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
Fourteenth Circuit

BRIEF FOR PETITIONER

Counsel of Record

NOVEMBER 20, 2017

TEAM 56

QUESTIONS PRESENTED

I. Under the doctrine of ripeness, can a pre-enforcement lawsuit be ripe for review when the challenge is to the general applicability of an agency policy?

II. Under the Establishment Clause of the First Amendment, can churches receive the neutrally-allocated public benefit of disaster relief from the Federal Emergency Management Agency's Public Assistance Program?

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OPINIONS BELOW

The opinion of the United States District Court for the Central District of New Tejas is unreported. The unreported opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 2-21. The Order Granting Writ of Certiorari by this Court is set forth on page 1 of the record.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fourteenth Circuit entered its decision on October 1, 2017. R. 2. This Court then granted Petitioners' timely petition for writ of certiorari, R. 1., and possesses appellate jurisdiction under 28 U.S.C. § 1254(1) (2012). This case presents a federal question regarding the actions of a federal agency, granting this Court subject matter jurisdiction under 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act). The relevant portions of the Stafford Act are appended.

This case also involves the interpretation and application of the Establishment Clause of the First Amendment, which provides, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. Statement of the Facts

The Cowboy Church of Lima ("the Church") has freely opened its doors to the local community without regard to religion since 1998. R. 3. The Church's facilities serve as, among other things, a community meeting center, a concert hall, a town hall, and a church. R. 3, 7. The massive flooding following Hurricane Rhodes caused devastating structural damage to the Church's facilities, far beyond the capabilities of local volunteer efforts. R. 5-6. As would any other private nonprofit that provides benefit to its local community, the Church seeks the opportunity for equal consideration of eligibility for FEMA relief.

1. The Cowboy Church of Lima

The Cowboy Church of Lima occupies an eighty-eight-acre tract of land near the small town of Lima, New Tejas, comprised of only 4,150 residents. R. 3. The Church's eighty-eight-acre tract, designated as Religious Exempt Property by New Tejas, contains multiple structures, including a rodeo arena that seats about 500 people, a 2,250-square foot event center that seats 120 people (the largest event center in town), a 2,250-square foot chapel, and a variety of other storage facilities. R. 3-4. The Church has been 501(C)(3) designated by the Internal Revenue Service since it applied in 1990, the same year the chapel was built. R. 3.

In 1998, Lima Mayor Rachel Berry approached the head of the Church and the manager of the grounds, Chaplain Finn Hudson, and asked if the Church facilities could be used to host township events, like council meetings, because there

was no other space in Lima large enough to do so. *Id.* Mayor Berry offered to pay rent to use the facilities, but Chaplain Hudson refused to accept any such payment, stating that the Church's buildings were "open to anyone, anytime." R. 4.

Throughout the years, civic and private events became commonplace at the Church. *Id.* To accommodate the increasing needs of the community and the Church, the Church held a regional bake sale each year. *Id.* Between private donations and funds raised from the bake sale, the Church was able to fund the construction of an event center, annexed to the chapel in 2005. *Id.* The following year, the Church sought to have the event center declared tax exempt as a government building, but the application was denied by the county. *Id.* Two years later, the City of Lima considered building an event center on Councilwoman Mercedes Jones' property, but it was voted down because Lima citizens did not see the need for Lima to have two event centers. *Id.*

2. Hurricane Rhodes, the Flanagan Dam and Catastrophic Damage

On August 13, 2016, Hurricane Rhodes made landfall in New Tejas, just one hundred miles north of Lima. R. 2. The hurricane dropped over forty-five inches of water within a period of thirty-six hours, an unprecedented amount of rainfall in New Tejas. R. 2-3. The massive amount of rain triggered the failure of the Flanagan Dam (which was in the midst of a repair effort) on August 15, 2016, which caused water to overflow the Motta River, producing a "catastrophic" flood to surge toward Lima. R. 3.

As flood waters were rising, Chaplain Hudson and the Church staff rushed to the chapel and event center and began removing Bibles, hymnals, religious pamphlets, religious paraphernalia, tables, chairs, podiums, and kitchen supplies, moving these items to storage facilities or placing them as high as possible to avoid damage. R. 4.

Water breached the doors of the chapel and event center at 11:45pm on August 15, causing between three and three and one-half feet of flooding. R. 4-5. The flooding coated the inside of the event center and chapel with "mud, silt, grass, and other assorted plant debris as well as possible raw sewage and chemicals," and destroyed "carpets, flooring, drywall, insulation, doors, furniture, pews, and a variety of other materials." R. 5.

The flood water finally dissipated around 9:30 am on August 17, 2016. *Id.* The next morning, Chaplain Hudson and his staff assessed the damage and began repair efforts. *Id.* Preliminary repair efforts required removing four feet of sheetrock and insulation from the walls throughout the buildings, all of the flooring, and every item from the buildings, including altars, kitchen goods, artwork, dry erase boards, and supplies used for both religious and civic purposes. *Id.*

Recognizing an "odd look" to the chapel and event center, Chaplain Hudson asked a structural engineer to look over the structure. *Id.* The engineer concluded the chapel and event center likely suffered structural damage and needed repair to avoid collapse. R. 6.

3. The Cowboy Church of Lima Seeks FEMA Assistance

On August 19, 2016, President Barack Obama declared Hurricane Rhodes to be a major natural disaster, triggering the availability of FEMA relief for New Tejas. *Id.* Following that declaration, Chaplain Hudson sought legal advice from attorney Arthur Abrams who advised him to apply for FEMA relief immediately. *Id.* On August 20, 2016, Chaplain Hudson applied for FEMA relief and on August 23, 2016 he applied for a Small Business Administration ("SBA") loan. *Id.* The Church did not have flood insurance as it was located outside of the 100-year floodplain and thus deemed unlikely to flood. *Id.* While the Church's application for relief was pending, the Church's congregation and other members of the community took action to make the necessary repairs to the chapel and event center. R. 8. Time and materials were donated by construction crews, a structural engineer, and a network of Cowboy Church Groups around the country. R. 9.

4. FEMA Assessment

On August 24, 2016, FEMA adjuster Ms. Quinn Fabray contacted Chaplain Hudson to assess the damage to the chapel and event center on the following day. *Id.* During Ms. Fabray's tour of the premises, she noted the event center was often used for community events and projects which were unrelated to the church. R. 7. These events included birthday parties, banquets, meetings of the Rotary Club, and more. *Id.* She also noted the chapel was sometimes used for secular events like nonreligious concerts and father-daughter dances. *Id.* Ms. Fabray expressed that she "hated that FEMA does not cover monetary assistance

for churches" and explained to Chaplain Hudson that "she had never heard of FEMA granting an exception." *Id.*

5. FEMA Procedures

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act), FEMA may provide assistance 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" upon a declaration of "an emergency or major disaster" by the President. 42 U.S.C. § 5172(a)(1)(B) (2012).

To operate federal assistance in New Tejas, FEMA acts through its Public Assistance Program (PA Program), FEMA regulations, and policies contained in the FEMA's PA Program and Policy Guide. R. 11. FEMA publishes proposed PA Program Policy language in the Federal Register for public notice-and-comment if changes are "significant," 72 Fed. Reg. 3432 (Jan. 25, 2007), or if the policy reduces the availability of FEMA assistance, 42 U.S.C. § 5165c(b). The purpose of the PA Program, the largest grant of federal funds to FEMA under the Stafford Act, is to assist communities recovering from major disasters or emergencies to save lives, protect property and permanently restore community infrastructure affected by declared disasters. *Id.*

FEMA assistance is available to eligible private nonprofits (PNPs) under the following conditions. First, the organization must hold current 501(c) designation by the United States Internal Revenue Service, 44 C.F.R. § 206.221(f) (2017), and

second, the organization must "own or operate [an eligible] private nonprofit facility," 44 C.F.R. § 206.222(b). Facilities that provide a critical service, including educational, utility, emergency, or medical services, are eligible. 44 C.F.R. § 206.221(e)(7). A facility that does not provide a critical service is eligible if it provides essential services and meets the requirements for being open to the general public. *Id.* "Facilities established or primarily used for . . . religious . . . activities are not eligible." Fed. Emergency Mgmt. Agency, Public Assistance Program and Policy Guide, FP 104-009-2, 11 (Jan. 1, 2016) [hereinafter FEMA PA Program and Policy Guide]. Ineligible services include "religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large;" "religious education;" and "religious services." FEMA PA and Policy Guide, at 14; 44 C.F.R. § 206.221(e)(1).

PNPs that provide both eligible and ineligible services are "mixed-use facilities," and eligibility for relief is dependent on what FEMA adjusters determine is the "primary use" of the facility. FEMA PA and Policy Guide, at 16. Considering the entire structure as a whole the primary use is "the use for which more than 50 percent of the physical space in the facility is dedicated," or "for which more than 50 percent of the operating time is dedicated." If more than 50 percent is dedicated to ineligible services, the entire facility is deemed ineligible. *Id.* If the facility is dedicated to more than 50 percent eligible services, the facility is eligible, but aid is prorated to cover only eligible services. *Id.* As a prerequisite to relief under the PA

Program, PNPs that provide non-critical, essential governmental services must apply for a loan from the United States Small Business Administration. *Id.* at 17.

