NO. C17-2893-1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

COWBOY CHURCH OF LIMA,

Petitioner,

— against —

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

Respondents.

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

BRIEF FOR RESPONDENTS

TEAM 60

Attorneys for Respondents

QUESTIONS PRESENTED

I. Is a challenge to a disaster-relief eligibility determination ripe for judicial review, even when the federal agency responsible for making the factual determination has not yet done so and that the applicant has already used charitable donations to remediate the damage?

II. May the government choose not to use taxpayer money to subsidize religious activities without violating the First Amendment's Religion Clauses?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, the Federal Emergency Management Agency and W. Craig Fugate—the defendants in the United States District Court for the Central District of New Tejas and the Appellees before the United States Court of Appeals for the Fourteenth Circuit—respectfully submit this brief-on-the-merits in support of their request that this Court affirm the judgment of the court of appeals.

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.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction to decide this case pursuant to 28 U.S.C. § 1331 (2012) because this case raises a federal question. The district court granted summary judgment. R. at 10. Petitioner appealed to the United States Court of Appeals for the Fourteenth Circuit. R. at 11. That court had appellate jurisdiction pursuant to 28 U.S.C. § 1292(a) (2012) and entered final judgment on October 1, 2017. R. at 2. The petition for a writ of certiorari was granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

This case also involves the interpretation of section 5172(a)(1)(B) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which provides that the President may "make contributions" to the owner or operator of "a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses." 42 U.S.C. § 5172(a)(1)(B) (2012).

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

This appeal involves a First Amendment claim by the Cowboy Church of Lima, seeking to be included in a federal disaster relief program administered by the Federal Emergency Management Agency ("FEMA"). After FEMA denied relief to the church, this lawsuit ensued.

The Statutory Scheme. Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, "[t]he President" may "make contributions" to the owner or operator of "a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses." 42 U.S.C. § 5172(a)(1)(B). As a prerequisite to federal assistance, the President must declare that a major disaster exists in a State. FEMA

then administers federal financial assistance in that State through its Public Assistance Program in accordance with FEMA regulations and FEMA policies contained in FEMA's Public Assistance Program and Policy Guide, https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf ("FEMA Policy Guide").

The Public Assistance Program helps communities responding to and recovering from major disasters or emergencies declared by the President. *Id.* The program provides emergency assistance to save lives and protect property, and assists with permanently restoring community infrastructure affected by a federally declared incident. *Id.*

To be eligible for the disaster aid under the Public Assistance Program, a private nonprofit organization "must show that it has [a] current letter ruling from the U.S. Internal Revenue Service granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code of 1954" and the organization must "own[] or operate[] an eligible facility." FEMA Policy Guide at 12–13, 17 (citing 44 C.F.R. § 206.221(f) (2003)). An "eligible facility" is either (1) "A facility that provides a critical service, which is defined as education, utility, emergency, or medical," or (2) "A facility that provides non-critical, but essential governmental services AND is open to the general public." *Id.* at 12. Eligible "non-critical" services include "museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature." 44 C.F.R. § 206.220(e)(7) (2003). For "mixed-use facilities"

"that provide both eligible and ineligible services," eligibility "is dependent on the primary use of the facility," which means "more than 50 percent of the physical space in the facility is dedicated" to eligible services. FEMA Policy Guide at 17. In cases where the same physical space is used for both eligible and ineligible services, the "primary use" is the use for which more than 50 percent of the operating time is dedicated in that shared physical space." *Id.* If FEMA determines that 50 percent or more of physical space is dedicated to ineligible services, the entire facility is ineligible. If the facility is eligible, FEMA prorates funding based on the percentage of physical space dedicated to eligible services. *Id.* at 17.

For eligible facilities, the PA Program provides funds for both "Emergency Work" and "Permanent Work." *Id.* at 20. Emergency Work is "that which must be done immediately to: Save Lives; Protect public health and safety; Protect improved property; or Eliminate or lessen an immediate threat of additional damage." *Id.* at 43. Emergency work is divided into two categories: (A) "debris removal" and (B) "emergency protective measures." *Id.* Debris removal may also be authorized "to ensure economic recovery of the affected community." *Id.* at 44. Permanent work "is work required to restore a facility to its pre-disaster design (size and capacity) and function in accordance with applicable codes and standards." *Id.* at 20.

To qualify for the Public Assistance Program, repair work must (1) "Be required as a result of the declared incident;" (2) "Be located within the designated area, with the exception of sheltering and evacuation activities;" and (3) "Be the legal responsibility of an eligible Applicant." *Id.* at 20.

