of human religious experience and [were] not limited to courses [on one] religion." *Id.* at 686–87.

As previously discussed, Petitioner serves dual purposes in providing both secular and religious services that are not limited to a single religion. R. at 7. Based on the broad variety of services Petitioner provides, it cannot be said "that the inculcation of religious values [is] . . . the dominant purpose of the institution[ ]." *Tilton*, 403 U.S. at 687. Further, participants in secular events that disagree with any message in a religious flyer or hymnal "are free to ignore them, or even to turn their backs," because nothing in such a passive situation can be said to "coerce [other] individuals in the practice of [Petitioner's] religion." *Cty. of Allegheny v.*

ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part and dissenting in part); *Allen*, 392 U.S. at 249.

Additionally, the nature of aid provided by the government lessens any entanglement between church and state. *Tilton*, *Allen*, and *Everson* all exhibit situations in which the Court upheld government aid to religious institutions because the aid involved "secular, neutral, or nonideological services, facilities, or materials." *Tilton*, 403 U.S. at 688. Here, as in *Tilton*, the government would provide funds for "facilities that are themselves religiously neutral," unlike situations in which the government tried to fund teacher salaries, who themselves "are not necessarily religiously neutral." *Id.* The provision of a building – something that is not inherently religious or nonreligious – lessens the risk of government aid to religion and the need for surveillance over the subsidy's effect on religious indoctrination. *Id*. at 687_88.

Lastly, government entanglement is not implicated if FEMA awarded Petitioner federal funds because "the Government aid here is a one-time, single-purpose construction grant [with] no continuing financial relationships or dependencies [and] no annual audits." *Id*. at 688. FEMA would not have to continuously involve itself in the day-to-day activities Petitioner puts on or make additional contributions. Ultimately, the *Lemon* test does not bar Petitioner's receipt of FEMA funds because the Public Assistance Program would maintain its legitimate secular purpose, would not advance religion, and would requiring little entanglement between church and state.

2. Allowing mixed-use facilities to receive PA Program Aid would not violate the Establishment Clause under Justice O'Connor's "endorsement" analysis.

This Court has stated that "[t]he Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (citing *Agostini v. Felton*, 521 U.S. 203, 222-223 (1997)); *see also Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). These key inquiries are easily analyzed regarding FEMA's Public Assistance Program — even without the mixed-use policy in place the Program would still have a clear secular purpose and would not have an improper effect.

a. Allowing mixed-use facilities to receive FEMA funding will not result in a violation of the purpose inquiry, because the Public Assistance program will retain a primarily secular purpose.

This Court has stated that a government action that is motivated in part by a religious purpose may be valid under the Establishment Clause, but one that "is entirely motivated by a purpose to advance religion" must be invalidated. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)). The Court has made clear, however, that the purpose test does not require that laws and rules demonstrate "callous indifference to religious groups." *Corp. of the Presiding Bishop of the Church of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) (quoting *Zorach*, 343 U.S. at 314). Rather, the test aims to prevent

government decision makers from acting with the intent of "promoting a particular point of view in religious matters." *Id.*

The primary purpose of FEMA's Public Assistance Program is to provide aid to local governments and organizations that provide community services and have been damaged by a disaster. 42 U.S.C. § 5121; Fed. Emergency Mgmt. Agency, *supra*, vii. A ruling in favor of Petitioner would not negate that undoubtedly secular purpose for all the reasons set forth in Section II.A.1.a, *supra*. Furthermore, the mixed-use policy does not currently ensure compliance with the Establishment Clause — some mixed-use facilities already receive funding under the current scheme.

FEMA cannot claim that the existing policies exist to preserve the separation of church and state. There are mixed-use facilities that provide religious services and receive grants under the Public Assistance Program. Fed. Emergency Mgmt. Agency, *supra*, 16. In this case, the facility provides a total of forty five percent eligible services — the result is that Petitioner is barred from receiving any funds. R. at 10. And yet, a facility providing only six percent more eligible use would receive funding for fifty-one percent of its total restoration costs. Fed. Emergency Mgmt. Agency, *supra*, 16. Under these provisions, if a community center is forty-nine percent eligible and the community center in the next town is fifty-one percent eligible, the latter will receive funding and the former will not. This simple comparison demonstrates that the existing eligibility cutoff point does not preserve any secular purpose of the program. Rather, it is an arbitrary means of excluding

certain applicants with higher religious affiliation under the guise of implementing the Establishment Clause.

