No. C17-2893-1

**IN THE**

# SUPREME COURT OF THE UNITED STATES

**October Term 2017**

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**COWBOY CHURCH OF LIMA,**
***PETITIONER,***
**v.**

**FEDERAL EMERGENCY MANAGEMENT AGENCY,**
**W. CRAIG FUGATE, ADMINISTRATOR OF THE**
**FEDERAL EMERGENCY MANAGEMENT AGENCY,**
***RESPONDENTS.***

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*On Writ of Certiorari to the*

*United States Court of Appeals for the Fourteenth Circuit*

# Brief for Petitioner

**Team No. 67**
***Attorneys for Petitioner,***
***Cowboy Church of Lima***

## QUESTIONS PRESENTED

I. A case is ripe for judicial adjudication when the issues are appropriate for judicial resolution and a hardship is imposed upon a party. Did the Fourteenth Circuit err by holding that Cowboy Church's case was not ripe for judicial adjudication?

   A. The issue is appropriate for judicial resolution when it concerns a primarily legal question, does not demand additional factual development, and the regulation at issue is a "final agency action." Does a categorical exclusion of religious organizations, where no new facts will emerge, and a FEMA adjuster has given a de facto denial of relief, make the case appropriate for judicial resolution?

   B. A hardship is imposed when the action results in sufficiently direct and immediate consequences if relief is denied. Does a religious institution, whose facilities are extensively damaged, and who complied with all the necessary FEMA regulations, but is denied relief solely due to its religious status, suffer a hardship?

II. The First Amendment of the United States Constitution includes the Establishment Clause and the Free Exercise Clause in order to institute a civil coexistence of the church-state dichotomy. Did the Fourteenth Circuit err by upholding the granting of a motion for summary judgment, holding the Establishment Clause barred recovery on the denial of the religious institution's application for financial aid?

   A. The Establishment Clause protects government regulations from inhibiting the practice of religion. Does a regulation that specifically excludes a religious institution from receiving federal aid violate the Establishment Clause and is therefore unconstitutional?

   B. When a government action has the secular purpose of helping communities in times of natural disaster, its neutral application only incidentally benefits a religious organization, and the implementation of the government action does not create excessive entanglement by the government into the religious organization's affairs, is that government action in compliance with the Establishment Clause and therefore constitutional?

   C. The Free Exercise Clause provides persons and institutions protection when expressing their beliefs. Does a government regulation that establishes a maximum threshold religious use of a facility as the

determining factor to receive federal aid prevent the free exercise of the religious activity?

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## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourteenth Circuit was entered 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) (2006).

## OPINIONS BELOW

The opinion of the United States District Court for the Central District of New Tejas is unreported. The opinion of the Fourteenth Circuit is also unreported and set out in the record. R. at 2–21.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment's Religion Clauses, the Establishment Clause and the Free Exercise Clause, U.S. CONST. amend. I. *See* App. A. This case also involves the ripeness doctrine, which is rooted in the Constitution's case or controversy requirement, U.S. CONST. art. III., § 2, cl. 1. *See* App. B.

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and rules involved in this case are listed below and reproduced in the Appendix:

44 C.F.R. § 206.221(e)(7) (2003). *See* App. C.

44 C.F.R. § 206.221(f) (2003). *See* App. D.

5 U.S.C. § 704 (2012). *See* App. E.

## STATEMENT OF THE CASE

This is a case about the Federal Emergency Management Agency (FEMA) categorically excluding religious organizations from eligibility for natural disaster-related assistance. It raises important questions about whether a case is ripe for

adjudication when a party has effectively been denied assistance, although has yet to receive an official determination, and about how the First Amendment's Religion Clauses affect natural disaster relief funds.

***Hurricane Rhodes floods the Cowboy Church of Lima.*** On August 13, 2016, Hurricane Rhodes made landfall, dropping over forty-five inches of water within just thirty-six hours. R. at 2. As flood waters continued to rise, the water soon flooded the 88-acre tract of the Cowboy Church of Lima (Cowboy Church) on August 15, 2016. R. at 4. The two structures of the Cowboy Church, a registered 501(c)(3) organization, that experienced significant water damage (flooded with over three feet of water) included the chapel, and the events center. R. at 3, 4–5. The chapel held religious, civil, and private events, while the events center hosted community activities. R. at 7. These facilities endured extensive damage due to the water that remained in the building from August 15, 2016, until August 17, 2016. R. at 5. With extensive damage to the carpets, flooring, drywall, insulation, doors, furniture, pews and a variety of other materials, this left the structures destroyed. *Id.*

***Chaplain Hudson Assesses the Damage.*** With the help of the church staff, Chaplain Hudson, the head of the church and the manager of the church grounds, began remediation on the chapel and the event center, which comprised the structures that received the water damage. R. at 5. Chaplain Hudson and the staff removed the damaged sheetrock and insulation from the buildings, as well as the floors, which included carpet, marble, and wood floorings. *Id.* Chaplain Hudson noted that the buildings were not at their original state and quickly asked Kurt Hummel,

a structural engineer and home designer, to evaluate the status of the buildings. *Id.* Upon his inspection, Hummel concluded that immediate repairs needed to be made within the coming months, otherwise the structures were at risk of collapsing. R. at 6. Indeed, eventually the roof did collapse. R. at 9. A previous determination that the church facilities sat outside the 100-year flood plain and thus unlikely to flood led the Cowboy Church to forgo flood insurance, leaving the church without the necessary monetary means to repair the church. R. at 6.