Eligible private nonprofit facilities that provide eligible non-critical services must apply for a Small Business Administration ("SBA") disaster loan before seeking Public Assistance Program funds for Permanent Work. *Id.* Public Assistance Program funds are available only for the portion of Permanent Work that an SBA loan does not cover, or if the SBA loan application is denied. *Id.* But nonprofits may seek and receive Public Assistance Program funds for Emergency Work regardless of whether they have applied for an SBA loan. *Id.* at 18. Eligible facilities must submit a Request for Public Assistance to FEMA within 30 days of the President's disaster proclamation. *Id.* at 131.

This Litigation. Hurricane Rhodes made landfall on August 13, 2016, one-hundred miles north of Lima, New Tejas. R. at 2. Over the course of thirty-six hours, Hurricane Rhodes dropped more than forty-five inches of water causing the Flanagan Dam to fail, which led to catastrophic flooding along the Motta River. R. at 2, 3. Lima sits two miles off the river, but still faced the ferocious flood waters. R. at 3. Afterwards, President Barack Obama declared the Hurricane a "major natural disaster," allowing FEMA to provide relief to those affected by the storm. R. at 6.

One of those affected by the hurricane was the Cowboy Church of Lima, which sits on the outskirts of town. R. at 6. The church occupies an eighty-eight-acre tract of land, which contains a chapel, event center, rodeo arena, and multiple storage buildings. R. at 3. The church does not pay state property tax for any part of the property because of its Religious Exempt Property status and has a letter ruling from the U.S. Internal Revenue Service granting it a tax exemption. R. at 3.

Since being built, the church has hosted various private and public events. R. at 3–4. These events included both religious and non-religious functions. R. at 4. People hosted events at the church facilities because the rodeo arena, chapel, and event center were often the only structures capable of hosting larger events in the city. R. at 3.

As flood waters approached the church's land, Chaplain Finn Hudson and his staff rushed to move the Bibles, hymnals, and religious paraphilia to the storage buildings to avoid losing them in the flood waters. R. at 6. Water entered the chapel and event center, filling the structure with three feet of water. R. at 4. Water stayed in the buildings until it drained two days later. R. at 5.

After assessing the damage, the Chaplain and his staff removed four feet of sheetrock and insulation as well as all the flooring throughout the structures. R. at 5. Over the next few days, they removed religious and non-religious items from the buildings. R. at 5. Chaplain Hudson also determined they had suffered structural damage. R. at 5, 6.

Quin Fabray, an adjuster contracted by FEMA, inspected the damaged buildings to determine the scope of the claim. R. at 6. She estimated the event center was used between 15% and 55% for religious events. R. at 7. She also estimated that the chapel was used between 10% and 15% for non-religious events. R. at 7. Before submitting her report and FEMA making its decision, Fabray told the Chaplain that FEMA did not give monetary assistance to churches. R. at 7. She told him she would do what she could, and it could be a few weeks before FEMA gets back to him. R. at 8.

Almost a year after the storm, the church reopened its doors to the public. R. at 8. Community members donated their time after the storm to help repair the damaged buildings after the flood. R. at 8. A local engineer donated his time to determine what repairs were needed to fix the buildings. R. at 9. A construction crew donated its time and efforts to make those necessary repairs. R. at 9. And most of the materials needed for the repairs were donated by Cowboy churches around the country. R. at 9.

II. NATURE OF THE PROCEEDINGS

The District Court. The church sued FEMA in the Central District Court of Lima. R. at 8. During discovery, Chaplain Hudson testified that the event center was "mostly used" for church-related activities. R. at 9. In addition, Jesse St. James, FEMA's Regional Director, testified that FEMA can make different aid determinations on a case-by-case basis. R. at 10. FEMA released Fabray's report that determined the event center was used for 80% FEMA-eligible purposes and the chapel was used for 10% FEMA-eligible purposes. R. at 10. Mr. St. James expressed his intent to conduct a review of the file to determine if the church could receive disaster relief. R. at 10.

After months of discovery, FEMA filed a motion to dismiss, arguing that this case was not ripe for judicial review and a motion for summary judgment, arguing that FEMA's church-exclusion policy preserved the sanctity of the Establishment Clause. R. at 10. The church responded by arguing that the denial of disaster-relief funds to the church was impermissible under *Trinity Lutheran Church* and FEMA's

failure to act was a de facto denial of its claim. R. at 10. The district court denied the motion to dismiss on ripeness grounds but ruled for FEMA on the merits. R. at 10. The district court granted summary judgment that the Establishment Clause barred the church from recovery. R. at 10.