Thus, removing the fifty percent rule for eligibility under the Public Assistance program will not negate the secular purpose of the program and, moreover, the existence of the rule does not currently protect the sanctity of the Establishment Clause or First Amendment.

b. Allowing currently ineligible mixed-use facilities to participate in the Public Assistance Program will not result in a violation of the effect inquiry.

The second "endorsement" factor is whether the Public Assistance Program would have the primary effect of promoting religion. *Lynch*, 465 U.S. at 681. This Court has included the excessive entanglement analysis in the primary effect inquiry in several cases. *Agostini*, 521 U.S. at 232–233. There are three primary considerations in determining whether aid has the violative effect of advancing religion: (1) whether it results in governmental indoctrination; (2) whether it defines its recipients by religion; and (3) whether it creates an excessive entanglement. *Id.* at 234. This case does not negatively implicate any of these considerations.

i. Granting FEMA aid to Petitioner will not implicate governmental indoctrination.

First, Petitioner and others similarly situated provide both eligible and ineligible religious services. Funding that supports the non-religious uses and purposes of the organization, however, does not offend the Establishment Clause because it retains a primarily secular *purpose*, as discussed above. *See Lynch*, 465

U.S. at 690–94 (O'Connor, J., concurring). The same is true for the secular *effect* analysis.

This Court has taken no issue with religious organizations accepting benefits under neutral programs so long as the benefits did not have the *primary* effect of subsidizing religion. *Widmar v. Vincent*, 454 U.S. 263, 273 (1981). In *Widmar*, Court explained that a neutral policy will not convey any state approval of a religious practice nor commit the state to "religious goals." *Id.* at 274. In *Lynch*, the Court explained that a program with neutral purpose will not violate the Establishment Clause, even where benefits to religion are substantial. *Lynch*, 465 U.S. at 680. And with only minimal oversight, the government can be reasonably assured that funds will be used in an appropriate manner and not for any contribution to indoctrination or proselytization through purchase of religious supplies, employment of ministers, etc.

ii. A program that allows granting FEMA aid to Petitioner will not identify its beneficiaries by religion.

Second, a ruling for Petitioner's would not result in a policy that identifies its beneficiaries by religion. The Court has evaluated this factor in determining whether a program promotes religion by asking whether the program creates a "financial incentive" to undertake religious indoctrination or practices. *See Agostini*, 512 U.S. at 230–31. The Court found in *Agostini* that no incentive is implicated when eligibility rules make no reference to religion and are based on neutral requirements. *Id.* at 231 ("This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor

religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.").

In another case, the Court overturned a state university's policy of barring registered religious student groups from using certain facilities even though those facilities were otherwise open to non-religious student groups. *See Widmar*, 454 U.S. 263. The Court determined whether the university, having opened its facilities for use by student groups, may now exclude groups because of the content of their use or events. *Id.* at 271–72. The Court held that the Establishment clause did not require such a rule, and that a neutral policy allowing access by all would not offend the First Amendment. *Id.* at 271–75 ("In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.").

In this case, a ruling for Petitioner would not give rise to a financial incentive for institutions to engage in religious services or programming. In fact, the opposite is true — a ruling against Petitioner would uphold the financial incentive for privately owned community centers not to engage in "too much" religious use. Furthermore, ruling for Petitioner would result in a facially neutral policy that evaluates eligibility on "neutral, secular criteria." *Agostini*, 512 U.S. at 231. The Court is aware of, and takes no issue with the fact that religious groups may benefit from a neutral policy as long as such benefit does not constitute the primary advancement of religion. *Widmar*, 454 U.S. at 273.

iii. Holding that FEMA may grant aid to Petitioner will not create an excessive entanglement that offends the Establishment Clause.

