No. C17-2893-1

In the Supreme Court of the United States

COWBOY CHURCH OF LIMA,
Petitioner,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,
W. CRAIG FUGATE, Administrator of the Federal Emergency Management Agency
Respondents.

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

BRIEF FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

Team #61
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether Cowboy Church of Lima's claim is justiciable, given it filed this suit before the Federal Emergency Management Agency made a final determination denying aid eligibility.

II. Whether the Federal Emergency Management Agency may distribute public funds to religious entities for sectarian uses as part of its Public Assistance Grant program under the Establishment Clause.

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The unreported opinion of the United States Circuit Court of Appeals for the Fourteenth Circuit appears in the record at pages 2 through 17. The District Court's decision is unreported and unavailable.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered their final decision on October 1, 2017. R. at 2. Following a timely appeal, this Court granted the petition for a writ of certiorari on October 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution, U.S. CONST. amend. I, and the two sections of the Robert T. Stafford Disaster Relief and Emergency Assistance Act related to "private nonprofit facilities," 42 U.S.C. §§ 5122(11), 5172(a)(1)(B), have been reproduced in the Appendix.

STATEMENT OF THE CASE

A. Hurricane Rhodes and its Impact.

Hurricane Rhodes made landfall on August 13, 2016, one hundred miles north of the Township of Lima ("Lima") on the western coast of New Tejas, dropping over forty-five inches of rain in a thirty-six-hour period. R. at 2. The heavy, sustained rainfall overburdened the nearby Flanagan Dam, causing a breach of the Motta River, resulting in disastrous flooding across the region. R. at 3. Lima has a population of approximately 4,150 people, and sits about two miles from the banks of the Motta River. R. at 3. The flood waters in Lima rose throughout August, causing mass devastation. R. at 4. On August 19, 2016, President Barack Obama declared the damage caused by Hurricane Rhodes to be a major natural disaster, authorizing the Federal Emergency Management Agency ("FEMA") to distribute relief to certain affected areas of New Tejas. R. at 6.

B. The Cowboy Church of Lima.

The Cowboy Church of Lima ("the Church") sits on an 88-acre tract of land on the outskirts of town, designated as "religious exempt property" under the New Tejas Property Code. R. at 3. The property contains multiple structures including a small rodeo area, a chapel with an attached event center, and several storage structures. The chapel was the original structure on the property, built in 1990, the same year the Church filed for its 501(c)(3) designation with the Internal Revenue Service. R. at 3. At all times, the Church has complied with its tax-exempt reporting requirements. R. at 3.

Beginning in 1998, the chapel began hosting several Lima town events, including city council meetings, because it was the only space large enough to accommodate a crowd. R. at 3. Although Mayor Rachel Berry offered to pay "fair rent" for the space, Chaplain Finn Hudson refused to accept any rent because his property was always open. R. at 3-4. Over time, the chapel was used more and more for private and civic events until eventually, to accommodate the growing demands of the Lima community, the Church used charitable donations to build an event center annex in 2005. R. at 4. In 2006, Chaplain Hudson petitioned for the event center to be designated tax-exempt as a government building, but his application was denied by the County. R. at 4. In 2008, Lima considered building its own event center, but the measure was voted down because the citizens felt the Church's event center was sufficient to meet their needs. R. at 4.

As the flood waters crossed onto Church property, Chaplain Hudson and his staff rushed to the chapel to remove the bibles, hymnals, religious pamphlets, and sectarian paraphernalia to the storage sheds. R. at 4. They also moved the tables, chairs, podiums, and kitchen supplies out of the event center and into another storage building. R. at 4. On August 15, 2016 around 11:45pm, the flood waters invaded the chapel and event center, flooding all 5,500 square feet (the chapel and event center each occupy exactly 2,250 square feet respectively). R. at 4. Later, water marks and debris lines would indicate the flood waters rose to around three-feet throughout the structure.

The waters did not recede until around 9:30 a.m. on August 17, 2016. R. at 5. Chaplain Hudson and his staff began to assess the damage within the structure around 10:45 a.m. on August 18, 2016. R. at 5. They determined the water deposited mud, silt, grass, plant debris, raw sewage, and chemicals throughout the facility. R. at 5. They began remediation that same day, stripping out four feet of sheetrock and insulation, as well all the flooring (including wood, carpet, and marble). R. at 5. Chaplain Hudson oversaw the removal of every item over the following week, including supplies used solely for sectarian or civic purposes. R. at 5. Chaplain Hudson felt the structure itself had an "odd look to it," and consulted his half-brother, Kurt Hummel, a local home designer and structural engineer. R. at 5. It was Mr. Hummel's opinion that the facility had suffered structural damage, which required significant repairs in the next few months, otherwise the building risked partial collapse. R. at 6.

C. The Cowboy Church of Lima Seeks FEMA Assistance.

Upon President Obama's declaration of Hurricane Rhodes as a major natural disaster, Chaplain Hudson contacted his attorney, Arthur Abrams, for advice as to how to seek FEMA assistance. R. at 6. On August 20, 2016, Chaplain Hudson filed his online application for public assistance with FEMA. R. at 6. Three days later, on August 23, 2016, Chaplain Hudson filed an application for a Small Business Administration ("SBA") loan. R. at 6.

Ms. Quinn Fabray, a claims adjuster contracted by FEMA, toured the damaged chapel and event center on August 25, 2016. R. at 6. Throughout the tour, Ms. Fabray

made careful notes and asked numerous questions about the use of the facilities, ultimately telling Chaplain Hudson she estimated the event center "was used somewhere between 45% to 85% of the time for community projects unrelated to the church," although on Sundays it was used for Sunday school classes, youth group meetings, and adult bible study meetings. R. at 7. Secular events hosted at the event center included "birthday parties, banquets, meetings of the Lions and Rotary Clubs, retirement parties, local glee club concerts, rodeo meetings, a polling location for county elections, large city council meetings, school dances, substance abuse support meetings, and marriage and family counseling sessions." R. at 7. The event center was also designated an emergency relief shelter. R. at 7.

By contrast, Ms. Fabray told Chaplain Hudson she "estimated the chapel was used 85% to 95% of the time for religious purposes." R. at 7. On Sundays, the chapel was used exclusively for religious worship, but on weekdays the chapel was used for a mix of sectarian and secular events including: religious and non-religious concerts, holiday festivals, bar and bat mitzvahs, father-daughter dances, receptions after funerals, christenings, and other similar activities, non-denominational weddings, and some non-religious meetings. R. at 7.

After her inspection, Ms. Fabray confided in Chaplain Hudson that she was a member of a church at home, and that "she shouldn't tell him this," but "she hated that FEMA does not cover monetary assistance to churches." R. at 7. Further, "she had never heard of FEMA granting an exception because of the Church and State Separation doctrine." R. at 7. Upon leaving, she hugged him, told him it would take

a few weeks before Chaplain Hudson heard from FEMA, and she would "do what she could, but not to get his hopes up." R. at 8.

That evening, Chaplain Hudson again consulted with his attorney, Mr. Abrams, who advised him FEMA would "surely deny his application," but if Chaplain Hudson wanted to file a lawsuit, Mr. Abrams would represent him *pro bono*. R. at 8. Two days later on August 27, 2016, Chaplain Hudson returned to Mr. Abrams office to tell him he wished to move forward with the lawsuit. R. at 8. The current suit was filed August 29, 2016 in the United States District Court for the District of New Tejas, at which point FEMA immediately stopped processing the Church's application until the resolution of this legal process. R. at 8.

After several months of church and community members donating their time and money to repair the structural damage, the Church reopened on July 26, 2017. R. at 8.

D. FEMA's Mixed-Use Procedure.

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Act") "The President may make contributions," subject to conditions, "to a person who owns or operates a private nonprofit facility damaged or destroyed by a major natural disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred." 42 U.S.C. § 5172(a)(1)(B). Such "contributions" are part of the Public Assistance grant program. Although the Act contains a definition of a "private nonprofit facility" ("PNP"), FEMA has further clarified that definition in its own regulations. *See* 44 C.F.R. § 206.221(e).