The Court of Appeals. Both parties appealed to the United States Court of Appeals for the Fourteenth Circuit. R. at 2. The church asked the court of appeals to reverse the summary judgment and remand for further proceedings. R. at 10–11. FEMA asked the court of appeals to dismiss the case under the ripeness doctrine. R. at 10. Reasoning that further factual development was needed, the court of appeals held that the church's claim was not ripe for review. R. at 15. In addition, the court of appeals "declined to revisit the summary judgment holding, but noted that *Trinity Lutheran* does not affect content-neutral policies like those promulgated by FEMA. R. at 15–17.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fourteenth Circuit correctly entered judgment for FEMA. This Court should affirm the judgment for one of two reasons. First, this case is not ripe for judicial review because the church has failed to identify a final agency action that this Court may review. Second, FEMA is not obligated to provide disaster relief funds to remediate a facility used for religious activities.

I.

The church's claim is not ripe for judicial review. Article III of the United States Constitution limits what a district court may hear. It must be a case or controversy

that is ripe for review. In the administrative law context, ripeness requires a final agency action. Here, the church has not identified a final agency action that is ripe for review.

Although FEMA has promulgated policies that guide how disaster relief claims are processed, it has not yet determined if the church qualifies for financial assistance. Before it could do so, the church decided to file its claim with the district court. The church's lawsuit presumes that FEMA will deny the claim because an investigator made comments to the Chaplin and a preliminary assessment did not appear favorable. But this is not the final agency action that could invoke the district court's Article III jurisdiction. Nothing is ripe for review.

Additionally, even if it were, this Court should dismiss the lawsuit based on prudential considerations. Further factual development is necessary, particularly given the fact that FEMA officials are reevaluating the claim. No hardship would result from the Court's decision to withhold consideration of the claim. The church is already back in its building, having remediated the damages through charitable donations.

This Court should dismiss the claim on ripeness grounds.

II.

Alternatively, this Court should find that FEMA is entitled to prevail on the First Amendment claim. While the church and its members have a right to freely exercise whatever religion they choose, there is no corresponding right to make the government pay for it. A Free Exercise violation occurs only when a governmental

practice prohibits an individual from exercising his or her religion. And that is important because government must not only honor an individual's free exercise right but it must also remain neutral so as not to run afoul of the dictates of the Establishment Clause.

Contrary to the church's suggestion, this case's outcome is not determined by the recent case of *Trinity Lutheran Church v. Comer*. That case involved a very different type of government action. It was a law that withheld generally available benefits from religious entities simply because they were religious entities. Disaster relief is very different. It is based on how the funds are used, not based on who receives them. Since our founding, government entities have been required to distinguish between religious and secular uses when it came to government funding. Nothing about *Trinity Lutheran Church* changed that.

This Court should affirm the summary judgment on the First Amendment claim.

ARGUMENT AND AUTHORITIES

This case involves the denial of a motion to dismiss for lack of jurisdiction and the granting of a motion for summary judgment. An appellate court reviews the denial of a motion to dismiss for lack of jurisdiction on ripeness grounds de novo. *See, e.g.*, *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56 (1st Cir. 2003). A court reviews the grant or denial of summary judgment de novo. *See, e.g.*, *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004).

I. THE COWBOY CHURCH OF LIMA'S CLAIM IS NOT RIPE FOR JUDICIAL REVIEW.

As a threshold matter, the Cowboy Church of Lima's claim is not ripe for judicial review. Through this lawsuit, the church seeks a determination that it qualifies or federal disaster relief funds. In doing so, it asked the district court to make factual determinations that FEMA had not.

Because the church has failed to identify a "final agency action" that causes it harm, its claim is not ripe for judicial review. *See Ohio Forestry Ass'n v. Sierra Club*, 532 U.S. 726, 733 (1998). Where, as here, a claim rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all," it is not ripe for judicial review. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). This ripeness doctrine is a "question of timing," designed to avoid "premature adjudication" of federal and state regulations until the effects of that regulation "are felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). This doctrine stems both from Article III of the Constitution and from "prudential reasons" not to exercise jurisdiction. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003).

The ripeness doctrine conserves judicial machinery for issues that are real, present, or imminent—not waste it on hypothetical ones. Because FEMA has taken no action whose effects have been felt in a concrete way by the church, judicial review under the APA is premature. This Court should therefore refuse to decide the case on the merits.

A. Review of the Eligibility Standards Promulgated Under the Public Assistance Program Is Premature Because FEMA Has Not Yet Determined if the Church Qualifies for Disaster Relief.

The Article III actual case or controversy requirement serves two purposes: 1) it "assures that the federal courts will not intrude into areas committed to other branches of government"; and 2) it "limit[s] the business of the federal courts to questions presented in an adversary context." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). In fact, "[t]he best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949). Plaintiffs contesting the validity of a government action must

> present a real, substantial, controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Legal rights asserted by appellant are threatened with *imminent invasion* by appellees and will be *directly affected to a specific and substantial degree* by decision of the questions of law.

Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945) (emphasis added). To meet that burden, a plaintiff must "establish at an irreducible minimum an injury-in-fact; that is, there must be some threatened or actual injury resulting from the putatively illegal action." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988).

