No. C17-2893-1

In the
# Supreme Court of the United States

**COWBOY CHURCH OF LIMA,**

***Petitioner*,**

v.

**FEDERAL EMERGENCY MANAGEMENT AGENCY,**
**W. Craig Fugate, Administrator of the**
**Federal Emergency Management Agency,**

***Respondents.***

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

## BRIEF FOR PETITIONER

TEAM 51

*Counsel of Record*

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## QUESTIONS PRESENTED

I. Whether the Federal Emergency Management Agency can be subject to lawsuits prior to determining whether an entity is eligible to receive disaster relief or whether such lawsuit is barred by the doctrine of ripeness when the Cowboy Church raises a constitutional challenge to a longstanding agency policy that would bar the applicant from receiving full relief on the basis of its religious character.

II. Whether extending disaster relief benefits to the Cowboy Church of Lima under the Federal Emergency Management Agency's Public Assistance Program would violate the Establishment Clause of the First Amendment when the stated purpose of the Public Assistance Program is to provide disaster relief in a fair and equitable manner and when the current policy would bar houses of worship from receiving full relief on the basis of their religious character.

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**TO THE HONORABLE SUPREME COURT OF THE UNITED STATES**

Petitioner, the Cowboy Church of Lima—the plaintiff in the United States District Court for the Central District of Lima and the appellant/cross-appellee before the United States Court of Appeals for the Fourteenth Circuit—respectfully submits this brief on the merits in support of its request that this honorable Court reverse the decision of the Fourteenth Circuit Court of Appeals.

## OPINIONS BELOW

The United States District Court for the Central District of Lima entered summary judgment in favor of the Respondents. (R. at 10.) On October 1, 2017, the United States Court of Appeals for the Fourteenth Circuit in Case Number C17-2893-1 affirmed the entry of summary judgment and directed the District Court to enter an order dismissing the case because it was unripe. (R. at 17.)

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered its final judgment on October 1, 2017. (R. at 17.) The Cowboy Church of Lima timely filed a petition for writ of *certiorari* which this Court granted. (R. at 1.) Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2013).

## STATUTORY PROVISIONS INVOLVED

The nondiscrimination provision of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5151 (2006), is located at Appendix A. The Federal Emergency Management Agency's nondiscrimination regulation, 44 C.F.R. § 206.11 (2013), is located at Appendix B. The constitutional provisions at issue, the Establishment Clause and the Free Exercise Clause of the First Amendment, are located at Appendix C.

## STATEMENT OF THE CASE

### The Cowboy Church of Lima

The Cowboy Church of Lima (the "Cowboy Church") is a cowboy ministry led by Chaplain Finn Hudson. (R. at 3.) It is built on an 88-acre tract of land in the Township of Lima ("Lima") in the State of New Tejas. (R. at 3.) The population of Lima is approximately 4,150 people. (R. at 3.)

Originally built in 1990, the Cowboy Church included a 2,250-square-foot chapel, a small rodeo that seats about 500 people, and several storage buildings. (R. at 3–4.) The chapel hosted both religious and non-religious events during the week, and was used exclusively for religious purposes on Sundays. (R. at 7.) These events included religious concerts, holiday festivals, christenings, and bar and bat mitzvahs, but also included non-religious concerts, father-daughter dances, non-denominational weddings, funeral receptions, and non-religious meetings. (R. at 7.)

In 1998, Lima Mayor Rachel Berry approached Chaplain Hudson to ask if the chapel could accommodate a few township events each year, since no other space in Lima was large enough to host certain city council meetings. (R. at 3.) Although Mayor Berry offered to pay fair rent to the church for each event, Chaplain Hudson refused to accept any payment. (R. at 4.) In refusing, he stated that his church and its buildings were open to anyone at any time. (R. at 5.)

Over time, the number of civic and private events held at the chapel grew. (R. at 4.) To accommodate the needs of the church and the Lima community, the

Cowboy Church held an annual bake sale. (R. at 4.) The funds from this bake sale, in addition to private donations, allowed the Cowboy Church to expand. (R. at 4.)

In 2005, the Cowboy Church built a 2,250-square-foot event center attached to the chapel. (R. at 4.) The event center seated 120 people and held a wide variety of events, including birthday parties, banquets, quinceañera celebrations, school dances, retirement parties, local glee club concerts, and rodeo meetings. (R. at 3–4.) The event center also hosted Lions Club and Rotary Club meetings, large city council meetings, substance abuse support meetings, marriage and family counseling sessions, and acted as a polling location for county elections. (R. at 3, 7.) The event center was also designated as an emergency relief shelter. (R. at 7.)

The Cowboy Church is a 501(C)(3) designated nonprofit and tax-exempt entity, and the property is exempt from property tax under the New Tejas Property Code. (R. at 3.) In 2006, Chaplain Hudson sought to have the event center declared as tax exempt as a government building, but the county denied the application. (R. at 4.) Two years later, Lima looked to build its own event center, but the proposal was voted down due to concerns that the town did not need two event centers. (R. at 4.)

**Hurricane Rhodes Devastates New Tejas**

On August 13, 2016, Hurricane Rhodes made landfall on the western coast of New Tejas one hundred miles north of Lima. (R. at 2.) Within thirty-six hours, Hurricane Rhodes dropped an unprecedented amount of rain on the region. (R. at 2-3.) Over forty-five inches of rain fell, causing the Flanagan Dam to fail. (R. at 2–3.)

The resulting floodwaters overflowed the Motta River and caused disastrous flooding to the New Tejas communities. (R. at 3.)

The floodwaters reached Lima on August 15, 2016. (R. at 3.) As the waters rose, Chaplain Hudson became concerned that the floodwaters may breach the chapel and the event center. (R. at 4.) Chaplain Hudson and the staff rushed to move materials in both the chapel and event center to higher ground and into a storage building. (R. at 4.)

On the evening of August 15, 2016, Chaplain Hudson's fears materialized when the floodwaters entered the chapel and event center and rose to as high as forty-two inches within the buildings. (R. at 5.) The flooding deposited raw sewage, chemicals, mud, silt, grass, and plant debris in the chapel and event center and destroyed the carpets, flooring, drywall, insulation, doors, furniture, and other objects and materials within the premises. (R. at 5.) Water remained in the chapel and event center for nearly two days. (R. at 5.)

On August 18, 2016, Chaplain Hudson and his staff started to assess the damage. (R. at 5.) The same day, the staff removed the destroyed sheetrock, insulation, and flooring from the buildings. (R. at 5.) As part of the clean-up, every item was removed from the chapel and event center. (R. at 5.) Subsequent inspection of the premises by local home designer and structural engineer, Kurt Hummel, determined that there was likely structural damage to the chapel and event center that required immediate attention. (R. at 6.) Mr. Hummel opined that there was a risk that the structure of the buildings might fail, and the buildings

could collapse if repairs were not made within the next few months. (R. at 6.) Ultimately, the chapel's roof collapsed. (R. at 9.)

On August 19, 2016, President Obama declared Hurricane Rhodes a natural disaster. (R. at 6.) The President's declaration prompted the Federal Emergency Management Agency's ("FEMA") involvement in the relief efforts in New Tejas. (R. at 6.)

**FEMA's Public Assistance Program**

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the "Stafford Act"), "[t]he President" is authorized to "make contributions" to the owner or operator of "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." (R. at 11.)

FEMA administers federal assistance through its Public Assistance Program (the "PA Program") in accordance with its regulations and policies contained in FEMA's PA Program and Policy Guide (the "Policy Guide"). (R. at 11.) The PA Program is FEMA's largest grant program under the Stafford Act. (R. at 11.) It assists communities responding to and recovering from federally-declared disasters. (R. at 11.)

After a disaster is declared by the President, FEMA provides emergency assistance to help save lives and protect property and also assists with permanent restoration of community infrastructure. (R. at 11.) To be eligible for relief under the PA Program, a private nonprofit organization must show that it has a current

letter ruling from the U.S. Internal Revenue Service granting tax exemption under Sections 501(c), (d), or (e) of the Internal Revenue Code, and the organization must "own or operate an eligible facility." (R. at 11.)

Under the PA Program, an "eligible facility" is either: (1) "A facility that provides a critical service, which is defined as education, utility, emergency, or medical," or (2) "[a] facility that provides non-critical, but essential governmental services and is open to the general public." (R. at 11.)

Eligible "non-critical" services are defined as "institutes of public utility such as museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature." (R. at 12.)

"[M]ixed-use facilities . . . provide both eligible and ineligible services," and their eligibility "is dependent on the primary use of the facility." (R. at 12.) Primary use means "more than 50 percent of the physical space in the facility is dedicated" to eligible services. (R. at 12.) If the same physical space shares its space for eligible and ineligible purposes, FEMA looks to whether 50 percent of the operating time is dedicated to eligible services. (R. at 12.)

If FEMA determines that 50 percent or more of a physical space is dedicated to ineligible services, the entire facility is ineligible. (R. at 12.) If the mixed-use facility is eligible, FEMA will prorate funding based on the percentage of physical space dedicated to eligible services. (R. at 12.)

