No. C17-2893-1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

COWBOY CHURCH OF LIMA,

Petitioner,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,

W. Craig Fugate, Administrator of the

Federal Emergency Management Agency,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Attorneys for the Respondents
Team Number: 38

QUESTIONS PRESENTED

I. Under the ripeness doctrine, a benefits applicant cannot sue an administering agency until the agency has definitively rendered an adverse decision under a challenged policy and on a record that is sufficient for judicial review. The Cowboy Church of Lima assumed that FEMA would deny its application because of FEMA's "mixed-use" policy and preemptively filed suit only nine days after it applied and before a final determination was made. Has the Church failed to state a claim that is ripe for judicial review?

II. The Establishment Clause of the First Amendment prohibits government interaction with religion that constitutes sponsorship, financial support, or active involvement in religious activity. The Cowboy Church of Lima does not adequately engage in the approved secular activities under FEMA's Public Assistance Program but asserts that it should receive benefits based on its essentially religious endeavors. Does the Establishment Clause bar the Cowboy Church of Lima from receiving government funds to further its religious purposes?

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JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 1, 2017. Petition for writ of certiorari to this Court was granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2016).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1

"The judicial Power shall extend to all Cases . . . [and] Controversies."

United States Constitution, Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

42 U.S.C. § 5172(a)(1)(B)

"The President may 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 and for associated expenses incurred by the person."

STATEMENT OF THE CASE

The Federal Emergency Management Agency ("FEMA") is authorized by Congress to provide federal financial relief aid under its Public Assistance Program ("PA Program") to eligible victims of major disasters or emergencies when so directed by the President. Eligibility for the PA Program turns on whether the recipient facility provides "essential services of a governmental nature" and whether the facility is primarily used for those eligible services.

Despite its engagement in primarily religious activities, the Cowboy Church of Lima ("the Church") sought relief aid from the PA Program after its chapel and event center flooded. Less than ten days after applying for relief from FEMA, the Church filed suit before a final determination of eligibility could be made. Now, FEMA seeks to protect its right to make a formal determination of eligibility and to defend the constitutionality of its eligibility criteria.

Flood waters from a dam failure cause significant damage to the Church

In August 2016, Hurricane Rhodes hit the western coast of New Tejas, dropping over forty-five inches of rain in thirty-six hours. R. at 2. Two days passed and the little township of Lima remained relatively undisturbed until a nearby dam that had been undergoing repairs failed, sending flood waters surging over the banks of the Motta River and towards the Church. R. at 3.

As the waters from the dam failure rose, Chaplain Finn Hudson, the leader of the Church and the manager of the grounds, sprang into action with his staff to prepare for flooding in the chapel and the attached event center. R. at 4. From the

chapel, the team rescued Bibles, hymnals, religious pamphlets, and other religious paraphernalia. R. at 4. From the event center, they liberated tables, chairs, podiums, and kitchen supplies. R. at 4. That night, the waters enveloped the entire 5,500 square foot facility in at least three feet of water. R. at 4-5.

Two more days passed and the waters receded, allowing staff to begin removing damaged materials. R. at 5. Losses included sheetrock and insulation from the walls, floorings, altars, kitchen goods, artwork, dry erase boards, supplies used solely for religious purposes, and other supplies used solely for civic purposes. R. at 5. It was during this time that Chaplain Hudson noticed structural damage to the facility. R. at 6. Months later, in his deposition, Chaplain Hudson for the first time claimed that the flood waters had caused that structural damage, resulting in the collapse of the roof of the chapel. R. at 9.

On August 19, 2016, President Barack Obama declared the floods and storm damage that had been caused by Hurricane Rhodes to be a natural disaster, granting FEMA license to administer relief aid to the areas affected. R. at 6. Hearing this news, Chaplain Hudson contacted the Church's attorney who advised the Chaplain to apply for FEMA relief, which he did the next day. R. at 6. He did not, however, submit an application for a Small Business Administration ("SBA") loan, a prerequisite for some forms of FEMA relief, until three days later. R. at 6. The day after the loan application was submitted, an adjuster contracted by FEMA, Quinn Fabray, contacted Chaplain Hudson and scheduled a tour to assess the damage the following day, August, 25, 2016. R. at 6.

FEMA's initial estimates suggest the facilities may be ineligible

The 88 acres where the Church rests is designated as tax exempt religious property under New Tejas Property code. R. at 3. In addition to the chapel and event center, the property includes a rodeo arena and assorted storage sheds. R. at 3. The damaged 5,500 square foot facility is comprised of a chapel with an attached event center; each taking up 2,250 square feet. R. at 3-4. In 1990, the Church erected the chapel and applied for 501(C)(3) tax exempt status, which was granted and with which the Church has remained in compliance. R. at 3.

In 1998, the Chaplain began allowing the members of the larger Lima community to use the chapel for a few township events, due to the lack of another appropriate community space. R. at 3. Public use of the chapel evolved into a more frequent occurrence and soon, due to both growing church needs and the more frequent public use of the chapel, funds were collected from bake sales and the solicitation of private donations to erect the event center in 2005. R. at 4. In 2006, the Church attempted to obtain a "government building" tax exemption for the event center, but was denied by the County. R. at 4. Additionally, a 2008 referendum to build a city owned event center was voted down. R. at 4.

During her tour, FEMA's adjuster learned that Sundays in the event center were dedicated to Sunday school classes, youth group meetings, and adult bible studies. R. at 7. Other days of the week brought various types of activities to the event center; in addition to being designated as an emergency relief shelter, parties, meetings of local volunteer clubs, city council meetings, counseling groups, school

functions, and polling for county elections took place there. R. at 7. The adjuster then estimated that roughly 45 to 85 percent of the operating time of the event center was used for community projects unrelated to the church. R. at 7. However, the Chaplain's deposition would later reveal that church-related events predominated use of the event center; roughly 60 percent of the total usage was for church events. R. at 9.

Too, use of the chapel was predominated by religious events. R. at 7. Sundays were used exclusively for church services and religious events. R. at 7. On weekdays the chapel hosted religious and non-religious concerts, holiday festivals, bar mitzvahs, father-daughter dances, and receptions after funerals, christenings, and similar activities. R. at 7. It would also occasionally host non-denominational weddings and non-religious meetings. R. at 7. The adjuster again explained to the Chaplain that her estimate was that the chapel was used for religious purposes 85 to 95 percent of the time. R. at 7.

Likely realizing that the facilities may not meet eligibility requirements, the adjuster mentioned that she regretted that FEMA "does not cover monetary assistance for churches," but promised to "do what she could" to help. R. at 7-8.

The Church files suit before any formal determination by FEMA

Impulsively, Chaplain Hudson contacted his attorney and decided to file suit less than two days after FEMA's adjuster toured the facility. R. at 8. By August 29, 2017, two days later, the complaint was filed and FEMA immediately stopped processing the Church's application to wait on a determination by the court. R. at

8. In fact, FEMA never made a final decision in this case. R. at 10. However, the final report completed by the adjuster explained that it was her belief that the event center was used for eligible purposes 80 percent of the time, but that the chapel was used for ineligible purposes 90 percent of the time. R. at 10. While internal reviews initially had suggested that the Church's claim be denied, FEMA's Regional Director, Jesse St. James, revealed in his deposition that he intended to personally review the file because he believed the event center may have qualified for aid. R. at 10. Had the church waited to file suit, it likely would have had an answer by September 30, 2016, FEMA's internal deadline, but definitely would have had an answer by October 14, 2016. R. at 10. The Church reopened its doors on July 26, 2017, after members of the church and larger community donated time and funds to repair the event center and chapel. R. at 8-9.

Procedural History

After the Church filed suit in the federal district court for the Central District of New Tejas, FEMA filed 12(b)(6) and 12(b)(1) motions that were denied. R. at 9. The court explained that after more discovery, a Motion for Summary Judgment would be "more appropriate." R. at 9. Depositions were taken during the discovery period and FEMA moved for summary judgment on the theories that the Church's claim was not ripe for judgment and that the Establishment Clause required FEMA to apply its policy regarding churches. R. at 10. The Church countered that the Free Exercise Clause required that it be eligible for relief funds and that FEMA's failure to act amounted to *de facto* denial of the claim. R. at 10. Ultimately, the

court granted summary judgment on the Establishment Clause grounds but denied the ripeness claim. R. at 10.