***Hurricane Rhodes is Declared a Major Natural Disaster.*** A few days after the initial landfall of Hurricane Rhodes on August 19, 2016, President Barack Obama declared Hurricane Rhodes to be a major natural disaster, which allowed Federal Emergency Management Agency (FEMA) relief to be supplied to the areas affected by the storm and its terrible aftermath. R. at 6.

***Cowboy Church Files for FEMA Assistance and Undergoes Assessment.*** With this information, Chaplain Hudson, upon the advice of Attorney Arthur Abrams, immediately filed an online application for assistance from FEMA on August 20, 2016, and then later submitted an application for a Small Business Administration (SBA) loan. R. at 6. On August 25, 2016, Quinn Fabray, a FEMA adjuster, assessed the affected properties and told Chaplain Hudson that although she was not allowed to divulge FEMA's policy, she did state that she "hated that FEMA does not cover monetary assistance for churches." R. at 7. Furthermore, she did not know of any exceptions that the church would benefit from and that Chaplain

Hudson should not "get his hopes up" that he would receive financial assistance for the extensive damages that Cowboy Church had suffered. R. at 7–8.

After hearing Fabray's assessment, Chaplain Hudson spoke with Attorney Abrams, who informed Chaplain Hudson that FEMA would deny his application. R. at 8. The only way for Chaplain Hudson to save his church was to take immediate action. *Id.* Hudson then filed suit against FEMA on August 29, 2016; consequently, FEMA immediately stopped processing the claim. *Id.*

***Cowboy Church Receives Help in Returning to Basic Functionality.*** With the risk of the community event center and the chapel collapsing and with no sign of forthcoming assistance from FEMA, Chaplain Hudson accepted national and local charitable help to get the church back to a functional state. R. at 8–9. Hudson solicited donations, national networks and church groups donated materials, Hummel donated his time to determine the necessary structural repairs, and a construction company's charitable assistance in repairing the severe structural damage of the south wall of the chapel. R. at 8–9. Only with assistance and coordination that spanned across the country was the Cowboy Church of Lima able to reopen their doors to the public on July 26, 2017. R. at 8.

***The District Court.*** Following discovery, U.S. Attorney Sebastian Smythe moved for summary judgment and dismissal on two theories: (1) Cowboy Church's case was not ripe for judicial adjudication; and (2) FEMA's policy of excluding churches from aid is rooted in the First Amendment, so as to preserve the sanctity of the Establishment Clause. R. at 10. Judge Beiste denied FEMA's motion for summary

judgment in part and granted the motion in part, denying the lack of ripeness claim, but stating that the Establishment Clause barred Cowboy Church's recovery. *Id.*

***The Appellate Court.*** On appeal, the Fourteenth Circuit held that Cowboy Church's case was not ripe for adjudication, and affirmed the summary judgment on the First Amendment claim, citing the harmony between the Establishment Clause and the Free Exercise Clause. R. at 15, 17. Cowboy Church petitioned this Court, and certiorari was granted. R. at 1.

## SUMMARY OF THE ARGUMENT

### I. Pre-Enforcement Review by the Supreme Court of the United States Does Not Bar FEMA From Being Subject to a Lawsuit by the Doctrine of Ripeness.

The Fourteenth Circuit erroneously held that Cowboy Church's case was not yet ripe for judicial adjudication. The Fourteenth Circuit blamed its denial on the ripeness doctrine's purpose of preventing courts from getting entangled in political questions prior to an official, finalized determination, but failed to take into account FEMA's categorical exclusion of religious institutions from disaster assistance eligibility. Cowboy Church's case is appropriate for judicial review because it presents a legal question as to whether religious institutions should continue to be precluded from disaster relief, no additional facts will develop, and FEMA's policy constitutes final agency action. The case is further ripe because FEMA's denial of relief levies a burdensome hardship upon Cowboy Church.