Finally, a ruling in Petitioner's favor would not establish an excessive entanglement between FEMA and the organizations receiving aid. An entanglement must be excessive before it violates the Establishment Clause, and courts have always tolerated some interaction between church and state. *Agostini*, 521 U.S. at 233. The Court's analysis in *Agostini* is highly instructive in this case. There, the Court held that, in the context of Title I of the Elementary and Secondary Education Act, provision of public-employee teachers for aid in parochial schools did not implicate the entanglement factor of the Establishment Clause analysis. *Id*. at 232–35.

In doing so, the *Agostini* Court analyzed and overruled *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, the Court found an excessive entanglement where the Title I program (i) required "pervasive monitoring" by public authorities to ensure that the teachers did not inculcate religion; (ii) required administrative cooperation between the agency and the schools; and (iii) might increase the dangers of "political divisiveness." *Agostini*, 521 U.S. at 233 (quoting *Aguilar*, 473 U.S. at 413–14). The *Agostini* Court modified this analysis by holding that the latter two factors are no longer sufficient, on their own, to create an excessive entanglement. *Id*. at 233–34. The Court reasoned that those factors would be present in all administration of Title I programs. *Id.* at 234. The same is evident in this case — any government grant to a private organization will require cooperation and may

give rise to heated political debate. Even disaster relief administered by FEMA is subject to these risks.

Furthermore, the *Agostini* Court went on to explain that monthly visits to supervise the public-employee teachers would be sufficient to ensure that inculcation was not taking place and would not constitute pervasive monitoring. *Id*. Moreover, the Court pointed out that it had found no excessive entanglement even where much a more onerous burden had been placed upon religious institutions. *Id*. (citing *Bowen v. Kendrick*, 487 U.S. 589, 615–17 (1988)). In *Bowen*, the Court held that monitoring to ensure proper use of funds was not pervasive when it included review of programs funded, inspection of materials purchased, and site visits. *Bowen*, 487 U.S. at 616–17. The Court emphasized that this was particularly true when the organizations were not "pervasively sectarian." *Id*.

In this case, Petitioner and others subjected to the mixed-use analysis on religious grounds may be subject to the kind of monitoring approved of in *Bowen* and upheld by *Agostini*. Even if FEMA must inspect accounting records, review materials purchased with grant money, and make visits to the site of the work, such oversight would not constitute pervasive monitoring or excessive entanglement under this Court's precedent. Further, Petitioner and others similarly situated are not so "perversely sectarian" that this analysis would be invalid. The Court used that phrase to describe purely religious parochial schools, not mixed-use facilities that serve as community centers. *Bowen*, 487 U.S. at 616–17. Therefore, under the Court's analysis in *Agostini* and *Bowen*, a ruling for Petitioner in this case will not

result in an excessive entanglement because it does not implicate a "pervasive monitoring" of the recipient of the funds.

Because invalidating the missed-use policies would not result in a program lacking in secular purpose, and because such a ruling would also not destroy the primarily secular effect of the Public Assistance program, the Court should hold that the Establishment Clause does not bar Petitioner's receipt of funding under the Public Assistance Program. In so holding, the Court should proceed to ask whether FEMA's discriminatory mixed-use policy violates the Free Exercise Clause.

B. The Free Exercise Clause and the strict scrutiny standard prohibit FEMA's discriminatory treatment of facilities that provide religious services.

The Free Exercise Clause protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that disadvantage the religious or place upon them a special disability. *Lukumi Babalu*, 508 U.S. at 533, 542. The right to free exercise encompasses protection for both religious belief and actions taken in religious practice. *Id.* at 546, 547 ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."). In recent years, the Court has differentiated between laws that are neutral and generally applicable, and those that single out the religious. *Trinity Lutheran*, 137 S. Ct. at 2020.

Laws that are either not facially neutral *or* are not generally applicable may violate the Free Exercise Clause and are subject to strict scrutiny. *See id.* at 2021 (quoting *Lukumi Babalu*, 508 U.S. at 532); *Lukumi Babalu*, 508 U.S. at 546. In

other words, the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). This Court has explained that withholding a generally available benefit from the religious "imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). Therefore, under the strict scrutiny standard, the Court asks whether there is such a state interest and whether the discriminatory policy is narrowly tailored to promote that interest. *Lukumi Babalu*, 508 U.S. 546 (citing *McDaniel*, 435 U.S. at 628).