The Church then appealed to the United States Court of Appeals for the Fourteenth Circuit for reversal of the summary judgment order and remand for further proceedings; FEMA appealed for a grant of dismissal under the Ripeness Doctrine. R. at 11. On the issue of ripeness, the Court of Appeals held that the analysis of legal question in this case would be significantly advanced by further factual development because it is nearly impossible to make a determination that the Church would be denied without a final determination by FEMA. R. at 14-15. Too, the court found no hardship to the parties by withholding consideration because damages to the Church that were ultimately repaired without FEMA funds were not sufficient to deprive FEMA of its administrative function. R. at 15.

On the Establishment Clause issue, the court held that FEMA's regulation was a content-neutral provision in harmony with both the Free Exercise and Establishment Clauses. R. at 16-17. Thus, the Court of Appeals affirmed the district court on the Establishment Clause issue and ordered that the district court enter an order dismissing the case based on the ripeness issue. R. at 17.

Judge Sylvester dissented. R. at 17.

SUMMARY OF THE ARGUMENT

I. The Fourteenth Circuit correctly applied the Ripeness Doctrines in holding that FEMA must be permitted to make a final determination on the Church's application before the determination may be challenged. The Church's claim fails on both constitutional and prudential ripeness grounds.

First, it is unconstitutional for this Court to review the Church's claim because no actual or imminent Article III case or controversy exists and an outcome favorable to the Church would not alleviate its claimed burden. Suspiciously absent fron the record is evidence that FEMA's actions have effectively denied or that FEMA policy effectively denies the Church's application. Without that evidence, there is no injury. What is more, even if this Court were to decide that the Establishment Clause does not bar FEMA from providing the Church funds, FEMA would not be forced to change its policy or to provide the Church with aid as a result of that determination, destroying the assertion that a favorable decision would give the Church what it wants. Absence of either of these elements dictates that these claims lack constitutional justiciability.

Second, it is imprudent for this Court to disrupt the administrative process in order to consider incomplete facts and harmless agency action. Critically, these claims request judicial review of an administrative adjudication in which no final agency action has occurred, interrupting the agency process and eroding the benefits of administrative decision-making. More facts are needed to resolve this hybrid factual/legal question because the Church cannot possibly know whether

FEMA will act on the grounds that the Church finds objectionable, and surely, a partial grant of funds by FEMA would negate the Church's contention that religious institutions "need not apply." Lastly, hardship, in legal or practical effect is, again, eerily absent from the Church's claim and without it, these claims do not survive this Court's established prudential ripeness concerns.

II. The harmony between Establishment Clause and Free Exercise Clause considerations inherent in FEMA's "mixed-use" policy, should not, as the Fourteenth Circuit held, be disturbed. Establishment Clause case law and Free Exercise case law dictate that the Church is not entitled to use federal aid to further essentially religious endeavors.

First, this Court has repeatedly honored the Establishment Clause's prohibition of the use of government funds to achieve a primarily religious objective. While *incidental* benefits to religion do not invalidate a statute on Establishment Clause grounds, provisions that are used in *substantial* part to further primarily religious objectives are wholly incompatible with constitutional constraints, as would be the case if a distribution of FEMA funds occurred here. Additionally, such a distribution would equate religious practices to essential functions of government, creating an unprecedented degree of entanglement of the two realms and a fusion of religious and governmental functions that fundamentally offends the very purpose of the Establishment Clause.

Second, those same concerns highlight the primary reason that the Free Exercise Clause does not extend the Church the right to receive FEMA funds;

where denial of government benefits is based on the use of those benefits to further "essentially religious endeavors," the Free Exercise Clause is not implicated. Here, FEMA does not engage in discrimination based on religious status, but instead applies secular, neutral, and generally applicable criteria to all of its applicants. If the Church offered the relevant facilities more frequently for the approved activities, it would not be barred from recovery, evidencing that FEMA policy is directed at religious use rather than religious identity, which is permissible under the Free Exercise Clause.

Because the Church cannot establish the justiciability of these claims, this Court lacks jurisdiction to engage in judicial review. Moreover, the First Amendment prohibits FEMA from distributing funds to the Church. Accordingly, the judgment of the Fourteenth Circuit should be AFFIRMED.

ARGUMENT

I. This issue is not ripe for judicial review because it is unconstitutional and imprudent to review a speculative injury based on incomplete and harmless agency action, an underdeveloped record, and a legal question that will not produce the relief desired.

The Fourteenth Circuit properly held that this claim is premature and unfit for judicial consideration. This Court has repeatedly instructed the judiciary to "'avoid[] . . . premature adjudication'" and not interfere in an agency process "'until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (citations omitted). To that end, ripeness requirements exist in two categories, "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). As this Court's precedent illustrates, if either constitutional ripeness or prudential ripeness is not present, this Court should withhold judicial review. *Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014) (requiring constitutional ripeness); *Nat'l Park*, 538 U.S. at 803 (requiring prudential ripeness).

The Church's claim is not ripe on both fronts. It is unconstitutional because it fails to assert an imminent injury that a favorable decision is likely to resolve. Moreover, it is imprudent to consider because judicial review at this stage would disrupt an administrative process on insufficient facts when the Church has suffered no harm due to the actions of the agency.

A. It is unconstitutional for this Court to consider the Church's claim because it presents no "Case" or "Controversy."

This claim cannot pass constitutional muster because the Church merely presents a "hypothetical case[]" that begs an "advisory opinion[]." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). Article III of the United States Constitution provides that "[t]he judicial Power shall extend to all Cases . . . [and] Controversies." U.S. Const. art. I, § 2, cl. 1. To satisfy the constitution's case-or-controversy requirement with regard to ripeness, the Church must "show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation omitted; brackets in original). The Church, however, cannot demonstrate two of these: it has not suffered an injury, and it is not likely that a decision favorable to the Church will redress the asserted injury.

1. The Church has not suffered any actual or imminent injury.

The Church's assertion that it has been injured by little more than a week's wait or that it will inevitably be injured by FEMA's "mixed-use" policy is illustrative of its inability to play by the rules rather than indicative of the justiciability of this case. Fundamentally, an injury in fact requires the "invasion of a legally protected interest which is . . . 'actual or imminent.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Here, injury is not present because there is no basis for the assertion that FEMA has neglected this case to the extreme of "agency inaction" nor is there a cognizable claim a denial would have inevitably resulted.

Performing a thorough review spanning nine days cannot amount to a refusal to act that justifies removing FEMA's right to make a final administrative determination. The Second Circuit, for instance, has held that "[w]hen an administrative agency simply refuses to act upon an application, the proper remedy—if any— is an order compelling agency action, not plenary review of the application by a district court." *McHugh v. Rubin*, 220 F.3d 53, 61 (2d Cir. 2000). In that case, the Court held that even where the plaintiff received a letter from the administrative agency that it could not act on plaintiff's request, the proper remedy was an order compelling agency action. *Id.* If even a cognizable concept at all, a failure to act can only be considered a "de facto denial" where there is "unreasonable delay." *Telecommunications Research & Action Ctr. v. F.C.C.,* 750 F.2d 70, 76 (D.C. Cir. 1984). In that case, recipients waited years for an agency decision that never came before the court felt it appropriate to intervene. *Id.* By comparison, the Church's claim that because FEMA could not completely adjudicate its application within nine days, there was an agency "failure to act [that] . . . amounted to a de facto denial" is laughable. R. at 10.

Even if this Court were to recognize the validity of the Church's de facto denial theory, it is certainly not true that FEMA has completely failed to act. FEMA surveyed the Church only five days after the Church applied for funds, and only two days after the Church completed the prerequisite SBA loan application. R. at 6. FEMA continued its internal processing of the application with a scheduled completion date falling 41 days after the application's submission. R. at 6, 10. The

Church, however, gave the agency a mere nine days to completely adjudicate its application and then filed suit claiming the agency was "fail[ing] to act." R. at 6, 8, 10. And even if this could be considered slow agency action, it falls short of what has been recognized as "agency inaction"—no action at all. At bottom, the Church has not suffered a de facto denial. FEMA was actively moving toward an actual decision until interrupted by this lawsuit. R. at 8. There is no actual injury.