FEMA provides a variety of aid to eligible facilities. Eligible work must be (1) required as a result of the major disaster; (2) be located within the designated major disaster area; and (3) be the legal responsibility of the eligible PNP. 44 C.F.R. § 206.223(a). Moreover, FEMA covers "emergency work" and "permanent work." Emergency work is available "to save lives, to protect public health and safety, and to protect improved property." 44 C.F.R. § 206.225(a)(1). Permanent work involves the structural restoration of damaged facilities. 44 C.F.R. § 206.226; FEMA PA and Policy Guide, at 23.

B. Proceedings Below

Upon the news from Ms. Fabray that the church would be ineligible for relief, Chaplain Hudson rushed to consult Attorney Abrams about the Church's options. R. 8. The attorney advised Chaplain Hudson that FEMA would "surely deny his application," and that he would represent him pro bono if Chaplain Hudson wanted to take legal action. *Id.* On August 27, 2016, after weighing the options, Chaplain Hudson told his attorney it was not fair that the Church would not get relief after all it had done for the community and taking this matter to court would be the only way to get justice for the Church. *Id.* On August 29, 2016, the Church filed the present action against FEMA. *Id.* FEMA promptly stopped

considering the request for funding by the Church. *Id.* Over the ensuing year, the community continued to volunteer to help the Church in recovery efforts. *Id.*

The District Court held a status conference on November 2, 2016, at which the court denied the U.S. Attorney's motion to dismiss. R. 9. During the discovery period that followed, both sides took depositions. *Id.* During Chaplain Hudson's deposition, he testified the donated time and materials had not been enough to restore the chapel. *Id.* He testified he could not estimate how much time the event center was used for nonreligious activities because he only attended the church-related activities. *Id.*

During his deposition, FEMA Regional Director Jesse St. James stated the event center was used 80% of the time for FEMA-eligible purposes and the chapel was used over 90% of the time for non-FEMA-eligible purposes. R. 10. He admitted the Church's application had been placed in the preliminary denial category, but he was planning to review the file again himself before the final determination. *Id.* Director St. James conceded FEMA sometimes misses internal deadlines, which would have been September 30, 2016 in this case, and his final review "may have also been" completed on October 14, 2016. *Id.*

After discovery, the U.S. Attorney moved for summary judgment on the theory that the case was not yet ripe and the church-exclusion policy was necessary under the Establishment Clause. *Id.* The district court granted summary judgment for the government, reasoning that the Church could not get FEMA relief under the

Establishment Clause. *Id.* However, the court found subject matter jurisdiction and denied the ripeness claim. *Id.* Both parties cross-appealed. R. 10-11.

The Fourteenth Circuit reversed the District Court's ripeness determination, finding there was no hardship to the Church in withholding judicial consideration. R. 15. The Fourteenth Circuit affirmed the District Court's holding with respect to the Establishment Clause, focusing its reasoning on the relationship between the Free Exercise Clause and the Establishment Clause. R. 15-17. The dissenting judge at the Fourteenth Circuit, Sylvester, J., would have held the issue was ripe for determination. R. 17-19. His analysis hinged on his determination that the question for the Court was whether the Establishment Clause bars a church from receiving FEMA relief. R. 18. On that question, he would have held it did not. R. 19-21.

SUMMARY OF THE ARGUMENT

The Cowboy Church of Lima's challenge to the validity of FEMA's rule deeming religious services ineligible, a facial challenge that does not turn on the application of the rule in any particular case, is ripe for judicial review.

First, the Church's claim is a "final agency action" that was subject to notice-and-comment rulemaking and has the legal effect of a binding law, making it ripe for review under the text of the APA.

Second, the Church's claim is ripe under prudential ripeness considerations. Under the first prudential consideration, this claim is fit for judicial review because it is a purely legal issue that does not require further factual development. The

alleged constitutional violation is FEMA's rule as it applies to every religious institution seeking FEMA aid. That violation has occurred and is ongoing because FEMA's rule discriminates against religious institutions by deeming all religious services ineligible for aid and prorating aid to not cover religious services even if a facility is otherwise eligible. Under the second prudential consideration, substantial legal hardship will result if this Court withholds consideration because of the ongoing alleged constitutional violation. Practical hardship will also result because each day the Church does not receive the help it needs, the risk of its facility collapsing increases, given the severe structural damage caused by the major disaster.

Finally, constitutional ripeness considerations pose no bar to this Court hearing the Church's claim. The Church has already sustained sufficient injury by being treated unequally in the FEMA application process simply because of its religious attributes. That injury would be sufficiently redressed by the relief requested because striking down FEMA's rule would afford the Church with the same opportunities as all other Private Nonprofits applying for FEMA aid.

With respect to the Establishment Clause claim, the Court should adopt the endorsement test and find there would be no violation of the Establishment Clause if FEMA were permitted to provide disaster relief to the Cowboy Church of Lima. The Stafford Act and the PA program are neutral and available to all eligible PNPs. Thus, the Stafford Act and the PA program do not signal an endorsement by the government of religious activities.

Either subsequent to its determination on endorsement or instead of making such a finding, the Court should apply the three-pronged *Lemon* test and similarly find there would be no violation of the Establishment Clause by providing FEMA aid to the Church. There is no violation because (1) the Stafford Act and the PA Program have a secular legislative purpose; (2) the government action would not have the primary effect of advancing or inhibiting religion; and (3) giving disaster relief to the Church would not excessively entangle the government with religion.

Furthermore, there is no violation of the Establishment Clause in this case under the *Lee* coercion test. The government action in this case does not coerce citizens to participate in religious activity. The funding would not require citizens to visit the Church, aid in the reconstruction, or otherwise set foot in the Church. Thus, the government is not coercing any member of its community to participate in religious activities.

ARGUMENT

I. THE COWBOY CHURCH OF LIMA'S SUIT AGAINST FEMA IS RIPE FOR REVIEW

The Church's challenge to FEMA's internal policy denying federal disaster relief funds to institutions established or primarily used for religious activities is ripe for judicial review. This Court need only consider whether religious institutions should be eligible for relief in the same manner other Private Nonprofits (PNPs) are eligible. *See* 44 C.F.R. § 206.221(e) (2017). It need not

consider whether FEMA would have deemed the Church's property eligible for federal relief, because even such eligibility would require FEMA to prorate aid in proportion to the percentage of religious services the Church provides. *See* Fed. Emergency Mgmt. Agency, Public Assistance Program and Policy Guide, FP 104-009-2, 16 (Jan. 1, 2016) [hereinafter FEMA PA Program and Policy Guide]. Thus, FEMA can be subject to this pre-enforcement suit by the Church because the ultimate challenge is to FEMA's underlying policy discriminating against religious institutions by requiring them to prove secularity to be FEMA-eligible.

Important to this Court's consideration of the claim at issue is the APA's presumption in favor of judicial review of agency action. *See* 5 U.S.C. § 701(a)(1)-(2) (2012); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action"). Indeed, the APA curtails judicial review only when a "statute preclude[s] judicial review" or when the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)-(2). Affording this presumption is consistent with the role of the judiciary in ensuring government agencies do not act arbitrarily and protecting individual rights against agencies operating outside of their legal authority. *See Inv. Co. Inst. v. Bd. of Governors of the Fed. Reserve Sys.*, 551 F.2d 1270, 1279-80 (D.C. Cir. 1977). Although scholars have argued Justice Harlan was simply applying the law of pre-enforcement review and did not affirmatively intend to create such a strong presumption in its favor, pre-

enforcement review "is today the norm." *See* Gary Lawson, *Federal Administrative Law* 1139 (7th ed. 2016).

With this presumption in mind, the Church's claim is ripe for review. Ripeness draws on Article III limitations on justiciability as well as on prudential considerations developed by this Court. *See Reno v. Catholic Soc. Servs. Inc.*, 509 U.S. 43, 57, n.18 (1993). Ripeness assumes the existence of an injury that is sufficiently direct to satisfy the requirements of Article III standing, but asks whether that injury is too remote or hypothetical at the time to warrant judicial review. *See Bronx Household of Faith v. Bd. of New York*, 492 F.3d 89, 111 (2d Cir. 2007) (Leval, J., concurring); *Nat'l Park Hosp. Ass'n v. Dep't of the Interior,* 538 U.S. 803, 814 (2003) (Stevens, J., concurring); *see also Regional Rail Reorganization Act Cases,* 419 U.S. 102, 140 (1974). Prudential ripeness prevents courts from weighing in on abstract disagreements between parties and allows courts to withhold consideration when delaying review may allow the issues to crystallize. A*bbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Constitutional ripeness is closely related to Article III standing and "[i]n many cases, [constitutional] ripeness coincides squarely with standing's injury in fact prong." *See Iowa League of Cities v. EPA*, 711 F.3d 844, 870 (8th Cir. 2013) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 1999) (*en banc*)).