Cowboy Church complied with every FEMA regulation and rule, yet still is ineligible for assistance because of its religious affiliation. If Cowboy Church were any other type of nonprofit, its eligibility for aid would not be in question. This is not something that is going to change, and this Court will not be in a better position than it currently sits to decide this issue. This Court should also take notice of the hardship that FEMA's denial places upon Cowboy Church. Even with the charity of the community and national donations, Cowboy Church still is not back to the point it was before Hurricane Rhodes and the subsequent flooding. Continuing to wait on a determination from FEMA, when a FEMA adjuster specifically told Chaplain Hudson that FEMA does not give assistance to churches, imposes a heavy hardship on

Cowboy Church, who would qualify for assistance were it simply not a church. This Court cannot allow FEMA to categorically exclude religious organizations from disaster relief, then hide behind the defense of the ripeness doctrine when disaster victims trying to recover and rebuild bring legal action to ensure assistance.

## II. The First Amendment's Religion Clauses Do Not Bar Cowboy Church From Receiving FEMA Disaster Relief.

The Fourteenth Circuit erroneously held that the current FEMA policy excluding Cowboy Church of Lima from receiving federal aid in the aftermath of Hurricane Rhodes did not violate the Establishment Clause for three reasons (1) a policy that would allow a religious institution to receive funds in a desperate time of need would not violate the Establishment Clause under applicable tests; (2) the current FEMA policy is written in a way that excludes the practical possibility that a religious institution may qualify to receive aid and it therefore has the effect of inhibiting religion; and (3) the current FEMA policy violates the Cowboy Church's right to freely exercise its religion without being specifically excluded from receiving religious aid.

Under the Establishment Clause, courts have a plethora of different tests to use when scrutinizing a government action under the Establishment Clause. However, the test formed in *Lemon v. Kurtzman* established three criteria to evaluate Establishment Clause challenges. The FEMA policy is touted as having a secular purpose: aiding damaged facilities in a time of necessity. Allowing Cowboy Church to receive FEMA assistance under the policy would simply help restore the facility to its original condition. Thus, there would be no advancement of religion, and any benefit

the religious institution would receive would be incidental, which is still permissible under the Establishment Clause. Further, Cowboy Church's receipt of FEMA assistance in the wake of Hurricane Rhodes and the subsequent flooding does not excessively entangle the church-state dichotomy.

A single distribution of funds from the federal government to assist in a restoration of a destroyed religious institution that hosts various secular and sectarian activities does not excessively entangle the government in the religious institution's affairs. In the alternative, even if the Court ruled that aid could only go towards secular aspects and property of the religious institution, the government would not have an excessive entanglement because it would be a short-term supervision of the application of the federal funds since the aid is to go towards restoring the facility in the shortest time possible.

While the current FEMA policy may have a secular purpose to provide the aid, the policy violates the second prong of the *Lemon* test, known as the effect prong, because the effect of the regulation inhibits the practice of religion since desperately needed aid is denied to any religious institution that is trying to restore its property. Further, the neutrality principle that was introduced into the Establishment Clause jurisprudence is often applied within the analysis of the effect prong. The neutrality principle aids the effect prong of the *Lemon* test by asking whether one religion is preferred over another, or, in the case at bar, whether a lack of religion is preferred over religion. The current FEMA policy fails this analysis because by singling out primarily religious institutions, the current policy disfavors religion, barring aid to

the religious institutions. Further, the current policy actually excessively entangles the government into the religious institution's affairs because of the current application process. The government has to conduct a detailed inquiry of the religious institution's activities in order to determine the precise proportion of secular and sectarian activities.

FEMA's policy violates the Free Exercise Clause of the First Amendment, and is therefore unconstitutional. FEMA's assistance policy specifically excludes primarily religious institutions. Therefore, the policy must pass strict scrutiny in order to remain valid. In order to pass strict scrutiny, the policy must have: (1) a compelling government interest; and (2) the policy must be achieved through the least restrictive means. While the government may have a compelling interest to protect the health, safety, and welfare of the community, it is not doing so via the least restrictive means because it is categorically excluding religious institutions.

This Court should reverse the Fourteenth Circuit's judgment in all respects, and remand for further proceedings on the merits.

## ARGUMENTS & AUTHORITIES

This is an appeal of a motion for summary judgment and dismissal. R. at 10, 15, 17. Both issues on appeal are subject to de novo review. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014); *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89 (1st Cir. 2013); *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 281 (5th Cir. 1999).

Cowboy Church would qualify for FEMA's government aid, but because it is a religious institution, it is specifically excluded from receiving desperately needed assistance from FEMA. FEMA receives funds from the Executive Branch of the federal government through the Robert T. Stafford Disaster Relief and Emergency Assistance Act. *See* 42 U.S.C. § 5172(a)(1)(B) (2012); R. at 11. FEMA distributes the funds through the Public Assistance Program (the PA Program) that helps restore property damaged by natural disasters. R. at 11. In order to be eligible to receive funds as a nonprofit, Cowboy Church must (1) be ruled tax exempt by the Internal Revenue Service under 501(c) of the Internal Revenue Code; and (2) own or operate an eligible facility. *See* 44 C.F.R. § 206.221(f) (2003). Cowboy Church met both eligibility prongs by having 501(c)(3) tax exemption status and is considered an eligible "mixed use" facility because Cowboy Church provides both eligible and ineligible services by nature of its operations as a church. *See* R. at 3, 12 (citing 44 C.F.R. § 206.220(e)(7)[1]).