The church has failed to meet its burden to show Article III standing. It cannot demonstrate that any action by FEMA has directly affected it in any material way. In *Franklin v. Massachusetts*, this Court outlined a two-prong test for determining what constitutes a final agency action, holding that "[t]he core question is whether the agency has completed its decision-making process, and whether the result of that

process is one that will directly affect the parties." 505 U.S. 788, 797 (1992). Neither prong is met.

First, FEMA has not completed it decision-making process. *See Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Although FEMA has adopted eligibility standards that are used to determine if a particular facility qualifies for disaster relief, the agency was not allowed to make the administrative determination. R. at 13. This is not a "final agency action." *See* 5 U.S.C. § 704 (2012). Nonetheless, the church formally challenges the program, assuming that it will not qualify for disaster relief. As a substitute for a concrete denial of coverage, the church relies on Ms. Fabray's statements that churches never receive funding and the fact that its application was preliminarily placed in a denied category. R. at 10. But this does not qualify as final agency action either. *See Madison Servs., Inc. v. United States*, 90 Fed. Cl. 673, 679 (2010) (dismissing as unripe a challenge agency's decision to follow a GAO recommendation, and holding that FEMA's "stated intention" failed to constitute final agency action because "FEMA retained fully the right to reconsider its tentative decision before taking any final action from which legal consequences would flow."); *Harris Patriot Healthcare Sols., LLC v. United States*, 95 Fed. Cl. 585, 596 (2010) (dismissing bid protest as unripe because plaintiff's "speculation as to what the agency might do cannot give rise to a ripe controversy because the agency can decide to pursue a different course of action"). It was only one step in the decision-making process. *See Stauffer Chem. Co. v. FDA*, 670 F.2d 106, 108 (9th Cir. 1982) (holding an opinion letter by a subordinate was not ripe for review). *Id.*

Second, the decision to utilize any particular methodology for eligibility determinations will not, in and of itself, have any effect that will be felt by the church or any other applicant for federal disaster relief. Harm to the church will not occur until a specific eligibility determination is made. The Cowboy Church's claim is not ripe for adjudication because it is based on "contingent future events that may not occur as anticipated." *Thomas*, 473 U.S. at 580–81. FEMA has not made a decision that determines the church's "rights or obligations" or from which "legal consequences will flow." *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). There is no evidence that this preliminary decision was "irreversible." *Los Alamos Study Grp. v. U.S. Dept. of Energy*, 692 F.3d 1057, 1065–68 (10th Cir. 2012).

The church brought this claim too early. To address this claim today would bypass the administrative process that FEMA has employed to determine who receives disaster-relief funding. *See Farrell-Cooper Mining Co. v. U.S. Dep't of Interior*, 728 F.3d 1229, 1235 (10th Cir. 2013) (explaining that an ongoing administrative review of an agency action is not ripe for judicial review). Without that determination, Article III standing is lacking.

B. This Court Should Dismiss This Case on Prudential Grounds Because the Cowboy Church of Lima Will Not Suffer Hardship by Waiting for FEMA to Make an Eligibility Determination.

In addition to the Article III concerns, this Court should dismiss this case because the church's claims do not satisfy the prudential and equitable requirements of the ripeness doctrine. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18

(1993). Similar to the Article III injury-in-fact requirement, prudential and equitable considerations prevent the courts from entangling themselves in "premature adjudication," particularly when the effects of the dispute have not been felt "in a concrete way." *Abbott Labs.*, 387 U.S. at 148–49. The ripeness doctrine has two prudential requirements: 1) the fitness of the issues for judicial decision; and 2) the hardship to the parties of withholding court consideration. *Id.* at 149. The church's claim is not fit for judicial review because further factual development is necessary and the church has not demonstrated that waiting for an eligibility ruling will cause it or its members to suffer hardship.

First, the court of appeals regards the underlying issue as a purely legal issue but then says further factual development is necessary. This is counter-intuitive, If it is truly a legal issue, factual development is unnecessary. The church's complaint is that FEMA will deny its application for relief, but the problem is that FEMA has not decided if that's the case. *Cities Serv. Co. v. Dep't of Energy*, 520 F. Supp. 1132, 1140 (D. Del. 1981) (declining to hear a company's challenge of an agency ruling because the company wanted a declaration of the law to unresolved facts). In addition, factual issues are not fully developed until the plaintiff exhausts all of their administrative remedies, and a complete administrative record is created. *Nat'l Lawyers Guild v. Brownell*, 225 F.2d 552, 557 (D.C. Cir. 1955).