The Church's claim is ripe considering the bare requirements of the APA, prudential ripeness considerations, and constitutional ripeness considerations, all of which inform the ripeness analysis. However, before moving to the first step of the

ripeness inquiry (ripeness under the test of the APA), the Court must determine the nature and scope of claim at issue. Here, the Church is challenging the facial validity of FEMA's exclusion of religious services from FEMA eligibility.

A. The Cowboy Church of Lima's Claim Takes Issue with FEMA's Policy of Excluding Religious Institutions from Eligibility for Aid, Not Solely with the Individual Treatment of Its Application.

To properly assess ripeness, this Court must first determine the scope of the claim at issue by asking whether the challenge is to the agency rule on its face or dependent upon the application of the rule in the particular circumstances. The Church's claim in this case—a challenge to FEMA's policy of effectively excluding religious institutions from receiving federal disaster relief—does not depend "on the way in which [FEMA's rule] will be applied." *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 216 (D.C. Cir. 2007).

The determination of whether the issue is a facial challenge to an agency policy[1] or dependent upon the application of the rule in the particular circumstances is often dispositive of a ripeness determination because facial challenges only ask the Court to consider legality of the rule as it applies in any circumstance. *See id.* at 216 (explaining that the ripeness question turned on whether the claim "can be resolved on the face of the document, or whether it depends as well on the way in

[1] FEMA's requirement that religious services are ineligible for relief is the result of a combination of statutory requirements under The Stafford Act, regulations published in the code of federal regulations, and FEMA's policy guide regarding the PA Program, which was subject to notice-and-comment rulemaking. Each of these is binding and has a legal effect on applicants. *See* 5 U.S.C. § 551 (4) (2012); *see also American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). The majority opinion in the Fourteenth Circuit recognized this. R. 14.

which the document will be applied."); *Appalachian Power Co. v. Train*, 566 F.2d 451, 458 (4th Cir. 1977) (explaining that if a regulation is "alleged to be invalid as written," it is a final agency action, but if the challenge is to "the manner in which the regulations may be applied" in a particular circumstance, it may not be final).

FEMA's PA Program excludes religious services from eligibility for federal disaster relief. FEMA clarified in its PA Program and Policy Guide that "[f]acilities established or primarily used for . . . religious . . . activities are not eligible" for FEMA relief. *See* FEMA PA Program and Policy Guide, at 11. Although FEMA may, under the "Mixed-Use Facility" standard, have some discretion in allocating funds to religious institutions for non-religious services, FEMA deducts allocated aid in proportion to the percentage of services it deems religious to ensure those services are not covered. *Id.* at 16. It therefore remains that religious institutions are ineligible for relief simply by virtue of being religious. *See id.* Even Ms. Fabray, a FEMA adjuster, recognized that "FEMA does not cover monetary assistance for churches . . . and that she had never heard of FEMA granting an exception." R. 7. This is consistent with how FEMA has treated religious institutions applying for federal relief in the past. *See, e.g.*, Fed. Emergency Mgmt. Agency, Appeal Letter on Second Appeal—Chabad of the Space Coast, Inc., PA ID 009-UWWJ8-00, Request for Public Assistance, FEMA-1785-DR-FL (July 27, 2012); Fed. Emergency Mgmt. Agency, Appeal Letter on Second Appeal—Chabad Hebrew Academy, PA ID: 073-USSYQ-00, Tanya Books, FEMA-1498-DR-CA, Project Worksheet (PW) 829 (Sept. 11, 2005).

If FEMA did not discriminate against religious services by deeming them ineligible for relief, the Church would have no hurdle in establishing eligibility for FEMA relief. Under the PA Program, the Church is a PNP because it is a "nongovernmental agency or entity that currently has a ruling letter from the U.S. Internal Revenue Service, granting tax exemption under section[] 501(c) . . . of the Internal Revenue Code of 1954." *See* 44 C.F.R. § 206.211(f). As a PNP, the Church would only need to show it provided eligible services and was open to the general public. *See* FEMA PA Program and Policy Guide at 11. The first requirement, though the Church maintains is satisfied in this case, would be easily satisfied if religious activities were deemed eligible. To the second requirement, Cowboy Church is "open to the general public" because access to the facility is not limited to certain individuals and there are no membership fees required to utilize the Church's facilities. *See* FEMA PA Program and Policy Guide at 11.

Whether or not FEMA would have denied the Church's application is irrelevant to the issue because the harm to the Church, and religious institutions similarly situated, is the mere existence of a rule that deems religious services ineligible for FEMA relief.

B. The Cowboy Church of Lima's Claim Is Ripe Under the Administrative Procedure Act's Low Threshold for Ripeness and Presumption in Favor of Pre-Enforcement Judicial Review.

Cowboy Church's claim challenges a "final agency action," and, therefore, satisfies the bare requirement of the Administrate Procedure Act.[2] The APA grants a right of judicial review of all "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (2012). An agency rule will satisfy this requirement if (1) the action "marks the 'consummation' of the agency's decisionmaking process," and (2) the action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (first quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp*, 333 U.S. 103, 113 (1948), then quoting *Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

FEMA's rule is a final agency action. The first requirement is met because FEMA's rule is not merely "tentative or interlocutory." *See Bennett*, 520 U.S. at 178. FEMA's PA Program and Policy Guide have been subject to notice-and-comment and have a binding legal effect on all applications for FEMA aid, which is enough to establish "final agency action." *See Am. Mining Congress*, 995 F.2d at 1112. As

[2] Courts often consider the APA's finality requirement in tandem with the prudential consideration of whether an issue is "fit for judicial review" discussed *infra* Section I.C., *see Toliet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 162-63 (1967), however, the issues are analyzed separately because the text of the APA provides a threshold inquiry for judicial review as well as a presumption in favor of pre-enforcement review that should guide the Court's analysis in determining ripeness. *See Bowen*, 476 U.S. at 670.

demonstrated by this case, FEMA adjusters apply the rule with regularity, deeming religious services ineligible. R. 6-7, 10. With respect to the second requirement, rights and obligations have been determined and direct legal consequences flow from FEMA's policy: Religious services are wholly excluded from receiving FEMA relief, a violation of the Free Exercise clause. *See Bennett*, 520 U.S. at 177-78.

Despite the low threshold Congress developed for judicial review of agency action, this Court has determined that prudential and constitutional considerations must still be taken into account in determining whether a claim is ripe.

C. Prudential Considerations of Ripeness Weigh in Favor of This Court Reviewing Cowboy Church of Lima's Claim.

Prudential factors of ripeness demonstrate that this Court should not hesitate to review Cowboy Church's claim. Prudential ripeness, a judicially created doctrine detached from the text of the APA, holds a claim is ripe if (1) the issue is "fit for judicial review" and (2) the party seeking review "would suffer substantial hardship if consideration of the issue was withheld." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 808 (citing *Abbott Labs.*, 387 U.S. at 149).

The purpose of these additional requirements, according to the Court, is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148–49.

Despite this often-quoted passage, the Court in *Abbot Laboratories* upheld pre-enforcement review of an administrative regulation, *id.* at 151–53, recognizing the expansive presumption in favor of judicial review of pre-enforcement agency action, *see* Kristin E. Hickman, *A Problem of Remedy: Responding to the Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 Geo. Wash. L. Rev. 1153, 1163 (2008). This presumption should guide the Court's inquiry in determining that Cowboy Church's claim is ripe for judicial review.

1. The Church's claim is fit for judicial review because it presents a purely legal question of constitutional interpretation for which further factual development is unnecessary.

Cowboy Church's claim is fit for judicial review because it is a "definite and concrete" challenge to FEMA's exclusion of religious institutions from federal relief. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). Two inquiries guide this Court's prudential determination of fitness: (1) whether the issue is "purely legal," *Abbot Labs*, 387 U.S. at 149, and (2) whether further factual development would "significantly advance [the Court's] ability to deal with the legal issues presented," *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978).

This case presents a "purely legal question" regarding a FEMA policy. *See Whitman v. American Trucking Ass'n*, 531 US 457 (2001); R. 14. It is well settled that "claims that an agency's action is . . . contrary to law present purely legal issues." *Nat'l Ass'n of Home Builders*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (quoting *Atlantic States Legal Found., Inc. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003)); *see*

also Abbot Labs, 387 U.S. at 149. The Church's claim asks this Court to consider the constitutionality of FEMA's refusal to grant federal relief to religious services, a question of whether FEMA's action is contrary to federal law. Judicial review of "purely legal claims," such as the claim at issue here, is "the norm rather than the exception." *See* Gary Lawson, *Federal Administrative Law* 1132 (7th ed. 2016); *Chamber of Commerce v. Riech*, 57 F.3d 1099, 1100 (DC Cir. 1995) ("A claim that raises purely legal questions is presumptively fit for judicial review so long as 'the challenged policy is . . . sufficiently fleshed out to allow the court to see the concrete effects and implications of its decision."). Although a court may still withhold consideration if it determines that further factual development would significantly advance its ability to deal with the legal issue, *Duke Power Co.*, 438 U.S. at 82, such further factual development is not necessary to the proper judicial resolution of this case.