With respect to an imminent injury, the Church again misses the mark by claiming that FEMA will undoubtedly deny its claim based on the "mixed-use" policy. This claim rests on two assumptions: first, that FEMA policy requires denial, and second, that denial will be based on the challenged policy. In *Catholic Social Services*, for example, this Court examined the legality of a benefits-conferring regulation. 509 U.S. at 59. The Court held that the claim was unripe because the plaintiffs had not actually applied for the benefit and then been rejected because of the challenged rule. *Id.* at 58 n.19, 58–66. The Court "[]emphasize[d] that . . . access to the benefit in question [was] conditioned on several nontrivial rules other than the two challenged" such that "the agency might deny [a plaintiff] the benefit on grounds other than . . . ineligibility under the [challenged] rule." *Id.* at 58 n.19; *Id.* at 68 (O'Connor, J., concurring). Accordingly, the Court held the claims unripe. *Id.* at 66. Likewise, here, there are grounds on which FEMA can deny the Church's request outside of the contested policy. For instance, FEMA can only approve the Church's fund request for damages exceeding those that a Small Business Administration loan would cover. R. at 13. SBA loans can be approved to

cover all expenses "as the [Small Business Administration] may determine necessary or appropriate" consistent with appropriations acts. 15 U.S.C. § 636(b)(2) (2015). Thus, it is possible that the Church will receive sufficient SBA loans to warrant a denial of FEMA funds.

Too, the record makes clear that the damage to the Church was not a result, at least an initial result, of the Hurricane Rhodes, but instead was a result of the failure of a dam two days after the Hurricane made landfall. R. at 3. It may very well be the case that FEMA must deny funds to the Church because this damage was not included in the President's authorization, as the record reflects that relief was only authorized for damage "caused by Hurricane Rhodes." R. at 6. With nothing more, this Court cannot assume that FEMA will not rightfully deny the Church's application on grounds outside of the challenged policy. Finally, there is no basis on which to find that relief will necessarily be denied. By way of example, Regional Director James's testimony in his deposition indicates that the Church's application was very much still alive as he was set to engage in further review because of the potential eligibility of the event center. R. at 10. Thus, there is nothing demonstrating a coming denial of funds premised on the challenged rule. There is no imminent injury here. With no injury, actual or imminent, the Court has no jurisdiction over this case and should send it back to the agency.

2. A decision favorable to the Church is not likely to redress the alleged injury.

A decision favorable to the Church in this case would not invalidate FEMA's policy under the Free Exercise Clause, and therefore would not require FEMA to

change the policy. Even if this Court considers the claim, it is not true that the alleged "injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). In *Bennett*, the plaintiffs sued the advisory agency because it issued an opinion that had "a powerful coercive effect" on the acting agency such that the acting agency would probably take measures to the detriment of the plaintiffs. *Id.* at 169. This Court held that if the advisory opinion was rescinded (a favorable decision to the plaintiffs), the acting agency would "likely" not take the alleged harmful actions. *Id.* at 171. Put differently, where it was probable that a favorable decision would ultimately cause the acting agency to follow a course of action that would not harm the plaintiffs, the third element of constitutional ripeness was met.

But here, it is not probable that a favorable decision will give the Church the funds it desires. What the Church really wants is for FEMA to change its policy such that, even if the facilities of a religious institution provide 50% or less of ineligible services, the religious institution can still receive FEMA funds. But the narrow question before this Court is whether "the Establishment Clause . . . bar[s]" the Church from receiving such funds. R. at 1. Additionally, the Establishment Clause's prohibition of the funding of churches was the basis for the district court's decision, rather than an invalidation of the "mixed-use" policy based on the Free Exercise Clause. R. at 10. Therefore, a decision favorable to the Church in this case would invalidate the district court's opinion that recovery for the Church is barred by the Establishment Clause. A favorable ruling, however, would not validate the

Church's assertion that the Free Exercise Clause requires FEMA to change its policy and thus provide funds to the Church. And in fact, FEMA has little incentive to change its policy because the policy is the practical means by which the agency determines funds eligibility for all entities. Changing the policy would thus require FEMA to fundamentally shift the way it evaluates all claims, not just those of religious institutions. The Petitioner bears the burden of proving its claim is ripe. *Bennett*, 520 U.S. at 167–68. Yet the Church has put forward no evidence that FEMA will even possibly change its policy if such is constitutionally permissible. Thus, it certainly is not true that the Church has proven that FEMA is likely to change its policy.

Because the Church has demonstrated no actual or imminent injury, and a favorable outcome would not provide the relief that the Church seeks, there is no constitutional ripeness and therefore no jurisdiction for this Court to consider this case.

B. It is imprudent for this Court to consider the Church's claim because this issue is not fit for review and the Church will not suffer a hardship by withholding review.

In addition to the lack of Article III justiciability in this case, there is a severe lack of prudential value to premature judicial review. This Court has enumerated a two-prong test to determine when agency actions are prudentially unripe for review. *See Nat'l Park*, 538 U.S. at 808. Specifically, this Court looks to "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* The Church's claim fails both prongs. First, it is not fit for

judicial review because: there is no final agency action; the question presented is not a purely legal one; and further factual development is necessary. *Id.* at 812. Second, withholding review does not work any hardship to the Church; FEMA has not withheld anything from the Church nor created any adverse effects of a strictly legal kind for the Church, and FEMA has not affected the Church's primary conduct or day-to-day affairs. *Id.* at 808–11. Further, there is no "substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately" as no part of the policy compels the Church to operate any differently that it has all along. *Id.* at 808.

Despite some recent assertions that constitutional concerns predominate the ripeness analysis, prudential ripeness concerns remain a valuable basis upon which this Court can deny the justiciability of the Church's claim. In *SBA List*, this Court explained that the idea that prudential ripeness factors could prevent justiciability of a recognized Article III injury was "in some tension with recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is 'virtually unflagging.'" 134 S.Ct. at 2347. (citations omitted). Nonetheless, the Court declined "to resolve the continuing vitality of the prudential ripeness doctrine." *Id.*

Prudential ripeness concerns, however, do not conflict with the judiciary's general mandate to consider cases if jurisdiction exists. Rather, this Court's jurisprudence supports the idea that prudential ripeness concern connote the same degree of import as constitutional ripeness concerns. The conclusion of *SBA List*

regarding the "virtually unflagging" duty to consider cases when jurisdiction exists has its roots in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1967)—a case decided only two months prior to the foundational prudential ripeness case of *Abbot Labs*, 387 U.S. at 136 (1967). That is, when this Court crystallized its prudential ripeness doctrine in *Abbot Labs*, it did so fully knowing the mandate that *SBA List* highlights, yet was unconcerned about potential tension between the duty to hear cases and the prudential ripeness doctrine. *See Abbot Labs*, 387 U.S. at 136; *Colorado River*, 424 U.S. at 800. To the contrary, this Court strongly reaffirmed the "long-established prudential aspects of the ripeness doctrine" in *National Parks* in 2003. *Kiser*, 765 F.3d at 607. This consistent reaffirmation of *Abbot Labs'* principles of prudential ripeness indicates that, while this Court has a "virtually unflagging" duty to consider cases when jurisdiction exists, prudential ripeness concerns occupy that small space of exception and remain relevant as an independent basis upon which to deny ripeness.

1. This claim concerns the ripeness of a challenge to an administrative adjudication, not the ripeness of a facial challenge to an administrative policy.

Although the Church may attempt to characterize its claim as a challenge to the facial validity of FEMA's policy, this case concerns an administrative adjudication of particular applicability. Generally, the contours of ripeness apply both to facial rule challenges and as-applied adjudications. *See, e.g., United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003) (applying *National Park*'s facial validity

test to state agency adjudication). However, the distinct considerations relevant to the different challenges are of significant import here. The hardship factor, for instance, can encompass broader considerations under a pre-enforcement, facial challenge. *Compare, e.g., Abbot Labs*, 387 U.S. at 152 (looking to the broad effects of a rule's mere promulgation in considering the prudential ripeness factor of hardship) and *F.T.C. v. Standard Oil of California*, 449 U.S. 232, 242, 244 (1980) (evaluating hardship simply in terms of an agency's actions taken during the adjudication and prior to judicial review).