Second, the withholding of consideration in this case imposes no severe hardship on the church. The church is not precluded from opening or operating. After the hurricane, it reopened and resumed its usual role in the community. FEMA's Public

Assistance Program has not had an immediate impact on the church. Even though its FEMA application is still in the review process, the church has already been rebuilt. R. at 8. This is not the type of hardship that this Court has found sufficient to make a claim ripe for review. Hardship "does not mean just anything that makes life harder; it means hardship of a legal kind, or something that imposes a significant practical harm upon the plaintiff." *Nat. Res. Def. Council v. Abraham*, 388 F.3d 701, 706 (9th Cir. 2004).

The church must establish that the hardship "is immediate, direct, and significant." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir. 1992). This Court further explained in *Toilet Goods Ass'n v. Gardner* that the hardship inquiry measures the "degree and nature of the regulation's present effect on those seeking relief." 387 U.S. 158, 164 (1967). In *Abbott Laboratories*, for example, this Court found sufficient compliance hardship to justify judicial review where the regulation required plaintiffs to "change all their labels, advertisements, and promotional materials . . . [in addition to] invest[ing] heavily in new printing type and new supplies." 387 U.S. at 152 This Court has explained the point at which hardships satisfy the prudential requirements of the ripeness doctrine:

> [N]o irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type of inspection. Unlike the other regulations challenged in this action, in which seizure of goods, heavy fines, adverse publicity for distributing "adulterated" goods, and possible criminal liability might penalize failure to comply, a refusal to admit an inspector here would at most lead only to a suspension of certification services to the particular party, a determination that can then be promptly challenged through an administrative procedure, which in turn is reviewable by a court. Such review will provide an adequate forum for testing the regulation in a concrete situation.

Toilet Goods Ass'n, 387 U.S. at 164–65 (citations omitted). Here, the court of appeals correctly stated that the church would not be harmed by waiting until FEMA made the factual determination regarding disaster relief eligibility.

II. FEMA'S PUBLIC ASSISTANCE PROGRAM DOES NOT VIOLATE THE FIRST AMENDMENT.

The Cowboy Church of Lima contends that FEMA has violated the First Amendment by creating regulations and policies that deem facilities used for religious activities ineligible to receive federal disaster relief funds. The argument stands on the proposition that any treatment of churches that differs from how government treats nonreligious institutions is constitutionally suspect and must be subjected to strict scrutiny. But the church's argument misinterprets the First Amendment, ignoring its text, history, and this Court's precedent. The Free Exercise Clause, by its plain language, only prevents the government from "prohibiting" the free exercise of religion. It does not guarantee churches public financing, nor does it require that the government act with absolute neutrality toward religious and non-religious interests. FEMA's decision not to subsidize facilities used for religious activities places no meaningful restraint on the church members' ability to freely exercise their religion. For that reason, summary judgment was properly granted on the Cowboy Church of Lima's free exercise claim.

A. The First Amendment Does Not Require FEMA to Provide Federal Financial Assistance for Religious Activities.

The First Amendment's Religion Clauses provide: "Congress shall make no law respecting an establishment of religion, or *prohibiting* the free exercise thereof." U.S.

Const. amend. I (emphasis added). The Establishment Clause prohibits the government from preferring or favoring one religion over another. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Free Exercise Clause, on the other hand, guarantees that individuals have the right to believe and profess whatever religious doctrine one desires without fears of government interference. *Locke v. Davey*, 540 U.S. 712, 721 (2004). While these two clauses are often in tension, "the Free Exercise Clause does not mandate the inclusion of religious institutions within every government program where their inclusion would be permissible under the Establishment Clause. There is room for legislative discretion." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008). This discretion ensures that states are protecting religious exercise while also serving a valid and substantial "antiestablishment interest" in preventing governmental involvement in the governance, operation, doctrine, and funding of churches. *See Locke*, 540 U.S. at 722.

Forcing taxpayers to provide direct financial assistance to churches violates religious liberty and jeopardizes the freedom to decide which faith, if any, to practice and support. The Framers knew that taxpayer support for religious institutions pits faith against faith, sect against sect, as they compete for public funding. At the same time, publicly funded religion invites government meddling and entanglement in religious matters. As a result, the First Amendment's Religion Clauses are premised on the principle that government must be neutral in religious matters so that individuals remain free to practice their faith, or not, as they see fit.

Although this Court has in some circumstances upheld against Establishment Clause challenges governmental decisions to subsidize some religious activities,[1] it has never held that those subsidies were required by the Free Exercise Clause. In fact, this Court has specifically rejected "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Cammarano v. United States*, 358 U.S. 498, 515 (1959); *see also Harris v. McRae*, 448 U.S. 297, 316–17 (1980) ("It simply does not follow that a woman's freedom of choice comes with a constitutional entitlement to the financial resources to avail herself of the full range of protected resources."); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (holding that no individual has an "affirmative right to government aid"). The decision to provide disaster relief to a group is a matter of policy and discretion that belongs exclusively to the government, which has broad powers to encourage actions deemed to be in the public interest. *See Leathers v. Medlock*, 499 U.S. 439, 451–52 (1991) (citing *United States v. Realty Co.*, 163 U.S. 427, 444 (1896)).