Delaying review of a claim for the prospect of further factual development is appropriate only when proper judicial resolution depends on the materialization of additional facts not currently available to the Court. *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 812 (explaining that the facial challenge was dependent upon "specific characteristics of certain types of concession contracts," so awaiting a dispute about a particular concession contract would be preferable); *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 532 U.S. 726 (1998) (determining further factual development was necessary because the Court would be forced to assess a technical and elaborate plan without any concrete grounding that would help focus the inquiry); *Toilet*

Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 162-63 (1967) (holding the issue not ripe because the agency rule allowed for discretionary inspection of industry facilities and there was no way to determine whether the time, manner or reasoning for such an inspection would be sufficient or violative in any particular case). Alternatively, when an action is a purely legal question regarding a final agency action and the challenge to the policy is independent of the underlying facts, further factual development is not proper. *Abbot Labs*, 387 U.S. at 151-53 (finding a pre-enforcement challenge of an agency rule fit for review because the issue did not require a consideration of the undeveloped factual circumstances); *see also Atlantic Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 782-84 (D.C. Cir. 1984) (determining a pre-enforcement challenge of the Department of Energy's imposition of discovery sanctions on the plaintiff as outside of the Department's authority because "the grave questions in the legality of the Department's procedures" and "the strong public interest in early resolution of those questions" weighed in favor of immediate review).

In *Abbot Labs*, the Court was asked to review the Commissioner of Food and Drugs' adoption of regulations that required the established name of all drugs to be placed on the labeling of that drug and in advertising whenever the proprietary name of the drug was used. *Abbot Labs*, 387 U.S. at 137-38. Before the regulation was enforced against anyone in the industry, drug manufacturers challenged the rule, arguing that the Commissioner exceeded his statutory authority by promulgating it. *Id*. at 139. The Court found the issue suitable for review because it

involved only questions of law about final agency action and did not require the Court to consider any factual justifications for the regulation. *Id.* at 151-53. In other words, the rule itself was the alleged violation of law; therefore, it was independent of the underlying legal facts or how the rule applied in any particular circumstance.

In contrast, in *Toilet Goods*, the FDA regulation at issue required producers of color additives to give FDA employees access to all formulas and manufacturing facilities. *Toilet Goods*, 387 U.S. at 161-62. Like in *Abbot Labs*, the challenge in *Toilet Goods* was to the Commissioner's authority to promulgate the rule. *Id.* at 159. Unlike in *Abbot Labs*, the rule in *Toilet Goods* had no immediate effects, it "merely state[d] that the Commissioner *may* authorize inspectors to examine certain processes." *Id.* at 164 (emphasis added). Thus, without any indication of the circumstances in which the Commissioner might authorize inspections, the Court was unable to assess whether the promulgation exceeded the Commissioner's authority, making the case unfit for review.

The Church's claim, like the claim at issue in *Abbot Laboratories*, presents a purely legal question about a final agency action. Whether or not aid would have been denied in this case and FEMA benefit granted is irrelevant to the continuing alleged constitutional violation that exists simply by nature of FEMA's discrimination against religious services as ineligible for relief. It is in the public interest for the Court to solve such a "grave question of legality" involving fundamental First Amendment rights. *See Abbot Labs.*, 387 U.S. at 151-53; *Atlantic Richfield Co.*, 769 F.2d at 782-84.

As the opinion of the Fourteenth Circuit notes, bills advocating for setting aside FEMA's policy and clarifying that "houses of worship are eligible for certain disaster relief and emergency assistance on terms equal to other eligible private nonprofit facilities, and for other purposes" have been introduced in the House and the Senate. R. 14.; Federal Disaster Assistance Nonprofit Fairness Act of 2017, S. 1823, 115th Cong. (2017); Federal Disaster Assistance Nonprofit Fairness Act of 2013, H.R. 592, 113th Cong. (2013). This only underscores the importance of the issue. Moreover, that a Bill regarding an allegedly unconstitutional agency action is introduced in Congress does not strip this Court of its judicial duty to "say what the law is" and "decide on the operation" of two laws when they conflict with each other in a particular case. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Relief for the Church has already been delayed such that it has been forced to take matters into its own hands and rely heavily on the aid of the community to rebuild its structures, and should not be dependent upon the faint possibility of congressional legislation. FEMA's policy is fit for current review despite pending legislation. It continues to unconstitutionally infringe upon the constitutional rights of the Church, posing a continuing hardship, as discussed further in the next section.

2. The Cowboy Church of Lima faces significant practical and legal hardship if the Court withholds consideration because of the ongoing constitutional violation and expected collapse of the facility absent structural repair.

The Church will suffer significant hardship if the Court withholds review in this case. Hardship requires that the plaintiff "has sustained or is immediately in danger of sustaining" an injury as a result of the agency action. *See O'Shea v.*

Littleton, 414 U.S. 488, 494 (1974); *Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th Cir. 2016). A determination of whether hardship will result requires a reliance on the petitioner's view of the merits. *Better Government Ass'n v. Dep't of State*, 780 F.2d 86, 95 (D.C. Cir. 1986). In doing so, the Court looks to the existence of both legal hardship and practical hardship, both of which are present in this case. *See Ohio Forestry Ass'n, Inc*, 532 U.S. at 733-34.

Cowboy Church has suffered legal hardship because FEMA's current policy violates the Church's First Amendment right to Free Exercise. U.S. Const. amend. I. Ongoing violations of the First Amendment demonstrate substantial legal hardship sufficient to fulfill the hardship consideration. *See United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist*, 829 F.2d 1152, 1161 n.29 (D.C. Cir. 1987) (explaining that hardship was substantial especially "in view of the fact that the activity inhibited involves not merely business but also speech and religious exercise."); *See Action for Children's Television v. FCC,* 59 F.3d 1249, 1258-59 (D.C. Cir. 1995) (explaining the claim of an ongoing First Amendment violation weighed in favor a hardship and, therefore, ripeness); *cf. Clark v. Valeo*, 559 F.2d 642, 663 (D.C. Cir. 1977) ("Assuming this interest is sufficient to give him standing, it is not the kind of personal hardship that would compel this court to decide this case at this time. Clark is not asserting that his personal First Amendment or other constitutional rights have been unfairly restricted.").

In *United Christian Scientists*, the D.C. Circuit considered United Christian Scientists' request for a declaratory judgment that a statute vesting First Church with a copyright was unconstitutional under the Establishment Clause. 829 F.2d at 1161 n.29. Under the hardship prong of prudential ripeness, the court considered the alleged violation of religious exercise as creating an especially pressing claim of hardship. *Id.* The court, through its reliance on *Toilet Goods*, determined that the impact of the alleged First Amendment violation demonstrated sufficient hardship to satisfy the ripeness inquiry.

The hardship the Church will face in this case is similar to the hardship United Christian Scientists would have felt because FEMA's policy presents an ongoing First Amendment violation.[3] FEMA's policy violates the Church's rights (and the rights of every religious institution in the country) under the Free Exercise Clause, U.S. Const. amend. I, because it denies federal relief funds to religious institutions or for religious activities solely because of the religiosity of the application. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2018-25 (2017). Regardless of whether the Cowboy Church will ultimately prevail on its First Amendment claim and receive the benefit of FEMA aid, withholding consideration denies the Church the opportunity to vindicate its alleged

[3] The merits of the Church's Free Exercise claim are not currently before the Court. However, the claim was considered by the district and circuit courts. Further consideration of the merits of the Free Exercise claim may be warranted following the resolution of the Establishment Clause issue; nonetheless, to determine whether hardship will result in this case such that review should not be withheld, the Court should take petitioner's allegations regarding Free Exercise violation into account in assessing ripeness. *See Better Government Ass'n*, 780 F.2d at 95.

ongoing violation of its First Amendment rights. *See Action for Children's Television,* 59 F.3d at 1258-59 (holding hardship existed in a pre-enforcement suit when the applicant challenged FCC procedures as infringing upon its First Amendment right to free speech). FEMA's inevitable denial of the Church's application will neither increase nor decrease the current hardship imposed by nature of the immediate and continuing First Amendment violation.