In FEMA's 2016 Public Assistance Grant Program and Policy Guidelines ("Policy Guide"), the agency describes the procedures by which applicants ("PA applicants") should abide when seeking Public Assistance grants ("PA grants").[1] PNPs may be ineligible to receive FEMA funds if they engage in: religious activities ("worship, proselytizing, religious instruction, or fundraising"), athletic, vocational, or academic training, political education, lobbying, job counseling, or recreation; or are cemeteries, political or lobbying groups, property owner associations, etc. 2016 Policy Guide at 14.

Some PNP facilities may provide both eligible and ineligible services, designated as "mixed-use facilities." 2016 Policy Guide at 16. "Eligibility of mixed-used PNP facilities is dependent on the *primary* use of the facility, which is determined by the amount of physical space dedicated to eligible and ineligible services." *Id.* "'Primary use' is the use for which *more* than 50 percent of the physical space in the facility is dedicated." *Id.* Occasionally there are facilities where the same physical space is used for both eligible and ineligible services, known as "mixed-use spaces." *Id.* In these cases, the "primary use is the use for which more than 50 percent of the operating time is dedicated in that shared physical space. If . . . the Applicant cannot support that it is used for eligible services for more than 50 percent of the operating time this criterion is not met." *Id.* In either kind of facility, "[i]f FEMA determines that 50

[1] The 2016 Policy Guide is available online at: https://www.fema.gov/media-library-data/1456167739485-75a028890345c6921d8d6ae473fbc8b3/PA_Program_and_Policy_Guide_2-21-2016_Fixes.pdf

percent or more" of the physical space or use is "dedicated to ineligible services, the entire facility is ineligible." *Id.*

E. Judge Beiste's Decision at the District Court.

Judge Beiste held a status conference on November 2, 2016, to evaluate the Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) motions filed by the U.S. Attorney, Sebastian Smythe. R. at 9. Judge Beiste denied the pending Motions, but said a Motion for Summary Judgment would be more appropriate after "some discovery." R. at 9. Throughout the discovery period, several depositions were taken including Chaplain Hudson, and FEMA Regional Director, Jesse St. James.

During his deposition, Chaplain Hudson testified the water damage had caused the roof of the chapel to collapse, the repair bills were mounting, and donated volunteer hours were insufficient to rebuild. R. at 9. Further, he testified the event center was "used for mostly for church-related activities," and as he only attended religious-related events in the building, he estimated "60% of the event center usage was for church-related events." R. at 9.

During his deposition, FEMA Regional Director, Jesse St. James, stated FEMA makes its aid-eligibility determinations on a case-by-case basis, but that a final determination for the Church was never made due to the pending litigation. R. at 10. FEMA did release Ms. Fabray's report, which concluded that after substantial interviewing of local community members the "event center was used 80% of the time for FEMA-eligible purposes and the chapel was used 90% of the time for non-FEMA-eligible purposes." R. at 10. Mr. St. James conceded that, at least internally, the

Church had been designated in a pre-denial category, however, "because of the close nature of the factual issue, he was planning to review the file himself and ultimately the event center might have been granted FEMA assistance." R. at 10. He also conceded FEMA's internal deadline for a finalized decision was September 30, 2016, but occasionally the agency misses internal deadlines when faced with a high influx of applicants, so a final determination may also have been made on October 14, 2016. R. at 10.

After the discovery period, U.S. Attorney Smythe moved for summary judgment under two theories: (1) the case was not ripe for adjudication, and (2) FEMA's mixed-use standard was necessary to preserve the sanctity of the Establishment Clause. R. at 10. Judge Beiste denied the ripeness claim, but granted summary judgment on the Establishment Clause claim. R. at 10. The Church appealed, seeking remand on the Establishment Clause issue; FEMA cross-appealed, requesting the Court grant dismissal under the ripeness doctrine. R. at 11.

SUMMARY OF THE ARGUMENT

FEMA is entitled to summary judgment on the ripeness claim. The prudential ripeness doctrine measures the degree of the injury-in-fact; is it "concrete enough" to confer Article III standing? Evaluated this way, the Church has yet to suffer a justiciable injury under either Article III or the Administrative Procedure Act, because the lawsuit was filed before the agency could render a final decision denying it an economic benefit. The Church similarly does not allege a pre-enforcement challenge to an agency action. Its claim does not pose a purely legal question, because speculating as to whether FEMA would deny benefits under their mixed-use standard is a factual inquiry, and FEMA's actions are discretionary in nature. Further, the Church suffers no hardship sufficient to justify immediate judicial review because it is not subject to threat of adverse enforcement, criminal penalties, or prosecution, nor has FEMA chilled its religious exercise under the First Amendment, as the Church has currently reopened. U.S. CONST. amend. I.

Both common law tradition, and the Court's line of Establishment Clause precedent, prevent FEMA from distributing taxpayer funds to religious organizations for sectarian uses. FEMA's mixed-use standard is a generally applicable regulation that does not bar religious practice or conduct, and accordingly does not burden the Church's Free Exercise. Finally, as the Stafford Act does not define PNPs to include sectarian groups, FEMA's regulations and policies stating the term exempts facilities used for religious instruction or worship is entitled to deference as one reasonable way to interpret the statute.

STANDARD OF REVIEW

Whether a party has standing to sue is a question courts review *de novo*. *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 1376 (Fed. Cir. 2000); *see* U.S. CONST. art. III, § 2; *see also Warth v. Seldin*, 422 U.S. 490, 517-18 (1975) ("The rules of standing, whether as aspects of the Art. III case or controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention").

For Establishment Clause claims, the standard of review can be either rational basis review or strict scrutiny, however the nature of the regulation in this suit is in dispute. A law that is both neutral and generally applicable need only be rationally related to a legitimate government interest to survive a constitutional challenge, even if it incidentally burdens religious practice. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 885-87 (1990). Conversely, if a law is not neutral or generally applicable, it is subject to strict scrutiny. The burden on religious exercise violates the Free Exercise Clause, unless the government action is narrowly-tailored enough to advance a compelling government interest. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

ARGUMENT

I. SUMMARY JUDGEMENT IS APPROPRIATE AS TO THE RIPENESS DOCTRINE BECAUSE THE CHURCH CANNOT ALLEGE A GENERALLY JUSTICIABLE CLAIM, A "PURELY LEGAL QUESTION" FIT FOR REVIEW, NOR A SUFFICIENT HARDSHIP TO JUSTIFY PRE-ENFORCEMENT REVIEW.

The Fourteenth Circuit specifically limited its holding to one of "prudential" ripeness concerns, R. at n.1, but failed to evaluate the extent to which the prudential ripeness doctrine functions as an inextricable component of an Article III standing analysis, essentially acting as a question of whether the injury is in fact "concrete enough" to confer Article III standing. Put differently, ripeness is a temporal component of an Article III standing analysis: does a particular plaintiff have standing *yet*. In this case, the Church has yet to suffer a justiciable injury under either Article III or the Administrative Procedure Act ("APA"), because the lawsuit was filed before the agency could render a final decision denying it an economic benefit. Further the Church cannot establish a pre-enforcement challenge to FEMA's action, as it cannot allege either a purely legal question fit for review, nor a sufficient hardship to justify immediate review.

A. Precedent Indicates the Ripeness Doctrine Functions as a Threshold Question and Incorporates Notions of Both Constitutionality and Prudential Justiciability, However Plaintiffs Fail to Establish Either.

Article III constitutional standing analysis contains three core elements: (1) an injury-in-fact, (2) that is fairly traceable to the conduct complained of, and (3) redressable by a favorable decision of the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Court has also noted the standing doctrine contains "elements [that] express merely prudential considerations that are part of judicial

self-government." *Lujan*, 504 U.S. at 560 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984) (abrogated by *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014))).