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[1] *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (rejecting Establishment Clause challenge to Ohio Pilot Program School Program, which granted tuition aid to religious institutions); *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (rejecting Establishment Clause challenge to New York City's program of loaning public school teachers to parochial schools for remedial teaching of disadvantaged students); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (rejecting Establishment Clause challenge to Arizona school district's decision to provide government-paid interpreter to blind student at Catholic high school); *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988) (rejecting Establishment Clause challenge to Adolescent Family Life Act, which provided grants to religious entities providing family planning services); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (rejecting Establishment Clause challenge to state agency's decision to provide state vocational assistance to blind person studying at Christian college).

This Court has consistently applied this principle to a number of different government funding programs.[2] Nothing here justifies reaching a different result.

1. The federal government may protect Establishment Clause neutrality concerns without violating the Free Exercise Clause.

Unavoidable tension exists between the First Amendment's Religion Clauses. The twin imperatives of government neutrality toward religion and individual freedom to engage in religious activity inevitably come into conflict when government action draws lines on religious grounds. As this Court explained in *Walz v. Tax Commissioner*,

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to [e]nsure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, *there is room for play in the joints productive of a benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. 664, 669 (1970) (emphasis added).

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[2] *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (finding no constitutional right to federal funding for institutions of higher education that refuse access to military recruiters); *United States v. Am. Library Ass'n*, 539 U.S. 194, 211–12 (2003) (plurality op.) (finding no right to federal funds to pay for unfiltered access to the internet); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 590 (1998) (finding no right to federal funds for artists whose works do not meet general standards of decency); *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (finding no right to federal funds to engage in constitutionally protected family planning service related to abortion); *Maher v. Roe*, 432 U.S. 464, 487–88 (1977) (finding no constitutional right to Medicaid funding for medical services incident to constitutionally protected right to non-therapeutic abortions).

Ordinarily, that "play in the joints" is used to measure affirmative actions that include religious institutions in a government program. *See id.* at 672 (rejecting Establishment Clause challenge to New York statute providing tax exemption to realty owned by association organized exclusively for religious purposes and used exclusively for carrying out such purposes). The question invariably boils down to whether the inclusion of the religious entity "impermissibly advance[es] . . . religion." *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997). But here the claim is somewhat different. The Cowboy Church of Lima asks to radically reshape this Court's First Amendment jurisprudence so that any public funding not barred by the Establishment Clause would be *required* by the Free Exercise Clause. The argument seeks to eliminate any governmental choice and also any "play in the joints" between the Establishment Clause and Free Exercise Clause.

This Court rejected a similar argument in *Locke v. Davey*. 540 U.S. 712. That case involved a free-exercise challenge to a state college-scholarship program that excluded otherwise-eligible students who were "pursuing a degree in devotional theology." *Id.* at 715. Although the plaintiff there faced the difficult choice whether to forgo state aid to major in devotional theology, or instead to accept a scholarship and pursue some other degree, the Court held that the exclusion was constitutional because it "impose[d] neither criminal nor civil sanctions on any type of religious service or rite. It d[id] not deny to ministers the right to participate in the political affairs of the community. And it d[id] not require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21 (citations

omitted). Rather, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction," which the Free Exercise Clause permits. *Id.* at 721.

Locke allowed state legislators to exercise their own judgment in balancing the values under the Religious Clauses. *Id.* at 720. This Court ruled that "[t]raining someone to lead a congregation is an essentially religious endeavor" and the government has a valid "antiestablishment interest" in not funding the church in this way. *Id.* at 721–22. This holding confirms a governmental interest in not funding religious instruction and outreach may be exceptionally weighty, and fully deserving of deference, even when a funding restriction is not compelled by the federal Establishment Clause. *See id.* ("Even though the differently worded Washington Constitution draws a more stringent line than drawn by the United States Constitution, the interest it seeks to further is scarcely novel.").

An important fact that was considered pivotal in the *Locke* decision was the lack of evidence of hostility or animus towards religion. 540 U.S. at 524. And the Court was clear in its reasoning that the decision to withhold funding was not, in and of itself, an attempt to suppress any religious activity or belief. *Id.* In doing so, the majority in *Locke* distinguished its holding from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, where the Court found hostility toward religion when it reviewed a municipal ordinance that made it a crime to engage in any kind of animal slaughter. 508 U.S. 520, 535 (1993). The ordinance in *Lukumi* was unconstitutional under the Free Exercise Clause because the Court found it intentionally suppressed ritualistic animal sacrifices of the Santerían religion. *Id.* at 529. The evidence was in

the text of the ordinance, which used words such as "sacrifice" and "ritual." *Id.* at 534. Further, there were records from the city council meetings where council members and citizens expressed the need to restrict animal sacrifice by this religious group. *Id.* Specifically, the record showed that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace, and safety," and "reiterated the city's commitment to prohibit any and all such acts of any and all religious groups." *Id.*