The United States Congress has seen fit to codify some of these principles in the Religious Freedom Restoration Act ("RFRA"), which provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). This is true "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). In these provisions, "government" "includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . ." 42 U.S.C. § 2000bb-2(1). Furthermore, "person" includes non-profit corporations for the purposes of the RFRA. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–69 (2014).

In the case before the Court today, FEMA's mixed-use policies fall well within the scope of the Free Exercise Clause and the RFRA. Further, the policies are facially discriminatory and are not generally applicable, giving rise to a presumption of unconstitutionality and subjecting the policies to strict scrutiny. Finally, Respondent cannot establish a governmental interest sufficient to rebut that presumption and justify the policy.

> *1. The Free Exercise Clause and the RFRA do not draw a distinction between religious status and religious use; they merely require that the government not burden religion.*

Laws that infringe on the right to free exercise are subjected to the most exacting scrutiny, along with the interests that purport to justify them. *Trinity Lutheran*, 137 S. Ct. at 2019. Recently, this Court has discussed the reach of the Free Exercise Clause to apply this scrutiny. *See id.* at 2025–26 (Gorsuch, J., concurring in part). The Court's existing precedent, however, directs the outcome for today's case. *See Trinity Lutheran*, 137 S. Ct. at 2012–27 (striking down a law that discriminated on religious *identity* in granting funds); *but cf. Locke v. Davey*, 540 U.S. 712, 712–25 (2004) (upholding a law that discriminated by preventing religious *use* of government funds).

In *Locke*, the Court examined a Washington state law that required recipients of a state sponsored scholarship to be enrolled in a public or private post-secondary institution in Washington, even one with a religious affiliation. *Locke*, 540 U.S. at 716, 718. Pursuant to the Washington State Constitution, though, the statute prohibited a recipient of the scholarship from pursuing a degree that is

"devotional in nature or designed to induce religious belief" at that institution while receiving the scholarship. *Id.* at 716. Ostensibly, the student could concurrently pursue a devotional degree at a different institution. *Id.* at 721 n.4.

The law imposed no civil or criminal sanction on any religious service or rite, did not deny ministers the right to engage in political affairs, and did not "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21. The Court also reasoned that the training of clergy is not interchangeable with training for secular professions because it is as much a religious endeavor as an academic pursuit. *Id.* at 721. Furthermore, allocating taxpayer funds to the training and support of church leaders is a "hallmark" of an "established" religion. *Id.* at 722. Finally, the Court concluded that the statute did not contain any suggestion of animus toward religion because the scholarship could be used at religious institutions and recipients could take some devotional theology classes. *Id.* at 725. Therefore, the Court held that the statute was not "inherently constitutionally suspect," and could escape strict scrutiny. *Id.*

Over a decade later, the Court examined another denial of benefits in *Trinity Lutheran*. There, the State of Missouri had a policy of categorically rejecting religious institutions from participating in their Scrap Tire Program. *Trinity Lutheran*, 137 S. Ct. at 2018. The program provides reimbursement to nonprofit organizations that install playground surfaces made from recycled tires. *Id.* at 2017. Trinity Lutheran Church of Columbus administers a preschool and daycare called the Trinity Lutheran Church Child Learning Center, which operates year-round

and is open to children of working families of all religions. *Id.* Its mission is "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively." *Id.* at 2018. In 2012, the Center applied to the Scrap Tire Program for funding to replace the pea-gravel in their playground with a new, rubber surface. *Id.* Based on a number of neutral criteria, the Center ranked fifth among forty-four applicants that year — of those applicants, fourteen received grants. *Id.* at 2018. Because the Center was operated by the Church, however, it was denied funding. *Id.*