In addition to the legal hardship, the Cowboy Church has suffered and will continue to suffer a significant practical hardship as a result of FEMA's rule. Practical hardship is often satisfied by demonstrating that the petitioner will be subjected to substantial expense if review is withheld. *See Abbott Labs.*, 387 U.S. at 153 (explaining that withholding review would have required companies to face a significant loss of time and money); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1238–39 (10th Cir. 2004) (referring to "the uncertainty of not knowing whether they will be required to incur the substantial expenses" imposed by the statutes at issue). Reconstruction of infrastructure following a natural disaster is expensive. Indeed, offsetting the costs of rebuilding communities impacted by natural disasters is an important underlying purpose of the Stafford Act, 42 U.S.C. § 5172(a)(1)(B), and the impetus for FEMA's very existence. R. 11. If this review is withheld, the Cowboy Church will very likely be unable to repair its facilities given the structural damage the flooding caused, as this is beyond the capacity of community volunteers. Moreover, there is a risk that

the structural damage could cause parts of the building to collapse, making it unsafe for continued use until repairs are made.

That the Church took matters into its own hands and solicited donations and volunteer assistance to make initial repairs and avoid further devastation only weighs in favor of the hardship inquiry because it underscores that review delayed is very often review denied. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 47 (2000) (Thomas, J., dissenting). Indeed, if FEMA does not act soon, the Church may face the same fate as Mount Nebo Bible Baptist Church, which was devastated by flood waters as a result of Hurricane Katrina, denied FEMA aid nearly ten years after the event, and forced to close its doors permanently as a result of the delayed and denied aid. *See* Fed. Emergency Mgmt. Agency, Appeal Letter on Second Appeal—Mount Nebo Bible Baptist Church, PA ID 071-UD1T3-00, Facility Eligibility, FEMA-1603-DR-LA, Project Worksheet 20447 (Mar. 13, 2014). Thus, practically speaking, the Church has faced and continues to face substantial expense as a result of FEMA's policy and thus would suffer substantial hardship if this Court withholds review.

3. If this Court views the claim as a challenge to FEMA's treatment of the Church's application, the claim is still ripe because if FEMA aid was granted, it would have necessarily been prorated to avoid covering religious services.

Assessing the Cowboy Church's challenge to FEMA's policy of wholesale exclusion of religious institutions from federal relief does not require the Court to wait until FEMA Director Jesse St. James takes the perfunctory step of moving the church's application for federal aid from the "preliminary denial category," R.10, to

the official denial category. However, even if it did, FEMA's policy would still be ripe for review. That FEMA's PA Program and Policy Guide constitute "final agency actions" under the text of the APA as legally binding promulgations subject to notice-and-comment does not change under this analysis. *See supra* Section I.B. Prudential considerations similarly pose no ripeness bar.

First, further factual development is unnecessary and would not significantly advance the Court's ability to assess the claim. The denial of the Church's application for aid was inevitable and where inevitability "is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974). Moreover, there is no disagreement over the fact that even if the Church could demonstrate that its services were at least 51 percent not religious, any FEMA aid would have been prorated to cover only eligible services, of which religion is not one. *See* FEMA PA Program and Policy Guide, at 16. It was, therefore, "inevitable" that FEMA's policy would operate to Cowboy Church's disadvantage by excluding religious services from eligibility. *See Reno*, 509 U.S. at 69.

Second, hardship remains because the Church was still required to demonstrate that its religious aspects make up less than fifty percent of its services to be eligible for aid. This is an impermissible First Amendment burden, and the crux of the Church's claim. *See* Section I.C.2. Practical hardship also remains because FEMA's review of Cowboy Church's application has been delayed while

FEMA sorts out the percentage of religious versus nonreligious services the Church provides, a discriminatory inquiry that would be wholly unnecessary if religious services were eligible.

No matter what the Court determines is the proper scope of the issue, the Church's claim regarding FEMA's determination of religious services as ineligible for aid is ripe for review.

D. Cowboy Church of Lima's Claim Is Also Ripe Under Considerations of Constitutional Ripeness Because the Church Has Already Sustained an Injury of Unequal Treatment Based on Religion.

Cowboy Church's claim is similarly ripe under considerations of constitutional ripeness. Constitutional ripeness requires a "concrete dispute affecting cognizable current concerns of the Parties within the meaning of Article III." *See Ehrenfeld v. Mahfouz,* 489 F.3d 542, 546 (2d Cir.2007) (internal quotation marks omitted); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (laying the foundation of the "injury in fact" requirement of standing); *MedImmune, Inc. v. Genentech, Inc*, 549 U.S. 118, 128 n.8 (2007) ("The justiciability problem that arises, when the party seeking declaratory relief is himself preventing the complained-of injury from occurring, can be described in terms of standing ... or ... ripeness"). In other words, constitutional ripeness is, essentially, the concrete injury component of Article III standing. *See Nat'l Org. for Marriage Inc. v. Walsh*, 714 F.3d 682, 688-89 & n.6 (2d Cir. 2013) (explaining that "[c]onstitutional ripeness . . . is really just about" the injury-in-fact requirement of standing); *Mont. Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184 (9th Cir. 2014) (holding the case not ripe under the

constitutional ripeness inquiry for the "same reasons" the case does not present an injury-in-fact under the standing inquiry).

The Church's claim is constitutionally ripe because the Church has already sustained an injury that would be "redressed by the relief requested." *See Duke Power Co.,* 438 U.S. at 81; *see also Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003) (suggesting standing may be enough in most cases to satisfy the constitutional ripeness inquiry). If this Court strikes down FEMA's rule, the Church and religious institutions similarly situated will not be unfairly burdened by the requirement of proving it is not too religious to receive federal aid, despite meeting the other requirements of an eligible PNP.

Finally, this case poses no issue of constitutional avoidance. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J. concurring); *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 540 (3d Cir. 2017) (explaining the *Ashwander* principle, which informs the constitutional ripeness inquiry, as counseling courts to avoid ruling on constitutional matters in advance of the necessity of deciding them). When the conduct that caused the alleged harm has already occurred, constitutional avoidance is inappropriate. *See Plains All American*, 866 F.3d at 545. The violative conduct has already occurred. FEMA adjuster Quinn Fabray surveyed the church's property to determine its religiosity. Importantly, even if the event center and chapel are considered eligible, all relief will be prorated by the percent of religious services the Cowboy Church provides. This is underscored by considering a future plaintiff bringing suit just after FEMA

denies its application. This, on its face, is an ongoing constitutional violation and warrants swift review.

II. THE COWBOY CHURCH OF LIMA CAN RECEIVE THE PUBLIC BENEFIT OF RELIEF UNDER THE FEDERAL EMERGENCY MANAGEMENT AGENCY'S PUBLIC ASSISTANCE PROGRAM.

The First Amendment, incorporated to the states through the Fourteenth Amendment, contains two separate clauses related to religion, providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.; U.S. Const. amend. XIV.[4] These two clauses are "at best opaque," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), requiring the Court to look closely at government regulations to ensure they do not constitute an establishment of religion. However, this does not require a strict separation between church and state; "[s]ome relationship between government and religious organizations is inevitable." *Id.* at 614. The Court has a long history of "consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause.'" *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (quoting *Hunt v. McNair*, 413 U.S. 734, 742 (1973)). *Walz v. Tax Comm. of New York* points to the three evils against which the Establishment Clause is meant to protect: "sponsorship, financial support, and active involvement of the sovereign *in religious activity*." *Walz*, 397 U.S. 664, 668

[4] The Court has specifically held the Establishment Clause is incorporated to the states through the Fourteenth Amendment and that states are bound by all of the same substantive limitations that have always been imposed on Congress. *Cantwell v. Connecticut*, 310 US 296, 303 (1940).

(1970) (emphasis added). It is through this lens that the Court should now evaluate the challenge brought by the Cowboy Church of Lima.

The religion clauses are in constant tension, creating a "tight rope" for the Court to walk in every case involving government regulation of or aid to religious organizations. *See Walz*, 397 U.S. at 672. The "line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614. If the government accommodates religion to avoid interference with the right to free exercise, it begins to look like a violation of the Establishment Clause. On the other hand, *Trinity Lutheran* instructs that denying funding that is part of a neutral, generally available program solely on the basis of religious affiliation infringes on the free exercise of religion. 137 S.Ct. at 2025.

In the instant case, the decisions below discuss the challenge by the Church in reference to its Free Exercise Claim. R. 15-21. As Judge Sylvester mentions in his dissent, *Trinity Lutheran* answers the Free Exercise question. R. 19-21. The Free Exercise Clause "protects religious observers against unequal treatment," R. 19, which is precisely the case here. The Church is being subjected to unequal treatment solely because of its religious nature. Under *Trinity Lutheran* and *Church of Lukumi*, this is an impermissible violation of the Church's right to Free Exercise. *Trinity Lutheran*, 137 S.Ct. 2012; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The Free Exercise Clause is thus rightfully not at issue in the present case. What is at issue is whether or not granting FEMA aid in

the wake of a devastating natural disaster to non-religious as well as religious institutions alike is a violation of the Establishment Clause. Under any of the current Establishment Clause frameworks, it is not.