Additionally, *Locke* highlighted the fact that the scholarship was not a generally available government benefit that *all* similarly-situated individuals would receive but for the religious activity. 540 U.S. at 712. By punishing religious activity with the deprivation for a vested right, the burden placed on religious practice went beyond mere frustration and crossed the line into cases where this Court has regarded as prohibitions under the Free Exercise Clause.[3] Any attempt to treat FEMA's Public Assistance Program in this manner would necessarily fail because nothing in the record suggests it is an entitlement automatically available to everyone.

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[3] *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (holding that government withholding unemployment benefits from employee whose religious beliefs forbade her from working on the Sabbath prohibited religious exercise); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) (same); *McDaniel v. Paty*, 435 U.S. 618, 620 (1978) (holding that state law which excluded ministers from political participation by disqualifying them from holding public office prohibited religious exercise); *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961) (holding that state constitution which disqualified anyone who would not declare a belief in God from seeking state office prohibited religious exercise).

Locke is controlling here. FEMA's decision not to include facilities used for religious activity in disaster-relief grants is permissible under *Locke*'s rationale. 540 U.S. at 712 (finding that if there "exists any room between the two Religious Clauses, it must be here"). FEMA should not be required to direct public assistance funds to the Cowboy Church of Lima for use in its religious mission. Even though FEMA's regulations and policies are not neutral with respect to religion, they prohibit funding to *all* facilities used for religious activities. The federal agency's decision not to fund religious organizations does not infringe on any individual's right to believe and profess their beliefs.

2. FEMA's policies that decline to provide direct cash subsidies for religious activities do not prohibit members of the Cowboy Church of Lima from freely exercising their religious beliefs.

To sustain a Free Exercise claim in circumstances such as this case, the church would have to establish that FEMA's regulations and policies had the effect of burdening its members' free exercise of their religious beliefs. *See Sherbert v. Verner*, 374 U.S. 398, 412 (1963). But where, as here, that alleged burden on religious exercise arises because of the mandates of the Constitution itself—as opposed to a burden imposed by a rule or regulation the government instituted as a matter of policy choice, free of constitutional command—then the individual's religious claim cannot take precedence. *See Wallace v. Jaffree*, 472 U.S. 38, 84 (1985) (O'Connor J., concurring) (holding that a state may not "accommodate" the free exercise of religion to the extent doing so would constitute an establishment of religion).

Compulsion is the showing required to violate the Free Exercise Clause. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). This standard is a product of the Founders' fears they would be fined, jailed, tortured or even killed for practicing an unfavored religion. *Id.* at 9. When the Constitution was ratified there was substantial fear of the danger of a union between the church and the government. *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Thus, the Free Exercise Clause was adopted to forbid the enactment of laws that suggest "government compulsion." *Id.* at 430–31. The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). The crucial word in the text of the Free Exercise Clause is "prohibit." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (holding that a government project disrupting a forest sacred to Native Americans tribe did not violate the Free Exercise Clause because it did not *prohibit* the tribe from exercising their religion). It follows then that "[i]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Id.* And that burden has only been met with very specific types of showings.[4]

[4] *See, e.g., Church of the Lukumi Babalu Aye*, 508 U.S. at 532 (holding government may not impose criminal penalties on particular religious activity); *McDaniel*, 435 U.S. at 620 (holding government may not impose special disabilities on the basis of religious view or status); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969) (holding government may not intervene in controversies over religious authority or dogma); *Torcaso*, 367 U.S. at 494 (holding government may not compel affirmation of religious beliefs); *United States v. Ballard*, 322 U.S. 78, 86–88 (1944) (holding government may not punish the expression of religious doctrines it believes to be false).

FEMA's denial of disaster relief funds in no way rises to government compulsion. Any burden created by the Public Assistance Program is not direct and severe. FEMA's program simply requires that the church rebuild the building used for religious activities without any public funding. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."). Constitutional concerns are greatest when the State attempts to impose its will by force of law. *Maher v. Roe*, 432 U.S. 464, 476 (1977). By contrast,

> subsidies are just that, subsidies. The recipient is in no way compelled to operate a [subsidized] project; to avoid the force of the regulations, it can simply decline the subsidy. . . . By accepting . . . funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income.

Rust, 500 U.S. at 199 n.5. This Court's precedent "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" implicate the Free Exercise Clause. *Lyng*, 485 U.S. at 451. A Free Exercise violation requires more than government action that merely "frustrates or inhibits religious practice." *Id.* at 450–51. The Constitution requires a prohibition. *Id.* at 456.