If a facility is deemed eligible, FEMA will provide funds under the PA Program for both "emergency work" and "permanent work." (R. at 12.) Emergency work is "that which must be done immediately to: [s]ave Lives; [p]rotect public health and safety; [p]rotect improved property; or [e]liminate or lessen an immediate threat of additional damage." (R. at 12.) Permanent work "is work required to restore a facility to its pre-disaster design (size and capacity) and function in accordance with applicable codes and standards." (R. at 12.)

If an eligible private nonprofit facility providing eligible non-critical services seeks PA Program funds for permanent work, it must first apply for a Small Business Administration ("SBA") disaster loan. (R. at 13.) PA Program funds will only be available for the portion of permanent work not covered by an SBA loan or if the SBA loan application is denied. (R. at 13.) Nonprofit facilities seeking PA Program funds for emergency work are eligible regardless of whether they applied for an SBA loan. (R. at 13.)

As a general rule, religious institutions are ineligible for FEMA relief under FEMA's policy. (R. at 7, 10, 18.) If less than 50 percent of the religious institution's space is dedicated to religious activities, then its funding will be prorated under FEMA's mixed-use standard. (R. at 12, 18.) If more than 50 percent of the religious institution's space is dedicated to religious activities, the entire space is ineligible for funding. (R. at 12.)

**The Cowboy Church Seeks Public Assistance from FEMA**

After President Obama declared Hurricane Rhodes a natural disaster, Chaplain Hudson consulted with his attorney, Arthur Abrams. (R. at 6.) Attorney Abrams advised Chaplain Hudson that he needed to immediately apply to FEMA for funding. (R. at 6.) On August 20, 2016, Chaplain Hudson applied for relief from FEMA. (R. at 6.) On August 23, 2016, Chaplain Hudson applied for an SBA loan. (R. at 6.)

On August 24, 2016, FEMA adjuster, Quinn Fabray, contacted Chaplain Hudson and scheduled an inspection of the damage to the chapel and event center to determine the amount of loss. (R. at 6.) The next day, Ms. Fabray inspected the Cowboy Church's property. (R. at 7.) Ms. Fabray estimated that the event center was used between 45 and 85 percent of the time for community events unrelated to the church, and that the chapel was used about 85 to 95 percent of the time for religious purposes. (R. at 7.)

After completing her inspection, Ms. Fabray told Chaplain Hudson that FEMA does not provide monetary assistance to churches. (R. at 7.) Ms. Fabray further told Chaplain Hudson that she had never heard of FEMA granting an exception to a church applicant. (R. at 7.) Upset by Ms. Fabray's statements, Chaplain Hudson asked Ms. Fabray if there was anything he could do to improve his chances of receiving funding. (R. at 7–8.) Ms. Fabray told Chaplain Hudson that she would "do what she could, but not to get his hopes up." (R. at 8.) Ms. Fabray also

told Chaplain Hudson that it could be a few weeks before FEMA responded to his application. (R. at 8.)

As part of FEMA's investigation, Ms. Fabray's final report concluded that the event center was used 80 percent of the time for FEMA-eligible purposes and the chapel was used over 90 percent of the time for non-FEMA-eligible purposes. (R. at 10.) Ms. Fabray based her report on interviews with community members and a sworn statement by City Planner Mike Chang. (R. at 10.) Based on this report, FEMA Regional Director Jesse St. James noted that FEMA preliminarily denied the Cowboy Church's application. (R. at 10.) Director St. James also noted that the event center might have received FEMA assistance. (R. at 10.) According to Director St. James, FEMA's internal deadline to make a final determination on the Cowboy Church's application would have been September 30, 2016. (R. at 10.) However, because FEMA had previously missed internal deadlines, FEMA may have made a final determination on October 14, 2016. (R. at 10.)

**The Cowboy Church Sues FEMA**

On the evening of August 25, 2016, Chaplain Hudson contacted Attorney Abrams to discuss his options after Ms. Fabray informed him that FEMA did not provide funding to churches. (R. at 8.) Attorney Abrams told Chaplain Hudson that FEMA would deny his application and that Chaplain Hudson needed to take legal action. (R. at 8.) Attorney Abrams offered to represent the church pro bono. (R. at 8.) Chaplain Hudson prayed about the situation and consulted his congregation, and

then decided to proceed with the lawsuit. (R. at 8.) Chaplain Hudson did not like using the courts, but he hoped to seek justice for the Cowboy Church. (R. at 8.)

On August 29, 2016, the Cowboy Church filed a lawsuit against FEMA in the Central District Court of Lima. (R. at 8.) The Cowboy Church's lawsuit alleged that FEMA violated its rights under the Free Exercise Clause of the First Amendment. (R. at 16.) FEMA stopped processing the Cowboy Church's claim for public assistance pending the outcome of the litigation. (R. at 8.)

On November 2, 2016, District Court Judge Beiste denied FEMA's Motion to Dismiss and continued the case for discovery. (R. at 9.) During discovery, Chaplain Hudson and Director St. James were deposed. (R. at 9–10.) Chaplain Hudson estimated in his deposition that 60 percent of the event center was used for church-based events. (R. at 9.) Following the discovery period, FEMA moved to dismiss the case on the grounds that it was not yet ripe for adjudication. (R. at 10.) Additionally, FEMA moved for summary judgment arguing that its policy of excluding churches from receiving relief was grounded in the Establishment Clause of the First Amendment. (R. at 10.) The Cowboy Church argued that it should be eligible for relief under this Court's 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, and that FEMA's failure to decide the Cowboy Church's claim constituted a de facto denial of relief. (R. at 10.)

Judge Beiste held that the court had subject matter jurisdiction and denied FEMA's Motion to Dismiss, but granted FEMA's Motion for Summary Judgment because the Establishment Clause barred the Cowboy Church's claim. (R. at 10.)

A divided Court of Appeals for the Fourteenth Circuit affirmed the District Court's entry of summary judgment holding that the Establishment Clause barred recovery for the Cowboy Church, and it further directed the District Court to enter an order dismissing the case because it was not ripe for adjudication. (R. at 17.) In her dissent, Judge Sylvester argued that the case was ripe for review because the true challenge in this case was whether FEMA can ban churches from receiving relief, making further factual determinations moot. (R. at 18.) Regarding the Cowboy Church's free exercise claim, Judge Sylvester argued that the Establishment Clause can violate the Free Exercise Clause, and that the Cowboy Church should be entitled to receive public assistance from FEMA. (R. at 19–20.) This timely appeal followed, and this Court granted the Cowboy Church's petition for a writ of *certiorari*. (R. at 1.)

**Lima's Community Helps Rebuild the Cowboy Church**

Eleven months after filing the Complaint, the Cowboy Church re-opened. (R. at 8.) The restoration of the Cowboy Church was a joint effort by the congregation and other Lima community members who donated their time to help with the repairs. (R. at 8.) Mr. Hummel found a construction crew willing to donate their time to repair the severe structural damage to the south wall of the chapel. (R. at 9.) Most of the materials used to repair the chapel and event center were donated through church groups and private donations solicited by Chaplain Hudson. (R. at 9.)

## SUMMARY OF THE ARGUMENT

### I. The Cowboy Church's First Amendment Claim is Ripe for Judicial Review.

The Fourteenth Circuit improperly determined that the Cowboy Church's claim was not ripe for judicial review. A claim will be ripe for adjudication if (1) the issue is fit for judicial review, and (2) withholding consideration would result in substantial hardship to the challenging party.

Here, the Cowboy Church's claim is fit for judicial review because it raises a purely constitutional challenge to a longstanding agency policy, and further factual development is unnecessary to decide the legal issue at hand. Regardless of whether FEMA categorically denied the Cowboy Church disaster relief based on its religious status or partially denied the Cowboy Church disaster relief under its mixed-use standard, the Cowboy Church would have been ineligible to receive full relief either way. Analyzing the constitutionality of a longstanding agency policy is wholly within the province of this Court.

Additionally, the Cowboy Church has already been substantially harmed by the agency's policy and it will continue to be substantially harmed as long as its claim remains unresolved. Absent FEMA's discriminatory policy, the Cowboy Church would have been eligible for more relief, it would have received the aid sooner, and it would not have had to rely on community donations to rebuild. The Cowboy Church's constitutional claim should not be foreclosed simply because it took steps to reverse the damage. Furthermore, FEMA's religious exclusion policy

and mixed-use standard violates the Cowboy Church's First Amendment rights, and a violation of these rights is inherently an irreparable harm. Given that the Cowboy Church's claim satisfies both prongs of the ripeness test, this Court should find the Cowboy Church's claim ripe for adjudication.

## II. Extending the Cowboy Church Disaster Relief Would Not Violate the Establishment Clause of the First Amendment.

The Fourteenth Circuit improperly determined that the Establishment Clause barred the Cowboy Church from receiving disaster relief under FEMA's PA Program. A policy does not violate the Establishment Clause if (1) the policy has a secular legislative purpose, (2) the policy's principal or primary effect neither advances nor inhibits religion, and (3) the policy does not foster an excessive government entanglement with religion.

Here, FEMA disaster relief is a generally available benefit that is grounded in a mission to administer support, regardless of the applicant's religion. Further, extending relief to the Cowboy Church would not have the primary effect of advancing religion because the benefits would not promote any sectarian purpose. Lastly, by removing the religious exclusion policy, government entanglement with religion would decrease because the current policy compels FEMA to make a searching case-by-case inquiry into the religiosity of certain property uses.