In recent years, the Court has restructured "prudential" elements of standing, categorizing them as limitations to third-party standing, denial of generalized grievances, and the zone-of-interest test.[2] *See Lexmark*, 134 S. Ct. at 1387. Prudential ripeness also presents itself in the pre-enforcement context, and is related the otherwise broader doctrine of ripeness. In *Susan B. Anthony v. Driehaus*, 134 S. Ct. 2334 (2014), the Supreme Court reserved the question of prudential ripeness by stating it "need not resolve the continuing vitality of the prudential ripeness doctrine in this case." *Id.* at 2347 (2014). The Court should use the current facts to resolve that prudential ripeness is, in fact, still a viable doctrine of law in its relation to Article III standing.

"The ripeness doctrine is 'drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *National Park Hospitality Ass'n v. Department of Interior*, 528 U.S. 803, 812 (2003). Prudential ripeness draws on Article III constitutional standing doctrine as a foundation, and essentially functions like a temporal prong of the injury-in-fact element. To satisfy the injury-in-fact requirement, the injury must be "concrete and particularized,"

[2] *Lexmark* only evaluates the "zone-of-interests" test as a prudential doctrine, not ripeness. At footnote 4, Justice Scalia discusses the question of whether prudential concerns like "statutory standing" or statutorily granted causes-of-action constitute questions of subject matter jurisdiction, ultimately concluding they are *not* jurisdictional. Respondent does not contend the ripeness doctrine functions as a distinct jurisdictional component, rather, it is one part of the Court's larger analysis of jurisdictional standing under Article III.

Warth v. Seldin, 422 U.S. at 508, and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 506 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

Arguably, ripeness is the proper analysis for determining whether the injury is "concrete," "actual or imminent." In *Abbott Labs v. Gardner*, the Court determined the effects of an administrative action must be "felt in a *concrete* way by the challenging parties." 387 U.S. 136, 148-49 (1967) (emphasis added). In *National Hospitality Association*, the Court concluded the plaintiffs' case was not ripe because the APA only provides for judicial review when there has been some "*concrete* action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him," and that the "question presented . . . should await a *concrete* dispute." 528 U.S. at 808 (emphasis added). The Court employed the language "concrete," which is generally reserved for an injury-in-fact analysis, in finding the case was not ripe for review because no justiciable injury had yet occurred.

The question presented in *Susan B. Anthony* was "whether their pre-enforcement challenge was justiciable," particularly, "whether they ha[d] alleged a sufficiently imminent injury for the purposes of Article III." 134 S. Ct. at 2338. Although the Court distinguished prudential ripeness as a separate analysis under the two-part test from *Abbot Labs*, it nevertheless implicitly made a finding that the Article III injury was sufficiently "imminent" to overcome ripeness concerns. *See Susan B. Anthony*, 134 S. Ct. at 2338. First, the Court determined the petitioner's intended speech was "affected with a constitutional interest," and that the challenged law

"arguably proscribed" such speech. *Susan B. Anthony*, 134 S. Ct. at 2344 (citing *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). Second, the Court looked to a history of past enforcement of the law, to determine if the threat of enforcement was legitimate, but expressly reserved the question of whether the threat *alone* would satisfy standing. *Susan B. Anthony*, 134 S. Ct. at 2345 ("[W]e need not decide whether that threat standing alone gives rise to an Article III injury"). Ultimately holding the threat plus the "additional threat of criminal prosecution," was enough to create a sufficiently imminent injury to satisfy Article III. *Id.*

Implicitly, the Court still engaged in a ripeness analysis in weighing whether it is more important to immediately protect the plaintiffs' constitutional interests in free speech versus waiting until they are actually prosecuted – there, the potential injury to personal liberty was sufficiently imminent. The *Susan B. Anthony* Court treats the initial injury-in-fact element as something that can be overcome when the threat of injury is "imminent." 134 S. Ct. at 2338. In determining "imminence," ripeness is the only temporal doctrine available to ascertain whether the threat of injury is concrete and particularized enough to justify judicial review. In the present facts, FEMA's injury is merely speculative, let alone "imminent." There is no such threat of criminal enforcement, or chilling of constitutional rights, sufficient to overcome the analysis of whether the Church's injury is "concrete and particularized," functionally, ripeness.

1. The Church has not established Article III standing because it has not alleged a specific and concrete injury which the Court can redress.

Even before *Susan B. Anthony*, there is significant Supreme Court precedent to support the contention that First Amendment interests often supersede ripeness concerns, if a credible threat of adverse action exists. *See Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Babbitt*, 442 U.S. at 301. However, the Church in the present case cannot allege a concrete injury sufficient to establish standing under Article III because FEMA has not taken any adverse action, nor made a final determination denying funds. There is no dispute that the damage sustained during Hurricane Rhodes constitutes an injury to the Church itself, but it is not a legally cognizable injury. To the extent the Church argues its claim is analogous to *Trinity Lutheran Church of Columbia v. Comer*, it is important to note that, unlike the Church in the present facts, the daycare in *Trinity Lutheran* was actually *denied* access to funds after completing the entire application process. 137 S. Ct. 2012, 2018 (2017).

Here, the Church filed this current lawsuit before FEMA could ever render a final determination of eligibility and therefore, has not been injured. Although it is possible the Church would eventually be denied, it is equally possible it may have been deemed "eligible." The FEMA Regional Director, Jesse St. James, stated in his deposition that although the Church had been internally "slated" into a pre-denial category, "because of the close nature of the factual issue, he was planning to review

the file himself and ultimately the event center might have been granted FEMA assistance." R. at 10.

Whether the Church would or would not have been denied funding is the very definition of a "speculative" injury. "'The party invoking federal jurisdiction bears the burden of establishing' standing – and, at the summary judgment stage, such a party 'can no longer rest on . . . "mere allegations" but must "set forth" by affidavit or other evidence "specific facts."'" *Clapper v. Amnesty International USA*, 568 U.S. 398, 411-12 (2013) (quoting *Lujan*, 504 U.S. at 561). In *Clapper*, the Court held the plaintiffs "merely speculate[d] and m[ade] assumptions" in their allegation the Government targeted their communications, and they "set forth no specific facts demonstrating that the communications . . . will be targeted." *Clapper*, 568 U.S. at 412. Like the plaintiffs in *Clapper*, the Church at the summary judgment stage was required to come forward with specific, non-speculative evidence to support its alleged injury of FEMA's denial of funds, but it has not. The Church simply does not have Article III standing, meaning their claim is not ripe because the alleged injury has not been sustained.

2. Section 704 of the Administrative Procedure Act limits judicial review to only final agency action, so the Church's suit must be dismissed because it was filed before FEMA could render a final decision on their petition.

The Court has expressed reluctance to intercede in agency action:

> "[T]he basic rationale is to prevent 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 effects felt in a concrete way by the challenging parties."

Abbott Labs, 387 U.S. at 148.

The APA requires agency action be "final" before it is subject to judicial review. 5 U.S.C. § 704. Agency action may mean either a "rule," "regulation," "order," or "adjudication." *See* 5 U.S.C. § 551. FEMA's aid-eligibility determinations are best described as an "order," which is defined as "the whole or part of a *final disposition*, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." 5 U.S.C § 551(6) (emphasis added). The Church may not seek judicial review of a "preliminary, procedural, or intermediate agency action," and such only becomes "subject to review on . . .the final agency action." 5 U.S.C. § 704. The Church's suit is premature, as FEMA has not rendered a final aid-eligibility determination either approving or denying its PA grant application, and therefore, the suit must be dismissed for lack of justiciability under APA Section 704.

B. Under the Two-Prong Test from *Abbott Labs*, Plaintiffs Did Not Allege Either a "Purely Legal Question" Nor a Sufficient "Hardship" to Justify Immediate Judicial Review.

The Supreme Court crafted a two-prong test to help courts determine when pre-enforcement review of agency action is permissible: (1) is the question presented "fit" for judicial review, alleging only a purely legal question, not requiring substantial additional further fact-finding; and (2) is the potential impact of the regulation on the plaintiff "sufficiently direct and immediate" to justify judicial review at an earlier stage. *Abbott Labs*, 387 U.S. at 149-52. Put differently, the "fitness" prong evaluates

whether the regulation interferes with plaintiff's operations, and the "hardship" prong measures the degree of the potential injury-in-fact that would result from that interference.