[1] There appears to be a typo in the record; the correct statutory citation is 44 C.F.R. § 206.221(e)(7).

"To qualify for the PA 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.'" R. at 12; *see* 44 C.F.R. § 206.40(a)–(b) (2009). Cowboy Church complied with each of the requirements to qualify for FEMA's PA Program. *See* R. at 13 ("In this case, it appears that the Cowboy Church of Lima complied with the regulatory rules as required by FEMA.").

The Fourteenth Circuit erroneously ruled against Cowboy Church on both the ripeness and First Amendment issues. But for FEMA's blanket prohibition banning primarily religious institutions from receiving a public benefit, Cowboy Church would qualify for assistance. Therefore, the Fourteenth Circuit's ruling must be reversed, and the case remanded for a hearing on the merits.

## I. PRE-ENFORCEMENT REVIEW BY THE SUPREME COURT OF THE UNITED STATES DOES NOT BAR FEMA FROM BEING SUBJECT TO A LAWSUIT BY THE DOCTRINE OF RIPENESS.

Article III of the United States Constitution defines the scope of jurisdiction for federal courts and limits adjudication to matters that are "cases" and "controversies." U.S. CONST. art. III., § 2, cl. 1. The Supreme Court of the United States further defines additional legal doctrines, rooted in Article III, that limit the ability of federal courts to adjudicate disputes with respect to federal agencies. One of these is the ripeness doctrine.

Under the Administrative Procedure Act (APA), a suit challenging an administrative regulation is typically not "ripe" for review until the case or controversy is of a manageable scope, with enough facts to show how the regulation

is applied to the claimant in a harmful, or threateningly harmful, way. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). However, an exception to the APA's ripeness definition exists where practically, the claimant is forced to adjust his or her conduct immediately. *See id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). In deciding whether a suit is "ripe" for judicial resolution, the Court created a two-fold inquiry: (1) the issues must be appropriate for judicial resolution; and (2) there must be a hardship imposed upon the parties if relief is denied. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

The Fourteenth Circuit erroneously held that Cowboy Church's case was not ripe for judicial adjudication. The ripeness doctrine's purpose is to avoid the entanglement of courts "in abstract or political disagreements over administrative policies, and also to protect 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 148–149.

FEMA's policy stresses the importance and time-sensitive nature of coordination with FEMA when a disaster strikes. *See* FEMA, FP 104-009-2, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE 5 (2016), https://www.fema.gov/media-library-data/1456167739485-75a028890345c6921d8d6ae473fbc8b3/PA_Program_and_Policy_Guide_2-21-2016_Fixes.pdf [hereinafter FEMA Policy Guide]. But in this case, FEMA treats Cowboy Church differently than other similarly situated nonprofit groups in their applications for assistance. R. at 7 (FEMA adjuster stated that "FEMA does not cover monetary assistance for churches" and that "she had never heard of

FEMA granting an exception."). The Fourteenth Circuit states that it would be hard, if not impossible, to "make a determination that the Church would without a doubt be denied" despite noting, *in the preceding sentence*, that "there is evidence to suggest that the Church would be denied FEMA coverage." R. at 14. Instead, the Fourteenth Circuit relies on the technicality that no official determination has been made, choosing to push the issue for another day. *See id.*

In times of extensive and heavy damage, those affected by natural disasters need to make decisions about how to recover and how to rebuild, all "while their property is destroyed by mold, bacteria, and trapped moisture, and they are under immense pressure to remediate their property immediately or face permanent property loss." R. at 19. The Cowboy Church facilities suffered "likely structural damage" and risked physical failure and collapse. R. at 6. Cowboy Church could not afford to risk waiting "a few weeks" to hear FEMA's official decision, which the FEMA adjuster had already led Chaplain Hudson to believe would be an inevitable denial. R. at 7–8. Cowboy Church felt the effects of that inevitable denial as soon as the church facilities needed repairs. FEMA's delay left Cowboy Church in an unnecessary position.

This Court cannot allow FEMA to categorically exclude religious organizations from disaster relief, then hide behind the defense of the ripeness doctrine when disaster victims bring legal action to ensure assistance in trying to recover and rebuild. Accordingly, the Fourteenth Circuit's ruling must be reversed, and the case remanded for a hearing on the merits.

### A. Cowboy Church's Case is Appropriate for Judicial Review.

Cowboy Church's case is appropriate for judicial resolution when it concerns a primarily legal question (the issue is legal in nature) and does not demand additional factual development. *See Abbott Labs.*, 387 U.S. at 149. In addition, the regulation at issue must be a "final agency action" within the context of the APA. *Id.* Cowboy Church's case presents a legal question, all the facts are known and will not change as time passes, and FEMA's policy constitutes a final agency action; the first prong of the ripeness test is satisfied. Therefore, the Fourteenth Circuit improperly held that Cowboy Church's case was not appropriate for judicial review, and must be reversed and remanded.

#### 1. Cowboy Church's case presents a legal question.

The issue tendered is purely a legal one: whether churches and religious institutions should continue to be banned from receiving vital FEMA relief in the face of disaster. R. at 18. FEMA's categorical exclusion of churches from emergency aid, based on their religious designation alone, is a legal question. Because Cowboy Church is a religious institution, it is ineligible for FEMA assistance. *See* FEMA Policy Guide at 11 (Private nonprofit "[f]acilities established or primarily used for . . . religious . . . activities are not eligible."); *see also* Request for Public Assistance, FEMA-4020-DR-NY, Middleburgh Reformed Church (Nov. 12, 2013), https://www.fema.gov/appeal/283579 ("[A] church does not meet FEMA's definition of an eligible [private nonprofit] facility."). If Cowboy Church was any other type of nonprofit organization, Cowboy Church would be eligible for a FEMA grant, and this case would not be before the Court. *See* R. at 13 ("In this case, it appears that the

Cowboy Church of Lima complied with the regulatory rules as required by FEMA."). Further, the Fourteenth Circuit conceded that the issue is a purely legal question, satisfying this aspect of the first prong of the ripeness test. R. at 14.

**2. Based on FEMA's current policies, further factual development is unnecessary.**

There is no need for further factual development as FEMA has concrete policies in place that restrict churches from receiving necessary assistance in the wake of natural disasters. *See* FEMA Policy Guide at 11, 14. Waiting for FEMA to make a determination as to the event center's eligibility for assistance is irrelevant, because it is FEMA policy that churches do not receive such assistance:

> Here, it would be futile to force the Churches to wait for a denial that is expressly required by the text of FEMA's own policy. *See, e.g., LeClerc v. Webb*, 419 F.3d 405, 413-14 (5th Cir. 2005) (where government issued [a] "flat prohibition," further waiting is "futile" and there is no "utility of further factual development"). FEMA has "unequivocal[ly]" told the Churches that their kind of religious organization is "ineligible." *Palazzolo [v. Rhode Island]*, 533 U.S. [606, 619 (2001)]; FEMA Policy Guide at [11, 14].[2]

*Harvest Family Church v. Fed. Emergency Mgmt. Agency*, Plaintiffs' Reply in Support of Renewed Emergency Motion for Preliminary Injunction, Civil No. 17-cv-2662 (S.D. Tex. Oct. 12, 2017), https://s3.amazonaws.com/becketnewsite/2017-10-12-34-0-Pls-Reply-in-Supp-12-Renewed-Mot-for-Preliminary-Injunction.pdf; *see also* R. at 7–8.

The Fourteenth Circuit's attempt to extend the issue by clinging to the idea that "more information is always better" is a wholly unnecessary effort that

[2] Because the 2016 version of the FEMA Policy Guide is applicable to the case at bar, the page numbers cited here have been changed to reflect the correct pages in the 2016 version.

improperly characterizes Cowboy Church's case as "premature" and instead ignores the reality that set in during the aftermath of Hurricane Rhodes. R. at 14. The only outcomes to waiting for a final determination from FEMA are that either (1) FEMA would grant relief, which is what this case seeks to establish in the first place; or (2) that FEMA would deny relief, which leaves Cowboy Church in the same situation as it currently stands. This Court previously stated that when it "will be in no better position later than we are now to decide this question, . . . [the case] is presently ripe for adjudication." *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 82 (1978).

**3. FEMA's policy is a final agency action.**

FEMA's regulations constitute "final agency action" within § 10 of the Administrative Procedure Act. "Agency action" is any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Abbott Labs.*, 387 U.S. at 149. The APA states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704 (2012).

The Fourteenth Circuit conceded that in this case, FEMA's "mixed use" standard under the FEMA Policy Guide is one that is indicative of final agency action under the APA. *See* R. at 14. Further, there is no other adequate remedy, as the Fourteenth Circuit noted "there is evidence to suggest that the Church would be denied FEMA coverage." *Id.* Because the FEMA regulation at issue is indicative of "final agency action" and there is no other adequate remedy, it is appropriately subject to judicial review. *See id.*

### B. FEMA's Denial Levies a Burdensome Hardship Against Cowboy Church.

The impact of FEMA's denial imposes a hardship upon Cowboy Church that renders the case ripe for judicial resolution. The second prong of the ripeness doctrine is measured by analyzing if the party bringing suit would bear the brunt of a significant hardship should relief be denied—there must be an adverse consequence. *Abbott Labs.*, 387 U.S. at 149. Such an adverse consequence constitutes a hardship when the answer raises more questions than answers, when the action results in "sufficiently direct and immediate" consequences, or when there is an "immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Id.* at 152, 153.