The Court concluded that Missouri's policy was subject to strict scrutiny. *Id.* at 2021. The policy expressly discriminated against otherwise eligible recipients and "[put] Trinity Lutheran to a choice:" either participate in the "otherwise available benefit or remain a religious institution." *Id.* at 2021–22. The State argued that its policy did not prohibit the Church from freely exercising its religious rights, but the Court rejected this argument. *Id.* (citing *Lyng*, 485 U.S. at 450; *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.")). Rather than assert entitlement to a subsidy, the Center merely asserted its right to participate in a public benefit program. *Id.* The injury was not the denial of the grant, but the refusal to allow the Center to compete on equal footing with secular organizations. *Id.* (citing *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

The Court explained why *Locke* did not control in *Trinity Lutheran*. *Id.* at 2022–24. In *Locke*, the scholarship applicant was not denied because of who the applicant was, but rather because of what he was planning to do with the funding — pay for training to join the clergy, an essentially religious endeavor. *Id*. at 2023. This pulled the case out of the domain of the Free Exercise Clause and into the "play in the joints" between the religion clauses of the First Amendment. *Locke*, 540 U.S. at 725. In other words, the Free Exercise Clause does not require the government to give taxpayer dollars for the education of ministers even when the Establishment Clause would allow it. The object of the funding in *Trinity Lutheran*, however, was not an "essentially religious endeavor." *Trinity Lutheran*, 137 S. Ct. at 2023. Rather, it was an inherently neutral endeavor — to resurface a playground — that happened to have incidental benefit to a religious organization. *Id*. The Center was taken out of the running for a grant simply because of its religious character, and thus Missouri's policy was subject to strict scrutiny. *Id*. at 2024.

Trinity Lutheran controls in this case. First, this case puts Petitioner to the same choice that the Center in *Trinity Lutheran* had. Petitioner can either participate in the program or limit the amount of religious services it allows in its facilities. This is an impermissible restriction of religious activities created by the limited access to the program. *See id*. at 2021–22; *Sherbert*, 374 U.S. at 404. Second, just like in *Trinity Lutheran*, this is a case where a religious organization is asserting its right to stand on equal footing with all other nonprofit organizations in

competition for funding that would otherwise be accessible. *Id.* at 2022. It is not one where an applicant is requesting a subsidy for a religion or a religious activity. *Id.*

Third, constructing a facility, even one that is used for religious purposes, is not an inherently religious endeavor. Building a multipurpose community center that happens to be owned by a church is not analogous to training members of the clergy. The act of constructing the facility is distinct from the use of the facility, while training clergy is, in and of itself, a religious activity. An incidental benefit to a religious institution is not inherently a violation of the First Amendment. *See Trinity Lutheran*, 137 S. Ct. at 2024; *Widmar*, 454 U.S. 273–74. Fourth, other than the mixed-use analysis, neutral criteria dictate eligibility for a grant under the Public Assistance program, just like in *Trinity Lutheran*. 137 U.S. at 2017–18. Finally, FEMA's mixed-use analysis and Missouri's anti-church policies both openly state their burden on the religious. *Id.* at 2018. Whether the discrimination occurs on the grounds of identity or use, both are violative of the First Amendment. *Id.* at 2025–27 (Gorsuch, J., concurring).

Respondent will argue that *Locke* controls. These arguments, however, are flawed. First, Respondent may assert that government funding of a religious facility is a "hallmark" of establishment. *Locke*, 540 U.S. at 722. But constructing a community center for the kind of mixed-use described by this case does not rise to the degree of training clergy. Second, the section below will discuss why FEMA's policies are not neutral or generally applicable. Therefore, Respondents will not be able to demonstrate the lack of animus described by the *Locke* Court. Finally,

Respondent may argue that this case is analogous to *Locke* because in that case the recipients could attend religious schools and take religious classes, and in this case facilities that comply with the fifty-percent rule can receive funding. *Id.* at 724–25. But this is a false analogy. In actuality, the facts in *Locke* are most analogous to FEMA's prorated funding system. FEMA funds must only be used for secular purposes, just as the scholarships in *Locke* could only be used for non-devotional degrees. *Id.* at 716.