1. *The Church's challenge is unfit for judicial review because it seeks review of a fact-based, discretionary determination reserved to agency action, not a "purely legal question."*

An issue is fit for review when it presents a "purely legal question." *Abbott Labs,* 387 U.S. at 149. For example, the *Abbott Labs* Court found "whether the statute was properly construed by the Commissioner" in creating the new requirement to be a "purely legal question." *Id.* However, courts have discretion to deny review even if the case presents such a legal question, if the court "believe[s] that further factual development would 'significantly advance [their] ability to deal with the legal issues presented.'" *National Park Hospitality Ass'n*, 528 U.S. at 812 (quoting *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 82 (1978)).

In essence, the Church seeks review of FEMA's denial of funds before such a denial has ever been made. Far from a "purely legal question," the issue presented here requires guesswork on the part of this Court as to what FEMA's ultimate determination would be, based on their fact-intensive application of the mixed-use standard. The *Abbott Labs* Court did find that, at the very least, the Food and Drug Administration's rulemaking action was "final" under the APA, which is readily distinguishable from FEMA's actions in this case, as no final determination of aid-eligibility was ever rendered.[3] There can be no dispute that further fact-finding, and

[3] Respondent does not argue the Church was required to satisfy the doctrine of exhaustion, rather the Church cannot challenge a "denial" that has yet to occur. At the very least, the Church was

indeed a final eligibility determination by FEMA, would "significantly advance" the Court's ability to address the Church's claim. *National Park Hospitality Ass'n*, 528 U.S. at 812.

Additionally, the Church's claim further fails the "fitness" prong as case law indicates FEMA's aid-distribution determinations are reserved to agency discretion by law. *See Lockett v. Federal Emergency Management Agency*, 836 F. Supp. 847 (S.D. Fla. 1993); *City of San Bruno v. Federal Emergency Management Agency,* 181 F. Supp. 2d 1010 (N.D. Cal. 2001); *Konashenko v. Federal Emergency Management Agency*, 2014 WL 1761346 (E.D. N.Y. 2014). In determining that actions under Section 308 of the Stafford Act are reserved to agency discretion, the Florida District Court found persuasive the language that the President "may" act, in conjunction with the discretionary language of the corresponding agency regulation. *Lockett*, 836 F. Supp. at 854-55; *see also United States v. Rodgers*, 461 U.S. 677 (1983) ("The word 'may' when used in a statute, usually implies some degree of discretion.").

Following the logic in *Lockett,* aid-eligibility determinations under Section 406 of the Stafford Act, the Public Assistance Program, are similarly insulated from judicial review. *See generally* 5 U.S.C. § 701(a); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Section 406 states the President "may make contributions" to PNPs that meet certain statutory conditions. 42 U.S.C. § 5172(a)(3). The corresponding FEMA interpretation of the statute describes FEMA's authority to determine eligibility of: (1) applicants as a private nonprofit, (2) the facility itself,

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required to wait until FEMA rendered a final aid-eligibility determination *denying* it benefits, before filing a suit claiming entitlement to such funds.

(3) the type of work required, and (4) the potential costs associated. 44 C.F.R. § 206.221.

No federal agency can be compelled to engage in a discretionary action, and even if FEMA were to find a PNP "eligible," it would not necessarily be required to distribute PA grant funds. *Lockett*, 836 F. Supp. at 854. FEMA, alone, retains the discretion to award PA grants under the Stafford Act, and, in general, actions reserved to agency discretion by law must be dismissed for lack of justiciability. *See Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009).

Finally, the Church cannot allege a question fit for review because the Stafford Disaster Relief Act contains a "discretionary function exception," exempting the federal government from any claims based on the performance or denial of any "discretionary function or duty." 42 U.S.C. § 5148. The Court has created a two-part test for "discretionary function exemptions," asking: (1) whether the act involves an element of judgment or choice; and if so, (2) whether that judgment is of the kind the discretionary function exception was designed to shield. *United States v. Gaubert,* 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). It is clear the "decision to fund (or not fund) repairs necessarily involves the judgment of the decision-maker and is therefore discretionary." *California-Nevada Methodist Homes, Inc. v. Federal Emergency Management Agency,* 152 F. Supp. 2d 1202 (N.D. Cal. 2001). According to the Fifth Circuit in *St. Tammany Parish v. Federal Emergency Management Agency*, "the Stafford Act, its regulations, and related agency guidance do not give rise to a mandatory duty," but instead "permit

discretionary, policy-oriented choices that cannot be the basis for" judicial review. 556 F.3d 307, 326 (5th Cir. 2009); *see also California-Nevada Methodist Homes, Inc.* 152 F. Supp. 2d at 1202; *United Power Ass'n v. Federal Emergency Management Agency*, 2000 WL 33339635 (D. N.D. 2000).

2. *The Church does not allege an "undue hardship" if judicial review were withheld because FEMA's actions do not chill their religious practice, nor single out religious entities for additional delay in repairs.*

In *Abbott Labs,* the plaintiff drug companies established the "hardship" prong by demonstrating a "sufficiently direct and immediate" impact of the final regulation on their "day-to-day business." 387 U.S. at 152. Hardship can only be established by alleging "adverse effects of a strictly legal kind." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Just like the Forest Service plan at issue in *Ohio Forestry Ass'n*, FEMA's regulations "do not command anyone to do anything, or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." *Id.* at 733; *see also National Park Hospitality Ass'n*, 538 U.S. at 809.

The Court reasoned the drug companies in *Abbott Labs* were faced with the choice of either incurring the substantial costs of complying with the rule (although if their challenge were later successful, those costs would be sunk) or risking prosecution. *Abbott Labs*, 387 U.S. at 153. This economic hardship satisfied justiciability as a pre-enforcement challenge. *Id.* By contrast, the Church cannot allege such "direct and immediate" harm if judicial review were withheld at this stage. What is the Court to

review, if not a final agency action denying benefits to the Church? No such denial has been made. However, as a potential pre-enforcement challenge, the Church's harm could likely take two forms: either the chilling of its religious exercise, or the denial of funds as an economic hardship.

The chilling of protected expression as a hardship is nearly always raised in the First Amendment free speech context, and the Court has expressed a repeated willingness to find these cases ripe for review. *See Steffel v. Thompson,* 415 U.S. 452 (1974); *Susan B. Anthony List,* 134 S. Ct. at 2346 (2014). However, the analysis of those cases is totally inapposite to the current facts. The line of cases which have successfully alleged potential chilling of valid constitutional rights as a hardship have succeeded on the grounds that plaintiffs face either refraining from their speech, or criminal sanction. The Church challenges a FEMA regulation that does not implicate any kind of threatened enforcement, criminal penalty, or prosecution. Nor can the Church argue FEMA's regulation inhibits their religious practice. FEMA has not prevented it from reentering its facility, or reopening as a church. According to the record the Church has reopened, which is affirmative evidence its right to free religious exercise is not chilled in any way by FEMA, nor constitutes a practical harm sufficient to justify *immediate* judicial review.

Neither does delaying judicial review until FEMA can render a final decision of eligibility impose an economic hardship. All regulated applicants seeking PA grants have a duty to begin repair as soon as possible, so to the extent that waiting for funds to be distributed is a hardship, it is imposed equally across every applicant to the

program. "In practice, the PA grant process can be lengthy, especially in large-scale disasters resulting in a high volume of applicants," such as Hurricane Rhodes, and it is "not atypical under normal circumstances" for the obligation of funds to take "several years." Stronach Decl. ¶ 18; Mem. P. & A., *Harvest Family Church v. Federal Emergency Management Agency*, No. 4:17-CV-2662 (S.D. Tex. 2017 Oct. 3, 2017). According to FEMA's Policy & Guidelines, applicants should *not* wait for FEMA to obligate funds to begin construction or work projects, as FEMA will not provide PA grants for the repair of damage caused by "deterioration, deferred maintenance, the applicant's failure to take measures to protect the facility from further damage, or negligence." *See* 44 C.F.R. § 206.223(e); Policy Guide at 19. Just like every other similarly-situated PA applicant, the Church had a duty to begin work as soon as feasible to repair and reconstruct their facility, without regard to FEMA's timeline of actual or proposed distribution of funds.

II. THIS COURT SHOULD AFFIRM THE FOURTEENTH CIRCUIT'S RULING AS TO THE ESTABLISHMENT CLAUSE CLAIM BECAUSE FEMA'S NEUTRAL AND NARROWLY-TAILORED MIXED-USE STANDARD BOTH UPHOLDS ITS CONSTITUTIONAL DUTY AGAINST THE PROMOTION OF STATE RELIGION, WHILE BALANCING ITS COMPELLING INTEREST IN HELPING COMMUNITIES RECOVER FROM NATURAL DISASTERS.

The First Amendment contains two distinct clauses, and subsequently two distinct doctrines, characterizing the nature of religious constitutional challenges. The Establishment Clause protects religious freedom by limiting the government's ability to promote or create a state religion. U.S. CONST. amend I. By contrast, the Free Exercise Clause prohibits government action that suppresses an individual's freedom to practice their religion. *Id.*

Both common law tradition, and the Court's line of Establishment Clause precedent, prevent FEMA from distributing taxpayer funds to religious organizations for sectarian uses. In so far as the Church pleads its claim as a burden on its Free Exercise, FEMA's mixed-use standard is a generally applicable regulation that does not bar religious practice or conduct. Finally, as the Stafford Act does not define PNPs to include sectarian groups, FEMA's regulations and policies stating the term exempts facilities used for religious instruction or worship is entitled to deference as one reasonable way to interpret the statute.

A. FEMA May Not Distribute Funds to Religious Organizations for Sectarian Uses Without Violating the Establishment Clause.

1. *Common law tradition demonstrates the importance of separation of church and state.*

Since its inception as a nation, the United States has demonstrated a commitment to religious freedom, particularly by outlawing mandatory tithes for religious entities. As the dissent discussed in *Valley Forge Christian College v. Americans United for Separation of Church & State*, "many of the early settlers of this Nation came here to escape the tyranny of laws that compelled the support of government-sponsored churches and that inflicted punishments for the failure to pay establishment taxes and tithes." 454 U.S. 464, 502 (1982) (Brennan, J. dissenting). The Court in *Everson v. Board of Education*, 330 U.S. 1, 12-13 (1947), looked to the history of religious freedom in the United States as a "primary source for understanding the objectives, and protections, afforded by the. . . Establishment Clause." *Id.*

Specifically, the *Everson* court looked to the 1784-1785 battle in the Virginia House of Delegates over "a bill establishing provision for teachers of the Christian religion," as a classic example of state-sponsored religious indoctrination. *See Reynolds v. United States*, 98 U.S. 145, 162-63 (1879). In response to the bill, James Madison drafted and circulated his "Memorial and Remonstrance Against Religious Assessments," encouraging the legislature to create and maintain complete separation of church and state. *Valley Forge Christian College*, 454 U.S. at 503 (Brennan, J. dissenting). Ultimately, Madison succeeded in passing "A Bill for Establishing Religious Freedom," which had been previously introduced seven years earlier by Thomas Jefferson. *Id.*

In summarizing the language of Madison's Bill, Justice Rutledge said "in no phase was [Madison] more unrelentingly absolute than in opposing state support or aid by taxation." *Everson*, 330 U.S. at 40-41 (Rutledge, J. dissenting). Justice Black, writing for the majority in *Everson* said simply: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice." 330 U.S. at 16. Thirty-five years later, Justice Brennan in his dissent from *Valley Forge Christian College* echoed the very same principle: "It is clear, in the light of this history, that one of the primary purposes of the Establishment Clause was to prevent the use of tax money for religious purposes." *Valley Forge Christian College*, 454 U.S. at 504. According to Justice Brennan, there is "but one constitutionally imposed limit on" Congressional tax power: "Congress cannot use tax money to support a church, or to encourage

religion. That is 'the forbidden exaction.'" *Id.* at 509 (quoting *Everson*, 330 U.S. at 45 (Rutledge, J. dissenting)).

FEMA simply refuses to use taxpayer funds for the reconstruction, restoration, or repurchasing of *religious* items, but does not reject sectarian organizations merely by nature of their religious practice. Since before the ratification of the Constitution, the Founding Fathers were concerned about the possibility that taxpayer money would be used to build churches, pay for the education of ministers, and purchase bibles. Viewed in light of the longstanding common law tradition of refusal to use tax payer funds for religious purposes, FEMA's mixed-use standard strikes a balance between the competing concerns of government support for religious practice, and the potential burden on churches' free exercise.

Throughout the 1970's the Supreme Court decided several cases about the repair and restoration of religious structures, ultimately holding they may receive public funding for maintenance and construction of their facilities, however that aid may not be used for religious purposes. *See Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking down state grants without any restrictions to religious elementary schools); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding a state statute that provided funding to public and religious colleges for construction and refinancing); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding a federal program providing grants for construction for needed facilities of colleges, including religiously affiliated colleges). FEMA's mixed-use standard simply falls within this vein of Court precedent, by exempting buildings or structures used for

sectarian practice or conduct. FEMA does not bar any organization simply for its religious identity.

On the same day the Court decided *Tilton*, it also released its opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), evaluating the constitutionality of state subsidies for textbooks and teacher salaries at parochial schools. *Lemon,* 403 U.S. at 625. The three-part *Lemon* test determines whether the distribution of public funds would violate the Establishment Clause by asking if: (1) the grant has a secular purpose; (2) would result in a neutral effect that neither advanced nor inhibited religion; and (3) avoids excessive entanglement between the government and religion. *Id.*

Applying the analysis used in *Lemon,* the *Tilton* Court found that building adequate facilities, and accommodating more students, advanced a legitimate secular purpose. *Tilton*, 403 U.S. at 678-79. Further, the grant's benefits did not advance religion, if however, the financial assistance was limited to secular features of religious education. *Id.* at 679. Under the grant's statutory authorization, the "obligation not to use the facility for sectarian instruction or religious worship would appear to expire at the end of 20 years." *Id.* at 683. While the Court held there was no Establishment Clause violation with regard to providing funds for non-sectarian use, the Court invalidated the 20-year limitation provision reasoning that if, eventually, the building was "converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id.*

The exclusion of facilities or materials used solely for religious purposes is an important caveat to each and every funding case decided by the Supreme Court. *See Hunt v. McNair*, 413 U.S. 734 (1973). Like *Tilton*, in *Hunt* the Court emphasized the significance of the state bond program's explicit exclusion of facilities used for religious purposes. *Hunt,* 413 U.S. at 736. Referring to the program, the Court emphasized that "every lease agreement must contain a clause forbidding religious use and another allowing inspections to enforce the agreement." *Id.* at 744. This satisfied the Court that the proposal would "not have the primary effect of advancing or inhibiting religion." *Id.* at 745.

In *Nyquist*, the Court noted the "expenditures for 'repair and maintenance' are similar to other expenditures approved by this Court," but those cases fall within the "narrow" channel of "neutral, nonideological aid" for the secular instruction of students at parochial schools. 413 U.S. at 775-6. However, the New York state grant program at issue in *Nyquist* was not so narrowly-tailored, as the state could not demonstrate "an effective means of guaranteeing the . . .public funds will be used for secular, neutral and nonideological purposes." *Id.* at 780. The Court distinguished *Nyquist* from *Tilton* and *Hunt* on the grounds that the benefits received by the schools were "indirect and incidental." *Id.* at 775. In *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court held funds may be distributed directly to both public and religious schools, provided the funds do not directly support religious indoctrination or teaching, nor discriminate among recipients solely based on their secular or sectarian nature.