Additionally, FEMA's religious exclusion policy violates the Cowboy Church's free exercise rights. Under the Free Exercise Clause, public benefits must be made equally available to persons of all faith. Disparate treatment of an individual or entity's free exercise rights cannot disturb the Establishment Clause. By limiting

the Cowboy Church's access to a generally available benefit, FEMA runs afoul of the Free Exercise Clause of the First Amendment, and FEMA's policy cannot survive this Court's strict scrutiny review.

Therefore, this Court should find that extending disaster relief benefits to the Cowboy Church does not violate the Establishment Clause, and that FEMA's religious exclusion policy violates the Free Exercise Clause.

## ARGUMENT

### I. THIS COURT SHOULD REVERSE THE DECISION OF THE FOURTEENTH CIRCUIT BECAUSE THE COWBOY CHURCH RAISES A PURELY LEGAL ISSUE, INDEPENDENT OF FURTHER FACTUAL DETERMINATION, AND THE COURT'S FAILURE TO REVIEW THE COWBOY CHURCH'S CLAIM WOULD RESULT IN SUBSTANTIAL HARDSHIP.

The Fourteenth Circuit improperly determined that the Cowboy Church's claim was not ripe for judicial review. The ripeness doctrine is derived from the principle that courts should not "entangl[e] themselves in abstract disagreements over administrative polices" to shield agencies from premature judicial adjudication. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds by*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977). Whether a claim is ripe for review turns on two factors: (1) whether the issue is fit for judicial review, and (2) whether there would be substantial hardship to the parties if the Court were to withhold consideration. *Abbott Labs.*, 387 U.S. at 149. Ripeness is a question of law that is reviewed *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014); *Cal. ex rel. Lockyer v. U.S. Dep't of Agriculture*, 575 F.3d 999, 1010 (9th Cir. 2009).

In arriving at its decision, the Fourteenth Circuit recognized that while the Cowboy Church's question "may be purely legal," and that FEMA's mixed-use standard "may constitute final agency action," it nonetheless wanted further factual development before it could analyze the merits of the Cowboy Church's claim. (R. at 14.) This conclusion was misguided. Regardless of whether the Cowboy Church was categorically denied relief based on its religious status or partially denied relief

under FEMA's mixed-use standard, the Cowboy Church would have been denied full relief either way. Therefore, the Cowboy Church raises a purely legal issue that does not require further factual determination, and analyzing the constitutionality of an agency policy is wholly within this Court's jurisdiction. 5 U.S.C. § 706(2)(B) (2017). The Fourteenth Circuit erred by holding otherwise.

Furthermore, by withholding determination of the issue, the Cowboy Church has not only been substantially harmed, but it continues to be substantially harmed the longer its claim remains unresolved. This is not a hypothetical, speculative injury because the Cowboy Church has already felt the effect of the agency's policy in a concrete way. Furthermore, FEMA should not be able to subject the Cowboy Church to unequal treatment on the basis of its religious identity, when its own authorizing statute forbids that very practice. 42 U.S.C. § 5151(a) (2006); 44 C.F.R. § 206.11(a), (b) (2013). While the Fourteenth Circuit found it relevant that the Cowboy Church has reopened (R. at 15), the Cowboy Church should not be penalized for simply trying to mitigate the damage.

Given that the factual record does not need to be further developed for this Court to determine the constitutionality of FEMA's policy and because the Cowboy Church would face substantial hardship if the Court withholds consideration, this Court should reverse the Fourteenth Circuit and find the Cowboy Church's claim ripe for review.

### A. The Cowboy Church's Claim is Fit for Judicial Review Because the Constitutional Issue it Raises is Purely Legal and FEMA's Discriminatory Policy is Sufficiently Final.

The first prong of the ripeness doctrine is satisfied because the constitutional issue the Cowboy Church raises is purely legal and FEMA's discriminatory policy is sufficiently final. Under the first prong of the ripeness test, a claim will be fit for judicial review if (1) the issue is purely legal and (2) the agency action is sufficiently final. *Abbott Labs.*, 387 U.S. at 149; *Ciba-Geigy Corp. v. E.P.A.*, 801 F.2d 430, 435 (D.C. Cir. 1986). Determinative of whether an issue is purely legal is whether there is a straightforward legal question that does not require further factual development to answer or clarify the claim. *Thomas v. Union Carbide Agriculture Prods. Co.*, 473 U.S. 568, 581 (1985). This Court has given finality of agency action a pragmatic and flexible interpretation. *See Abbott Labs.*, 387 U.S. at 149–50. Specifically, the agency action will be final if it "mark[s] the 'consummation' of the agency's decisionmaking process," and the action must be one by which the "rights or obligations have been determined" or from which "legal consequences may flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

The Cowboy Church's claim meets both prongs of the judicial fitness test. The legal issue it raises does not need further factual development because the chapel would have been categorically denied disaster relief given that it was used 90 percent of the time for religious purposes (R. at 10), and the event center's funding would have been prorated under FEMA's mixed-use standard (R. at 12).

Additionally, a policy that has been consistently applied for at least two decades is not a tentative recommendation, but a final agency determination. *See infra* n.3.

### 1. The Cowboy Church Presents a Purely Legal Issue and Further Factual Development is Neither Helpful Nor Necessary for the Court to Determine the Constitutionality of FEMA's Religious Exclusion Practice.

Further factual development is neither helpful nor necessary for the Court to determine the constitutionality of FEMA's religious exclusion practice. A claim is purely legal if it presents a straightforward legal question independent of further factual development for the Court to resolve the issue. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 170–71 (1967). The purpose of this requirement is for courts to avoid weighing in on abstract or hypothetical issues. *Abbott Labs.*, 387 U.S. at 148–49.

Whether FEMA's historical practice of refusing disaster relief to religious institutions violates the Cowboy Church's First Amendment rights is a purely legal issue independent of further factual determination. *Maust v. Headley*, 959 F.2d 644, 649 (7th Cir. 1992) ("The existence of a clearly established, constitutional right is a purely legal question . . ."). The Fourteenth Circuit reasoned that, while the Cowboy Church's claim may be "a purely legal one," it still believed that further factual development would advance its ability to analyze the legal issue. (R. at 14.) This reasoning is misguided. Under FEMA's current regulatory scheme, the Cowboy Church would have *never* received 100 percent relief because of its religious status.

FEMA's 2016 Policy Guide states, "facilities established or primarily used for . . . religious . . . activities are not eligible" for relief.[1] Religious activities are defined as "worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large." FEMA Policy Guide at 14. As a result, the only way the Cowboy Church's chapel could have received any funding is if more than 50 percent of the physical space of the chapel was used for non-religious, eligible activities. FEMA Policy Guide at 16. This was not the case here, as Ms. Fabray determined that the chapel was used about 90 percent of the time for religious purposes. (R. at 10.)

Because the chapel would have been categorically denied relief, the only benefit the Fourteenth Circuit would have had by delaying resolution would be to see if the event center ultimately received FEMA relief. This is an unnecessary determination, however, because the Cowboy Church's event center would have never received full funding under FEMA's mixed-use standard.[2] As Ms. Fabray determined, the event center was used between 45 to 85 percent of the time for community projects unrelated to the church. (R. at 7.) She later determined that it was used 80 percent of the time for FEMA eligible activities. (R. at 10.) That means, at the very least, 20 percent of the event center was used for religious activities. (R. at 7.) Therefore, even if the Cowboy Church received relief for its event center, the

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[1] Public Assistance Program and Policy Guide, FEMA, 11 (January 2016), https://www.fema.gov/media-library-data/1456167739485-75a028890345c6921d8d6ae473fbc8b3/PA_Program_and_Policy_Guide_2-21-2016_Fixes.pdf [hereinafter "FEMA Policy Guide"].

[2] The Cowboy Church complied with all other regulatory rules required to receive funding. (R. at 13.)

relief would have been prorated because of its religious status. (R. at 12.) Either way, this practice is prohibited under the First Amendment. *See infra* Part II.

The definitive issue before the Court is not whether the church would have received relief absent FEMA's discriminatory policy, but whether it violates the First Amendment for FEMA to outright ban a church solely based its religious status. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) ("[E]xpress discrimination against religious exercise . . . 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."). For these reasons, the Cowboy Church presents a purely legal issue, and this Court does not need more facts to make a constitutionality determination.

### 2. FEMA's Discriminatory Policy was Final Agency Action under Section 10 of the Administrative Procedure Act because it was Not a Tentative Recommendation but a Final Agency Determination.

FEMA's historical practice of discriminating against houses of worship was final agency action under Section 10 of the Administrative Procedure Act ("APA") because it was not a tentative recommendation, but a longstanding agency policy. Section 10 of the APA defines reviewable acts as, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (1966). This Court has given final agency action a pragmatic interpretation, affording a strong presumption in favor of reviewability. *Abbott Labs.*, 387 U.S. at 141. Completeness of agency proceedings is not required for an action to be final for judicial review; rather, Congress intended for Section 10 of the

APA to cover a "broad spectrum of administrative actions." *Id.* Consequently, courts have found agency actions, far less formal than the policy here, to be sufficiently final for review. *See, e.g., Nat'l Envtl. Dev. Ass'ns Clear Air Project v. E.P.A.*, 752 F.3d 999, 1006–08 (D.C. Cir. 2014) (agency directive providing firm guidance to enforcement officials on how to handle permit decisions was final action because it reflected a settled agency position); *State of Nev. ex rel. Loux v. Herrington*, 777 F.2d 529, 535 (9th Cir. 1985) (guidelines viewed as only a statement of intent are eligible for review, and that was "[c]onsistent with the trend in favor of reviewing even policy statements and informal positions, letters, or announcements.").