Again looking to *Reno v. Catholic Social Services*, there the Court considered the ripeness of a challenge to a benefit-conferring rule. 509 U.S. 43, 68 (1993) (O'Connor, J., concurring). It held that a challenger to the rule could only contest it after having applied for the relevant benefit. *See id.* at 69. And even then, the Court held that the challenger would only have standing if he applied and then were denied the benefit because of the challenged rule. *Id.* at 66. That is, in determining who had a ripe claim to challenge a benefit-conferring rule, this Court would only look to the interactions between the rule, the regulated party, and the agency as those interactions occurred within an adjudication.

Here, FEMA grants the relevant funds under statutory authorization and pursuant to agency rules and policy. R. at 11–12. Thus, what is at issue here is a benefit-conferring rule challenged by an applicant, just like in *Catholic Social Services*. This Court cannot consider this suit to be a facial challenge to the rule itself. The Church may attempt to characterize it as such to convince this Court to

take favorable approaches to a question concerning final agency action; the nature of the question presented as a purely legal issue; the amount of necessary facts; or the number of considerations to account for in examining the hardship of withholding review. Nonetheless, the Court must approach this claim as a challenge to an agency adjudication and follow the ripeness jurisprudence that has evolved in that context and which is set-out below.

2. The issue in this case is not fit for review because there is no final agency action, the presented question is not a purely legal one, and further factual development is needed.

Too many question marks exist in this case to ensure that this Court will be able to make a meaningful decision instead of one that will not adequately consider the nature of the underlying issues. This Court looks to three considerations in determining if an agency action is fit for review: (1) whether the agency action preceding judicial review is final; (2) whether the question presented is "'a purely legal one;'" and (3) whether "further factual development would 'significantly advance [the Court's] ability to deal with the legal issues presented. *Nat'l Park*, 538 U.S. at 812 (citing *Abbot Labs*, 387 U.S. at 149; *Duke Power Co. v. Carolina Envtl. Study Grp.,* Inc., 438 U.S. 59, 82 (1978)). The Court can hold an issue unfit for review if any of the considerations are not present. *See, e.g., id.* (holding case unfit for review when only absent consideration was further factual development) and *U.S. Ass'n of Importers*, 413 F.3d at 1349–50 (pointing out the necessity of final agency action in that even if one of the factors is present, "the decision being challenged must still be a final agency action").

Here, there is no final agency action and further factual development would significantly advance the Court's ability to deal with the issue before it. There is no final agency action because FEMA did not conclusively adjudicate the Church's application and could not make legally binding determinations on rights or obligations. Final agency action generally "mark[s] the 'consummation' of the agency's decisionmaking process" — it is not "merely tentative or interlocutory" — and it determines "'rights or obligations' . . . from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citing *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103 (1948); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970). This Court considered final agency action in an adjudication in *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232 (1980). There, the F.T.C. initiated an administrative adjudication with an oil company after developing a "'reason to believe'" that the company was violating a federal statute. *Id.* at 235. The oil company disputed the F.T.C.'s position but did not even allow the agency to conclude the adjudication; instead, the company sued, asking a court to make a determination of the merits of the adjudication and terminate the agency action. *Id.* at 235, 238. This Court, however, refused to let the company erode the adjudicative process by evoking judicial review of an agency action that had "no legal force" or "practical effect." *Id.* at 239, 242–43. To let the company "turn[the] prosecutor into defendant before adjudication conclude[d]" would lead to "piecemeal review" that might ultimately be unnecessary. *Id.* at 242. Instead, this Court demanded that the company allow the

F.T.C. to formulate "a definitive ruling" before taking the agency to court. *Id.* at 239, 242–43.

So it is here: the Church filled out an application for FEMA relief. R. at 6. FEMA sent a contract field inspector, who had no control over the ultimate FEMA decision, to examine the Church's premises. She explained that "she had never heard of FEMA granting" funds to premises like that of the Church. R. at 7 (emphasis added). Only nine days passed from FEMA's receipt of the application until the filing of this suit. R. at 6, 8. Nothing else happened. FEMA made no definitive ruling affecting the Church's legal rights, obligations, or day-to-day reality. Yet the Church apparently took the word of a contracted field inspector as FEMA's definitive determination without further clarification and sued. At bottom, suits such as this one ultimately hinder the efficient application of FEMA funds to statutorily authorized sites. Final agency action had yet to occur prior to this suit.

Finally, further factual development is necessary because the Church does not even know what it argues against: a possible denial of funds to both the chapel and event center or only the former. It is impossible for this Court to determine if the Establishment Clause bars the Church's receipt of FEMA funds without knowing FEMA's factual basis for making a decision one way or the other. Prudential ripeness concerns require courts to rid themselves of factual questions that impede the ability to answer the legal question at issue. *Nat'l Park*, 538 U.S. at 812. Thus, if "further factual development would 'significantly advance [the Court's] ability to deal with the legal issues presented,'" the Court must withhold its

consideration. *Id.* The contours of how an agency will apply a policy are "facts," the lack of which can need "further development." In *United States v. Braren*, for example, the Ninth Circuit deemed a suit unripe for lack of factual development where a state agency had yet to apply a definite legal standard to a claim and it remained "possible" that the standard announced initially would change. 338 F.3d 971, 975–76 (9th Cir. 2003); *see also Plains All Am. Pipeline L.P., v. Cook*, 866 F.3d 534, 543 (3rd Cir. 2017) (case in need of "'further factual development'" where statute had yet to be applied in such a way that reviewing court could understand the exact nature of the constitutional claim before it).

One critical fact remains unknown at this time: whether a denial by FEMA would withhold funds from only the chapel or all of the Church's facilities. The exact standard that FEMA will apply to make that determination is not known. FEMA evaluates facilities independently to determine if each facility is eligible for funds. FEMA, FP 104-009-2, Public Assistance Program & Policy Guide, 14–16 (2016). Here, two facilities are at issue with one appearing ineligible for funds and another appearing eligible; moreover, they both occupy the same exact amount of square footage on the Church's property. R. at 4, 10. It is unclear if FEMA will completely withhold funds from the Church or only funds that might be destined for the ineligible facility. Neither FEMA's policy guide nor the relevant parts of the Code of Federal Regulations give conclusive indications on this point. *See* FEMA, FP 104-009-2, Public Assistance Program & Policy Guide, 10–16 (2016); 44 CFR §§ 206.201(c), 206.221(e). The record demonstrates the uncertainty of the applicable

standard: while FEMA decided that "the event center was used 80% of the time for FEMA-eligible purposes and the chapel was used over 90% of the time for non-FEMA-eligible purposes[,]" the agency had yet to decide if this would be grounds to completely deny the Church's application or allow the event center to still receive funds and only deny them to the chapel. *See* R. at 10 ("because of the close nature of the factual issue, [FEMA's Regional Director] was planning to review the file himself and ultimately the event center might have been granted FEMA assistance" (emphasis added)).

A critical legal standard has yet to be enunciated and applied on a factual basis by FEMA. The Church, thus, does not even know what it is arguing against: an alleged future denial of benefits to both the chapel and the event center or an alleged future denial of benefits to only the chapel. Further factual development is needed.

3. Withholding judicial review does not create any hardship for the Church because FEMA's actions prior to judicial review have not produced any adverse legal effects or practical effects for the Church.

To evaluate the hardship factor within an adjudication, this Court considers effects that result from agency action taken during the adjudication prior to judicial review. For example, the *Standard Oil* Court looked to the effects triggered by the "issuance of [a] complaint" that initiated adjudication. 449 U.S. at 232, 242, 244; *see also U.S. Ass'n of Importers*, 413 F.3d at 1350 (considering the hardship of effects brought about "in response . . . to [pending agency adjudications];" *Tianjin Magnesium*, 533 F. Supp. 2d at 1344–45 (examining hardship created by agency's

decisions in an administrative adjudication). Specifically, the Court looks to two types of effects: (1) "'adverse effects of a strictly legal kind'" and (2) practical effects. *Nat'l Park*, 538 U.S. at 809–10. The Court will find neither here.