2. *FEMA's mixed-use standard does not create an excessive entanglement under Lemon.*

The Church's request that FEMA provide federal funds to sectarian organizations for religious purposes would violate the federal Establishment Clause. However, FEMA's mixed-use standard allows sectarian organizations to recover funds, but limits their use to only secular purposes, which complies with all three prongs of the *Lemon* test. The first prong of *Lemon* asks whether the government action has a secular purpose. 403 U.S. at 612. Meaning, if the primary purpose of the government's action is to advance religion, it is unconstitutional. *McCreary County v. American Civil Liberties Union*, 545 U.S. 844. Here, the primary purpose of the PA grant program is to provide federal assistance to governmental organizations and certain PNPs after a major natural disaster. The purpose of FEMA's mixed-use standard is to mitigate the likelihood that government funds directly support the repurchasing or restoration of religious iconography, structures, or objects by differentiating eligibility based on actual use of the facility. FEMA's actions follow both Court precedent from the rebuilding cases of the 1970's, and advance a secular purpose in antiestablishment interests.

The second prong of *Lemon* seeks to ensure the primary effect of the government's action neither advances nor inhibits religion. *Lemon*, 403 U.S. at 612. Under this prong, FEMA's direct funding for religious facilities or materials would effectively amount to governmental advancement of religion. Neither does FEMA's action inhibit religious practice. The Church is not faced with a choice between remaining a church or closing, nor does FEMA categorically bar all churches from recovery based on the

nature of their religious identity. Unlike *Tilton*, the benefits resulting from FEMA's aid, if directed at religiously affiliated facilities without limitations, would have the "principle or primary effect" of advancing religion. *Lemon*, 403 U.S. at 612.

Lastly, FEMA's mixed-use standard does not create an excessive government entanglement with religion. The court "must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority," to determine if a government action creates an excessive entanglement. *Lemon*, 403 U.S. at 615. In *Lemon,* the Court found the state's subsidies for religious schools for textbooks and teacher salaries created such an excessive entanglement because of the "restrictions and surveillance necessary to ensure that teacher's play a strictly non-ideological role." *Id.* at 621.

FEMA's mixed-use standard does not create an excessive entanglement merely because it requires onsite interviews with FEMA personnel to determine eligibility, as this argument fails the actual analysis of the *Lemon* Court. There, teachers received state subsidies to teach secular subjects in religious or public schools, but those subsidies were "carefully conditioned" that teachers: could only teach subjects offered at public schools, using the same texts and materials, and could not in any way engage in the teaching of a religion course. *Lemon,* 403 U.S. at 619. To ensure those criteria were observed would require "comprehensive, discriminating, and *continuing* state surveillance," an untenable government entanglement *Id.* (emphasis added). FEMA's interviews and onsite visits are a one-time event, where all the

requisite information is acquired. Then, using internal procedures, FEMA makes an eligibility determination, and if appropriate, distributes the funds in a one-time sum. None of those actions implicate the sweeping, continual surveillance that so troubled the *Lemon* Court.

In recent years, the Court's Establishment Clause jurisprudence has shifted towards a neutrality-based approach. *See Zelman v. Simon-Harris*, 536 U.S. 639 (2002); *Mitchell*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenburger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). Using a neutrality approach, the Court asks whether the Government was trying to convey "a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 427 U.S. 38, 70 (1985) (O'Connor, J., concurring). FEMA's mixed-used standard is neutral because it uses a statutory set of criteria that is applied equally to all PNPs applicants, both secular and sectarian. 44 C.F.R. § 206.221.

The United States Department of Justice has determined that FEMA's actions *are* constitutional in light of its duty under the Establishment Clause to eliminate state promotion of religion. After an earthquake damaged a religious school in Seattle in 2001, the Office of Legal Counsel ("OLC") for the U.S. Department of Justice issued an opinion for FEMA on whether the Establishment Clause, and the Court's line of cases, would prohibit the agency from providing assistance to the school. United States Dep't of Justice: Office of Legal Counsel, 26 OP. O.L.C. 114 (2002).[4] The OLC

[4] U.S. Dep't. of Justice, Office of Legal Counsel, AUTHORITY OF FEMA TO PROVIDE DISASTER ASSISTANCE TO SEATTLE HEBREW ACADEMY, MEMORANDUM OPTION FOR THE GENERAL COUNSEL, FEDERAL EMERGENCY MANAGEMENT AGENCY, 26 OP. O.L.C. 114 (September 25, 2002), *available at* https://www.justice.gov/file/623861/download.

noted FEMA's aid is made available on the basis of neutral criteria, and because FEMA exercised its discretion in a neutral manner there is no Establishment Clause violation. *Id.* The opinion concluded that FEMA assistance should be analyzed as a type of emergency service under neutrality principles, rather than educational assistance, which the Court analyzes under *Lemon*. *Id.* While deference to the OLC's constitutional interpretations is not required, courts may take them under advisement when considering related matters. CONG. RES. SERV. CYNTHIA BROWN, FEDERAL AID FOR RECONSTRUCTION OF HOUSES OF WORSHIP: A LEGAL ANALYSIS (October 19, 2015), *available at*: https://fas.org/sgp/crs/misc/R42974.pdf.

B. FEMA's Mixed-Use Standard Does Not Burden the Church's Free Exercise of Its Religious Faith.

Generally, a statute will be struck down as burdening a party's exercise of their religious freedom if it presents an untenable choice between religious practice and a government benefit. In *Trinity Lutheran,* the Court emphasized that when Free Exercise challenges are rejected, it is often because the laws in question have been neutral and generally applicable without regard to religion. *Trinity Lutheran*, 137 S. Ct. at 2020. The Court is "careful to distinguish such laws from those that single out the religious for disfavored treatment." *Id; see also McDaniel v. Paty*, 435 U.S. 618, 627 (1978) (the statute discriminated against McDaniel solely because of his "status as a minster").

This case sits at the intersection between the Free Exercise and Establishment Clauses, a situation the Court discussed directly in *Locke v. Davey*, 540 U.S. 712 (2004). In *Locke,* a student sued the state of Washington claiming the State's

scholarship program unconstitutionally singled out religion for unfavorable treatment. *Id.* The scholarship program allowed him to attend a religious institution, enroll in a devotional theology course, but not major in devotional theology. *Id.* The Court held that although the state program did not violate the Federal Establishment Clause, there was similarly no Free Exercise violation in denying him under the state constitution's antiestablishment interest. *Id.* at 719. The Court reasoned that because of the state's historic interest in not training ministers, and the relatively minor burden on the student, the grant program did not violate the Constitution. *Id.* at 722.

Unlike *Locke,* where the state grant program was narrowly-tailored to only scholarship recipients, in *Trinity Lutheran* the Missouri Department of Natural Resources determined the church was ineligible under the state constitution's blanket ban of religious entities' participation in state programs. *Trinity Lutheran*, 137 S. Ct. at 2018. Specifically, Trinity Lutheran's right to participate in a program that offered reimbursement grants to qualifying nonprofit organizations that purchased playground surfaces made from recycled tires. *Id.*

The parties both agreed the Federal Establishment Clause did not prevent Missouri from including Trinity Lutheran in its Scrap Tire Program because the provision of funds would have no implication on religious practice. *Id.* at 2019. However, the Court recognized, as it did in *Locke*, there is a "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. *Id.* (citing *Locke*, 540 U.S. at 718). The Court ultimately held the Department's policy was a violation of Trinity Lutheran's rights under the Free

Exercise Clause by denying it an otherwise available public benefit solely on account of its religious status. *Trinity Lutheran,* 137 S. Ct. at 2024. The Court stated, "the express discrimination of 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 2015. Unlike *Locke*, Missouri's constitutional interest in antiestablishment concerns was not narrowly-tailored to only one subset of potential college majors, but rather a categorical exclusion of any sectarian organization from any state funds in any program. *Trinity Lutheran,* 137 S. Ct. at 2024

In the present case, the Church has analogized its claim to that of *Trinity Lutheran*. However, unlike the statute at issue in *Trinity Lutheran,* the Church is not being excluded from government funds solely because it is a church. Rather, FEMA treats nonreligious and religious organizations alike. Mem. P. & A., *Harvest Family Church v. Federal Emergency Management Agency*, No. 4:17-CV-2662 (S.D. Tex. 2017 Oct. 3, 2017). FEMA does not de facto deny churches or other faith-based organizations from its PA grant program, just as it does not automatically award grants to secular PNPs. *Id.* Instead, FEMA determines eligibility by evaluating the use of the facility, and the service provided by a particular PNP. "In applying the statutory criteria, FEMA has provided assistance to hundreds of religious organizations, including churches and other houses of worship that provide such services." *Id.*

Additionally, the Church's claim is distinguishable from both *Locke* and *Trinity Lutheran*, because the question here is whether a federal agency, not a state, may directly provide aid to a religious institution. That, in itself, does not necessarily violate the Federal Establishment Clause, only because FEMA limits the use of those funds for nonsectarian purposes. However, neither the actions in *Locke* nor *Trinity Lutheran* violated the Federal Establishment Clause because the funds were not federal funds, but rather state funds. The Supreme Court has repeatedly distinguished state autonomy, *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986), and individual and private choice, in the distribution of funds from states directly to sectarian entities or indirectly to individuals. *Zelman*, 536 U.S. at 638.