Here, the regulation directly targeted churches; an organization's simple designation as a religious organization bars recovery of valuable assistance in the aftermath of a natural disaster. This in itself required Cowboy Church to significantly change its conduct: FEMA's bar forced the church to go out and attempt to find any aid that could help return the church to at least a minimally functioning condition for the community. R. at 8–9.

In *Gardner v. Toilet Goods Ass'n*, the respondents challenged regulations under which the Food and Drugs Commissioner expanded what was classified as a "color additive," impermissibly extending the regulations' reach of products with which procedural compliance was mandated. 387 U.S. 167 (1967). In agreeing that the challenge to the regulations was ripe for review under the *Abbott Labs.* standard, this Court noted the regulations' "immediate and substantial impact upon the

[challengers]" left the challengers "in a quandary." *Id.* at 171–72. Further noting the impossible predicament that beset the challengers, this Court went on to note that the alternative "avenue of review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to the present . . . action." *Id.* at 172.

This Court only refrains from finding hardship when there is only a modicum of adversity present. For example, in *Nat'l Park Hosp. Ass'n*, National Park concessioners brought suit challenging Park Service regulations implementing a comprehensive concession management program that affected concession contracts. 538 U.S. at 806–07. This Court held that the suit was not yet ripe, because the challenged regulation did not affect the challengers' "primary conduct" and that the challengers "suffer[ed] no practical harm as a result." *Id.* at 810. Similarly, in *Toilet Goods Ass'n v. Gardner*, which was a companion case to *Gardner v. Toilet Goods Ass'n*, discussed *supra*, with the same factual background, this Court noted that when "only minimal, if any, adverse consequences will face petitioners," there is not a hardship and the petitioners must "exhaust th[e] administrative process." 387 U.S. 158, 166 (1967).

Similar to the challengers in *Gardner v. Toilet Goods Ass'n*, FEMA's regulations leave the Cowboy Church in a quandary of its own. To wait on a delayed determination provides clear hardship to petitioner as the property continues to suffer damage, with Cowboy Church facing the possible consequence of permanent property loss. R. at 19. While this Court has previously stated that "possible financial

loss is not by itself a sufficient interest to sustain a [pre-enforcement] judicial challenge to governmental action," here, Cowboy Church stands to lose much more than simple financial harm. *See Abbott Labs.*, 387 U.S. at 153.

But unlike *Nat'l Park Hosp. Ass'n* and *Toilet Goods Ass'n v. Gardner*, here FEMA issues a blanket denial for the church areas that are used for worship services, affecting Cowboy Church's primary conduct. Cowboy Church is not free to simply conduct its regular activities as they see fit. This is not some case where minimal adverse consequences will result; instead, this is a situation where "irremediable adverse consequences flow" from the denial of the present case from proceeding. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. at 164. The flooding from Hurricane Rhodes ravaged the facilities of Cowboy Church. Victims of catastrophic flooding "are constantly bombarded with paperwork and relief opportunities, many of which turn out to be scams." R. at 19. The federal government is an entity that all citizens should be able to trust is not a scam. But discovering if someone will qualify for FEMA relief is an arduous process, and a decision can take weeks, assuming that FEMA meets its deadlines, which the FEMA Regional Director admitted is not always the case. *See* R. at 8, 10. If flood victims' property "is [being] destroyed by mold, bacteria, and trapped moisture" while FEMA cannot even be bothered to meet its own internal determination deadlines, what more of an adverse consequence exists?

These consequences are not the end of Cowboy Church's hardship. The church also faces future denials from FEMA and the continued delay of their application. R. at 8 ("FEMA immediately stopped processing the claim . . . while waiting on the

determination of the legal process."). Simply put, *"[j]ustice delayed is justice denied."* R. at 19 (Sylvester, J., dissenting) (emphasis added). Denying or dismissing this suit creates further injustice and hardship on the church because either outcome precludes Cowboy Church from recovering the funds donated to it in the aftermath of Hurricane Rhodes.

Rather, in this case the emergency funds from FEMA are pivotal to getting the church back to its previous state. However, since Cowboy Church is ineligible for FEMA relief, it had to rely on the help of the community. R. at 15. Without the aid of the community, Cowboy Church would have as much luck at reopening as an ordinary carpenter would have at turning water into wine. *See John* 2:1–11 (New International Version (NIV)); R. at 8–9.

At the core of the policy, churches like Cowboy Church are left reeling in the face of disaster because they chose to host both worship services and community events. In exchange for helping the community via its facilities, FEMA attempts to leave Cowboy Church ironically high and dry, the opposite of the fate bestowed upon it from Hurricane Rhodes. Cowboy Church's case is not only appropriate for judicial resolution, but the current status quo denial imposes a hardship on the church. Because both prongs of the ripeness doctrine are met, the case is sufficiently ripe for pre-enforcement review. Accordingly, the decision of the Fourteenth Circuit should be reversed and remanded for a hearing on the merits.

## II. THE FIRST AMENDMENT'S RELIGION CLAUSES DO NOT BAR COWBOY CHURCH FROM RECEIVING FEMA DISASTER RELIEF.

The Fourteenth Circuit erroneously held that the First Amendment's Religion Clauses, the Establishment Clause and the Free Exercise Clause, barred Cowboy Church's claim for FEMA emergency aid. Because neither of the Religion Clauses are a bar to Cowboy Church's claim, the Fourteenth Circuit's decision should be reversed, and the case remanded for a hearing on the merits.

In his 1796 farewell address, President George Washington foretold "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . [a]nd let us with caution indulge the supposition that morality can be maintained without religion." George Washington, President of the U.S., Washington's Farewell Address (Sept. 19, 1796), http://avalon.law.yale.edu/18th_century/washing.asp. While that theory has persisted throughout the nation's development, religious-based organizations have often been left to fend for themselves in times of tragedy. Religious-based organizations have been formally recognized by the Executive Branch as playing a vital role in times of natural disasters, both in preparation and recovery. Some states and municipalities have even included the organizations in their official emergency management plans, but these religious-based organizations have been egregiously denied any financial support from the government to help these organizations mend their wounds from these terrible natural catastrophes. *See* Justine Brown, *Churches Play a Growing Role in Emergency Management*, e.Republic (Apr. 28, 2015), http://www.govtech.com/em/disaster/Churches-Playing-Growing-Role-Emergency-Management.html.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. This phrase, known as the Establishment Clause, intends to prevent the government from forcing a religion upon its citizens. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947). Closely related to the Establishment Clause is the Free Exercise Clause: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. During the colonization of America and in the preceding centuries, turmoil, civil strife, and persecutions overwhelmed various European countries, generated at least in part by established religions warring with each other for control over a nation's government. *Everson*, 330 U.S. at 8–9. Therefore, a newly-founded nation formed by individuals with exclusively uncivil experiences with the church-state dichotomy most likely feared another nation similarly divided along religious lines.

However, the degree of separation required to avoid another warring nation seemed to be unclear, even for the framers of the Constitution. *See generally* Lee Epstein & Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice* 128 (8th ed. 2013). While Thomas Jefferson asserted that the First Amendment created "a wall of separation between Church and State," many did not know how the metaphor translated into real world application. *See* Letter from Thomas Jefferson, President of the U.S., to Danbury Baptist Ass'n (Jan. 1, 1802) (on file with the Library of Congress). Consequently, a couple of theories developed from the outset on the interpretation of what was considered "a wall."

The first theory states that the Establishment Clause may only prohibit the establishment of an official national religion. Epstein & Walker, *supra*, at 129. This theory seems logical given that many colonials were from England, a nation-state that created the Church of England when Henry VIII grew frustrated with the idea of national religion. *See Church of England*, BBC, http://www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml (last updated Jun. 30, 2011). An alternative theory states the wall of separation only bars the state from favoring one religion over another, meaning nondiscriminatory support or aid for all religions is constitutionally permissible. Epstein & Walker, *supra*, at 128. The majority of the framers subscribed to at least one of the two theories, with very few taking the third, separationist, approach of erecting a solid wall and, consequently, prohibiting most, if not all, forms of public aid for, or in support of, religion. *See* Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute, 1978).

The first two interpretations have significant historical support because James Madison's original draft of the Establishment Clause only prohibited Congress from establishing a national religion and the same year that Congress passed the Establishment Clause, the legislature passed a law providing land grants to sectarian schools. Epstein & Walker, *supra*, at 128. In addition, Congress approved treaties requiring financial support of the religious education of Native American tribes in the early 1800s. *Id.* Consequently, the Establishment Clause jurisprudence became an "impossible tangle of divergent doctrines and seemingly conflicting results." *Id.*

Despite that tangle, the Establishment Clause (and the closely related Free Exercise Clause) do not bar Cowboy Church's case. Nothing about Cowboy Church's claim establishes a state religion, favors a single religion, nor infringes on anyone's right to practice her religion. Cowboy Church is only barred from relief by an arbitrary policy that categorically excludes religious organizations from relief eligibility, simply because of their sectarian affiliation. Accordingly, the Fourteen Circuit's decision should be reversed and the case remanded for further proceedings on the merits.