First, the Court should adopt the endorsement test to find supplying federal aid equally to all qualifying organizations regardless of their association with religion does not qualify as an endorsement of religion. After applying the endorsement test, or in the alternative, the Court should apply the *Lemon* test to find the granting of FEMA funds to nonprofit organizations with religious missions does not violate the Establishment Clause. This is so because (1) the Stafford Act and its implementation through the PA Program have a secular legislative purpose; (2) the Stafford Act and the PA Program do not impermissibly advance or inhibit religion; and (3) the Stafford Act and the PA Program do not foster excessive entanglement between the government and religion. Finally, allowing FEMA aid would satisfy the *Lee* test because it does not coerce individuals into participating in religious activity.

A. Equally Supplying Federal Aid to All Qualifying Organizations Without Regard to Their Religious Affiliation Passes the Endorsement Test.

The Court should adopt the endorsement test in this case to find that giving FEMA aid to religious institutions does not amount to government endorsement of religion. Under this test, the Court determines "what message a challenged governmental policy or enactment conveys to a reasonable, objective observer," defined as someone "who knows the policy's language, origins, and legislative

history, as well as the history of the community and the broader social and historical context in which the policy arose." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp.2d 707, 714 (M.D. Pa, 2013). It seeks to answer the question of whether the government's "actual purpose is to endorse or disapprove of religion" and regardless, whether "the practice under review in fact conveys an endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). Thus, the test is focused on whether the government is acting neutrally or is in some way showing favoritism for either religion generally or for one religious sect over another. *See Kitzmiller*, 400 F.Supp.2d at 714. Even if the Court does not adopt the endorsement test exclusively, the endorsement test should be applied before the *Lemon* test as a distinct inquiry. *Id.*; *see also, Freethought Soc. v. Chester County*, 334 F.3d 247, 261 (3d Cir. 2003).

In *Kitzmiller v. Dover Area School Dist.*, the court used the endorsement test to evaluate a school's practice of teaching intelligent design ("ID") as an alternative to evolution in high school biology classes. *Kitzmiller*, 400 F.Supp.2d 707. Importantly, the court in that case defined what is meant by a reasonable observer. *Id.* at 715. A reasonable observer is an informed citizen who is more knowledgeable than the average passerby and who considers relevant, publicly available evidence. *Id.* (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 US 753, 779-81 (1995)). The court found an objective observer would know that teaching intelligent design and the gaps in the evolution theory had obvious creationist, religious underpinnings. *Id.* at 716. In addition to the obvious religious underpinnings, the

court considered letters to the editor and editorials from the local paper as "substantial additional evidence that the entire community . . . collectively perceives the ID policy as favoring a particular religious view." *Id.* at 734. Because an objective observer in that community would understand the religious nature of the policy, the court concluded that objective members would view the policy as an endorsement of a religious view in violation of the Establishment Clause. *Id.*

The Court should focus on neutrality to answer the endorsement inquiry because unlike the religiously-motivated policy in *Kitzmiller*, reasonable observers do not perceive neutral programs as government sponsorship of religion. Focusing on neutrality to answer the endorsement question has the benefit of easing the tension between the Free Exercise Clause and the Establishment Clause. *See Bd. of Educ. of Kiryas Joel Villega Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion favoring neither one religion over others nor religious adherents collectively over nonadherents.") (internal quotations and citations omitted). In this case, the PA Program administers funds on criteria that are neutral, applying the same criteria to all nonprofit organizations.

The Court has considered neutrality as "a central, though not dispositive, consideration in sizing up state-aid programs." *Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.* 567 F.3d 278, 289 (6th Cir. 2009); *see also Agostini v. Felton*, 521 U.S. 203, 231 (1997); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1

(1993). In *Zobrest*, a student who had been deaf since birth attended a school for deaf children until the sixth grade. 509 U.S. at 4. He then attended a public school where he was provided an interpreter pursuant to the Individuals with Disabilities Education Act (IDEA). *Id.* He transferred to a Catholic high school for religious reasons and requested that district continue providing a sign-language interpreter. *Id.* The Court stated, "[g]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion do not violate the Establishment Clause solely because religious institutions may also receive an attenuated financial benefit." *Id.* at 8. Fundamentally, religious institutions are allowed to participate in "publicly sponsored, general social-welfare programs." *Id.* In *Zobrest*, the sign-language interpreter was part of the IDEA, which distributed benefits neutrally to any qualifying disabled child. Id. at 10. The benefit did not create an incentive for parents or students to choose religious schools over nonreligious schools. *Id.* The Court held this application of the IDEA was constitutional and did not violate the Establishment Clause. *Id.* at 14.

In *Agostini v. Felton*, the Court considered the neutrality and general applicability of a state program, though admittedly doing so in the context of the *Lemon* prongs. 521 U.S. 203. In that case, a New York program allowed government employees to provide supplemental, remedial instruction on a neutral basis on the premises of sectarian schools. *Id.* at 209-11. The Court stated that the criteria by which an aid program identifies its beneficiaries can be assessed to determine whether the criteria "themselves have the effect of advancing religion by

creating a financial incentive to undertake religious indoctrination." *Id.* at 231. In *Agostini*, that incentive was not present because the aid was "allocated on the basis of neutral, secular criteria that neither favor[ed] nor disfavor[ed] religion, and [was] made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* The program did not "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234. Therefore, the program in that case was constitutional. *Id.*

Similarly, if FEMA were allowed to provide aid to the Cowboy Church of Lima, that aid would be granted on neutral criteria without reference to religion. As it currently stands, the Church is in fact being denied aid with reference to religion. The published criteria for receiving aid do not include religious affiliation or any form of masked reference thereto. The criteria include tax exempt, nonprofit status and the provision of certain eligible services to the community. R. 11-12. FEMA's policy guide makes religious services categorically ineligible for aid. FEMA PA and Policy Guide, at 14. Therefore, in this case, the Church is being denied funding because of a policy that churches are never eligible for funding, unless, as Judge Sylvester mentions in his dissent, the church is willing to give up its church. R. 19. In all other respects, the requirements for granting aid are neutral and apply to all applicants. Because the reasonable observer has been defined as a citizen with more knowledge than the average passerby and one who considers relevant, publicly available information, a reasonable observer in this case would understand that nonprofit organizations are chosen by secular criteria and would not view the

FEMA aid as an endorsement of religion over irreligion or one religious sect over another.

Additionally, the record makes clear that the damage done to the church was done to the building itself, not to the religious items within. R. 4. When the flooding began, Chaplain Hudson and others immediately rushed to remove the "Bibles, hymnals, religious pamphlets, religious paraphernalia," and more. *Id.* The FEMA aid in this case would go to the repair and reconstruction of the church building, not the religious pieces of it. No reasonable observer would see the financial aid for structural repair to a building as expressing government endorsement of religion. Therefore, granting FEMA aid to churches is not a violation of the Establishment Clause under the endorsement test.

B. Aiding Religious Institutions That Have Been Severely Damaged by Natural Disasters Would Pass the Three-Pronged Lemon Test.

Under the *Lemon* test, giving aid to religious institutions is not a violation of the Establishment Clause. Although *Lemon* has been inconsistently applied in Establishment Clause cases, it is still the "prevailing analytical tool." *Doe v. Elmbrook*, 687 F.3d 840, 849 (7th Cir. 2012). The *Lemon* test is conjunctive; all three of its prongs must be satisfied to find there has been no violation of the Establishment Clause. *See, e.g., Stone v. Graham*, 449 U.S. 39, 40-41 (1980). First, the government regulation must have a secular legislative purpose. *Lemon*, 403 U.S. at 612. Second, the principal or primary effect cannot be to advance or inhibit religion. *Id.* Finally, the administration of the regulation or policy cannot entail

excessive government entanglement with religion. *Id.* at 613. The government regulation at issue here meets all three prongs and thus should be upheld.

1. The Stafford Act and the PA Program have secular legislative purposes.

The Stafford Act and the PA program have a legitimate, secular purpose; thus, this prong of the *Lemon* test is satisfied. The Court has found various legislative purposes to be legitimate and secular. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (ensuring that the State's citizenry is well-educated and assuring the continued financial health of private schools, both sectarian and nonsectarian, are legitimate and secular purposes); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (combatting the social and economic problems associated with teenage sexuality, pregnancy, and parenthood is a legitimate secular purpose). In general, the Court has stated "governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework." *Mueller*, 463 U.S. at 394. Thus, "[l]ittle time need be spent" on this question. *See id.* In this case, the issue of secular purpose is not a close question. The Stafford Act authorizes contributions to owners of private, nonprofit facilities destroyed by major disasters. This allows them to repair, restore, rebuild, or replace damaged facilities and cover other associated expenses. R. 11. The PA program's stated purpose is to "assist communities responding to and recovering from major disasters or emergencies declared by the President." *Id.* Through its aid, FEMA saves lives and restores community infrastructure affected by natural disasters. *Id.* There is nothing in the record to suggest that this purpose is being used to mask a religious

or sectarian purpose. Providing funds for organizations to respond to natural disasters is part of the traditional government function and is undoubtedly secular and legitimate. Thus, this prong of the *Lemon* test is easily satisfied in the present case.