Here, the ability of church members to practice their religious beliefs, performances, and other tenets is not prohibited or even restricted by FEMA's decision to deny federal disaster relief for religious activities. As the court of appeals recognized, the logic of FEMA's statutory scheme is to redistribute taxpayer funds to taxpayers or non-profits originally funded with taxpayer funds. R. at 16. For this reason, the Cowboy Church of Lima is not subject to state or federal taxes and, therefore, it receives no support under FEMA's program. This restriction simply is an attempt to provide for further separation between the church and the government by not funding the exercise of any one individual religious practice. While the program does not provide funds for facilities used for religious activities, this program does not prohibit any religious organization from continuing to operate or profess any religious beliefs. Even though the church does not have as much as it wants, FEMA's regulations and policies do not prohibit church members from "fully realizing" their First Amendment rights by prohibiting a religious conviction or tenet. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983).

B. *Trinity Lutheran Church* Outlawed Distinctions Based on Religious Status, Not Distinctions Based on Religious Uses.

The Cowboy Church of Lima contends this case is controlled not by *Locke v. Davey* but rather by this Court's recent holding in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). R. at 10. Both lower courts properly rejected the argument, appreciating that FEMA's policies here are fundamentally distinct from the grant program involved there. *See* R. at 10, 16–17. *Trinity Lutheran*

Church only addresses exclusions based on religious identity; it does not address exclusions based on religious uses.

Trinity Lutheran Church concerned an application to participate in a state program that reimburses non-profits for the purchase and installation of rubber playground surfaces made from recycled tires. 137 S. Ct. at 2017. The program—funded through a fee on the sales of new tires—was intended to reduce the number of used tires in the state's landfills while at the same time providing a safe place for children to play. *Id.* The church hoped to use the funds to replace its existing playground. *Id.* at 2018. Missouri's Department of Natural Resources, which administered the playground program, ranked Trinity Lutheran's application fifth out of the forty-four that were submitted. *Id.* Even though fourteen grants were ultimately awarded, Trinity Lutheran was not included because a provision of the state constitution prohibits state money from going "directly or indirectly, in aid of any church, sect, or denomination of religion." *Id.* at 2017 (citing Mo. Const. art. I, § 7).

Trinity Lutheran sued the state agency, arguing that its refusal to provide funds for its playground violated the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause. *Id.* at 2018 (citing U.S. Const. amends. I, XIV). The district court dismissed the case, relying on *Locke v. Davey*. *Id.* But this Court reversed, holding that the denial of aid violated the church's free-exercise rights. *Id.* at 2024. The majority opinion explicitly said that Missouri's choice to deny this aid to religious schools had to satisfy strict scrutiny under the Free

Exercise Clause, a burden the state could not meet. *Id.* at 2019. The holding reflects the longstanding notion that once the government opens up a "public benefit," it cannot deny that benefit to a religious entity based on that entities' religious nature. *Id.* at 2021. In the Court's view, "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand." *Id.* at 2025.

Despite invitations to do so, the court refused to overrule *Locke v. Davey* and instead distinguished the holding.[5] The Court said:

> Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

Id. at 2023 (citing *Locke*, 540 U.S. at 712). The Court also explained that:

> Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. . . . The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the church—solely because it is a church—to compete with secular organizations for a grant.

Id. at 2022. The majority focused its analysis on discrimination based on religious identity, deciding only that the First Amendment prohibits identity-based discrimination in public benefits programs.

These limitations, along with a specific footnote, indicate that exclusions of religious entities from government programs because of their religious activities

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[5] Justices Thomas and Gorsuch concurred because they wanted to overrule *Locke v. Davey* altogether. *See id.* at 2025 (Thomas, J., concurring); *id.* at 2026 (Gorsuch, J., concurring).

would not be controlled by the *Trinity Lutheran Church* opinion. Footnote 3 provides: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3. Although only a plurality of Justices expressly joined this footnote, the statements contained in Justice Breyer's concurrence and Justice Sotomayor's dissent, which was joined by Justice Ginsburg, indicate they would agree that *Locke v. Davey*, not *Trinity Lutheran*, applies to free exercise challenges based on religious activity.[6] Under this rationale, FEMA cannot be forced to provide federal disaster relief for facilities used for religious activity. After all,

> [h]istory shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship.

Id. at 2041 (Sotomayor, J., dissenting).

[6] In his concurrence, Justice Breyer discussed the narrow scope of the majority opinion and stated that he "would leave the application of the Free Exercise Clause to other kinds of public benefits for another day." *Id.* at 2027 (Breyer, J., concurring). Justice Sotomayor stated in her dissent that the majority opinion would not apply to cases involving indirect aid programs. *Id.* at 2032 (Sotomayor, J., dissenting).

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS