Docket 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

and

W. Craig Fegate, Administrator of the Federal Emergency Management Agency

Respondents.

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

Brief for Respondents

Attorneys for Respondents (#45)
November 20, 2017

QUESTIONS PRESENTED

I. Under the Administrative Procedure Act, is a potential claim barred by the doctrine of ripeness when an agency has not yet denied an entity's request, but the organization has chosen to file suit anyway?

II. The Federal Emergency Management Agency permits mixed-use religious organizations and other nonprofits to receive federal disaster relief funding if their facilities comply with certain conditions. Under the First Amendment, is it discriminatory for FEMA to require compliance with these conditions?

RULE 24.1(b) AND 29.6 STATEMENT

Pursuant to Supreme Court Rule 24.1(b), Respondent, Federal Emergency Management Agency, states that all parties to the proceeding below appear in the caption of the case on the cover page.

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TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, Federal Emergency Management Agency, appellee in Docket No. 17-2893-1 before the United States Court of Appeals for the Fourteenth Circuit, respectfully submits this brief on the merits, and asks this Court to affirm the Fourteenth Circuit Court of Appeals.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2017. (R. at 1.) The petition for writ of certiorari was granted on October 17, 2017. (R. at 1.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

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

STATUTES AND REGULATIONS

The following federal statutes and regulations are relevant to this case: 5 U.S.C. § 704; 42 U.S.C. § 5172(a); 44 C.F.R. § 206.206; and 44 C.F.R. § 206.221(e). These provisions are reprinted in Appendix B.

STATEMENT OF THE CASE

This case is about the continued viability of the Federal Emergency Management Agency's (FEMA) disbursement of federal aid following catastrophic natural disasters. (R. at 2.)

Hurricane Rhodes Strikes the Cowboy Church of Lima

In mid-August of last year, Hurricane Rhodes made landfall near Lima, New Tejas. (R. at 2.) Because of the heavy rainfall, a local dam failed and released a torrent of water that rushed into Lima, causing catastrophic flooding in the region. (R. at 3.) As a result of the rising floodwaters, a local church—the Cowboy Church of Lima (CCL)—sustained damage to its chapel and attached community center. (R. at 4.) The water flooded the entirety of the 5,500 square foot structure, including the 2,250 square foot chapel and the adjoining 2,250 square foot events center. (R. at 4.) Though the events center was designated as an emergency relief shelter, it was unable to be used because of the rising waters. (R. at 7.) Once the waters receded, the church's chaplain began the clean-up process to repair and restore the building. (R. at 5.)

While the church was being remediated, a volunteer also noticed that the building had some structural damage as well. (R. at 6.) Fearing that the structural damage could cause the building to fail, the chaplain then decided to apply for public assistance to help offset the cost of repairs. (R. at 6.) The chaplain applied for FEMA assistance and sent out an application for a Small Business Administration loan. (R. at 6.) In addition, the chaplain solicited donations and

voluntary labor from the community and from the larger Cowboy Church network, which ultimately allowed the church to reopen less than a year later. (R. at 8.)

Conflicts with FEMA

Immediately after the chaplain applied for aid, FEMA contracted a local adjuster to take a tour and survey the facility. (R. at 6.) During the tour, the damages were noted and recorded so that the information could be transmitted back to the FEMA office. (R. at 6–7.) Additionally, the adjuster also commented about her experience with FEMA funds being given to churches. (R. at 7.) The contracted adjuster told the chaplain that she had never personally heard of federal funds being given to a church for repairs, but that she would do what she could to help the church. (R. at 7–8.) She also told the chaplain that it would be a few weeks before FEMA contacted him regarding the eligibility determination. (R. at 8.)

Unfortunately, FEMA was never given a chance to make a formal decision regarding the church's application for funds. (R. at 8.) Four days after the contractor's tour of the church, the CCL filed suit against FEMA alleging violations of the Free Exercise Clause of the First Amendment. (R. at 8.) Because of the lawsuit, FEMA immediately abated the processing of the church's application, pending the results of litigation. (R. at 8.) Though the church had been placed into the preliminary denial category, the FEMA director stated that he was planning to review the church's application and ultimately, the event center might have been given aid. (R. at 10.)

At the trial court, conflicting deposition testimony was solicited from both parties concerning how the events center and chapel were used, and whether the facility was primarily a religious facility or a community facility. (R. at 9–10.) Overall, the witnesses estimated that the chapel was used for religious purposes 80% to 95% of the time, while the events center was used for religious purposes 15% to 60% of the time. (R. at 7, 9–10.) However, the chaplain of the church personally testified that the chapel was used for church-related events 85% to 95% of the time, and that the events center was used for church-related events 60% of the time. (R. at 7, 9.)

Procedural History

After concluding discovery, FEMA sought to dismiss the case by arguing that the case was not yet ripe, and that the Establishment Clause protected FEMA's ultimate decision regarding the church's eligibility for relief. (R. at 10.) The trial court granted the motion for summary judgment on the Establishment Clause issue, but denied to dismiss the claim for a lack of ripeness. (R. at 10.)

On appeal, the Fourteenth Court of Appeals also found for FEMA. (R. at 17.) Writing for the majority, Judge Schuester held that the church's claims were not ripe for adjudication and that the lower court had correctly barred recovery due to the requirements of the Establishment Clause. (R. at 17.) However, one judge dissented. (R. at 17.) In his dissent, Judge Sylvester noted that he believed that the issue in this case was sufficiently ripe for adjudication and that the grant of summary judgment was improper on the First Amendment claim. (R. at 21.)

SUMMARY OF THE ARGUMENT

Premature Claims Are Dismissible as Unripe

Under the APA, before a claim can be heard in the courts, the issue must be fully justiciable. More specifically, if an issue has not yet ripened, then it is not justiciable, and a reviewing court should dismiss the case. The hallmarks of ripeness include a developed record, and the likelihood of undue hardship if the claim is not heard. Since ripeness is a question of timing, if these factors are not present at the time that a lawsuit is filed, then the case should be dismissed for lack of ripeness. Because FEMA has not yet issued a decision concerning the CCL's eligibility for relief, a dispositive fact is presently absent from the record. Furthermore, because the CCL has already completely repaired its facilities, neither party has suffered an undue hardship in the absence of judicial review. Since both factors are absent in this case, the claim is not yet ripe and should be dismissed.

The Free Exercise and Establishment Clauses Must be Balanced

The Establishment Clause and the Free Exercise Clause are both limits on what the government can do if religion is involved. It is impermissible for the government to advance religion, but it is also unconstitutional to discriminate against religion. This Court, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, stated that there is room to work in the gaps between these two conflicting First Amendment mandates. Therefore, the government can offer federal funding to religious organizations, but only if the entity can comply with neutral, non-

religious conditions. By maintaining a neutral approach that neither favors nor disfavors religious entities, the government can strike a balance that manages to uphold the requirements of the First Amendment.

STANDARD OF REVIEW

A determination of ripeness is a legal determination and, thus, is subject to *de novo* review. *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 511 (2d Cir. 2014); *see also In re Jillian Morrison, L.L.C.*, 482 Fed. Appx. 872, 874 (5th Cir. 2012) (reviewing a ripeness determination *de novo*.). Similarly, *de novo* review is required when an appellate court reviews a First Amendment issue. *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2169 (2014). For *de novo* review, the appellate court must take the facts as they are found in the record, while also reviewing the legal issues anew. *Id.*

ARGUMENT

I. The doctrine of ripeness bars judicial review of this action because FEMA had not issued a final determination of funding and so any alleged injury was purely speculative.

Ripeness is the simply the requirement that a dispute must be mature before a court can intervene to review it. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732 (1998). By drawing upon the expressed limitations of Article III—as well as additional prudential considerations that concern the limits of judicial authority—ripeness prevents parties from entering the judicial system before a cognizable claim has fully materialized. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18 (1993). If a claim is not yet real or imminent, limited judicial resources

should not be squandered on the resolution of these abstract concerns. *See id.* Until a dispute has been properly developed, courts must strive to withhold from the premature consideration of such claims. *Abbot Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). Therefore, the ripeness doctrine reflects the policy "that the disadvantages of premature review…ordinarily outweigh the additional costs." *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

For disputes arising under the Administrative Procedure Act (APA), ripeness is also intended to ensure that our court system does not unnecessarily entangle itself by examining administrative policies and decisions that have not yet been truly formalized. *Id.* If an issue is not yet ripe for judicial review, it is a legal error for the court to rule on it. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*, 559 U.S. 662, 688 (2010) (Ginsburg, J., dissenting) ("The Court errs in addressing an issue not ripe for judicial review.").

Though the doctrine is closely related to other doctrines of justiciability, ripeness is uniquely treated and specifically addressed by this Court's jurisprudence. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n. 8 (2007) (explaining the difference between standing and ripeness when justiciability is at issue). Contrasted with the other doctrines of justiciability, ripeness primarily concerns questions of timing. *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 138 (1974). Therefore, until a "decision has been formalized and its effects felt in a concrete way[,]" the courts should refrain from ruling on an unripe issue. *Abbot Labs.*, 387 U.S. at 148. In addition, if the complainant cannot

show that he has sustained—or is about to sustain—a direct injury from the disputed agency action, then his claim is not yet ripe. *Laird v. Tatum*, 408 U.S. 1, 13 (1972).

A. The Cowboy Church of Lima's judicial challenge is not yet fit for review.

To determine whether an administrative action is ripe for review, this Court has developed a two-part test. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). First, the court must consider whether the issue is fit for determination. *Id.* Second, the court must examine whether any party will be subject to hardship if the court refuses review of the action. *Id.* This determination requires the court to balance these two factors when deciding whether an issue is ripe. *Devia v. Nuclear Regulatory Comm'n,* 492 F.3d 421*,* 423–25 (D.C. Cir. 2007). Under the APA, until an issue's scope has been sufficiently narrowed and a concrete, formalized action has been performed by the agency, the agency's action is not ripe. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

i. Review is improper because FEMA has not issued a preliminary ruling on the CCL's eligibility.

As to the first inquiry, an administrative dispute must be "fit" before it can be challenged. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). To be fit the factual record of a dispute must be nearly complete so that the reviewing court can conduct the necessary balancing of interests. *Ruckleshaus v. Monsanto*, 467 U.S. 986, 1020 (1984). Requiring a sufficient factual record helps

to prevent the premature review of a decision that has not been officially formalized. *Abbot Labs.*, 387 U.S. at 149.

Additionally, since ripeness calls into question the jurisdiction of the reviewing court, this determination must turn on the facts existing when the case was filed. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570–71 (2004). Therefore, if an agency has not yet made a "final" action when a lawsuit is filed, the reviewing court should dismiss the case for lack of ripeness. *Id.*; 5 U.S.C. § 704 (2017). In addition, "[a] preliminary, procedural, or intermediate agency action or ruling…is subject to review on the review of the final agency action." § 704. Though this statutory language is somewhat confusing, it just means that an aggrieved party must wait for a final agency determination before a suit may be filed. *See id.*

In this case, the CCL's claim was never permitted to ripen. This is because the CCL filed suit against FEMA on August 29, 2016—nearly a month and a half before FEMA was supposed to make its initial aid determination. (R. at 8.) When the suit was filed, FEMA had not yet made any formal decisions concerning the CCL's funding request. (R. at 10.) Even though the CCL had been placed into the "preliminary denial category[,]" FEMA had not rendered anything that could be remotely considered a final agency action. (R. at 10.) The record explicitly states that FEMA was never ultimately able to approve or deny the CCL's application before the lawsuit was filed. (R. at 8.) Therefore, the courts are presently expending judicial resources staging a battle that may never be needed. (R. at 10.)

The fact that the CCL's claims are presently unfit for review is especially noticeable because the CCL's position seems to be entirely based on speculation. (R. at 7.) In fact, the FEMA Regional Director conceded during a deposition that "he was planning to review [CCL's] file himself and ultimately the event center might have been granted FEMA assistance." (R. at 10.) If this decision was formalized, then there would be no more need to argue over the speculative harm that the CCL may have had to undergo. (R. at 10.)

With FEMA's funding determination looming just a month away, if the CCL had waited one month, the record would have been more complete than it is now, and the courts would not have been forced to rule on the presently unfounded assertions that inhabit the record today. (R. at 10.)

Furthermore, acceptance of the CCL's argument that waiting for FEMA's final funding determination "amount[ed] to a *de facto* denial" is especially worrying. (R. at 10.) Such a holding would create a troubling precedent for future agency discretion while also trampling upon the deference that this Court has traditionally given to agencies. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies"). If the Court were to step-in to decide the question presented at this preliminary stage of the process—before any final decisions have been made—then it would invite countless future parties to appeal any number of preliminary matters before an agency has been permitted to decide on them. (R. at 8.)

The courts would be inundated with unfit, unmatured claims from parties that are unwilling to wait for formal agency decisions. The records in these cases would be necessarily sparse due to the preliminary nature of the claims, and the fitness requirement of this Court's two-pronged ripeness test would become glossed over. Such a marked departure from the existing framework for judicial review would likely prove unworkable, and thus should be avoided.

This is not to say that the CCL cannot file against FEMA in the future if its claims have matured. But the question of ripeness is one of timing, and the CCL chose to file their lawsuit before the time was right. If the Court were to make its decision now, then it would be robbing the agency of its discretion. However, if FEMA is allowed to follow its mandate and make an actual decision concerning the CCL, then all of the necessary facts will be available for a court to properly review that decision.

ii. The CCL needs a final written agency decision before judicial review is proper.

FEMA regulations provide the right to appeal any decision made concerning an applicant's request for relief funds under the Public Assistance Program. 44 C.F.R. § 206.206 (2017); *see also* FED. EMERGENCY MGMT. AGENCY, FP 104-109-2, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE (2016) (explaining the FEMA appeals process). If an applicant is unhappy with its eligibility determination, the applicant has sixty days to file a notice of appeal to FEMA to request reconsideration. 44 C.F.R. § 206.206(c)(1) (2017). If the appeal is timely filed, the

applicant is presented with two additional opportunities for FEMA to reconsider its initial eligibility determination. § 206.206(b).

To begin, the FEMA Regional Administrator will examine the application and make a decision regarding its eligibility. § 206.206(b)(1). However, if the applicant disagrees with the Regional Administrator's determination, then a second appeal may be submitted to the Assistant Administrator of the Recovery Directorate at FEMA headquarters. § 206.206(b)(2). The Assistant Administrator provides the final level of review for FEMA's appeals process. *Id.* Once the Assistant Administrator has reviewed the second appeal and ruled on its eligibility, a "final written decision" is provided to the applicant that states the results of the applicant's appeal. PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE. If the second appeal is still unsatisfactory, an applicant can then seek judicial review of the applicant's final written eligibility decision. 5 U.S.C. § 704 (2017).

In *Califano v. Sanders*, this Court was asked to examine the permissibility of a similar appeals process for social security benefit claimants. *Califano v. Sanders*, 430 U.S. 99, 108 (1977). If a claimant was denied benefits, the claimant was entitled to seek administrative reconsideration if they filed for appeal within six months of the denial. *Id.* at 101. If that appeal's process was similarly unsuccessful—and a final decision was entered—then, finally, the claimant could file for judicial review in the district court. *Id.* at 102.

In *Califano*, the respondents tried to argue that § 10 of the APA entitled claimants to immediate judicial review if an initial request for social security

benefits was denied, making the additional administrative appeals unnecessary. *Id.* at 108. However, this argument proved fruitless. *Id.* In its opinion, this Court noted that interpreting the APA in such a manner would have stretched the Act past its limits. *Id.* The APA was not written to "allow a claimant judicial review simply by filing and being denied a petition." *Id.* Instead, the Act and the agency's regulations were meant to create an orderly system through which claims could be processed and finalized before a court was permitted to review them. *Id.* at 102.

In this case, the CCL's claims are not ripe because it has not yet received a final written decision from the Assistant Administrator of the Recovery Directorate at FEMA headquarters. (R. at 10.) In the absence of that final written decision, the CCL cannot yet seek appeal under the APA.

Like in *Califano*, the CCL has attempted to prematurely seek review before its claims have had an opportunity to fully ripen. *Califano*, 430 U.S. at 108. By ignoring the orderly appeals process that FEMA has developed for Public Assistance claims, the record is now devoid of the very facts that the CCL wishes to have reviewed, namely, whether FEMA has denied the CCL's application. (R. at 10.) Since there is not a final eligibility decision in the record, this Court has no final decisions that it can review under § 10 of the APA. (R. at 10.)

Like the Social Security Administration, FEMA has its own set of regulations and processes that must be followed before a final decision can be rendered. Without a final decision on the record—and the additional information that would inevitably accompany the FEMA appeals process—the facts cannot

currently support judicial review at this time. Therefore, until the Assistant Administrator has issued his final written decision concerning the CCL's application, this adjudication is not ripe. Because that decision has not been rendered, this case should be dismissed.

B. There is no hardship because the CCL has already repaired its facilities.

When determining the ripeness of an administrative action, the second inquiry that a court must make is whether a delay in judicial review will cause undue hardship to any of the parties. *Abbot Labs.*, 387 U.S. at 808. Thus, the courts must determine whether an agency's actions will create "adverse effects of a strictly legal kind." *Ohio Forestry Ass'n*, 523 U.S. at 733. If the hardship caused is great, then a court should be more willing to determine that an issue is ripe. *Ernst & Young v. Depositors Econ. Prot. Corp.,* 45 F.3d 530, 536 (1st Cir. 1995).

i. The CCL did not suffer any adverse effects.

If certain factors are present, it can be easily demonstrated that a party has suffered an undue hardship as contemplated by the test for prudential ripeness. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 165 n. 2 (1967). These factors include: the speed at which administrative proceedings are conducted, the potential for timely judicial review, and the availability of temporary or remedial measures. *Id.* Since the courts are asked to perform a balancing test, if these factors support a finding that further agency action would not unduly harm the other party, then ripeness bars judicial review of the administrative claim. *See id.*

In this case, the hardship factors for ripeness weigh heavily against the CCL. To begin, before a lawsuit was filed, FEMA's administrative proceedings were rapidly progressing. (R. at 10.) CCL initially filed its application for FEMA relief funding at the end of August 2016. (R. at 6.) Shortly thereafter, FEMA's Regional Director was prepared to issue a specifically-reviewed eligibility determination for the church and events center. (R. at 10.) However, only a week and a half after it filed its application, the CCL decided to file suit, even though FEMA was fully engaged in the process of reviewing the CCL's application. (R. at 8.) Once the lawsuit was filed, FEMA placed a hold on the CCL's claim, pending a legal determination. (R. at 8.) Absent this lawsuit, the administrative process was on track for a swift completion. (R. at 10.) This first factor therefore favors FEMA.

Next, timely judicial review of this case has already proven to be illusive. Instead of seeking a preliminary injunction so that the church could potentially receive its funding immediately, the CCL has chosen a different path through the judiciary. And thus far, the CCL has still not received any of the FEMA benefits that it applied for. (R. at 8.)

The Fourteenth Circuit Court of Appeals was unable to hear this case until the beginning of October 2017, well over a year after the CCL sustained damage from Hurricane Rhodes. (R. at 2.) In addition, this appeal is now before the Supreme Court of the United States, so it will take even longer before a final decision is made concerning the CCL's claims. (R. at 1.) If FEMA had been permitted to process the claims as scheduled—and the CCL had taken advantage

of FEMA's internal appeals process—the entirety of this dispute could have already been resolved in the CCL's favor. (R. at 10.) Instead, a lengthy court battle has ensued and after a year, no conclusion has been reached. (R. at 1.) For these reasons, the timeliness of judicial review also weighs against the CCL.

Finally, since the CCL rebuilt and reopened its facilities months ago, it is clear that alternative remedial measures were available in this case. (R. at 8.) Since the beginning of 2017, the CCL's congregation and community volunteered time and resources to rebuild the church and event center. (R. at 8.) In addition, the Cowboy Church Groups' network also gave materials while the CCL's chaplain solicited for other outside donations. (R. at 9.) As a result, the CCL has been fully operational for months now. (R. at 8.) For this reason, this factor also weighs against the CCL.

Since every factor for determining hardship weighs against the CCL, it seems clear that the CCL did not suffer an undue hardship in this case. Therefore, the doctrine of ripeness should bar further judicial review of this issue.

ii. Nor can the CCL show a direct and immediate dilemma.

As a corollary to the other hardship factors, a hardship determination can also be decided based on the presence of a "direct and immediate dilemma" that stems from an agency's actions. *Abbot Labs.*, 387 U.S. at 152. If a delayed resolution "would foreclose any relief from the present injury suffered[,]" the courts should not hesitate to find that an issue is presently ripe for adjudication. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978). Conversely,

if a dilemma or injury is speculative or non-existent, judicial review is an inappropriate remedy for an administrative agency's actions. *See id.*

Once again, since the potential harms suffered by the CCL are now non-existent, the record supports a finding that a delayed resolution of this issue would not have affected relief for the injury that the CCL suffered. (R. at 8.) The impetus for the CCL's haste in filing for judicial review seems to be that its facilities had sustained "structural damage…that required immediate repairs." (R. at 9.) But once again, these repairs were completed almost a year after the CCL initially applied for relief. (R. at 8.) The entirety of the CCL's argument seems to revolve around the fact that FEMA was not moving fast enough, but that claim finds no support in the record.

Assuming arguendo that the Regional Director would have waited until the last possible day to make the CCL's eligibility determination (October 14, 2016), the CCL would have had two months from that date to file for the second level of FEMA appeals with the Assistant Administrator at FEMA headquarters. (R. at 10.) This would have meant that the CCL would have been notified of FEMA's final decision by the end of 2016, at the latest. (R. at 10.) At that point, FEMA funds would have been distributed, or the CCL could have permissibly sought review in the district court—and the question of ripeness would not have been present to slow down the court's adjudication. (R. at 10.) Therefore, the CCL could have received its funds well before it resorted to soliciting for donations if it had not filed a lawsuit and disrupted the administrative processes of FEMA. (R. at 8, 10.)

In this case, the alleged injuries were not only speculative on the part of the CCL, but, like with all ripeness claims, they also seemed to be at least partially self-inflicted. (R. at 8.) Since the CCL's facilities were fully repaired and restored, there was not a direct and immediate dilemma to be solved by the courts here. (R. at 8.)

In sum, this case was never permitted to become ripe. For this reason, the holding of the Fourteenth Court of Appeals should be affirmed on the issue of ripeness and this case should be dismissed.

II. By using specific criteria for eligibility, FEMA has ensured that federal funds are distributed to nonprofits in need without conflicting with the First Amendment.

Since 1940, it has been well-settled precedent in this Court that the First Amendment shall act as a bar to the passage of any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Because of its primary position within the Bill of Rights, the strength and rigidity of the First Amendment is beyond reproach. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

Due to the absolute nature of the First Amendment, the Amendment's scope necessarily requires the government to be neutral in its dealings whenever religion is involved. *Id.* at 18. If the Free Exercise Clause and the Establishment Clause are both implicated in a particular case or cause, special scrutiny must be paid to ensure that Church and State are completely and unequivocally separated. *Zorach*

v. Clauson, 343 U.S. 306, 312 (1952). Where these two clauses happen to overlap, the government must maintain complete neutrality in any approach that it chooses to undertake. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). The actions of the government must never promote or restrain religion. *Id.*

A. Forcing FEMA to fund a religious institution would inadvertently violate the Establishment Clause.

The general principle of the Establishment Clause is that there must always be a necessary separation between the practice of religion and the foundations of civil authority. *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961). This means that a "wall" must be erected between government and religion, and the wall must be steadfastly maintained. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). Even if the government is acting with good intentions, the government and religion must remain segregated. *Schempp*, 374 U.S. at 226.

As a result of this principle, a large section of Establishment Clause precedent has arisen due to the issuance of public aid to religious institutions. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973). This is because the primary concerns of the Establishment Clause are the sponsorship and financial support of religious organizations by the government. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970). Though it can be difficult to delineate the "boundaries of permissible government activity in this sensitive area[,]" a test has emerged that can be used to determine the permissibility of governmental aid to religious institutions. *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

Originally promulgated in *Lemon v. Kurtzman*, this test looks at three factors when weighing the permissibility of the government's action. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). To avoid conflicting with the First Amendment, the action must: (1) have a secular legislative purpose; (2) its primary effect must not advance or inhibit religion; and (3) it must not foster excessive entanglement with religion. *Id.* (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *see also Agostini v. Felton*, 521 U.S. 203, 234 (1997) (explaining that analysis of the entanglement prong of the *Lemon* test is usually included within analysis of the advancement of religion prong).

i. The use of federal funding to reconstruct buildings for religious use is unconstitutional.

After the promulgation of the *Lemon* test, the courts have repeatedly reiterated the prohibition against direct aid to religious organizations when such aid has been used to advance religion. *See Camps Newfound Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 570 (1997). It can be assumed that such aid is being used to improperly advance religion when federal funds "flow 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). If an organization's existence is one in which religion dominates the organization's purpose and mission, then it follows that aid to that organization is improper—especially if such aid is to be used for the construction of on-site facilities. *Nyquist*, 413 U.S. at 774 ("If a 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.").

In *Tilton*, appellants challenged certain grants that were provided to church-related universities so that academic facilities could be constructed. *Tilton*, 403 U.S. at 676. Even though the funds were only used to build libraries, arts buildings, and science buildings, the Court unanimously held that the grants still could have potential Establishment Clause ramifications. *Id.* at 689. The reasoning for the Court's holding was that federal funding could not be used to subsidize the construction of any buildings if those buildings could ever be used for a religious purpose. *Id.* at 683. Even though the universities claimed that the buildings were for purely secular purposes, the Court noted that if the buildings were ever used for religious purposes in the future, then "the original federal grant will in part have the effect of advancing religion." *Id.* The risk of a potential future change in use caused the Court to overturn part of the granting statute that was implicated in *Tilton*. *Id.*

If FEMA is forced to distribute federal funding to the CCL to rebuild their damaged facilities, it is almost inevitable that a violation of the Establishment Clause would occur in the future. The record clearly reflects the fact that the damaged chapel was used for purely religious purposes for a clear majority of the time. (R. at 7, 10.) Depending on who was asked, the parties and witnesses estimated that the chapel was used for religious purposes about 80% to 95% of the time. (R. at 7, 10.) If FEMA approved the use of federal aid for rebuilding of the

chapel, a blatant violation of the Establishment Clause would have been present due to the religious use of the building.

However, the CCL will likely argue that funding should have been at least provided to help rebuild the events center that was also present on-site. But once again, the record illustrates the fact that this would also lead to an almost inevitable violation of the Establishment Clause. When depositions were taken, the estimates concerning the use of the events center for religious purposes varied wildly from witness to witness. (R. at 7, 9–10.) The estimates as to religious use ranged from 15% to 60% of the time. (R. at 7, 9–10.) The chaplain of the CCL claimed that the event center was used for church-related events 60% of the time—the lower estimates came from other community members that were not directly affiliated with the CCL. (R. at 7, 9–10).

Though the present numbers already prove that religious use is prevalent in the CCL's events center, if the estimates are still unpersuasive, the discussion does not end there. To avoid having federal funds implicated in the advancement of religion after the events center was rebuilt, the CCL would also have to be able to demonstrate that the events center would never be used for substantially religious purposes at any point in the future as well. Like in *Tilton*, if use of the building ever shifted from more secular uses to more religious uses, then the federal funds would have contributed to the impermissible support of religious activity. Since the record reflects that the facility already enjoys substantial religious use, such a showing would be almost impossible to procure. (R. at 7, 9–

10.) In addition, this would place FEMA in the unenviable position of having to perpetually maintain intrusive government monitoring of how this small-town events center was used to avoid any potential constitutional issues in the future. Such a position is simply untenable for a federal agency to manage, and it would create an excessive entanglement between FEMA and the CCL—a violation of the third prong of the *Lemon* test.

Additionally, the CCL may try to argue that this Court's holding in *Trinity Lutheran* now demonstrates that federal aid may be used for the construction of on-site facilities at a religious institution. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (permitting the dispersal of state funds to a purely religious entity). But this argument is similarly flawed. There is a notable difference between the construction of a building, and the resurfacing of a playground. A playground surface is undeniably secular. But the reconstruction of a church building is an action that cannot be easily claimed as a secular activity. This distinction is important though because the funding of an entire building would cross the line that this Court has drawn between the funding of religious entities, and the funding of secular activities that are only hosted by religious entities.

Since FEMA's funds could not be functionally limited to purely secular use by the CCL, a grant from FEMA would almost certainly create a violation of the Establishment Clause under the second prong of the *Lemon* test.

ii. The use of federal funds by the Church would constitute the direct support of religion.

In addition to the ban on the use of federal funds for the construction of religious buildings, a second line of this Court's precedent proscribes the direct support of religious organizations. *See Grand Rapids Sch. Dist. v. Ball,* 473 U.S. 373, 385 (1985). Through application of the second and third prong of the *Lemon* test, a distinction has been made between programs that directly contribute to religious entities, and those that do so only indirectly. *Id.* The restriction on aid that only indirectly benefits religious organizations is more relaxed, but the direct funding of religious activities is still strictly prohibited. *Mitchell v. Helms*, 530 U.S. 793, 815–16 (2000). This distinction between direct and indirect funding helps to ensure that the government does not advance religion and is not excessively entangled with sectarian activities. *Lemon*, 403 U.S. at 612.

Recently, the direct/indirect analysis has tended to focus on the narrow question of whether the government directly funds the religious organization, or whether a "private choice" is present so that the aid "first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere." *Id.* at 816 (citing *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986)). If a private choice is present, then it is less likely that governmental funding will directly serve to advance specific religious purposes—the actions of private citizens will serve as a barrier between the government's direct funding of the religious entity. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *see also Bowen v. Kendrick*, 487 U.S. 589, 610 (1988). However, if funds

are directly provided to an organization that is permeated by a religious character and purpose, such direct aid will inevitably violate the *Lemon* test because it directly supports the advancement and practice of religion. *Locke v. Davey*, 540 U.S. 712, 720 (2004); *see also Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976).

In this case, Chaplain Hudson sought FEMA funds as the direct agent of the CCL. (R. at 6.) The sole purpose of his request for federal funding was so that he could "receive public assistance for repairs [of the CCL's facilities]." (R. at 6.) As an agent of the church, Chaplain Hudson chose to pursue direct aid for the reconstruction of his damaged chapel and events center. (R. at 6.) There is no "private choice" present in the record.

Furthermore, as previously discussed, this aid would have been directly distributed to a pervasively religious institution. Though the CCL was known to host certain secular activities with its facilities, first and foremost, the CCL is and has always been a church. (R. at 4.) At one point, the CCL attempted to have its new events center declared a government building by county authorities, but that application was expressly denied. (R. at 4.) The county was in the best position to determine the true purpose of the CCL's facilities, and the record shows that the events center was not a governmental facility separate from the church itself. (R. at 4.) Both the chapel and the events center were built on church lands and were used for church-related activities. (R. at 4.)

For these reasons, if FEMA were to grant the chaplain's request, federal funding would be used for the direct advancement of religious activities. Since this direct gift would not be subject to the intervening decision of a private individual, such a grant would be in clear violation of the Establishment Clause.

B. The Free Exercise Clause cannot be used to overturn the mandates of the Establishment Clause.

It is well-settled that a claim under the Free Exercise Clause cannot "supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Under the Free Exercise Clause, individuals are protected from the risk of governmental interference with the individual's right to exercise their religion. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1836 (2014) (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring)). This means that the Clause is meant to protect against the unequal treatment of a religious observer solely because of their religion. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). Therefore, the government must not outlaw conduct merely because the conduct is religious in nature. *Id.*

However, the Court has also shown that it is willing to reject free exercise challenges in certain circumstances. *See Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). The Free Exercise Clause is not implicated every time that a governmental action may indirectly affect someone's religious beliefs. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Instead, the government's actions are only unconstitutional when

the actions "effectively penalize the free exercise of [a person's] constitutional liberties." *Id.* at 406.

Under FEMA's listed conditions for eligibility for disaster relief aid, contributions can be made for the repair and reconstruction of any private nonprofit facility that provides a necessary service to the community. 42 U.S.C. § 5172(a)(1)(B) (2017). As defined, FEMA considers a variety of private nonprofit facilities to be eligible for relief if they offer some form of "essential governmental type services to the general public." 44 C.F.R. § 206.221(e) (2017). A community center can provide these essential governmental services, even if a religious organization operates it. *Id.* § 206.221(e)(7); *see, e.g.,* PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE ("Although associated with a specific religion…Faith Community Center would be an eligible community center because it meets all the requirements of the definition.").

If a facility provides both eligible and non-eligible services, then FEMA applies a neutral "mixed use" analysis that examines how the facility is actually used. PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE. If "*more* than 50 percent of the physical space in the facility is dedicated" to eligible, approved governmental services, then the facility can receive FEMA funding. *Id.* (emphasis added).

i. Since FEMA's benefits are subject to non-discriminatory, facially-neutral conditions for disbursement, the Free Exercise Clause has not been violated.

If a governmental program automatically disqualifies an applicant purely because of religious character, the program may be found to be in violation of the

Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. at 2021. However, for a program to be found unconstitutional, there must be evidence that the program expressly disqualified an applicant for eligibility solely because of the applicant's religious character. *Id.* at 2022 ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant."). Furthermore, the right to free exercise is generally inapplicable as a means to attack the administration of a valid, facially-neutral program. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). This is true so long as the program is available to everyone without discrimination. *Id.*; *see also* Douglas Laycock, *Churchs, Playgrounds, Government Dollars—and Schools?*, 131 Harv. L. Rev. 133, 161 (2017) ("The Court upholds funding of religious organizations, and sometimes requires it, when the funding is part of a neutral program that treats religious and secular alike.").

In *Trinity Lutheran*, the Trinity Lutheran Church Child Learning Center applied for a state grant for use at its facility. *Trinity Lutheran*, 137 S. Ct. at 2017. After applying, the church's application was quickly denied because the state agency had "a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* Even though the church's application was ranked fifth out of the forty-four applicants, the denial was finalized, and the church was not permitted to receive a grant. After the church brought suit, this Court found in favor of Trinity Lutheran on Free Exercise

grounds. *Id.* at 2025. Because the church was not permitted "to participate in [the] government benefit program without having to disavow its religious character[,]" this Court held that the church's free exercise rights had been violated.

As the Court of Appeals noted in its opinion, the facts of *Trinity Lutheran* are easily differentiated from the ones at issue in this case. (R. at 16.) Since all private nonprofits that provide particular services are eligible to apply and be approved for FEMA relief, the Free Exercise Clause is not offended here. (R. at 16.) The record reflects that FEMA does not have a blanket ban in place that would expressly deny the application of any religious applicant. (R. at 16.) Instead, FEMA merely determines whether an eligible service is provided by the facility, and the eligibility determination is made based on the answer to that inquiry. (R. at 16.)

Even though the contracted adjuster that was retained by FEMA stated otherwise, her baseless speculations fly in the face of the policies that FEMA has instituted. (R. at 7.) Community centers run by religious organizations are not *per se* excluded from consideration. Instead, the religious use of the applicant's facility is only implicated when determining what percentage of the space is being used for governmental services; that is the extent of FEMA's examination. Under FEMA's reasoning, other non-religious nonprofits like animal shelters, veteran's support services, or even pro bono legal service organizations would be ineligible for funding because these entities also do not provide essential governmental services. Even though these other types of organizations are not at all religiously

affiliated, they would be similarly ineligible because they do not meet FEMA's neutral criteria for aid.

Therefore, assuming arguendo that the CCL would have been denied FEMA relief, it would not have been for a First Amendment reason. Instead, it would have been because the CCL was not providing the necessary governmental services that FEMA's guiding statutes and regulations require. Since the events center accounts for exactly half of the church's total square footage, this obviously does not meet FEMA's standard—which requires that more than 50% of the facility be devoted to providing the approved governmental service. (R. at 4.)

Simply put, the CCL's facilities were not eligible for relief because they could not meet the facially-neutral conditions that FEMA had promulgated for eligibility. The church's religious character played no role in FEMA's ultimate determination.

Though the CCL will likely try to argue that FEMA should have been awarded funding solely for the events center, this argument is not persuasive. This is because the record reflects that the events center was merely "added to the chapel" and was not its own building on the church's premises; the chapel and the community center should have been considered together. (R. at 4.)

For this reason, the church's free exercise rights were not violated when the church was expected to comply with the same standards that all private nonprofit organizations are subjected to. Therefore, the holding of the Fourteenth Court of Appeals should be affirmed on the First Amendment issue.

ii. Even if free exercise is abridged, FEMA's conditions further the compelling interest of protecting health and safety in the wake of a natural disaster.

Even if it is determined that the right of free exercise has been abridged in a case, then that does not necessarily mean that the government's actions must be immediately sanctioned. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). If a legitimate free exercise claim can be shown, then strict scrutiny is applied to determine whether the government's interests outweigh the individual's claims. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1981). Though this is a high standard to meet, the government's actions may be justified through a showing that its program is narrowly tailored to advance a compelling governmental interest through the least restrictive means. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1670 (2015) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)). The interest of providing for the health and safety of the general public has been shown to meet this high standard. *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983).

As mentioned previously, a private nonprofit is only eligible for disaster relief funding if it can be shown that the entity is able to provide for "educational, utility, emergency, medical, or custodial care, … [or] essential governmental type services to the general public." 44 C.F.R. § 206.221(e) (2017). The common thread that links all of FEMA's conditions for eligibility is that FEMA's funds are prioritized for organizations and private nonprofits that are necessary for the

establishment of general standards of health and safety in the wake of a destructive natural disaster. *See id.*

Though religion is an important cornerstone in the lives of many Americans, in the chaos that follows a natural disaster, religion must be relegated to a secondary position until—at the very least—utilities are operational, medical care is available, and local government is functional once again. Those priorities are readily reflected by the conditions that FEMA examines when determining whether to issue disaster relief aid.

It is clear from the record that religion is an important aspect within the Lima community. Since the CCL needed repairs due to the damage from Hurricane Rhodes, the community was ready and willing to donate time and resources to help repair the church and restore it to its former glory. (R. at 8.) However, FEMA has been tasked with looking at the big picture when a disaster strikes. Its limited resources must be prioritized to ensure the continued health and safety of every person within an affected community, regardless of their religious affiliation. Through FEMA's narrowly tailored terms of eligibility, this goal is accomplished. Even the CCL seems to admit this by arguing that the resources it used to rebuild its facilities could "have been allocated to others in need." (R. at 15.)

For this reason, even if this Court were to find that the CCL's free exercise rights were abridged by FEMA's policies concerning disaster relief aid, those same policies reflect the compelling interest of preserving human health and safety in the wake of a natural disaster.

CONCLUSION

In this case, the opinion of the Fourteenth Circuit Court of Appeals should be affirmed on the issues presented by the doctrine of ripeness and by the First Amendment. The prudential concerns that support the justiciable doctrine of ripeness ensure that claims are not heard before the claims have been allowed to properly mature and develop. If a claim is heard before an issue has fully materialized, then the record for appeal is unlikely to be adequately developed, leading to the squandering of precious judicial resources.

In this instance, the CCL never gave FEMA a chance to actually decide on the primary fact that the church is asserting as an injury, namely, whether the church was eligible to receive disaster relief funds. Based on the personal experiences of a contracted adjuster, the church was convinced that their denial was inevitable. The record disputes this primary assumption. When the lawsuit was filed, the FEMA Director was already considering giving funding to help rebuild part of the church's facilities. If funds had been disbursed, then the church's claims would have been entirely baseless.

Unfortunately, the church filed a premature lawsuit, putting a hold on the application process, and robbing this Court of a dispositive fact that would have greatly aided in this Court's analysis of both issues that have been certified—that fact is whether the church could have been approved for funds, despite being a nonprofit religious entity. Since that dispositive fact is presently absent from the

record, this Court is now forced to render a decision about an injury that may have never occurred.

In addition, even if the church's application was ultimately denied, that denial would have been based on a set of evenly applied, content-neutral conditions that FEMA requires of all nonprofits. The First Amendment commands the federal government to respect the free exercise of religion while also not establishing a religion. Therefore, when a government action happens to implicate religious activity, the government must maintain a neutral position that neither favors nor deters religion. By maintaining a neutral stance, the government can respect the requirements of both the Establishment Clause and the Free Exercise Clause of the First Amendment.

By requiring compliance with a list of facially neutral conditions for aid, FEMA has found a way to simultaneously respect both the religious clauses of the First Amendment. The agency has not completely prohibited the funding of religious organizations *per se*. Instead, FEMA will fund an organization if it can be shown that the entity also performs an important governmental function. Religion does not automatically disqualify an applicant.

Instead, FEMA looks to neutral criteria, such as what service the organization provides to its community, and whether that service is a critical one. It is unfortunate that the church believes that its religious character is the sole reason that it may not receive funds, but the church's religious character is not dispositive for FEMA's analysis. It is merely one more thing to be considered as

FEMA balances the requirements of both the Establishment Clause and the Free Exercise Clause of the First Amendment.

It is for these reasons that we ask this Court to affirm the holding of the Fourteenth Circuit Court of Appeals as to the First Amendment, and to dismiss this case because it is not yet ripe for adjudication.

Respectfully submitted,

/s/ # 45

Attorney for the Respondents

CERTIFICATE OF SERVICE

By my signature, I certify that a true and correct copy of Respondents' brief on the merits was forwarded to Petitioner, Cowboy Church of Lima, through the counsel of record by certified U.S. mail return receipt requested on this, the 20th day of November, 2017.

/s/ # 45

Attorney for the Respondents

APPENDIX A

Constitutional Provisions

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX B

Statutes and Regulations

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

5 U.S.C. § 704

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.

42 U.S.C. § 5172(a)

(a) Contributions

> (1) In general. The President may make contributions—
>
> > (A) to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government; and

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

(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.

44 C.F.R. § 206.206

An eligible applicant, subrecipient, or recipient may appeal any determination previously made related to an application for or the provision of Federal assistance according to the procedures below.

(b) Levels of Appeal.

(1) The Regional Administrator will consider first appeals for public assistance-related decisions under subparts A through L of this part.

(2) The Assistant Administrator for the Disaster Assistance Directorate will consider appeals of the Regional Administrator's decision on any first appeal under paragraph (b)(1) of this section.

(c) Time Limits.

(1) Appellants must file appeals within 60 days after receipt of a notice of the action that is being appealed.

(2) The recipient will review and forward appeals from an applicant or subrecipient, with a written recommendation, to the Regional Administrator within 60 days of receipt.

(3) Within 90 days following receipt of an appeal, the Regional Administrator (for first appeals) or Assistant Administrator for the Disaster Assistance Directorate (for second appeals) will notify the recipient in writing of the disposition of the appeal or of the need for additional information. A request by the Regional Administrator or Assistant Administrator for the Disaster Assistance Directorate for additional information will include a date by which the information must be provided. Within 90 days following the receipt of the requested additional information or following expiration of the period for providing the information, the Regional Administrator or Assistant Administrator for the Disaster Assistance Directorate will notify the recipient in writing of the disposition of the appeal. If the decision is to grant the appeal, the Regional Administrator will take appropriate implementing action.

(d) Technical Advice. In appeals involving highly technical issues, the Regional Administrator or Assistant Administrator for the Disaster Assistance Directorate may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 days of receipt of the report, the Regional Administrator or Assistant Administrator for the Disaster Assistance Directorate will notify the recipient in writing of the disposition of the appeal.

(e) Transition.

(1) This rule is effective for all appeals pending on and appeals from decisions issued on or after May 8, 1998, except as provided in paragraph (e)(2) of this section.

(2) Appeals pending from a decision of an Assistant Administrator for the Disaster Assistance Directorate before May 8, 1998 may be appealed to the

Administrator in accordance with 44 CFR 206.440 as it existed before May 8, 1998 (44 CFR, revised as of October 1, 1997).

(3) The decision of the FEMA official at the next higher appeal level shall be the final administrative decision of FEMA.

44 C.F.R. § 206.221(e)

(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.