2. The primary effect of the aid is not to advance or inhibit religion.

The Stafford Act and the PA program have the primary effect of providing relief to devastated communities rocked by natural disaster, not advancing or inhibiting religion, even when the funding goes directly to churches. Courts have allowed funding to go directly to churches without finding a violation of the Establishment Clause. *Am. Atheists, Inc.*, 567 F.3d 278. In *American Atheists*, Detroit had created a development program that allowed reimbursement for the cost of refurbishing the exteriors of downtown buildings and parking lots in preparation for the upcoming Super Bowl. *Id.* at 281. This program was limited to a part of town, but was otherwise available to all property within that limited area, including churches. *Id.* at 281-82. In fact, three churches participated. *Id.* at 282. The court held this aid was constitutional, reasoning that the act did not have the primary effect of advancing religion. *Id.* at 291. It did not stack the deck in favor of religious groups in the selection criteria, did not lead to religious indoctrination that could be attributed to the government action, and did not divert secular aid to further religious missions. *Id.* at 291-94. The court found important that "the vast majority of the reimbursed repairs—the renovation of exterior lights, pieces of masonry and brickwork, outdoor planters, exterior doors, concrete ramps, entrance

ways, overhangs, building trims, gutters, fencing, curbs, shrubbery and irrigation systems—lack any content at all, much less a religious content." *Id.* at 292. Thus, the "thrust of the program goes to façade, not to substance." *Id.* In the present case, the aid would similarly be administered to repair structures damaged by a natural disaster. R. 11. The aid would go to the repair of the building; again, Chaplain Hudson and other Church staff were able to remove the religious items from the church before the flooding began and place them high away from the flood waters. R. 4. These items do not need to be replaced, so the aid would not provide religious content as the courts have warned against. Only the physical structure itself is in need of government funding for its repairs.

Furthermore, the Court has long held "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736, 746 (1976). Rather, the Court has approved the use of neutrally allocated public benefits for religious organizations. *Bowen v. Kendrick*, 487 U.S. 589. In *Bowen*, the Court analyzed the constitutionality of the Adolescent Family Life Act, a statute that permitted the use of federal funds by public and private organizations that offered services and research regarding premarital adolescent sexual relations and pregnancy. *Id.* at 593-94. This allowed funds to go to religiously affiliated and secular organizations alike. *Id.* at 597. The Court upheld the Act and noted that religious institutions are not disabled by the First Amendment from participating in publicly sponsored social welfare programs. *Id.* at 609. It was particularly relevant to the Court that

there was nothing in the record that "a significant proportion of the federal funds will be disbursed to pervasively sectarian institutions." *Id.* at 610 (internal quotations omitted). This is precisely the case with respect to the Stafford Act and the PA Program. There is nothing in the record to suggest that the Stafford Act and the PA Program would provide aid mostly to religious organizations. Rather, as in *Bowen*, the aid requirements are "facially neural," there is a "wide spectrum of public and private organizations which are capable of meeting [those] requirements," and the majority of those institutions will not be pervasively sectarian. *See id.* at 610.

In addition to the program's neutrality, any benefit to the Church would be merely incidental under a separate line of cases analyzing this prong of *Lemon*. The Court has held incidental benefits to religious organizations do not run afoul of the Establishment Clause. See *Widmar v. Vincent*, 454 U.S. 263, 273 (1981) (citing *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)). The Court has found two factors relevant to the question of whether an alleged benefit is incidental. *Widmar*, 454 U.S. at 274. First, the Court looks to whether the policy at issue confers an "imprimatur of state approval on religious sects or practices." *See id.* Second, the Court determines whether the provision of benefits is to a broad spectrum of groups as an "important index of secular effect." *See id.* The Court recognized that "[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." *Id.*

(quoting *Roemer*, 426 U.S. at 747). The Court also stated that without "empirical evidence that religious groups will dominate," the Court cannot determine that the advancement of religion would be the primary effect. *Id.*

Any benefits to religious organizations conferred by the Stafford Act and the PA program to religious institutions would be merely incidental. Applying the two factors, allocating FEMA aid to churches and nonreligious institutions eligible under the same criteria would not confer an imprimatur of state approval on religious sects or practices. No reasonable person would see aid to rebuild an edifice destroyed by a hurricane as conferring state approval of that particular religious institution's practices and teachings. If the government were sending flyers in the mail requesting donations by citizens to the Church in order to make necessary repairs, that would look like the "imprimatur of state approval" that *Widmar* cautions against. Providing aid to repair a damaged structure in a community devastated by natural disaster does not imply the same state approval. It simply suggests that the government is willing to help all nonprofit organizations get back on their feet after a federally-declared national emergency. Second, the provision of benefits in this case is to a broad spectrum of groups, suggesting the benefits are incidental to churches rather than the primary effect. Like receiving protection by police and fire departments, churches deserve to be given the incidental benefit of FEMA aid when that aid is administered neutrally.

3. The administration of funds to religious institutions by FEMA under the Stafford Act would not require excessive government entanglement with religion.

Providing funds to the Church will not excessively entangle the government with religion. The entanglement prong is meant to deal with "programs, whose very nature is apt to entangle the state in details of administration." *Walz*, 397 U.S. at 694 (Harlan, J. concurring). The Establishment Clause is meant to prevent "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Mueller v. Allen*, 463 U.S. at 399-400 (quoting *Nyquist*, 413 U.S. at 796). That sort of entanglement does not exist in this case.

Excessive, impermissible entanglement exists where a statutory scheme requires back-end auditing and constant ensuring that the religious institution is in compliance with requirements for aid and is not using government aid to teach the gospel. *See Lemon*, 403 U.S. 602. In *Lemon*, the Court considered two statutes, one one from Rhode Island and one from Pennsylvania. *Id.* at 606. Under the Rhode Island statute, state officials could supplement teacher salaries at nonpublic schools when that teacher taught secular subjects. *Id.* at 607. All of the applicants for these benefits were employed by Roman Catholic schools. *Id.* at 608. This supplement was paid directly to teachers and the overall salary could not be higher than the salaries of public school teachers. *Id.* at 607. The teachers could only teach subjects offered in public schools, could only use materials used in public schools, and could not teach a course in religion while receiving the salary

supplement. *Id.* at 608. Schools were required to submit financial data and specified per-pupil expenditures in support of their applications. *Id.* at 607-08. The Pennsylvania statute was similar, authorizing reimbursement to nonpublic schools of actual expenditures for teachers' salaries, textbooks, and instructional materials. *Id.* at 609. The statute also included similar restrictions: the aid was limited to courses presented in public schools; was solely for courses in secular subjects; and the instructional materials had to be approved by state superintendent. *Id.* at 610. The Pennsylvania nonpublic schools were also required to keep detailed accounting records to show the separate cost of the secular education service, which were subject to state audit. *Id.* at 609-10. Neither statute in *Lemon* could satisfy the third prong of the test, due to the excessive entanglement with religion required under each statute. *Id.* at 614. The entanglement, the Court explained, existed because the government was required to audit the accounting records of the nonpublic schools under the Pennsylvania statute and to review financial data submitted by the nonpublic schools under the Rhode Island statute. *Id.* at 615-22. Because of these requirements, the aid was continuous and required the government to constantly remain involved with nonpublic and overwhelmingly religious schools.

On the contrary, the Court has often found programs offering a tax benefit or a tax exemption do not entangle the state in religion. *See Mueller*, 463 U.S. 388; *Walz*, 397 U.S. 664. In *Mueller*, the statutory scheme allowed taxpayers to deduct certain expenses incurred in providing for the education of their children. 463 U.S.

at 390. The law allowed deduction for actual expenses incurred for tuition, textbooks, and transportation of elementary and secondary school students. *Id.* at 391. The Court stated the "only plausible source of the 'comprehensive, discriminating, and continuing state surveillance' necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction." *Id.* at 403 (quoting *Lemon*, 403 U.S. at 619). The Court held the requirement to ensure that certain textbooks not be funded did not entangle the government in religion so as to violate the third prong of *Lemon*. *Mueller*, 463 U.S. at 403. In *Mueller*, the government was simply required to make a one-time determination to decide whether textbooks purchased by citizens were secular or religious in nature. Unlike in *Lemon*, the government did not have to remain in a continuous, sustained relationship with religious institutions to determine whether each and every expenditure made by the school was proper.

In *Walz*, the government program at issue granted tax exemptions to religious institutions. 397 U.S. at 666-67. Decided one year before *Lemon*, the Court did not strictly apply the three-pronged test it identified in *Lemon*. *Id.*at 666-80. However, the Court discussed the general principle of non-entanglement, where the Court suggested that the government "does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675-76. The Court stated the exemption creates "only a minimal and remote involvement between church and state." *Id.* at 676. In particular, the Court stated "[n]o one has ever suggested that tax exemption has converted libraries, art

galleries, or hospitals into arms of the state." *Id.* at 675. This is particularly relevant because here, as in *Walz*, we have a generally applicable statute that grants aid across the board to eligible nonprofit institutions. These types of institutions, as well as museums and zoos, can receive FEMA aid and no reasonable person would consider them to be "arms of the state." *See* R. 12.