FEMA's pre-review action has not created any legal effects for the Church. Adverse effects of a strictly legal kind accomplish agency goals such as "'command [parties] to do [some]thing or to refrain from doing [some]thing; . . . grant, withhold, or modify [a] formal legal . . . power, or authority . . . [or] subject [a party] to . . . civil or criminal liability.'" *Nat'l Park*, 538 U.S. at 809 (citation omitted). At bottom, adverse effects of a strictly legal kind "'create[] . . . legal rights or obligations.'" *Id.* (citation omitted). And incomplete adjudications that have not established a conclusive merits-based holding are the type of agency action that does not create any legal rights or obligations. *See Standard Oil*, 449 U.S. at 242–43 (initiation of adjudication in which no "definitive" agency action had occurred "had no legal force); *Tianjin Magnesium*, 533 F. Supp. 2d at1344–45 (agency determination to proceed with adjudication instead of postponing it had "'no legal force comparable to that of the regulation at issue in [*Abbot Labs*]'").

In this case, there are no adverse effects of a strictly legal kind flowing from FEMA's actions taken prior to judicial review. FEMA only had nine days to consider the Church's request for funds before this lawsuit stopped the administrative process. R. at 6, 8. During that time, FEMA merely sent a contracted adjuster to the Church's site and initiated the internal review process of the Church's application. R. at 6–8, 10. Nothing more. FEMA "never finalized its

determination" regarding the Church's application; the agency did not "command [the Church] to do [some]thing or to refrain from doing [some]thing;" and it did not "grant [or] withhold" anything from the Church. R. at 8; *Nat'l Park*, 538 U.S. at 809. The bottom line is that FEMA has not "create[d] . . . [any] legal rights or obligations" that are applicable to the Church. *Nat'l Park*, 538 U.S. at 809. There are no adverse effects of a strictly legal kind here.

Moreover, FEMA's pre-review action has not created any practical effects for the Church. Although the Church has suffered substantial damages to its facilities, there is nothing in its day-to-day activities that have been affected by FEMA's actions during the adjudication. Relevant practical effects include impacts on a party's "primary conduct" and "'day-to-day affairs.'" *Nat'l Park*, 538 U.S. at 809–10. *See, e.g., Abbot Labs*, 387 U.S. at 152–53 (where agency action mandated that drug manufacturers change labels, advertisements, and other informational materials or face criminal and civil penalties); *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171–72 (1967) (where agency action required entity to make "an immediate and substantial" alteration to the model by which it placed goods in the marked).

Practical effects, however, do not include economic impacts that result from uncertainty as to what results agency action may ultimately produce. *Nat'l Parks*, 538 U.S. at 811 (although agency's position created "uncertainty as to the validity of a legal rule" thereby creating unpredictable market conditions that affected pricing, the agency action did not have any "real hardship"). Practical effects also do not

include the "'expense and annoyance'" of undergoing adjudication. *Standard Oil*, 449 U.S. at 244.

FEMA's receipt of the Church's request and subsequent processing of the funds claim over a nine-day period did not create any practical effects for the Church. To be sure, the Church did experience great changes in its day-to-day affairs as the flooding led it to close its doors for a little short of a year. R. at 5, 8. FEMA's adjudicative actions prior to this lawsuit, however, had nothing to do either with the Church's closing or the length of that closure. FEMA simply took nine days to initiate and process the Church's claim for funds before this lawsuit interrupted that process. R. at 6, 8. Those actions resulted in no practical effects on the Church.

In sum, the Church has not asserted an injury that is actual or imminent and has not established that the favorable outcome of this case will alleviate the burden that it claims to bear. As a result, the Article III case-and-controversy requirement has not been met and adjudication here would create problems of constitutional proportions. The Church additionally has failed to satisfy this Court's longstanding prudential ripeness concerns, as the lack of final administrative action here leaves open questions of fact and law that cannot be resolved without further factual development. Because the Church has not successfully born its burden of demonstrating the justiciability of this case, this Court is left with a want for jurisdiction should not engage in judicial review. Accordingly, the decision of the Fourteenth Circuit on this issue should be AFFIRMED.

II. The Establishment Clause bars the Church from receiving FEMA aid because direct payment of governmental funds to further religious endeavors will have the primary effect of advancing religion and because the eligibility criteria for benefits does not require the church to sacrifice its religious identity.

The Fourteenth Circuit correctly held that FEMA's "mixed-use" standard is in harmony with the provisions of both the Establishment Clause and the Free Exercise Clause. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. To satisfy the requirements of the First Amendment, a statute must fall into the "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2019 (2017) (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

FEMA regulations and policies lie squarely in the constitutional sweet spot between the two clauses. The Robert T. Stafford Disaster Relief and Emergency Assistance Act authorizes "[t]he 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 and for associated expenses incurred by the person." 42 U.S.C. § 5172(a)(1)(B) (2016). This goal is achieved primarily through FEMA's Public Assistance Program ("PA Program") and is subject to interpretation through FEMA regulations and policies.

At issue here is the PA Program's so-called "mixed-use" standard, which is used to determine whether a facility adequately performs eligible services under the

Act. By its statutory authority, FEMA may only provide funds to those institutions that provide "essential services of a governmental nature to the general public." 42 U.S.C. § 5122(11)(B) (2016). To that end, eligible facilities are defined by the type of services they provide: critical and non-critical services. FEMA, FP 104-009-2, Public Assistance Program & Policy Guide, 11 (2016). An eligible "critical service" facility is one that provides "education, emergency, utility, or medical" services. *Id.* Importantly, "education" does not include "buildings, structures and related items used primarily for religious purposes or instruction." 44 C.F.R. § 206.221(e)(1). The Church does not provide any "critical" services. A "non-critical" service facility must provide "essential governmental service[s]" and must be "open to the public." *Id.* Eligible non-critical services include "institutes of public utility such as museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, and facilities which provide health and safety services of a governmental nature." *Id.* Additionally, FEMA policy excludes from this list: "[r]eligious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large." FEMA, FP 104-009-2, Public Assistance Program & Policy Guide, 14 (2016).

Finally, when a private non-profit engages in both eligible and ineligible services, in order to receive aid, the "primary use" of the facility must be dedicated to eligible services. *Id.* at 16. Primary use is determined by the use of the physical space. *Id.* But when a physical space is used for both eligible and ineligible

services, as is the case here, FEMA employs its "mixed-use" standard, requiring that a facility engage in eligible services for more than 50 percent of its operating time to receive benefits. *Id.* If 50 percent or more of the operating time of a physical space is dedicated to ineligible services, that physical space is ineligible and is not considered in determining the "primary use" of any remaining physical space. *Id.* Where the physical space is dedicated to eligible services for more than 50 percent of the total operating time, the physical space is considered to have an eligible primary purpose. *Id.*

These policies are consistent with this Court's longstanding precedent that benefits of public welfare legislation cannot be denied to religious entities or individuals "'*because of* their faith, or lack of it.'" *Trinity Lutheran*, 137 S.Ct. at 2020 (quoting *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947)) (emphasis in *Trinity Lutheran*). Without these limiting policies, FEMA's relief funds would be directed at churches "because of their faith." Such an allocation would be based on a determination by government that the primary functions of the Church, including worship, proselytizing, and religious instruction provide a benefit to "the community at large" equating to an "essential government service." Consequently, the distribution of FEMA funds in this case would fundamentally violate the Establishment Clause because the Church, by Chaplain Hudson's own admission, intends to use the funds to repair facilities that are used in major part to further the church's religious purpose. R. at 9. Granting relief funds in this case would

constitute the opposite of a mere incidental benefit to religion—a mere incidental benefit to *government* from funds directed to the advancement of *religion*.

For similar reasons, the Free Exercise Clause is not violated because the Church does not offer, in substantial portion, those "essential government services" that merit benefits. This Court's holding in *Trinity Lutheran* prohibited the exclusion of generally available public benefits to religious entities for which the entity is fully qualified. 137 S.Ct. at 2024. But unlike the church in *Trinity Lutheran*, the Church here, if denied funds at all, will not be denied generally available public benefits because of its *status* as a church, but instead, will be denied because the *use* of its facilities does not meet the "eligible services" criteria. Therefore, FEMA is not compelled by the Free Exercise Clause to provide funds to the Church but is barred by the Establishment Clause from doing so.

A. The Church intends to use FEMA funds to rebuild facilities that are used primarily for "worship," "proselytizing," and "religious instruction" in violation of the Establishment Clause.

The Establishment Clause prohibits FEMA from effectively subsidizing the Church's religious practices. Though this Court has encountered considerable difficulty in establishing a determinative test regarding whether an action by government violates the Establishment Clause, there is at least some consensus on a two part test. To that end, courts consider whether the action "1) has a secular purpose and 2) has a primary effect of advancing or inhibiting religion." *Mitchell v. Helms*, 530 U.S. 793, 807 (2000) (plurality opinion) (citing *Agostini v. Felton*, 521 U.S. 203, 234 (1997)). The first inquiry focuses on legislative intent. *Lemon v.*

Kurtzman, 403 U.S. 602, 613 (1971). FEMA does not assert that 42 U.S.C. § 5172 contains an inherently sectarian purpose. By its own legislative declaration, Congress intended the Robert T. Stafford Disaster Relief and Emergency Assistance Act to rebuild communities after devastating environmental emergencies. 42 U.S.C. § 5121(a) (2016).

Instead, FEMA asserts that while the statute itself is facially neutral, if funds were distributed to the Church in this case, those funds would have the primary effect of advancing religion and the Establishment Clause would be violated. Three factors are considered in the "effect" analysis: whether application of the statute results in "governmental indoctrination"; whether the statute "define[s] its recipients by reference to religion"; and whether the statute "create[s] an excessive entanglement." *Agostini*, 521 U.S. at 234.

The PA Program's "primary use" policy ensures that the Act does not run afoul of Establishment Clause restrictions by requiring that facilities receiving direct payments of tax-payer dollars be primarily used for secular, governmental purposes. Evaluating the constitutionality of a denial of funds here requires the assumption that the Church primarily used both the chapel and the event center for ineligible purposes. Any assertion to the contrary is prohibited by the reality that PA Program policy explicitly includes within "eligible services" "community centers operated by a religious institution that provide secular services…that help the community at large." *Id.* at 13, table 2. Ultimately, a denial of funding for the event center would be based only on the *use* of the facility as opposed to the *identity*

of the Church. *Id.* Therefore, the Church's request must be considered a request for benefits which will be used intentionally issued FEMA and used by the Church in major part to further essential religious endeavors.

This type of request fundamentally violates the Establishment Clause. First, it is fundamental to the First Amendment that "[n]o tax in any amount, large or small, can be levied to support any religious activities . . . " *Everson,* 330 U.S. at 16. Granting the Church funds here would foster "governmental indoctrination" by creating an explicit understanding that the funds will be offered by FEMA and used by the Church for the practice of religion. Additionally, the responsibility for this indoctrination would lie squarely at the feet of the government as there is no private choice here; funds pass directly from FEMA to eligible entities without community consent.

Second, in order for the Church to be eligible under the statute, FEMA would have to extend the definition of "essential governmental services" to include "worship," "proselytizing," and "religious instruction." Defining religious practices as essential functions of the government and creating a class of eligibility based on religious practice destroys the Establishment Clause's requirement that benefits be distributed on a secular, neutral, and non-ideological basis. Finally, a grant of funds to the Church for the purpose of furthering its religious goals would require FEMA to perform a value determination of the worthiness of the Church's religious practices and adopt the position that the practices and beliefs of the Church somehow benefit the community. This sponsorship of religion amounts to a degree

of excessive governmental entanglement with religion that is unprecedented. Accordingly, granting government funds to churches for the purpose of repairing or replacing facilities that are primarily used for religious practice is barred by the Establishment Clause.

1. The direct disbursement of money benefits to the Church would result in religious indoctrination that is unequivocally attributable to government action.

Because the primary use of the damaged facilities at the Church is religious indoctrination, any FEMA funds contributed directly thereto would necessarily result in governmental advancement of religion. In order to determine whether a particular distribution of governmental aid results in religious indoctrination, courts must consider whether the religious indoctrination "can be reasonably attributed to governmental action." *Mitchell*, 530 U.S. at 809 (plurality opinion) (citing *Agostini*, 521 U.S. at 226.) To that end, this Court has repeatedly emphasized the importance of neutrality. *See Everson*, 330 U.S. at 18; *Agostini*, 521 U.S. at 231.

The plurality in *Mitchell* explained that where "the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." 530 U.S. at 810 (citations omitted). Importantly, it is inherent in this Court's understanding of "neutrality" that the recipient of aid be able to adequately further the secular purpose. *Id.* The Church cannot adequately further

the secular purpose of the statute because it does not use either of its facilities primarily for secular purposes.

In most cases considered by this Court, the "secular purpose" furthered by a statute in question is one regarding education. *See e.g., Mitchell*, 530 U.S. at 809 (considering whether aid to religious schools can be attributed to governmental action); *Lemon*, 403 U.S. at 620 (finding excessive entanglement where religious institutions were directly reimbursed for teachers' salaries). Education cases, however, do not generally contain the same underlying issue that this case presents: whether a program may provide funds used to further the practice of religion because the practice of religion itself could potentially further the secular purpose. Here, there is no assertion in this case that the Church is not eligible for aid because it is a religious institution. Instead, the question is whether the Church is ineligible for aid because it intends to use those funds primarily to further its "specifically religious activities." *Id.* at 621.

No precedent from this Court sanctions the use of public funds to finance religious activities. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 847 (1995). To the contrary, this Court has held that government has advanced religion where governmental aid "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *See also Am.United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*,

509 F.3d 406, 424 (8th Cir. 2007) (holding that direct payments for inmate participation in religious activities violated the Establishment Clause). More directly, "aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is clearly prohibited under the Establishment Clause." *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986).

FEMA's "primary use" policy honors the longstanding requirement of this Court that government maintain a position of neutrality in regard to religion. On the other hand, providing aid to the Church despite FEMA's policy offends the Establishment Clause by both ensuring that governmental funds will flow to an institution where religion is so pervasive that "a substantial portion of its functions are subsumed in the religious mission" and that those funds will be used for "a specifically religious activity in an otherwise substantially secular setting."

Additionally, this Court has consistently held that erecting a building for the purpose of promoting religious interests has the primary effect of advancing religion. First, this Court considered whether an institution's obligation not to use a facility constructed with taxpayer funds "for sectarian instruction or religious worship" that expired at the end of 20 years violated the Establishment Clause, concluding that the potential for building to be repurposed to advance religion was impermissible. *Tilton v. Richardson*, 403 U.S. 672, 683 (1971). Later precedent only further resolved the issue as the Court once again wrote, "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Comm. For Pub. Ed.*

& Religious Liberty v. Nyquist, 413 U.S. 756, 777 (1973). Again, in the issuance of bonds to a religious school, this Court administered special importance to the conditions on which the aid was granted, noting that those conditions precluded the possibility that funds would be used for the construction of a building used for religious purposes. *Hunt*, 413 U.S. at 744.

The Establishment Clause violation that would occur in this case is only exacerbated by the fact that the direct aid to the Church would not be the result of private choice, but instead would be a singular act of government. To assure neutrality, this Court considers whether "any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Mitchell*, 530 U.S. at 810 (plurality opinion) (citing *Agostini*, 521 U.S. at 226). "For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Id.* This Court has even warned against the "'special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.'" *Mitchell*, 530 U.S. at 843 (O'Connor, J. concurring) (quoting Rosenberger, 515 U.S. at 842). The rationale is that if aid is directed at individuals who then choose to support religion, the advancement of religion has been performed by the individual and not by the government. *Witters*, 474 U.S. at 488. Payment of claims under the PA Program, however, are made directly to the recipient. 44 C.F.R. § 206.205. Instead of being

funneled through the hands and private choices of members of the community, a grant of funds in this case would result from a single choice of government. Therefore, requiring FEMA to distribute funds to an entity that will use the aid primarily for the purpose of religious indoctrination ensures that religious indoctrination will occur as an unencumbered consequence of governmental action in violation of the Establishment Clause.

2. Approval of the Church's request would require FEMA to define recipients by reference to religion and would destroy the neutral, secular basis on which relief is currently administered.