Further refuting the charge that churches are categorically barred from recovering any FEMA funds, churches often receive reimbursements incurred for emergency expenses like feeding, sheltering, or providing water to those displaced by the natural disaster pursuant to an agreement with the State government. Press Release, Federal Emergency Management Agency, Faith-based, Voluntary and Nonprofit Organizations May Be Eligible for FEMA Disaster Grants (Sep. 28, 2017), https://www.fema.gov/news-release/2017/09/28/faith-based-voluntary-and-nonprofit-organizations-may-be-eligible-fema. Although the Record states the Church was designated an emergency relief shelter, there is no indication it was ever used as such during or after Hurricane Rhodes. *See* R. at 7.

However, under the Court's existing precedent, denial of a government benefit for facially-religious reasons triggers a claim of Free Exercise. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Once such a burden is identified, the Court can analyze the claim under one of two standards of review: rational basis or strict scrutiny. In *Employment Division, Dept. of Human Resources of Oregon v. Smith,* the Court refined the initial test that originated in the 1960's with *Sherbert*, to an analysis which asks if the law in question is generally applicable, or whether it specifically targets religion. *Smith,* 494 U.S. at 878. The *Smith* Court found it permissible to deny unemployment benefits to individuals who tested positive for peyote use, which they argued was a ritual part of their religious practice, because it was an otherwise valid, generally applicable criminal law. *Id.* In contrast, the Court struck down a regulation outlawing a specific variant of ritualist animal sacrifice in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, because the regulation was so obviously targeted at one particular religious sect. 508 U.S. at 534-35.

If the Court determines strict scrutiny is applicable, the proper analysis is whether the government can provide a compelling state interest that is advanced by a narrowly-tailored regulation. *Id.* at 405. In applying the strict scrutiny analysis in *Wisconsin v. Yoder,* the Court found that although the government has an "admittedly strong interest" in compulsory education, it could not articulate with sufficient "particularity" how it would be adversely affected by granting a religious exemption to the Amish community. 406 U.S. 205, 236 (1972). After *Smith*, a strict scrutiny analysis is only applicable in the special case of "hybrid claims," where a

plaintiff can allege not just a Free Exercise claim but an additional burden to another constitutional right like Free Speech. *Smith*, 494 U.S. at 882. Because the Church never raised an additional constitutional claim, it has not alleged a hybrid claim which qualifies for a strict scrutiny analysis. Therefore, the Court must proceed under the rational basis test provided by *Smith.*

FEMA's mixed-use standard is both neutral and generally applicable as required by *Smith*, because it is applied evenly across all PNP applicants – secular or sectarian. Secular PNPs that provide vocational training for adults could just as easily be found ineligible for PA grant funds under the mixed-use standard as a Church. Policy Guide at 19. The standard does not target any one religious sect, nor sectarian organizations in general, merely by nature of their religious identity. At its simplest form, the Free Exercise Clause is written so as to limit the government's effect on individuals, not to grant individuals the ability to exact something from the government. The Church's claim falls well within the latter category – it is seeking discretionary grant funds from a government entity that has not denied them an economic benefit for a constitutionally protected reason.

Even if this Court chooses a strict scrutiny analysis, FEMA's mixed-use standard is still constitutional. Implicit in *Trinity Lutheran* is the question of whether Missouri's interest in avoiding an Establishment Clause violation is sufficient to overcome a Free Exercise challenge, and the Court answers in the negative. 137 S. Ct. at 2025. However, unlike *Trinity Lutheran*, the case before the Court today is not complicated by the Fourteenth Amendment implications of state action, nor does it

contain a categorical bar for all religious entities. At footnote 3 in *Trinity Lutheran,* Chief Justice Roberts explicitly narrows the holding to the facts of the case, namely to funding playground resurfacing, "not religious uses of funding or other forms of discrimination."[5] *Id.* at 2024. Today, the Court should distinguish the holding in *Trinity Lutheran,* and hold the federal government has a compelling government interest in the nonpromotion of religion sufficient to survive a Free Exercise challenge, when the challenged action is not a blanket exclusion of all religious groups, but rather a narrowly-tailored, neutral set of criteria.

FEMA alleges a compelling interest in avoiding an Establishment Clause violation because "[i]n terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer – and upon the life of all citizens" than that of the prohibition on Congress to enact laws "respecting an establishment of religion." *Valley Forge Christian College*, 454 U.S. at 514 (Stevens, J., dissenting). By its very nature, in distributing PA grant funds to a Catholic church for the restoration of its tabernacle, or to a mosque for the repair of its minarets, is the use of taxpayer funds to further religious practice. Such a subsidy runs counter to more than 250 years of American history and jurisprudence.

[5] Chief Justice Roberts wrote for the majority of the Court, however only Justices Kagan, Alito, and Kennedy joined in full (i.e. including footnote 3). Justices Thomas and Gorsuch joined in the opinion with the exception of footnote 3.

C. FEMA's Interpretation That PNPs Do Not Include Sectarian Organizations is Entitled to Deference.

The Stafford Act defines PNPs to include medical, emergency or educational facilities, as well as those that provide "essential services of a governmental nature" like zoos, museums, or community centers. 42 U.S.C. § 5122(11). The Act is silent as to whether PNPs include religious organizations or those that support sectarian practices. FEMA has determined PNPs do not include organizations used for "sectarian instruction or worship." Policy Guide 2016 at 14. In its accompanying regulations, FEMA has further defined the individual categories of PNPs like "educational facilities" to include those "supplies, equipment, machinery, and utilities" required for the continued operation of a school, but specifically exempted "the buildings, structures, and related items used primarily for religious purposes or instruction." 44 C.F.R. § 206.221(e)(1). Those organizations may recover funds, however, under the mixed-use standard for any other qualifying activities. Using the "educational facilities" example, if a diocesan grade school has a building for their general curriculum of math, English, science, music, and art, but a separate chapel and classroom for the instruction and practice of the Catholic faith, under FEMA's mixed-use standard, the school would potentially be eligible for PA grant funds to repair the school building, but not the chapel or its accompanying classroom.

When Congress leaves a statute silent as to a particular interpretive question, it is said Congress has delegated authority to the administering agency. *City of Arlington, Tex. v. Federal Communication Commission,* 569 U.S. 290, 296 (2013). Agencies have the expertise, time, and resources to consider technical and complex

policy questions that arise under their enabling acts and companion statutes, and are often best suited to interpret that language. *Skidmore v. Swift,* 323 U.S. 134, 140 (1944). Agency rules can take two broad forms: legislative rules and interpretive rules. Generally, legislative rules are those which are subject to the APA's rulemaking procedures like notice-and-comment. *See* 5 U.S.C. § 553. Interpretive rules are exempted from notice-and-comment rulemaking if they either advise the public of the agency's construction of the statute or rule which it administers, or are "general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A).

Depending on the type of rule, courts can defer to an agency interpretation in one of two ways: "*Chevron* deference," or "*Skidmore* deference." In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court crafted a two-step test for courts to follow when deciding whether or not an agency's legislative rulemaking interpretation is binding: (1) is the statute silent or ambiguous on the precise interpretive question at issue; and, (2) if so, is the agency's interpretation based on a reasonable construction of the statute. *Chevron*, 467 U.S. at 843. In *Skidmore,* the Court created an alternative kind of deference, which while not controlling on courts, evaluates interpretive rules against a set of factors like the thoroughness of agency consideration, validity of reasoning, and consistency with earlier pronouncements. 323 U.S. at 140. Interpretive rules can be subject to a *Chevron* analysis, as the Supreme Court arguably left open the question in *United States v. Mead*, 533 U.S. 218, 230 (2001).