When analyzing whether an action is sufficiently final for review, this Court has held that two conditions must be met. *Bennett*, 520 U.S. at 177. "First, the action must mark the 'consummation' of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177–78 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Conversely, if the challenged action is more like a "moving target" and a "tentative recommendation rather than a final and binding determination," the agency action is not final and therefore not subject to judicial review. *Franklin v. Massachusetts*, 505 U.S. 788, 797–98 (1992).

Here, there is nothing tentative about FEMA's religious exclusion policy. Since at least 1998, FEMA has excluded houses of worship from receiving full

disaster relief.[3] An agency's policy is not tentative if houses of worship have been consistently denied full relief for at least two decades. Rather, this policy reflects a well-settled agency position determining that religious institutions do not qualify for full disaster relief. Ms. Fabray, a FEMA adjuster, further corroborated the definitiveness of this policy when she told Chaplain Hudson that she had never heard of FEMA granting an exception to a church. (R. at 7.) Indeed, FEMA had already put the church into the preliminary denial category. (R. at 10.)

Notably, FEMA is violating its own authorizing statute by excluding houses of worship from relief. 42 U.S.C. § 5151(a) (2006); 44 C.F.R. § 206.11(a), (b) (2013). Specifically, Section 5151(a) of the Stafford Act requires personnel carrying out federal assistance functions to distribute disaster aid in an equitable and impartial manner. 42 U.S.C. § 5151(a) (2006). This includes processing aid applications and distributing relief without discrimination on the grounds of religion. *Id.* The Stafford Act's nondiscrimination requirement is reiterated in FEMA's own regulation, requiring that the processing of aid applications and distribution of relief be accomplished without discrimination on the grounds of "race, color, *religion*, nationality, sex, age, or economic status." 44 C.F.R. § 206.11(b) (2013)

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[3] FEMA has kept a record of its policy guides since 1998. Its 1988 policy guide stated that, "'[f]acilities established or primarily used for religious . . . or similar . . . activities' are not eligible community centers. A facility used for a variety of community activities but primarily established or used as a religious institution or place of worship would be ineligible. Generally this includes churches, synagogues, temples, mosques, and other centers of religious worship." 9521.1 – Community Center Eligibility, FEMA, 4 (1998), https://www.fema.gov/media-library-data/1504204645497-be8ec7f6e01800da60de435c34b48211/FEMA_Public_Assistance_9500_Series_Policies_1998-2015_8-31-2017_Update.pdf.

(emphasis added). Yet, FEMA continues to violate its own authorizing statute and regulation by discriminating against houses of worship. FEMA Policy Guide at 14.

Furthermore, the Cowboy Church had no other adequate remedy in court because FEMA's discretionary determinations are precluded from judicial review. Under the APA, judicial review of agency actions is permitted unless "statutes preclude judicial review, or . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (2011). When enacting Section 5148 of the Stafford Act, Congress indicated its intent to "preclude judicial review of all disaster relief claims based on discretionary actions of federal employees." *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987); *see also Cal.-Nev. Methodist Homes, Inc. v. F.E.M.A.*, 152 F. Supp. 2d 1202, 1206 (N.D. Cal. 2001) (holding that Section 5148 precluded plaintiff's lawsuit because FEMA's decision to fund (or not fund) repairs was discretionary). In the statute's legislative history, Congress stated that it was concerned with the government making mistakes in the administration of disaster relief and subsequently facing litigation. *Rosas*, 826 F.2d at 1008; H.R. 8396, 81st Cong., 2d Sess., 96 Cong.Rec. 11895, 11912 (1950). However, "there is no reason to believe that Congress ever intended to commit to an agency's discretion the question of whether or not to act constitutionally . . . [because] adherence to constitutional guidelines is not discretionary; it is mandatory." *Rosas*, 826 F.2d at 1008; *see also Campbell v. Office of Pers. Mgmt.*, 694 F.2d 305, 307 (3d Cir. 1982) ("[I]t is well established that Congress cannot preclude judicial review of allegedly unconstitutional agency action.").

Under Section 5148 of the Stafford Act, even if the Cowboy Church eventually received prorated funding and wanted to challenge the agency's determination, it would be unable to sustain a judicial challenge. Instead, the Cowboy Church brought a purely legal claim alleging a constitutional violation of its First Amendment rights, which is fully within this Court's jurisdiction. If the Court withholds consideration, there would be no other remedy for the Cowboy Church to challenge the constitutionality of FEMA's practice.

Lastly, FEMA's policy was also final agency action because there was a firm prediction that the Cowboy Church's application would be denied. Concurring in *Reno v. Catholic Social Services Inc.*, Justice O'Connor applied a firm prediction test to determine whether an agency action is sufficiently final. 509 U.S. 43, 69 (1993). Justice O'Connor contended that "if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule – then there may well be a justiciable controversy that the court may find prudent to resolve." *Id.* (O'Connor, J., concurring). This reasoning would logically extend to cases where the plaintiff has applied for the benefit, but the agency has not yet denied the filed application. *Immigrant Assistance Project of Los Angeles County Fed'n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 861 (9th Cir. 2002). Notably, the *Reno* majority did not reject Justice O'Connor's firm prediction rule, but instead stated that the firm prediction rule was not satisfied under the facts of the case. *Reno*, 509 U.S. at 59 n.19.

Here, the Court can firmly predict that the Cowboy Church's application would be denied. FEMA's policy states that "[f]acilities established or primarily used for . . . religious . . . activities are not eligible." FEMA Policy Guide at 11. For a church to receive any relief under FEMA's policy, the majority of its space and operating time must be dedicated to secular activities. Even so, a church could never receive 100 percent relief under FEMA's current scheme.

Ms. Fabray determined that the chapel was used 90 percent of the time for non-FEMA-eligible purposes, and the event center was used 80 percent of the time for FEMA-eligible purposes. (R. at 10.) As a result, the Cowboy Church would have surely been denied funding for the chapel, and the event center's relief would have been at prorated by at least 20 percent. If the Court chooses to adopt Justice O'Connor's firm prediction test, FEMA's policy would amount to final agency action because the Court could firmly predict that the Cowboy Church would have never received full relief.

The plain language of the policy guide and FEMA's historical practice of denying churches disaster relief demonstrates that this was a final agency position. *See supra* n.3. Therefore, the policy marks the consummation of FEMA's decisionmaking process because it determines the rights of a church to receive relief. For these reasons, the Court should find that FEMA's policy is final agency action under Section 10 of the APA and, consequently, the first prong of the ripeness test is satisfied.

### B. By Withholding Consideration, the Cowboy Church has not only Been Substantially Harmed, but it Continues to be Substantially Harmed as Long as its Claim Remains Unresolved.

The Cowboy Church has not only been substantially harmed by FEMA's discriminatory policy, but it continues to be substantially harmed as long as its claim remains unresolved. Paradigmatic cases of unripe claims concern "abstract disagreements" where the challenging party has not felt the effect of the agency action in a concrete way. *Abbott Labs*., 387 U.S. at 148. A court will not find a claim ripe for review "if [the claim] rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Therefore, withholding review would have to create either a legal harm, a significant practical harm, or the agency action would have to force the party to modify its behavior to avoid future adverse consequences. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 –35 (1998).

First, the Cowboy Church's claim is not premature because the Cowboy Church already felt the effects of FEMA's policy in a concrete way. The Fourteenth Circuit underestimated the hardship the Cowboy Church faced as a result of FEMA's policy. After Hurricane Rhodes, the damage to the Cowboy Church was catastrophic. (R. at 5.) By the time the Cowboy Church filed its Complaint, the church and event center were already filled with mud, silt, plant debris, sewage, and chemicals. (R. at 5.) The flood destroyed the Cowboy Church's carpets, flooring, drywall, insulation, furniture, and other materials. (R. at 5.) There was structural damage to the chapel and event center, and as a result, the church's roof collapsed a

few months later. (R. at 5–6, 9.) Because of FEMA's policy, the Cowboy Church's chapel would have been categorically denied relief to fix these issues. (R. at 7.) While there was a chance the Cowboy Church's event center may have received relief, it would have been prorated by at least 20 percent, and FEMA may not have come to that decision until almost two months after Chaplain Hudson submitted his application for aid. (R. at 6, 10.) Absent FEMA's discriminatory policy, the Cowboy Church would have been eligible for more relief, it would have received the aid much sooner, and it would not have had to rely on community donations to rebuild.