The circuit court below grossly misstated the purpose of the FEMA Public Assistance Program. R. at 16 ("the logic of FEMA's statutory scheme is to redistribute taxpayer funds back to taxpayers or to nonprofit entities originally funded with taxpayer funds."). The circuit pointed out that Petitioner pays no taxes, and, citing no authority, pointed to the Free Exercise Clause as the source of that privilege. R. at 16. The circuit went on to state, again citing no authority, that under the Establishment Clause, Petitioner is barred from receiving any government funds. R. at 16–17. in conclusion, the circuit stated "the harmony [between the religion clauses] is created because the Church is not asked to support the State and the State is not asked to support the church." R. at 17.

This argument has two flaws. First, the stated purpose of the Public Assistance program has nothing to do with redistribution of tax dollars. Fed. Emergency Mgmt. Agency, *supra*, 5. Second, analysis of the religion clauses does not turn on taxes — the circuit's characterization of the First Amendment is overly broad, inaccurate, and unsupported. If the circuit's analysis was true and taken

literally, then churches could expect not to receive emergency assistance, the benefit of public works such as sidewalks and roads, or other ordinary government services. This Court has refuted that very idea. *Everson,* 330 U.S. at 17–18.

> *2. FEMA's mixed-use policy is subject to strict scrutiny because it subjects some facilities to unequal treatment simply because of religious use, and thus is neither facially neutral nor generally applicable.*

FEMA's mixed-use policies are not neutral or generally applicable under this Court's own standards. In *Lukumi Babalu*, the Court struck down a city ordinance that stated "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within" the city limits. *Lukumi Babalu*, 508 U.S. at 528. The ordinance defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at 527. The purported reason for this ordinance was "that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals." *Id.* at 528.

Although the ordinance itself did not mention a religion or openly reveal its purpose, the Court found that the ordinance was not neutral for several reasons: (1) because the city council members held open animosity against members of the target religion, (2) the ordinance itself targeted a specific religious practice, (3) the ordinances were carefully gerrymandered to prohibit religious killings but allow almost all secular killings, and (4) the ordinances went beyond steps reasonably necessary to promote the ends asserted in their defense. *Id.* at 548. Furthermore, the Court found a lack of general applicability because the ordinance was

underinclusive and only pursued the government's purported interest against religious activities. *Id.* at 543, 545.

In this case, there is a very similar situation. Unlike in *Lukumi Babalu*, however, FEMA's mixed-use policy discriminates against religious activities on its face. Fed. Emergency Mgmt. Agency, *supra*, 10–16. A law that lacks a secular meaning discernable from the language or context is not facially neutral. *Lukumi Babalu*, 508 U.S. at 533. Since it is a minimum requirement of neutrality that a law not discriminate on its face, the Court need not evaluate the mixed-use policy against any other test or set of factors. *Id.*

Furthermore, the mixed-use policy is not generally applicable. The basic principle is that government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. In this case, the mixed-use policies specifically discriminate against religious services. Fed. Emergency Mgmt. Agency, *supra*, 10–16. No religious service is offered without religious motivation. Therefore, the policies violate the basic principle of general applicability. *Lukumi Babalu*, 508 U.S. at 543.

> *3. Strict scrutiny mandates that only a governmental interest of the highest order can justify such discrimination, and there is no such interest in this case.*

Both this Court's constitutional common law and federal statute require a compelling government interest when a law infringes on the free exercise of religion. *Trinity Lutheran*, 137 S. Ct. at 2024; 42 U.S.C. § 2000bb-2. This Court has clearly and unequivocally stated that a governmental interest in antiestablishment

is not sufficient to justify such a law that is not neutral or generally applicable. *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting *Widmar*, 454 U.S. at 276 ("the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.")). Yet, that is the only interest that FEMA can assert in good faith in this case. Therefore, the Court must find that no "compelling interest" or "interest of the highest order" exists in this case sufficient to justify the mixed-use eligibility policy. *Id.*; 42 U.S.C. § 2000bb-1. Because the policies are not even facially neutral, are not generally applicable, and are supported by no sufficient government interest, the Court must strike them down, and need not proceed to the "narrowly-tailored" inquiry. *See Trinity Lutheran*, 137 S. Ct. at 2024; *Lukumi Babalu*, 508 U.S. at 546–47; 42 U.S.C. § 2000bb-1.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Fourteenth Circuit and hold that this case is ripe for review, that the Establishment Clause does not prohibit Petitioner's receipt of FEMA Public Assistance funds, and that the Free Exercise Clause prohibits the continued enforcement of FEMA's mixed-use test as it applies to otherwise qualified facilities that provide religious services.