The Church's request unconstitutionally requires that FEMA create a new class of "eligible" benefits that would necessarily have the effect of advancing religion by defining eligibility in reference to religion. The second inquiry into the primary effect of a statute requires that courts "consider whether an aid program 'define[s] its recipients by reference to religion.'" *Mitchell*, 530 U.S. at 812 (quoting *Agostini*, 521 U.S. at 234). This inquiry considers whether the criteria for aid eligibility will have the effect of "creat[ing] a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. To avoid the creation of a financial incentive, programs should allocate aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion" and the aid should be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* The foregoing description of appropriate eligibility criteria is perfectly modeled by the policies used by the PA Program.

First, the PA program limits aid by reference to neutral, secular criteria—whether a private non-profit performs an essential governmental function. Second, while program policy limits its applicability to non-religious endeavors, it does so to maintain the neutral, secular character of the program. In fact, in accordance with this Court's well-established precedent, program policy makes clear that religious institutions are eligible for aid, so long as they further the secular purpose of providing the community with a service that "benefits the public at large."

The same neutral, secular criteria are also employed in numerous other Congressional enactments. For example, the American Recovery and Reinvestment Act of 2009, while authorizing funds to both secular and religious institutes of higher education, limits the use of funds to the secular purpose by prohibiting "modernization, renovation, or repair of facilities (A) used for sectarian instruction or religious worship; or (B) in which a substantial portion of the functions of the facilities are subsumed in a religious mission." 20 U.S.C. § 10002(b)(2) (2016); 20 U.S.C. § 10004(c)(3) (2016); *See also* Serve America Act, 42 U.S.C. § 12584a (a)(7) (2016) (prohibiting "constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship…").

Consistent and longstanding congressional use of the same limiting criteria that FEMA uses further legitimizes FEMA's policy. Adding to that legacy of legitimacy is repeated congressional refusal to amend FEMA's authorizing statute to require eligibility for houses of worship and facilities of religious institutions,

regardless of the primary purpose of those facilities. *See* Federal Disaster Assistance Nonprofit Fairness Act of 2015, H.R. 3066, 114th Cong. (2015); Federal Disaster Assistance Nonprofit Fairness Act of 2013, H.R. 592, 113th Cong. (2013).

Without these limiting provisions, FEMA would be forced to recognize religious instruction, worship, and proselytization as essential functions of government, creating a new class of beneficiaries based, not on their ability to further the secular purpose, but solely on the fact that they engage in religious activities. Creation of "skewed selection criteria," like the Church requests in this case, "stack[s] the deck in favor of groups that engage in religious indoctrination, encouraging potential recipients to take part in religious activity by rewarding them for doing so." *Am. Atheists, Inc. v. City Of Detroit Downtown Dev. Auth.,* 567 F.3d 278, 291 (6th Cir. 2009) (citing *Agostini*, 521 U.S. at 231). In *American Atheists*, the Sixth Circuit explained that churches in downtown Detroit did not receive aid based on "skewed selection criteria," but rather, that the churches received aid on a neutral, secular basis. *Id.* The Detroit churches met the neutral, secular criteria of the aid program, not because they engaged in religious activity, but because they owned buildings that were in disrepair. *Id.* In contrast, the Church, in this case, does not further the secular purpose of FEMA's PA Program because it does not adequately provide the types of services that the program funds. In order to extend aid to the Church, FEMA would necessarily be forced to create a new criterion favoring and ultimately subsidizing groups that engage in religious indoctrination,

which in turn would create financial incentive for potential recipients to engage in religious practices in exchange for governmental benefits.

3. Requiring FEMA to provide relief funds to the Church would result in an excessive entanglement that would fuse together the functions of government and religion.

Because the Church does not adequately further the secular purpose of the PA Program, the grant of relief funds would constitute a governmental endorsement of religious beliefs and would foster an excessive entanglement. This Court has long recognized that the "substantial religious character" of a potential aid recipient "gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Lemon*, 403 U.S. at 616. But this Court explained that not all entanglements occur to a degree which runs afoul of the Establishment Clause. *Agostini*, 521 U.S. at 233. As an example, the Court cited to *Roemer*, where this Court also found no excessive entanglement where a state conducted annual audits to ensure that governmental funds were not used to teach religion. *Id.* (citing *Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 764–765 (1976)).

In stark contrast to those cases, here the provision of aid to the Church would necessarily result in a governmental endorsement of the church's religious practices. To reiterate, though FEMA has not actually denied the Church's request for relief aid, this Court must assume that a denial would have been based on a determination by FEMA that more than 50 percent of the operating time of the chapel and event center were dedicated religious, ineligible services. FEMA, FP 104-009-2, Public Assistance Program & Policy Guide, 16 (2016). PA Program

policy explicitly includes within "eligible services," "community centers operated by a religious institution that provide secular services…that help the community at large," ensuring that the Church would not receive a denial of benefits based on its status as a religious entity. *Id.* FEMA enjoys very little discretion in these determinations. *See* U.S. Department of Justice, Office of Legal Counsel, *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, Memorandum of Opinion for the General Counsel, Federal Emergency Management Agency*, 26 Op. O.L.C. 114 (September 25, 2002), available at https://www.justice.gov/file/623861/download ("…there is little exercise of discretion regarding religion in the distribution of grant funds…). Thus, any relief received by the Church would necessarily be granted with the understanding that a majority of the funds would be used to further its religious purpose.

While it is true that the Church does provide use of the event center to the public for some secular purposes, the facility is used for the majority of its operating time as a place where religious endeavors are conducted, and therefore, any benefits to the advancement of religion would not be "incidental." The Establishment Clause does not prohibit "incidental," "remote," or "indirect" benefits to religion, but instead is concerned with the evils of "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Nyquist*, 413 U.S. at 772. This Court has upheld the "incidental" benefits to religion caused by tax-exemptions and, in turn, characterized a "sponsorship" as a transfer of the government's revenue to churches. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 675 (1970). To

reach that conclusion, the Court engaged in a balancing test of sorts and equated tax exemptions to incidental benefits such as police protection and school transportation, noting that a much greater entanglement between religion and government would occur if churches did not receive tax exemptions. *Id.* at 676.

That logic applies to this case. The excess of entanglement created by a direct money grant of FEMA funds for use in an ineligible religious facility far outweighs any potential entanglement caused by the alternative. That is, if the event center at the Church had not been rebuilt, the people of Lima could have urged the city to reconsider building a government-funded event center as was the plan in 2008. R. at 4. Ultimately, tax-payer funds will be used to fund the construction of an event center in either case. But using tax-payer funds to construct an event center owned by the city would not create the extensive entanglement issues presented by the Church's request. Moreover, if the Church ever decides it will no longer offer the event center for public use, government could compel the Church to open the facility for public use, measuring up to the degree of entanglement caused by the taxation of churches that concerned the Court in *Walz*.

Similarly, "active involvement of the sovereign in religious activity," arguably the most egregious form of entanglement, could occur if FEMA were to grant funds to the Church based on its engagement in religious activities, rather than on secular, neutral criteria. This Court in *Lemon* was particularly concerned with the possibility that excessive interaction between government and the church could lead to the intrusion of governmental power on religion. 403 U.S. at 620. The Court

explained that "state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches." *Id.* Moreover, this Court has warned of the constitutional dangers of permitting government to make "value judgments" regarding the social benefit of religious practices and institutions. *Walz*, 397 U.S. at 674. In refusing to justify tax-exemptions on the grounds that churches provide social benefit communities, the Court emphasized that the role of churches in the community is variable and the extent of the social services they provide may wax and wane. *Id.* Thus, giving emphasis to the social benefit of religious bodies would necessarily require that government evaluate and standardize the functions of the church, "producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Id.* "Hence," the Court concluded, "the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions." *Id.*

Despite such caution from this Court, the Church asks that FEMA endorse and subsidize its religious practice, apparently oblivious to the strength of the strings that may come attached to the government check. By its statutory authority, FEMA may only provide funds to those institutions that provide "essential services of a governmental nature to the general public." 42 U.S.C. § 5122(11)(B) (2016). Because the Church does not adequately engage in the secular

activities currently approved by the PA Program, distribution of FEMA funds would necessarily entail sponsorship of the church's religious activities and support of the social value of those activities to the community as a whole.