FEMA's interpretation that PNPs do not include religious or sectarian organizations is a legislative rule entitled to *Chevron* deference. When determining whether a rule is legislative or interpretive, courts look to both the agency's characterization of the rule, and whether the agency intended by its action to "create new law, rights, or duties." If so, the rule is legislative. *Metropolitan School District of Wayne Township v. Davila*, 969 F.2d 485, 489 (7th Cir. 1992). FEMA characterized its promulgation of the regulations defining PNPs as a legislative rule, as evidenced by the observance of proper notice-and-comment rulemaking procedure. On March 21, 1989, FEMA published an "interim rule with request for comments," amending the definition of "educational facilities" "so that the only exclusion is for facilities used primarily for religious purposes or instruction." Interim Rule with Request for Comments, 54 Fed. Reg. 11610-01 (Sep. 21, 1989). In other words, the current definition of PNPs found at 44 C.F.R. § 206.221 was promulgated for public comment. No comments were received questioning the exemption of "religious purposes or instruction" from the definition of "educational facilities." Final Rule, 55 Fed. Reg. 2297-01 (Jan. 23, 1990) (to be codified at 44 C.F.R. § 206). Generally, interpretive rules are used to define terms "without having to undertake cumbersome proceedings," *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987), like notice-and-comment, yet FEMA chose to do so. Further, ""legislative rules" are those which create law, usually implementary to an existing law.'" *Id.* (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952)). FEMA created a new law defining the eligibility of educational facilities, to better implement the Stafford Act.

As a legislative rule, FEMA's promulgation of the definitions of PNPs at 44 C.F.R. § 206.221 is entitled to *Chevron* deference. Under Step (1), Congress defined PNPs broadly, but was silent as to the inclusion of religious or sectarian organizations. FEMA, as the administering agency of the Stafford Act, interpreted Congress' silence to mean that religious or sectarian organizations are *not* eligible for recovery as PNPs. Under Step (2), the Court should conclude such an interpretation was one "reasonable" construction of the statute. It need not be the best interpretation available, merely a "permissible" or "reasonable" construction.

If the Court disagrees that FEMA's promulgation was a legislative rule and instead finds its actions to be interpretive, FEMA argues its rule is still subject to *Chevron* deference. In *United States v. Mead,* the Court stated that although the vast majority of *Chevron* cases reviewed "the fruits of notice-and-comment rulemaking," the want of formal rulemaking procedure did not bar the use of *Chevron*. *Mead*, 533 U.S. at 230. The next term, in *Barnhart v. Walton*, 535 U.S. 212 (2002), the Supreme Court refined its holding in *Mead*, and enumerated factors like the "interstitial nature of the legal question, related expertise of the agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time," to determine whether *Chevron* is the "appropriate legal lens through which to view the legality of the Agency interpretation" at issue. *Barnhart*, 535 U.S. at 222.

First, FEMA used formal rulemaking procedure, which according to the *Mead* Court initially demarcates its interpretation as fit for *Chevron* deference. *Mead*, 533 U.S. at 230. Second, FEMA's actions meet the *Barnhart* test. In promulgating 44 C.F.R. § 206.221(e), the agency carefully evaluated the relevant language of the Stafford Act and tailored its regulations. FEMA is the only federal agency with exclusive jurisdiction over disaster relief, although some other agencies like the SBA may be tangentially related to its mission. FEMA's determination that it cannot provide PA grant funds for religious worship or sectarian practice is crucial to the administration of the statute, because if FEMA is in fact required to provide such funds, that completely changes the distribution and amount of funds available across the board to all PNPs. The administration of PA grant funds is widely acknowledged to be extremely complex and time consuming. And finally, FEMA originally promulgated its interim rule redefining "educational facilities" in 1989, and promulgated the final rule adopting the definition on January 23, 1990. Final Rule, 55 Fed. Reg. 2297-01 (Jan. 23, 1990) (to be codified at 44 C.F.R. § 206). Twenty-eight years later, FEMA's definition of "educational facility" is still in use.

Alternatively, FEMA argues that its mixed-use standard found in the Policy Guide is its own interpretation of the original regulation at 44 C.F.R. § 206.221(e) extending the exemption of "religious purpose or instruction" to not just educational facilities but all PNPs, and as such, should be given controlling weight. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The Policy Guide would normally be subject to *Skidmore* deference as an agency regulatory manual. *See Christensen v.*

Harris County, 529 U.S. 576, 587 (2000). The mixed-use standard at issue before the Court today is found only in the Policy Guide, not in the accompanying regulations that were subject to notice-and-comment rulemaking. As such, the mixed-use standard itself is not entitled to *Chevron* deference, but rather FEMA argues it is an interpretation extending the agency's original finding that religious entities cannot recover for sectarian uses.

Generally, an agency's interpretation of its own regulations is given controlling weight, and is entitled to judicial deference, unless it is plainly erroneous or inconsistent with the regulation. *Seminole Rock*, 325 U.S. at 414. FEMA's regulation at 44 C.F.R. § 206.221(e) plainly states that FEMA cannot provide public monies for the repair of buildings, structures, or the repurchasing of related items "used primarily for religious purposes or instruction," although arguably the rest of the "educational facility" could recover. *See* 44 C.F.R. § 206.221(e). In its Policy Guide, FEMA has further defined that sectarian exemption by creation of the mixed-use standard, which applies to all PNPs, not just "educational facilities." Policy Guide at 10-16. The mixed-use standard is one reasonable way for FEMA to determine PNP eligibility for the discretionary distribution of funds, and is consistent with the original definition promulgated in 1989.

CONCLUSION

FEMA is entitled to summary judgment on both the ripeness and First Amendment claims. The Church has yet to suffer a justiciable injury under either Article III or the Administrative Procedure Act, because this lawsuit was filed before the agency could render a final decision denying it an economic benefit. The Church cannot allege a pre-enforcement challenge because: (1) its claim does not pose a purely legal question; and, (2) it suffers no hardship in delaying judicial review because it is not subject to the threat of adverse enforcement, criminal penalties, or prosecution, nor has FEMA chilled its religious exercise under the First Amendment, as the Church has currently reopened. U.S. CONST. amend. I.

These facts sit at the intersection between the Establishment and Free Exercise Clauses. Under the Establishment Clause of the First Amendment, FEMA may not distribute taxpayer funds to religious organizations for sectarian uses. *See* U.S. CONST. amend. I. FEMA's actions similarly do not burden the Church's Free Exercise, because FEMA's mixed-use standard is a generally applicable regulation that does not bar religious practice or conduct. Finally, as the Stafford Act does not define PNPs to include sectarian groups, FEMA's regulations and policies stating the term exempts facilities used for religious instruction or worship is entitled to deference as one reasonable way to interpret the statute.

Respectfully submitted this 20th day of November 2017,

Team #61, Counsel for Respondents

APPENDIX

Constitutional Amendment

U.S. CONST. amend. I

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

Statutory Provisions

42 U.S.C. § 5122. Definitions.

(11) PRIVATE NONPROFIT FACILITY –

(A) In General – The term "private nonprofit facility" means private nonprofit educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled) and facilities on Indian reservations, as defined by the President.

(B) Additional Facilities – In addition to the facilities described in subparagraph (A), the term "private nonprofit facility" includes any private nonprofit facility that provides essential services of a governmental nature to the general public (including museums, zoos, performing arts facilities, community arts centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, and facilities that provide health and safety services of a governmental nature), as defined by the President.

42 U.S.C. § 5172(a)(1), (3). 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.

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

(3) CONDITIONS FOR ASSISTANCE TO PRIVATE NONPROFIT FACILITIES –

(A) IN GENERAL – The President may make contributions to a private nonprofit facility under paragraph (1)(B) only if –

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

(ii) the owner or operates 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, education, and emergency medical care.