The Fourteenth Circuit reasoned that the Cowboy Church could not have been substantially harmed because the Cowboy Church has reopened, meaning FEMA funds were not essential to rebuild. (R. at 15.) This is a flawed conclusion. It took almost a year for the Cowboy Church to reopen, largely due to community contributions and donations. (R. at 8–9.) Even though it eventually reopened its doors, the Cowboy Church should not be penalized for taking steps to mitigate the damage. Indeed, it would be an absurd result to make a church wait for its case to go through the court system before it can start to repair the damage, all the while its property decays from mold, bacteria, and moisture. Just because the Cowboy Church accepted community donations to repair its property does not mean that it was not substantially harmed in the process. If that were the standard, any eligible entity with a large enough bank account to rebuild on its own would be foreclosed from FEMA relief because FEMA funds would not be essential to its repairs. The Cowboy Church took steps to save its property with the help of the community, and

its constitutional claim should not be foreclosed simply because it took steps to reverse the damage.

Second, the Cowboy Church continues to be substantially harmed by FEMA's policy. In its suit, the Cowboy Church is not claiming that it would be entitled to full relief absent FEMA's discriminatory policy; rather, the substantial harm it faced and continues to face is the unequal treatment to receive a benefit solely on the basis of its religious character. *See N.E. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [the relevant inquiry] . . . is the denial of equal treatment resulting from the imposition of the barrier . . . not the ultimate inability to obtain the benefit."). A violation of First Amendment rights is inherently an irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Notably, the federal courts of appeals have unanimously held that First Amendment violations relax the ripeness requirement given the important constitutional interest at stake.[4] Given that FEMA's religious exclusion

[4] *See, e.g.*, *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 495–96 (1st Cir. 1992) ("A facial challenge of this sort, implicating First Amendment values, customarily works a relaxation of the ripeness criteria."); *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) ("[I]n the First Amendment context, the ripeness doctrine is somewhat relaxed."); *Peachlum v. City of New York*, 333 F.3d 429, 434 (3d Cir. 2003) ("A First Amendment claim, particularly a facial challenge, is subject to a relaxed ripeness standard."); *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) ("Much like standing, ripeness requirements are also relaxed in First Amendment cases."); *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 821 (5th Cir. 1979) ("[W]here the appellants claim that the challenged ordinance deters them from practicing their religion, the injury to their first amendment rights recurs each day and is, in a sense, irreparable."); *Currence v. City of Cincinnati*, 28 F. App'x. 438, 441 (6th Cir. 2001) ("Ripeness analysis is relaxed for First Amendment cases involving a facial challenge to a regulation...");

policy violates the Cowboy Church's free exercise rights under the First Amendment, the Cowboy Church has been irreparably harmed and continues to be irreparably harmed until its claim is resolved.

The Cowboy Church's claim should be weighed heavily in favor of review given FEMA's noncompliance with its own authorizing statute, historical discriminatory practices, and the importance of protecting the Cowboy Church's First Amendment rights. The Cowboy Church should not have to disavow its religious identity and decrease its religious activities to less than 50 percent to avoid being categorically denied relief. Like the Court found in *Trinity Lutheran Church*, "the express discrimination against religious exercise . . . 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." 137 S. Ct. at 2022. As in this case, the Cowboy Church is not claiming entitlement to 100 percent relief, it is simply asking for a seat at the table.

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*Planned Parenthood Ass'n of Chicago Area v. Kempiners*, 700 F.2d 1115, 1122 (7th Cir. 1983) ("Requirements of ripeness are less strictly construed in the first amendment context..."); *281 Care Committee v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011), *cert. denied*, 135 S. Ct. 1550 (2015) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006) ("Plaintiff's claim was ripe where plaintiff alleged the requirement 'by its very existence, chills the exercise of Plaintiffs' First Amendment rights."); *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1062 (9th Cir. 1995) ("[I]njury to First Amendment rights more readily justifies a finding of ripeness..."'); *U S West, Inc. v. Tristani*, 182 F.3d 1202, 1209 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 845 (2000) ("[A]ny chilling effect the statute may have on [the plaintiff's] First Amendment rights counsels in favor of ripeness."); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1227 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2040 (2007) ("Because this case involves an alleged violation of the First Amendment, our review of this suit's ripeness is at its most permissive."); *Martin Tractor Co. v. Federal Election Commission*, 627 F.2d 375, 380 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 954 (1980) ("Within the first amendment arena, the jurisprudential criteria for constitutional adjudication are sometimes relaxed when a facial attack is launched.").

Lastly, it cannot be ignored that major natural disasters are going to continue happening.[5] This claim does not rest on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 580–81. Natural disasters have always occurred and will continue to occur; they are not hypothetical, imaginative, or speculative situations. If an injury is certainly impending, a plaintiff need not "await the consummation of threatened injury to obtain preventative relief." *Id.* at 581. Accordingly, because all of the elements of the ripeness test are satisfied, it is imperative that this Court considers the constitutionality of FEMA's policy before the next natural disaster strikes.

### C. The Cowboy Church's Claim is Not a Political Question and it is Wholly Within this Court's Jurisdiction to Review.

Analyzing the constitutionality of an agency policy is not a political question and it is wholly within this Court's jurisdiction to review. A political question is found where there is:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962).

[5] Places in the United States that are prone to hurricanes can face a 40 to 48 percent chance per year of experiencing a strike by a tropical storm or hurricane. Hurricane Research Division, Atlantic Oceanographic & Meteorological Laboratory, http://www.aoml.noaa.gov/hrd/tcfaq/G11.html.

None of these criteria apply to this case. While it is true that Congress has considered this issue before, a question regarding the constitutionality of a historically discriminatory policy is a question that the Court, not Congress, is equipped to decide. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). In 2013 after Hurricane Sandy hit the east coast, the Federal Disaster Assistance Nonprofit Fairness Act was introduced in the House of Representatives. H.R. 592, 113th Cong. (2013). The Act was intended to amend the Stafford Act to include houses of worship as eligible for disaster relief. *Id.* The bill passed in the House, but was never brought to a vote in the Senate. *Id.* In 2015, the bill was re-introduced in the House but was never brought to a vote. Federal Disaster Assistance Nonprofit Fairness Act of 2015, H.R. 3066, 114th Cong. (2015). This bill was yet again reintroduced in the House in 2017, but there has been no action taken on the bill for over six months. Federal Disaster Assistance Nonprofit Fairness Act of 2017, H.R. 2405, 115th Cong. (2017). While Congress has looked at the issue before, it has shown an indifference to legislatively addressing the problem.

Hypothetically, even if Congress were to legislatively override FEMA's policy, this Court would still have to make the ultimate determination about whether providing relief to houses of worship violates the Establishment Clause. As Judge Sylvester recognized in her dissent, if FEMA no longer excluded churches from relief, some entity would inevitably file a lawsuit against FEMA and the Court would have to decide the very issue before it now. (R. at 18.) Accordingly, there is no

reason to delay the Court's decision for an indefinite number of years while hurricanes continue to damage houses of worship each year. For all the reasons stated, this Court should find the Cowboy Church's claim ripe for judicial review.

## II. FEMA WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE COWBOY CHURCH'S CLAIM BECAUSE EXTENDING FEMA RELIEF TO THE COWBOY CHURCH WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT AND FEMA'S CURRENT POLICY VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The Fourteenth Circuit improperly granted FEMA summary judgment on the Cowboy Church's claim because extending FEMA relief to religious institutions would not violate the Establishment Clause of the First Amendment and because FEMA's religious exclusion policy violates the Cowboy Church's free exercise rights. This Court will "'make an independent examination of the whole record'" in reviewing a First Amendment decision of a lower court. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)). Accordingly, the proper standard of review is *de novo*. *See Snyder v. Murray City Corp.*, 159 F.3d 1227, 1230 n.7 (10th Cir. 1998) (en banc) (reviewing summary judgment decision in Establishment Clause action *de novo* "in light of the First Amendment issue . . . [and] consequential obligation to make an independent examination of the whole record" (internal quotation marks omitted)), *cert. denied*, 526 U.S. 1039 (1999); *see also Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (noting that questions of law are reviewed *de novo*).

The First Amendment states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Extending FEMA relief to the Cowboy Church would not

violate the Establishment Clause because FEMA's PA Program has a secular purpose, the policy does not have the primary effect of advancing religion, and the policy would not foster excessive government entanglement with religion.

In addition, resolving the First Amendment issue in this case requires inquiry into both the Establishment and Free Exercise Clauses because there is considerable "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church*, 137 S. Ct. at 2019 (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)); *see also Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) ("[W]hile in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause."). Therefore, this Court should evaluate *both* the Respondents' position that the Establishment Clause bars religious institutions from receiving FEMA relief (*see infra* Part II.A.) and the merits of the Cowboy Church's Free Exercise claim (*see infra* Part II.B.). Under either approach, this Court should reverse the decision of the Fourteenth Circuit.

### A. The Establishment Clause Does Not Bar the Cowboy Church from Receiving Relief Under FEMA's PA Program Under Well-Established First Amendment Precedent.

The Fourteenth Circuit erred in determining that the Establishment Clause bars recovery for the Cowboy Church. The primary First Amendment issue in this case is whether providing public disaster relief to religious institutions, like the

Cowboy Church, would run afoul of the Establishment Clause. Notwithstanding the merits of the Cowboy Church's underlying claim—that FEMA's categorical ban on providing aid for religious institutions violates the Free Exercise Clause (*see infra* Part II.B.)—the canon of First Amendment law supports a conclusion that granting relief to the Cowboy Church would not violate the Establishment Clause.

Contrary to what the Fourteenth Circuit held, FEMA's mixed-use policy does not create a "content-neutral" scheme from which FEMA can allocate relief to secular and non-secular institutions by finding "harmony" between the Establishment and Free Exercise Clauses. (R. at 16–17.) By making religious affiliation an ineligible criterion under its policy, FEMA precludes churches from receiving full disaster relief. FEMA Policy Guide at 14. A plain reading of FEMA's policy, Ms. Fabray's disclosure to Chaplain Hudson that FEMA does not fund churches, and Director St. James' preliminary denial of the Cowboy Church's claim more than suggests that the Cowboy Church would not have received full relief from FEMA. (R. at 7, 10); FEMA Policy Guide at 14. Additionally, FEMA has excluded religious institutions for almost two decades. *See supra* at n.3. FEMA's practice of excluding religious institutions undeniably makes it more difficult for a religious institution like the Cowboy Church to receive disaster relief than it would for a secular institution. *See N.E. Fla. Chapter of Assoc. Gen. Contractors of Am.*, 508 U.S. at 666 ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the relevant injury "is the denial of equal treatment resulting from the imposition of

the barrier, not the ultimate inability to obtain the benefit."). FEMA's religious exclusion policy is not required by the Establishment Clause, it violates the Cowboy Church's free exercise rights, and therefore, it cannot pass constitutional muster.

To determine whether an action violates the Establishment Clause, courts apply the test recognized in *Lemon v. Kurtzman*. 403 U.S. 602 (1971); *see, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589 (1988); *see also Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (en banc) (noting that "[t]he three-pronged test set forth . . . in *Lemon v. Kurtzman* remains the prevailing analytical tool for the analysis of Establishment Clause claims." (Citation and internal quotation marks omitted)), *cert. denied*, 134 S. Ct. 2283 (2014).[6] A policy is constitutional under the *Lemon* test if: (1) the policy has a secular legislative purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) the policy does not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612–13. In this case, the policy at issue is the extension of FEMA public aid benefits to religious institutions, a practice that FEMA expressly rejects. (R. at 7, 10, 19–20); 44 C.F.R. § 206.221(e)(1) (2013); FEMA Policy Guide at 14. Such a change in FEMA's policy would not disturb the Establishment Clause under *Lemon*.

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[6] Since 2008, the federal courts of appeals have unanimously applied the *Lemon* test to Establishment Clause challenges. *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 9 (1st Cir. 2010); *Am. Atheists, Inc. v. Port Auth. of N.Y and N.J.*, 760 F.3d 227, 238–45 (2d Cir 2014); *Tearpock-Martini v. Borough*, 674 F. App'x 138, 140–42 (3d Cir. 2017); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 608–10 (4th Cir. 2012); *Comer v. Scott*, 610 F.3d 929, 934 (5th Cir. 2010); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 447 (6th Cir. 2017); *Elmbrook Sch. Dist.*, 687 F.3d at 849 (7th Cir. 2012) (see above); *Patel v. United Bureau of Prisons*, 515 F.3d 807, 817 n.12 (8th Cir. 2008); *Gardner v. Comm'r of Internal Revenue*, 845 F.3d 971, 976 (9th Cir. 2017); *Felix v. City of Bloomfield*, 841 F.3d 848, 856–57 (10th Cir. 2016); *Smith v. Governor for Ala.*, 562 F. App'x 806, 816 (11th Cir. 2014); *In re Navy Chaplaincy*, 738 F.3d 425, 430 (D.C. Cir. 2013).

### 1. Providing Disaster Relief to Religious Institutions Would Not Violate the First Prong of the *Lemon* Test Because FEMA's PA Program has a Secular Purpose.

The first prong of *Lemon* requires that the policy at issue have a valid secular purpose to avoid an Establishment Clause violation. *Lemon*, 403 U.S. at 612. The mission of FEMA's PA Program is to provide disaster relief in a fair and equitable manner, and thus, it has a secular purpose.

Decades before the adoption of the *Lemon* test, this Court recognized that generally available public benefit programs that are secular in nature can be extended to religious entities without violating the Establishment Clause. *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1 (1947). In *Bradfield*, this Court held that granting federal funding to a hospital operated by a Catholic group did not violate the Establishment Clause because the "legal character of the hospital . . . [was] purely secular." 175 U.S. at 297–98. In *Everson*, this Court held that a state law permitting a taxpayer-funded general program that paid the bus fares of public and parochial school students did not violate the Establishment Clause because the program was neutral to religious and non-religious individuals. 330 U.S. at 17–18. The *Everson* Court noted that the First Amendment "does not require the state to be the[ ] adversary" of religious groups, and that "[s]tate power is no more to be used so as to handicap religions, than it is to favor them." *Id.* at 18. Illustratively, it "is obviously not the purpose of the First Amendment" to cut churches off from "general government services [such] as

ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks." *Everson*, 330 U.S. at 17–18.

Applying the secular purpose prong of the *Lemon* test, this Court has held that a policy can be invalidated "only if it is motivated wholly by an impermissible purpose." *Bowen*, 487 U.S. at 602 (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)). The "secular purpose" prong of *Lemon* exists to "prevent[ ] the relevant governmental decisionmaker . . . from abandoning neutrality." *Corp. of Presiding Bishop of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). As this Court noted, "governmental assistance programs have consistently survived [the secular purpose] inquiry." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). Accordingly, "if 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." *Mitchell v. Helms*, 530 U.S. 793, 810 (1999) (plurality opinion) (citation omitted).

Here, FEMA's PA Program has the wholly legitimate secular purpose of "provid[ing] assistance to [American states and territories] . . . so that communities can quickly respond to and recover from major disasters or emergencies declared by the President." FEMA Policy Guide at 5. Moreover, FEMA's authorizing statute requires that FEMA's regulations ensure "that the distribution of supplies, *the processing of applications*, and other relief and assistance activities shall be accomplished in an *equitable and impartial manner*, without discrimination on the

grounds of race, color, *religion*, nationality, sex, age, disability, English proficiency, or economic status." 42 U.S.C. § 5151(a) (2006) (emphasis added); 44 C.F.R. § 206.11(b) (2013). If FEMA's authorizing statute and regulation explicitly prohibit administrators of its programs from discriminating against religious institutions in the administration of relief, then why should FEMA be permitted to do just that?

Unlike Respondents' contention that FEMA's religious exclusion policy is obligated by the Establishment Clause, if the policy was in fact removed, it would not change the PA Program's secular purpose. Congress never intended that FEMA administrators be permitted to extend aid based on race, sex, or religion. 42 U.S.C. § 5151(a) (2006). Therefore, it cannot logically follow that it was ever the intention of Congress to exclude religious institutions from equal access to disaster relief. *Id.*; 44 C.F.R. § 206.11(b) (2013). As FEMA's policy illustrates, disaster relief is a generally available public benefit. Extending these funds to religious institutions would not make this generally available benefit any less secular because of the benefit's inherent secular nature. This is especially true for recipients like the Cowboy Church, who opened its doors to the entire Lima community. (R. at 4); *see also Bradfield v. Roberts*, 175 U.S. 291, 297–98 (1899) (holding that federal funding appropriation did not violate the Establishment Clause where the "legal character" of the institution receiving funding was "purely secular").

Hurricane Rhodes proceeded on an indiscriminate path of terror; it did not selectively choose whether to destroy religious property or non-religious property. This reality is reflected by FEMA's secular purpose to help *all* communities rebuild.

FEMA Policy Guide at 5. Any FEMA aid provided to the Cowboy Church would "only [have] the effect of furthering that secular purpose." *Mitchell*, 530 U.S. at 810. There is no practical or constitutional reason to treat the applications of religious institutions any different than non-religious institutions because FEMA's PA Program has a clearly secular purpose.

### 2. Providing Disaster Relief to Religious Institutions Would Not Violate the Second Prong of the *Lemon* Test Because It Would Not Have the Principal or Primary Effect of Advancing or Inhibiting Religion.

Applying the second prong of the *Lemon* test, extending relief to the Cowboy Church would not have the primary effect of advancing religion. *Lemon*, 403 U.S. at 612. A policy upsets this prong if "the Government itself . . . advance[s] religion through its own activities and influence." *Amos*, 483 U.S. at 337. It is important to note that "a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 839 (1995). Where a benefit is generally available, there is a strong suggestion that the policy does not have the primary effect of advancing religion and that the policy does not violate the Establishment Clause. *See Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) (holding that "we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.").

Allowing religious institutions to have equal access to relief under FEMA's PA Program would not affect the program's character in a way that would have the

effect of advancing religion in general or the faiths of the churches that benefit. The Court's decision in *Bowen* supports this conclusion. 487 U.S. 589 (1988). In *Bowen*, this Court held that the Adolescent Family Life Act ("AFLA"), a law allowing both religious and non-religious entities to apply for federal funding to research premarital teenage sexuality, did not violate the Establishment Clause under *Lemon*. *Id.* at 617. Considering the primary effect of the law, the *Bowen* Court highlighted the AFLA's neutrality with regards to the applicant's religious status. *Id.* at 608. In supporting this position, the Court noted that, under the AFLA, "a fairly wide spectrum of organizations is eligible to apply for and receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." *Id.*

In this case, disaster relief under FEMA's PA Program exists to help communities rebuild and recover. FEMA Policy Guide at 5. Deeming religious institutions and properties that support religious endeavors "ineligible" is constitutionally unnecessary because allowing all applicants, including the Cowboy Church, equal access to this generally available public benefit would be neutral to religion and at peace with the Establishment Clause. *See Bowen*, 487 U.S. at 608. Extending FEMA benefits to the Cowboy Church under the same criteria that it would extend to a non-religious institution—i.e., removing religious status as an ineligible criterion—would not create any incentive for individuals to join, operate, or support churches. *See Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 483, 488–89 (1986) (holding that provision of public benefits to a visually impaired

student studying religious ministry did not violate the Establishment Clause where extending the applicant benefits under the program "creates no financial incentive for students to undertake sectarian education"). Moreover, removing the religious exclusion provision from FEMA's policy would not run afoul of the Establishment Clause because, as this court held in *Bowen*, the lack of an express provision preventing the use of federal funds for religious purposes is unnecessary, and its absence does not mean that the law has the primary effect of advancing religion. *Bowen*, 487 U.S. at 614–15. An equally accessible FEMA PA Program would simply allow religious institutions like the Cowboy Church a fair opportunity to receive relief and would not have the primary effect of supporting or spreading religion.

This Court has long been cognizant of the odious effect that a strict application of the Establishment Clause would have on religious institutions. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970) (noting that "rigidity [in the application of the First Amendment's religious clauses] could well defeat the basic purpose of these provisions"). For example, as the Court illustrated in *Widmar v. Vincent*, "[i]f the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" 454 U.S. 263, 274–75 (quoting *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976) (plurality opinion)). Public relief from an indiscriminate natural disaster like Hurricane Rhodes should not be viewed any differently than public protection from crime, fires, or potholes. *Id.*; *see also Trinity Lutheran Church*, 137 S. Ct. at 2027 (Breyer, J., concurring) (upholding a

free exercise challenge to playground state scrap tire program that excluded religious applicants because there was "no significant difference" between the purpose of the program and a program that provides general government services like police and fire protection (citing *Everson*, 330 U.S. at 17)). A religiously neutral disbursement of these public benefits does not promote any sectarian purpose. *See Rosenberger,* 515 U.S. at 839; *see also Roemer*, 426 U.S. at 746 (plurality opinion) (noting that "religious institutions need not be quarantined from public benefits that are neutrally available to all.").

Providing the Cowboy Church funding to assist it in rebuilding in the aftermath of Hurricane Rhodes does not advance the ideology on which the Church is founded, nor does it have the effect of advancing the Cowboy Church's ministry efforts. Any argument that FEMA funding would allow the Cowboy Church to spend its money elsewhere, specifically on sectarian purposes, is quickly quelled by the well-established case law of this Court. In evaluating policies for their effect of advancing or inhibiting religion under the Establishment Clause, "the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *see also Bowen*, 487 U.S. at 609 (noting that "we have found it important that the aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution").

Here, the Cowboy Church serves a multitude of secular, governmental, and community focused purposes that were unavailable to Lima residents while the

Cowboy Church was in ruins. (R. at 7.) Allowing religious institutions like the Cowboy Church equal access to public assistance from FEMA does not advance or endorse the cowboy faith; rather, FEMA assistance merely allows the Cowboy Church to be made whole again.[7] *See Roemer*, 426 U.S. at 747. Therefore, extending relief to the Cowboy Church does not have the primary effect of advancing religion.

### 3. Providing Disaster Relief to Religious Institutions Would Not Violate the Third Prong of the *Lemon* Test Because it Would Not Foster Excessive Government Entanglement with Religion.

Extending FEMA relief to the Cowboy Church would not foster excessive government entanglement with religion under the *Lemon* test. *Lemon*, 403 U.S. at 613. The entanglement prong of the Lemon test is closely related to the primary effect prong. In fact, this Court has analyzed the entanglement and primary effect prongs of the *Lemon* test together because "both inquiries rely on the same

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[7] The Cowboy Church contends that the *Lemon* test is the proper test to apply to FEMA's Establishment Clause challenge. *See supra* at n.6. However, even if this Court were to apply the "endorsement test" proposed by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, FEMA's challenge still fails. 465 U.S. 668 (1984). The essence of the endorsement test is that "[t]he proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691 (O'Connor, J., concurring); *see also Elmbrook Sch. Dist.*, 687 F.3d at 850 (noting that "the endorsement test [is] a legitimate part of *Lemon*'s second prong"). Here, the extension of FEMA Public Assistance benefits to religious institutions like the Cowboy Church would not "convey a message of endorsement of religion," but rather, the government would simply be extending generally available benefits to *all* groups under equal criteria as it codified in 42 U.S.C. § 5151(a) and 44 C.F.R. § 206.11(b). *Lynch*, 465 U.S. at 691; *see also Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (applying the endorsement test). Moreover, "a hypothetical reasonable observer" would not find the extension of public benefits to a church in the wake of a natural disaster a governmental endorsement of religion. *Salazar v. Buono*, 559 U.S. 700, 728 (2010) (Roberts, C.J., concurring) (applying the endorsement test).

Similarly, if this Court applies the "coercion test" proposed by Justice Kennedy in *Lee v. Weisman*, FEMA's challenge falls fatally short. 505 U.S. 577 (1992). Under the coercion test, there is no violation of the Establishment Clause unless the government directly or indirectly "coerce[s] anyone to support or participate in religion or its exercise." *Id.* at 587, 592 (Kennedy, J.). In this case, providing benefits to religious institutions would not result in governmental coercion to join the cowboy faith.

evidence." *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring) (citing *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997)). A law or policy "'excessively entangle[s]' the state in religion" if it requires "'comprehensive, discriminating, and continuing state surveillance'" to ensure that the policy is not violating the First Amendment. *Mueller*, 463 U.S. at 403 (quoting *Lemon*, 403 U.S. at 619)).

In this case, FEMA's current policy does more to inexorably entangle the government and religious entities than the PA Program would if it granted religious entities equal access. Distinguishing between what activities or materials are religious and which are secular is difficult because "the character of an activity is not self-evident." *Amos*, 483 U.S. at 343 (Brennan, J., concurring). Here, in investigating the Cowboy Church's claim for relief, FEMA conducted "a searching case-by-case analysis" consisting of an in-person tour of the premises, interviews, and approximation of religious use. *Id.*; (R. at 7, 10.) Concurring in *Amos*, Justice Brennan was justifiably concerned that the "searching" process of trying to decipher between religious and non-religious behavior "results in considerable ongoing government entanglement in religious affairs." *Id.* Several circuit courts of appeals have shared Justice Brennan's concern and declined to encourage such a futile inquisition. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 230 (3d Cir. 2007) (quoting Brennan's concurrence in *Amos* and declining to conduct religious analysis); *see also Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 264 (4th Cir. 1988) (same); *see also Spencer v. World Vision,*

*Inc.*, 633 F.3d 723, 730 (9th Cir. 2011) (O'Scannlain, J., concurring) (per curiam) (same). This Court should be similarly weary of enforcing FEMA's current searching, mixed-use standard.

In addition to the reasons expressed in the primary effect analysis above, this Court must reject FEMA's unworkable policy that excessively entangles the government with religious entities and compel a PA Program that does not exclude religious applicants. FEMA's policy creates more unwanted entanglement between government and religion than it would have without its religious exclusion policy.

Having satisfied all three prongs of the *Lemon* test—as well as the alternate coercion and endorsement tests previously proposed by this Court (*see supra* at n.7)—FEMA was not entitled to summary judgment because its religious exclusion policy is not mandated by the Establishment Clause, and thus, the decision of the Fourteenth Circuit should be reversed.

### B. FEMA's Policy Violates the Free Exercise Clause of the First Amendment Because it Categorically Denies Full Relief for the Cowboy Church and Other Religious Institutions.

By impeding the Cowboy Church's access to full relief, FEMA's policy violates the Free Exercise Clause of the First Amendment, and the Cowboy Church must be allowed to pursue its claim. Compliance with the Free Exercise Clause is not optional, it is compulsory. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983). Where a policy violates a party's free exercise rights, "the state is constitutionally obligated to accommodate them, even if this entails some degree of disparate treatment of religious activity." *Forest Hills Early Learning Ctr., Inc. v.*

*Lukhard*, 728 F.2d 230, 241 (4th Cir. 1984) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972)).

Undeniably, the Establishment and Free Exercise Clauses exist in tension with one another. *Locke*, 540 U.S. at 718. But key to this Court's resolution of the issue at bar is the central principal that "by definition, constitutionally compelled accommodation of free exercise rights cannot abridge the establishment clause." *Lukhard*, 728 F.2d at 241 (citing *Yoder*, 406 U.S. at 234 n.22). Here, assuming *arguendo* that the Court is concerned that extending funding to the Cowboy Church would offend the Establishment Clause, such concern is overcome by a constitutionally compelled determination that FEMA's religious exclusion policy violates the Cowboy Church's free exercise rights. *See Widmar*, 454 U.S. at 266, 277–78 (reversing summary judgment against religious student group who claimed that the state university violated their free exercise rights by barring them from conducting meetings in campus buildings and holding that campus "equal access" policy did not violate the Establishment Clause).

A law that hinders religious practice must withstand strict scrutiny to overcome a free exercise challenge. *Trinity Lutheran Church*, 137 S. Ct. at 2019; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). To this point, as this Court recently noted in *Trinity Lutheran Church*, "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the

highest order.'" 137 S. Ct. at 2019 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)).

Under the Free Exercise Clause, public welfare benefits must be made equally available to persons of all faiths. *See Everson*, 330 U.S. at 16 (holding that the government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."). Where an applicant's ineligibility for benefits is based solely on their religious practice, the pressure on the applicant to forego their religious practice is strong, and there is a violation of the Free Exercise Clause. *Trinity Lutheran Church*, 137 S. Ct. at 2023–24.

This Court's recent decision in *Trinity Lutheran Church* is instructive. 137 S. Ct. 2012 (2017). In that case, this Court held that Missouri's categorical prohibition against religious institutions receipt of funds for a playground scrap tire program violated the Free Exercise Clause. *Id.* Like the relief under FEMA's PA Program, the religious applicant in *Trinity Lutheran Church* was denied a public benefit for which it was otherwise qualified. *Id.* This Court held that the applicant had a right under the Free Exercise Clause "to participate in a government benefit program without having to disavow its religion character." *Id.* at 2022. To hold otherwise would be "odious to our Constitution." *Id.* at 2025.

Similarly, the Cowboy Church is being denied access to relief for being a religious institution. While the consequence of Missouri's discriminatory ban on

funding religious entities resulted in "a few extra scraped knees," the consequence of FEMA's religious exclusion is an already devastated church having to privately fund extensive structural repairs while navigating its dangerous premises poisoned by chemicals, dirt, and toxins. *Trinity Lutheran Church*, 137 S. Ct. at 2025; (R. at 7–10.)

Moreover, FEMA cannot present a compelling governmental interest for excluding religious institutions from its PA Program, nor can it show that its policy is narrowly tailored to achieve whatever interest it could proffer. *See Lukumi*, 508 U.S at 531–32. It makes no difference that FEMA's budget for providing relief is limited; this Court has rejected the argument that scarce resources justify discrimination under the First Amendment. *See Rosenberger*, 515 U.S. at 835. While FEMA argued to the District Court and Fourteenth Circuit that its policy is necessary to avoid a violation of the Establishment Clause, a careful application of the *Lemon* test shows that omitting this discriminatory component of FEMA's policy would not invite a legitimate Establishment Clause challenge. *See supra* Part II.A. FEMA cannot survive the strict scrutiny this Court places on laws, like FEMA's policy in this case, that burden religious practice. *See Lukumi*, 508 U.S at 531–32, 546.

In resolving the First Amendment issue before this Court, it is relevant that FEMA's religious exclusion policy violates the Cowboy Church's free exercise rights because "by definition, constitutionally compelled accommodation of free exercise rights cannot abridge the Establishment Clause." *Lukhard*, 728 F.2d at 241 (citing

*Sherbert v. Verner*, 374 U.S. 398, 409 (1963)). Considering the tension that exists between the religion clauses of the First Amendment, it is possible that affording too much protection under the Establishment Clause can run afoul of a party's free exercise rights where an accommodation is required. *See Yoder*, 406 U.S. at 234 n.22 (noting that accommodating the religious beliefs of a party whose free exercise rights were abridged "can hardly be characterized as sponsorship or active involvement" that would violate the Establishment Clause). Here, the Cowboy Church's religious identity prevents, or at least diminishes, its accessibility to public assistance from FEMA, and this violation of the Cowboy Church's free exercise rights must eclipse any Establishment Clause concerns. *See Lukhard*, 728 F.2d at 241. Therefore, FEMA's policy violates the Cowboy Church's free exercise rights.

### C. The Justification for Extending Disaster Relief to the Cowboy Church is Grounded in Sound Public Policy Interests that Highlight the State's Interest in Supporting Religious Institutions and Promoting a Mutually Beneficial Relationship.

Allowing religious entities equal access to public assistance from FEMA is not only constitutionally compelled, but it is in accord with both public policy and previous federal natural disaster response. The Establishment Clause does not preclude federal funding for religious buildings solely because of their status as houses of worship. *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 299–300 (6th Cir. 2009) (holding that federal funding that supported the restoration of three historic Detroit churches did not violate the Establishment

Clause because benefits were neutral and generally applicable); *see also Taylor v. Town of Cabot*, --- A.3d ---, 2017 WL 4454708, at **8–10 (Vt. Oct. 6, 2017) (holding that the town's use of federal funds for restoration of a historic church did not violate the Establishment Clause). Notably, the *American Atheists* court warned against an interpretation of the Establishment Clause that would permit "a categorical no-aid to religious entities rule" because it would exclude the very benefits at issue in this case: "government programs designed to provide one-time emergency assistance through FEMA and other public agencies to churches devastated by natural disasters." 567 F.3d at 299–300.

Here, FEMA's policy severely hampers the ability of churches like the Cowboy Church to rebuild in the wake of disaster, and this policy is not only odious to the Constitution, but its enforcement by this court would unnecessarily jeopardize a slew of other federal programs that justifiably provide funding to religious entities. *See id.* (discussing programs that may be unconstitutional because of a categorical no-aid to religious entities rule). This Court's canon of Establishment Clause law does not support FEMA's exclusionary policy (*see supra* Part II.A.), and neither does this nation's interest in having a cooperative government and religious community serving each other in times of great strife. The current administration recognized this interest when it recently directed agencies to respect religious liberties. Exec. Order No. 13,798 § 1, 82 Fed. Reg. 21,675 (May 4, 2017) (ordering agencies that "[i]t shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom.").

In the wake of record disasters, like Hurricane Rhodes, FEMA has previously relied on the work of religious institutions to share the burden of rebuilding devastated regions. Brian C. Ryckman, *Indoctrinating the Gulf Coast: The Federal Response to Hurricanes Katrina and Rita and the Establishment Clause of the First Amendment*, 9 U. Pa. J. Const. L. 929, 930 (2007). In fact, in the aftermath of Hurricanes Katrina and Rita, FEMA and the Bush Administration agreed to use public funds to reimburse religious organizations for their extraordinary efforts in helping to save lives and reconstruct the Gulf Coast. *Id.* at 955 (concluding that the governmental responses to Hurricanes Katrina and Rita regarding religious institutions, including the FEMA reimbursement plan, would not violate the Establishment Clause, and stating that "[p]aramount to this conclusion is the fact that each of the government's programs has the same legitimate secular purpose: to aid in rebuilding this devastated area of the United States.").

Considering the federal recognition of the important role religious institutions play in disaster relief, it would certainly not be unprecedented to extend FEMA PA Program funding to the Cowboy Church. The Cowboy Church plays an undeniably strong role in the small Lima community, especially as a designated emergency relief shelter. (R. at 7.) Therefore, allowing the Cowboy Church an equal opportunity to receive FEMA relief does not run afoul of the Establishment Clause, it is mandated by the Free Exercise Clause, and it would not be anomalistic considering the federal government's recent practice of reimbursing religious institutions for their relief efforts in the aftermath of devastating hurricanes.

For these reasons, this Court should reverse the decision of the Fourteenth Circuit and hold that FEMA's policy violates the Free Exercise Clause. However, at a minimum, because the Establishment Clause does not bar the Cowboy Church from recovery (*see supra* Part II.A.), this Court should reverse the decision of the Fourteenth Circuit and remand the case for resolution of the Cowboy Church's claim.

## CONCLUSION

For the foregoing reasons, the Cowboy Church respectfully requests that this Court reverse the decision of the Fourteenth Circuit and deny summary judgment and hold that the Cowboy Church's claim is ripe for adjudication.

Respectfully Submitted,

/s/ *Team 51*

Counsel for Petitioner

## CERTIFICATE OF COMPLIANCE

Pursuant Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Petitioner, the Cowboy Church of Lima, contains 13,975 words, beginning with the Statement of Jurisdiction and through the Conclusion, including all headings and footnotes, but excluding this Certificate of Compliance and attached Appendices.

/s/ *Team 51*

Counsel for Petitioner

## APPENDIX A

42 U.S.C. § 5151 (2006)

Nondiscrimination in Disaster Assistance

(a) Regulations for equitable and impartial relief operations

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

(b) Compliance with regulations as prerequisite to participation by other bodies in relief operations

As a condition of participation in the distribution of assistance or supplies under this chapter or of receiving assistance under this chapter, governmental bodies and other organizations shall be required to comply with regulations relating to nondiscrimination promulgated by the President, and such other regulations applicable to activities within an area affected by a major disaster or emergency as he deems necessary for the effective coordination of relief efforts.

## APPENDIX B

44 C.F.R. § 206.11 (2013)

Nondiscrimination in Disaster Assistance

(a) Federal financial assistance to the States or their political subdivisions is conditioned on full compliance with 44 CFR part 7, Nondiscrimination in Federally–Assisted Programs.

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

(c) As a condition of participation in the distribution of assistance or supplies under the Stafford Act, or of receiving assistance under the Stafford Act, government bodies and other organizations shall provide a written assurance of their intent to comply with regulations relating to nondiscrimination.

(d) The agency shall make available to employees, applicants, participants, beneficiaries, and other interested parties such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

## APPENDIX C

First Amendment of the United States Constitution

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