Respectfully submitted,
Team No. 35
Counsel for Petitioner
November 20, 2017

APPENDIX A – Constitutional Provisions

The First Amendment to the United States Constitution provides in relevant part:

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

APPENDIX B – Statutory Provisions

Provisions of the Administrative Procedure Act (5 U.S.C. §§ 500–596)

Section 551 – Definitions

"(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
. . .
(13) 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; . . ."
5 U.S.C. § 551.

Provisions of Title 5 Chapter 7: Judicial Review (5 U.S.C. §§ 701–706)

Section 701 – Application; definitions

"(b) For the purpose of this chapter—
. . .
(2) 'person', 'rule', 'order', 'license', 'sanction', 'relief', and 'agency action' have the meanings given them by section 551 of this title."
5 U.S.C. § 701.

Section 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. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704.

Provisions of Title 42 Chapter 68: the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C §§ 5121–5208)

Section 5122 – Definitions

"As used in this chapter—

. . .

(11) Private nonprofit facility.—

(A)In general.—

The term "private nonprofit facility" means private nonprofit educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled) and facilities on Indian reservations, as defined by the President.

(B)Additional facilities.—

In addition to the facilities described in subparagraph (A), the term "private nonprofit facility" includes any private nonprofit facility that provides essential services of a governmental nature to the general public (including museums, zoos, performing arts facilities, community arts centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, broadcasting facilities, and facilities that provide health and safety services of a governmental nature), as defined by the President." 42 U.S.C. § 5122.

Section 5151 – Nondiscrimination in disaster assistance

"(a) Regulations for equitable and impartial relief operations

The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status." 42 U.S.C. § 5151.

Section 5165c – Public notice, comment, and consultation requirements

"(a) Public notice and comment concerning new or modified policies

(1) In general

The President shall provide for public notice and opportunity for comment before adopting any new or modified policy that—

(A) governs implementation of the public assistance program administered by the Federal Emergency Management Agency under this chapter; and

(B) could result in a significant reduction of assistance under the program.

(2) Application

Any policy adopted under paragraph (1) shall apply only to a major disaster or emergency declared on or after the date on which the policy is adopted."

42 U.S.C. § 5165c.

Section 5172 – Repair, restoration, and replacement of damaged facilities

(a) Contributions

(1) In general

The President may make contributions—

. . .

(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.

. . .

(3) Conditions for assistance to private nonprofit facilities

(A) In general

The President may make contributions to a private nonprofit facility under paragraph (1)(B) only if—

(i) the facility provides critical services (as defined by the President) in the event of a major disaster; or

(ii) the owner or operator of the facility—

(I) has applied for a disaster loan under section 636(b) of title 15; and

(II)

(aa) has been determined to be ineligible for such a loan; or

(bb) has obtained such a loan in the maximum amount for which the Small Business Administration determines the facility is eligible.

(B) Definition of critical services

In this paragraph, the term "critical services" includes power, water (including water provided by an irrigation organization or facility), sewer, wastewater treatment, communications (including broadcast and telecommunications), education, and emergency medical care.

. . ." 42 U.S.C. § 5172.

APPENDIX C – Regulatory Provisions

Provisions of Code of Federal Regulations Title 44 Part 206: Disaster Assistance

Subpart A - General
Section 206.2 – Definitions

"(19) Private nonprofit organization: Any nongovernmental agency or entity that currently has:

(i) An effective ruling letter from the U.S. Internal Revenue Service granting tax exemption under section 501 (c), (d), or (e) of the Internal Revenue Code of 1954; or

(ii) Satisfactory evidence from the State that the organization or entity is a nonprofit one organized or doing business under State law.

(20) Public Assistance: Supplementary Federal assistance provided under the Stafford Act to State and local governments or certain private, nonprofit organizations other than assistance for the direct benefit of individuals and families. . ." 44 C.F.R. § 206.2.