Even when a church receives aid directly, courts have held there is not necessarily excessive entanglement. *Am. Atheists, Inc.*, 567 F.3d at 300. In *American Atheists*, petitioners urged that "every feature of a church, synagogue or mosque, from its structure to its windows to the colors of its doors, conveys religious meaning" and argued that granting aid to churches necessarily entangles the government in deciding whether a particular fixed-up item has religious meaning sufficient to violate the Establishment Clause. *Id.* The court, however, was unpersuaded. It found "reviewing the validity of a refurbished storm window and a sign—to say nothing of the painting, tuck-pointing and parking-lot fixing—has not enmeshed us in any great controversies of religious symbolism." *Id.* In essence, it held granting government aid to churches does not necessarily entangle the government in religion simply because the money goes directly to the refurbishment of the religious premises.

In the present case, the Stafford Act and the PA Program authorize one-time payments to a church, and other similarly-situated religious institutions, to repair the destruction caused by a natural disaster. R. 11. This payment depends on neutral, generally applicable criteria that do not take the religious nature of the

recipient into account. R. 11-12. The government would not need to get entangled with the religious institution to monitor and audit the way it was spending the funds. Rather, the government would give the money to the religious institution, as it does to all the other qualified nonprofits, in order to repair damage to the structure caused by natural disaster. Without anything in the record to suggest that the religious institutions would make improper use of the funds, it should be presumed that the aid will be used for its intended purpose: to rebuild and repair a structure in a town devastated by natural disaster. This will not create excessive entanglement between the government and religion and therefore, there is no violation of the Establishment Clause.

In fact, the current statutory scheme creates impermissible entanglement between the government and religious institutions. By instituting the "mixed-use standard" that it has created, the statute requires that the government agency look closely at the particular ways religious institutions are being used. It requires the government to send FEMA representatives into the religious institutions themselves to evaluate what they are doing inside their sanctuaries. R. 7-8. Inviting the government into religious institutions to determine whether they are eligible for relief from the federal government and evaluating the choices made by those religious institutions creates the kind of impermissible entanglement the third prong of *Lemon* warns against. The entanglement prong would be better satisfied with a rule that allows disaster aid to go to religious and nonreligious

institutions alike than with this mixed-use standard that fosters government intrusion and entanglement.

Finally, allowing FEMA to give federal aid to religious institutions does not raise the sort of concern over political divisiveness that the Court has taken into consideration in prior cases. As this Court put it, a "broader base of entanglement of yet a different character" is presented when a state program creates political divisiveness. *See Lemon*, 403 U.S. at 622. In striking down the statute in *Lemon* on entanglement, the Court considered the fact that the statutes created political controversy. *Id.* at 622. The Court stated "[i]n a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity." *Id.* Most importantly, the Court worried that people confronted with the issue of funding to parochial schools would "find their votes aligned with their faith." *Id.*

In the present case, there is nothing in the record to suggest delivering aid to the Cowboy Church of Lima, along with all of the other nonprofit organizations that have received aid, would cause political divisiveness. In fact, the church at issue in this case takes in all members of the community by hosting events such as Rotary Club meetings, Quinceñeras, and the like in its event center. R. 7. The record in its entirety suggests that rather than political division over the issue of aid to the Cowboy Church of Lima, there would be no reason for the citizens of Lima to oppose aid to an institution that had served as a bulwark in helping the town get back on its feet. Therefore, the Court should not be concerned that granting FEMA aid to

the Church in this case would create the sort of political divisiveness it takes into consideration in many Establishment Clause cases.

C. Aiding Religious Institutions Passes the Lee Coercion Test.

Under the coercion test, giving aid to religious institutions would not be a violation of the Establishment Clause. This test involves looking to whether the government action coerces citizens to participate in religious activity. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992) ("[G]overment may not coerce anyone to support or participate in religion or its exercise."). Ultimately, the inquiry is "a fact-sensitive one that considers both the setting . . . and the audience." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014). Thus, the primary considerations of the Court in evaluating the coercive nature of a government program are the setting of the government action and the audience thereto. In this case, granting FEMA aid to the Cowboy Church of Lima would not violate the coercion test because citizens would not be required to attend religious events or go to the church. Instead, the church would simply receive federal aid.

The coercion test has been applied mainly to cases involving public prayer. *Town of Greece*, 134 S. Ct. 1811 (prayer at the beginning of a town hall meeting); *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000) (prayer over the public address system at a school before varsity football games); *Lee*, 505 U.S. 577 (prayer at a graduation ceremony). The Court held in *Town of Greece*, there was no governmental coercion in allowing prayer at the beginning of a town hall meeting. 134 S. Ct. at 1825. The respondents made much of the fact that the town citizens in

attendance might be there to secure grant funding or otherwise get approval from the town council and may seek to curry favor by participating in the prayer. *Id.* However, the Court was unpersuaded by this argument. *Id.* The Court noted the prayer was for the benefit of the lawmakers themselves, not the observers. *Id.* The Court stated the analysis would turn out differently "if town board members directed the public to participate in the prayers." *Id.* at 1826. However, because the visiting members of the town were not required to be in attendance and could choose not to participate in the prayer, there was no coercion. *Id.*

In *Lee v. Weisman*, the Court held it was coercive to allow prayer at a high school graduation. 505 U.S. 577. The government, through the school, invited a Jewish rabbi to deliver a prayer at the school's graduation ceremony. *Id.* at 581. In holding this practice unconstitutional, the Court found it particularly important that students are essentially obligated to attend the graduation, as it is "the one school event most important for the student to attend." *Id.* 597. The Court held the recitation of prayers amounts to governmental coercion to participate in religious activities. *Id.* at 599. Although the attendees were not required to actually speak the prayer, they were obligated to be there and observe it in a way that the audience is not in legislative sessions or town hall meetings. *Id.* at 596-97. The ceremony placed pressure on the students to at least maintain respectful silence during the prayer, which could signify to the dissenting student his or her participation or approval of it. *Id.* at 593.

In this case, there is no coercion. Citizens are not required to attend church services, help with the repair and reconstruction of the church, or even step inside the Church. The only involvement citizens have with the reconstruction and aid is if they pay federal income tax. The Court has never considered it coercive in the *Lee* sense to use funding from federal income tax to grant aid to religious institutions. In fact, many programs that supply funding by allocating taxes have been upheld as constitutional with no mention of coercion. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589. In short, giving federal aid to religious institutions as well as nonreligious institutions on the basis of generally applicable criteria does not impermissibly coerce citizens into participating in religious activity.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that decision of the Fourteenth Circuit be reversed.

APPENDIX

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

(a) CONTRIBUTIONS

(1) IN GENERAL The President may make contributions—

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

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

(2) ASSOCIATED EXPENSES For the purposes of this section, associated expenses shall include—

(A) the costs of mobilizing and employing the National Guard for performance of eligible work;

(B) the costs of using prison labor to perform eligible work, including wages actually paid, transportation to a worksite, and extraordinary costs of guards, food, and lodging; and

(C) base and overtime wages for the employees and extra hires of a State, local government, or person described in paragraph (1) that perform eligible work, plus fringe benefits on such wages to the extent that such benefits were being paid before the major disaster.

(3) CONDITIONS FOR ASSISTANCE TO PRIVATE NONPROFIT FACILITIES

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

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

(ii) the owner or operator of the facility—

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

(II)(aa)has been determined to be ineligible for such a loan; or **(bb)**has obtained such a loan in the maximum amount for which the Small Business Administration determines the facility is eligible.

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

(c)LARGE IN-LIEU CONTRIBUTIONS

(2) FOR PRIVATE NONPROFIT FACILITIES

(A) In general In any case in which a person that owns or operates a private nonprofit facility determines that the public welfare would not best be served by repairing, restoring, reconstructing, or replacing the facility, the person may elect to receive, in lieu of a contribution under subsection (a)(1)(B), a contribution in an amount equal to 75 percent of the Federal share of the Federal estimate of the cost of repairing, restoring, reconstructing, or replacing the facility and of management expenses.

(B)**Use of funds** Funds contributed to a person under this paragraph may be used—

(i) to repair, restore, or expand other selected private nonprofit facilities owned or operated by the person;

(ii) to construct new private nonprofit facilities to be owned or operated by the person; or

(iii) to fund hazard mitigation measures that the person determines to be necessary to meet a need for the person's services and functions in the area affected by the major disaster.

(e)ELIGIBLE COST

(1) DETERMINATION

(A) In general For the purposes of this section, the President shall estimate the eligible cost of repairing, restoring, reconstructing, or replacing a public facility or private nonprofit facility—

(i) on the basis of the design of the facility as the facility existed immediately before the major disaster; and

(ii) in conformity with codes, specifications, and standards (including floodplain management and hazard mitigation criteria required by the President or under the Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)) applicable at the time at which the disaster occurred.