Even more alarmingly, incorporating the Church's religious practices in the definition of "essential services of a governmental nature" creates a frightening marriage of church and state that would seem to permit the government to exercise dominion over religious decisions usually reserved for the church. To be sure, characterizing essentially religious endeavors as a function of government is precisely the type of overreach the Establishment Clause was intended to enjoin. This Court's precedent has forwarned:

> The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963).

This Court's concern that an entanglement could rise to the level of a "fusion of governmental and religious functions" is illustrated by this case. The Church's request, if granted, would not serve to further the secular purpose set out by Congress, but would instead result in religious indoctrination solely at the hands of government. Permitting the creation of a new criterion for eligibility under the PA Program's policy based on religion would sanction the distribution of tax-payer as benefits for those who engage in religious practices. The end result would be an

entanglement that would erase the already-blurred line between religion and government. Ultimately, if FEMA were required to provide aid to the Church, the Establishment Clause would be fundamentally weakened and would provide no real protection from the establishment of a government religion at all. Accordingly, the judgment of the Fourteenth Circuit should be affirmed.

B. The Free Exercise Clause does not entitle the Church to use FEMA relief funds to sponsor its essentially religious endeavors.

If funds to the Church were denied, the denial would be the consequence of the church's failure to meet the neutral and generally applicable criteria of FEMA's PA Program, not because of its status as a religious entity. Under the Free Exercise Clause, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Determining the neutrality of a law requires that the Court evaluate the text in order to determine if the purpose of the law is to disadvantage one religion or all religions. *Id.* at 533. In *Locke v. Davey*, this Court held that *Lukumi*, where the Court held that the law at issue was not neutral because it explicitly targeted religious practices, was not applicable where a law does not require an entity or individual to "choose between their religious beliefs and receiving a government benefit." 540 U.S. 712, 720-721. In that case, this Court upheld a Washington state law that prohibited the use of government funds for the furtherance of a devotional, religious degree. *Id.* at 719. In determining that the law was neutral, the Court explained that the law did not

impose criminal or civil sanctions on any type of service or religious rite; it did not deny religious persons the right to participate in the political affairs of the community; and it did not require Davey to give up his religious beliefs in order to be eligible for the government benefit. *Id.* at 720-721.

Such is the case here. In looking to the text of the statute, it is clear that not only is the application of the law a neutral one, but it is also one that is generally available. It is not the purpose of the law to disadvantage religion. The purpose of the Robert T. Stafford Disaster Relief and Emergency Assistance Act is to rebuild communities after devastating environmental emergencies. 42 U.S.C. § 5121(a) (2016). Unlike other cases where this Court has found a violation of the Free Exercise Clause, this Act makes no reference to the practice of religion. *See Trinity Lutheran*, 137 S. Ct. at 2022; *Lukumi*, 508 U.S. at 534; *McDaniel v. Paty*, 435 U.S. 618, 628 (1978). Instead, the requirements for eligibility under FEMA's PA Program require only that a nonprofit provide "essential services of a governmental nature to the general public." 42 U.S.C. § 5122(11)(B) (2016). Though FEMA policy excludes from eligibility: "[r]eligious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large," it does not do so because it intends to suppress religious conduct. FEMA, FP 104-009-2, Public Assistance Program & Policy Guide, 14, table 3 (2016).

In contrast, FEMA policy prohibits the use of federal funds from being to further the "essentially religious endeavors" of the Church as is required by the

Establishment Clause. *See Locke*, 540 U.S. at 721. Like in *Locke*, the prohibition of the use of government funds for the practice of religion does not stem from "hostility towards religion" but is a product of the nature of our laws. *Id.* It is inherent in our understanding of the Religion Clauses of the First Amendment that the "essential functions of government" do not and should not coincide with "essentially religious endeavors." *Schempp*, 374 U.S. at 222.

Too, just as in *Locke*, the PA Program does not disqualify applicants based on religious status. According to this Court in *Trinity Lutheran*, the difference between cases like *Lukumi* and *Locke* is that in *Locke*, the potential recipient was not denied aid "because of who he *was*," but he was denied "because of what he proposed *to do*." 137 S. Ct. at 2016 (emphasis in original). Likewise, the PA program does not ask recipients to choose benefits over their religious beliefs. Just like the recipient in *Locke*, the Church has options if it wants to continue its religious mission and meet the eligibility requirements of the PA Program. 540 U.S. at 721. The Court in *Locke* explained, for example, that the recipient in that case could have used his scholarship to study business at one school while taking devotional courses at another school. *Id.* In this case, if the event center is to be eligible for relief funds, then the church has the option to perform less of its essentially religious functions in that room, potentially using the event center for church business that is consistent with the PA program's eligible services. It could, for example, conduct a food drive that benefits the community at large in the event center while conducting more primarily religious activities in other rooms. Though,

it would be curious if the Church were opposed to using the event space less often; if the church is unwilling to provide the use of the space, then it cannot claim that it is unfair that it does not receive benefits for doing so.

The court pointed out in *Locke* that the program in question "went a long way towards including religion in its benefits." 540 U.S. at 720-721. Here, too, PA Program policy explicitly includes within "eligible services" "community centers operated by a religious institution that provides secular services…that help the community at large." FEMA, FP 104-009-2, Public Assistance Program & Policy Guide, 13, table 2 (2016). Further, evidence of FEMA's intent to honor that policy may be gleaned from the reality that after the Church's application was preliminarily classified for denial, FEMA Regional Director, Jesse St. James, intended to review the application again to determine if the event center would satisfy eligibility requirements. Additionally, in practice, the PA Program's criteria allow for religious entities to participate in the program, so long as they meet the objective criteria—there is little room for FEMA to exercise any discretion in reference to religion.

Moreover, the facts of Trinity Lutheran explain why it is inapplicable in this context. There, this Court noted that the program in question was not akin to the program in *Locke* because the program in Locke involved an antiestablishment concern that "lay at the historic core of the Religion Clauses." 137 S.Ct. at 2023. The program in Trinity Lutheran, in contrast, concerned a program reimbursing entities for the purchase of recycled tires used to resurface playgrounds. *Id.* Again,

the similarities between this case and *Locke* and the distinctions between this case to *Trinity Lutheran* are striking. Like in *Locke*, this case concerns a fundamental antiestablishment issue: government funds may not be used to further the advancement of religion. 540 U.S. at 721; *See also Everson*, 330 U.S. at 16 ("No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . to teach or practice religion.")

In fact, this case requires the consideration of antiestablishment clause concerns to an even higher degree than was present in *Locke*. In *Locke*, the Court began its analysis by noting that the case did not present an Establishment Clause concern because while states are permitted to promulgate laws that restrict the use of state funds for the purpose of furthering religious education, the Establishment Clause does not require that they do so. 540 U.S. at 719. As the Court explained, under Establishment Clause precedent, the link between government funds and religious training is broken when individuals employ private choice to fund those "essentially religious endeavors." *Id.* However, that rationale does not apply in this case because there is no private choice here; funds flow directly from the hands of government to religious institutions and the link is not broken by the choice of the tax-payers. Therefore, even if the statute were not neutral and generally applicable, the limitation on the use of federal funds would satisfy strict scrutiny because the government has an interest "of the highest order" in satisfying the requirements of the Establishment Clause. *Trinity Lutheran*, 137 S.Ct. at 2024.

Analysis of this case under both Establishment Clause case law and Free Exercise case law demonstrates that the Church is not entitled to use federal funds to further its essentially religious endeavors. A grant by FEMA for that purpose would violate the restrictions of the Establishment Clause by causing religious indoctrination at the hands of government and would lead to a constitutionally impermissible fusion of the functions of government and religion. Likewise, the Free Exercise Clause does not compel the funding of the Church's religious endeavors because FEMA's PA Program does not discriminate against religious entities based on their religious affiliations. Rather, FEMA's eligibility criteria are neutral and generally applicable to all recipients, demonstrating that the Church's non-compliance with these objective standards is the cause for its denial of benefits. Because the Establishment Clause bars the Church from receiving federal funds to further its essentially religious purpose, this Court should AFFIRM the judgment of the Fourteenth Circuit.

CONCLUSION

This Court should AFFIRM the decision of the Fourteenth Circuit regarding ripeness and AFFIRM the decision of the Fourteenth Circuit regarding the Establishment Clause.

Respectfully Submitted,

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Team 38
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