Section 206.11 – Nondiscrimination in disaster assistance

"(b) All personnel carrying out Federal major disaster or emergency assistance functions, including the distribution of supplies, the processing of the applications, and other relief and assistance activities, shall perform their work in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status." 44 C.F.R. § 206.11.

Subpart G – Public Assistance Project Administration
Section 206.221 – Definitions

"(e) Private nonprofit facility means any private nonprofit educational, utility, emergency, medical, or custodial care facility, including a facility for the aged or disabled, and other facility providing essential governmental type services to the general public, and such facilities on Indian reservations. Further definition is as follows:

(1) Educational facilities means classrooms plus related supplies, equipment, machinery, and utilities of an educational institution necessary or appropriate for instructional, administrative, and support purposes, but does not include buildings, structures and related items used primarily for religious purposes or instruction.

(2) Utility means buildings, structures, or systems of energy, communication, water supply, sewage collection and treatment, or other similar public service facilities.
(3) Irrigation facility means those facilities that provide water for essential services of a governmental nature to the general public. Irrigation facilities include water for fire suppression, generating and supplying electricity, and drinking water supply; they do not include water for agricultural purposes.
(4) Emergency facility means those buildings, structures, equipment, or systems used to provide emergency services, such as fire protection, ambulance, or rescue, to the general public, including the administrative and support facilities essential to the operation of such emergency facilities even if not contiguous.
(5) Medical facility means any hospital, outpatient facility, rehabilitation facility, or facility for long term care as such terms are defined in section 645 of the Public Health Service Act (42 U.S.C. 2910) and any similar facility offering diagnosis or treatment of mental or physical injury or disease, including the administrative and support facilities essential to the operation of such medical facilities even if not contiguous.
(6) Custodial care facility means those buildings, structures, or systems including those for essential administration and support, which are used to provide institutional care for persons who require close supervision and some physical constraints on their daily activities for their self-protection, but do not require day-to-day medical care.
(7) Other essential governmental service facility means 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. All such facilities must be open to the general public.

(f) Private nonprofit organization means any nongovernmental agency or entity that currently has:
(1) An effective ruling letter from the U.S. Internal Revenue Service, granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code of 1954, or
(2) Satisfactory evidence from the State that the nonrevenue producing organization or entity is a nonprofit one organized or doing business under State law."
44 C.F.R. § 206.221.

Subpart H – Public Assistance Eligibility
Section 206.222 – Applicant eligibility

"The following entities are eligible to apply for assistance under the State public assistance grant:
. . .
(b) Private non-profit organizations or institutions which own or operate a private nonprofit facility as defined in § 206.221(e)." 44 C.F.R. § 206.222.

Section 206.223 – General work eligibility

"(a) General. To be eligible for financial assistance, an item of work must:
(1) Be required as the result of the emergency or major disaster event;
(2) Be located within the designated area of a major disaster or emergency declaration, except that sheltering and evacuation activities may be located outside the designated area; and
(3) Be the legal responsibility of an eligible applicant.

(b) Private nonprofit facilities. To be eligible, all private nonprofit facilities must be owned and operated by an organization meeting the definition of a private nonprofit organization [see § 206.221(f)]." 44 C.F.R. § 206.223.

Section 206.226 – Restoration of damaged facilities

"Work to restore eligible facilities on the basis of the design of such facilities as they existed immediately prior to the disaster and in conformity with the following is eligible:
. . .
(c) Private nonprofit facilities. Eligible private nonprofit facilities may receive funding under the following conditions:
(1) The facility provides critical services, which include power, water (including water provided by an irrigation organization or facility in accordance with § 206.221(e)(3)), sewer services, wastewater treatment, communications, emergency medical care, fire department services, emergency rescue, and nursing homes; or
(2) The private nonprofit organization not falling within the criteria of § 206.226(c)(1) has applied for a disaster loan under section 7(b) of the Small Business Act (15 U.S.C. 636(b)) and
(i) The Small Business Administration has declined the organization's application; or
(ii) Has eligible damages greater than the maximum amount of the loan for which it is eligible, in which case the excess damages are eligible for FEMA assistance."
44 C.F.R. § 206.226.