### A. Cowboy Church is not Barred from Receiving FEMA Relief Under the Establishment Clause.

The Establishment Clause is no bar to Cowboy Church receiving FEMA disaster assistance. Initially, the Court sparingly analyzed and interpreted the Establishment Clause. The Establishment Clause first came up for review over one hundred years after its passage, in *Bradfield v. Roberts*, 175 U.S. 291 (1899). In *Bradfield*, Congress appropriated $30,000 to a hospital operated by Roman Catholic nuns for the construction of facilities that would be used for indigent patients. *Id.* at 293. The Court held that since the hospital had a secular purpose, the appropriation was constitutional. *Id.* at 299. While *Bradfield* did not produce a standardized test to be utilized in future litigation, it did demonstrate the Court's willingness to permit government aid or benefits to flow towards religious institutions. In addition, Establishment Clause jurisprudence began to take shape as to just what action would "respect an establishment of religion." U.S. CONST. amend. I.

Between *Bradfield* and the next pivotal case in the Establishment Clause realm of inquiry, *Everson*, this Court heard few cases interpreting the Clause. One such case was *Cochran v. Louisiana State Bd. of Educ.*, where the Court ruled that making textbooks available to schoolchildren regardless of what schools they attended (whether parochial or not) did not violate the Establishment Clause. 281 U.S. 370, 375 (1930). This further resolved the debate that the Establishment Clause permits some flow of government funds to religious institutions, at least for secular purposes.

In *Everson*, the Court provided more guidance on what the wall of separation permits and prohibits. The Court determined that (1) setting up a state church; (2) passing laws which specifically aid one religion or aid religions generally; (3) forcing or otherwise influencing individuals to attend or not to attend church; (4) punishing people for ascribing to certain beliefs or disbeliefs or for attending or not attending church; (5) taxes levied to support religious institutions or activities; and (6) governmental participation in religious organizations or religious organizations participating in government activities resulted in "respecting an establishment of religion;" therefore, such activities would be prohibited. *Everson*, 330 U.S. at 511–12.

**1. Allowing religious institutions to partake in the assistance program does not violate the Establishment Clause.**

In times of catastrophe, many people and organizations need help. Religious institutions are no different, and categorically excluding such organizations from much-needed assistance is impermissible, and does not equate to an Establishment Clause violation. "The simplistic argument that every form of financial aid to church-

sponsored activity violates the Religion Clauses was rejected long ago." *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (citing *Bradfield v. Roberts*, 175 U.S. 291 (1899)). When the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis, it is held constitutionally permissible. *See Agostini v. Felton*, 521 U.S. 203, 232 (1997).

*Lemon v. Kurtzman* defined what has become known as the most widely applied Establishment Clause test: the *Lemon* test. 403 U.S. 602 (1971). The *Lemon* test sets forth a three-pronged test to determine whether a statute, law, or government regulation violates the Establishment Clause. The three-pronged test is as follows: (1) there must be a secular legislative purpose; (2) the primary effect must not aid or inhibit religion; and (3) there must be no excessive entanglement. *Id.* at 612–13. The statute or government regulation would need to pass all three prongs in order to constitutionally comply with the Establishment Clause.

#### *a. The purpose of the FEMA assistance policy shows a disapproval of religious organizations.*

The first prong of the *Lemon* test focuses on the reasons underlying the specific legislation of the law, asking "whether government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (holding that the law mandating the theory of creationism (sectarian view) shall be taught when the theory of evolution was taught (secular view) violated the Establishment Clause) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). In

*Edwards*, the law at issue was found unconstitutional due to the fact there was no secular purpose to mandating the teaching of creationism. *Id.* at 578.

However, unlike *Edwards*, Cowboy Church has given back to the community by offering its resources, property, and facilities for secular activities countless times and seeks financial aid from the government in order to be able to continue doing so. In fact, Cowboy Church hosted important government events—like city council meetings—while refusing payment from the municipality in exchange for the use of the space. R. at 3–4. In addition, in order to accommodate the growing needs of the community, the church, on its own, raised money to expand the center so the space could accommodate all of the civic and private events hosted at Cowboy Church. R. at 4. The township of Lima also saw the importance of the Cowboy Church and actually voted down the opportunity to build its own event center because the township did not feel a need for "two event centers." R. at 4. As a result, Cowboy Church is not only a faith center, but a community center that endorses and welcomes any and all religions and faiths. Therefore, if FEMA's policy included the realistic possibility that religious institutions could receive government funds in the wake of natural disasters like Hurricane Rhodes, then the public benefit of financial assistance would be going to the main purpose of FEMA as an organization: helping communities after a devastating natural disaster. See FEMA Policy Guide at 9. However, FEMA's absolute prohibition on providing relief to religious organizations—organizations that are sometimes the first line of assistance for FEMA and the victims of natural disasters—promotes a disservice to FEMA's policy

and actually inhibits the practice of religion. *See* Brown, *supra*. Since FEMA specifically excludes religious institutions from receiving aid, the policy does not have a secular purpose, but actually is condemning the religious institution by precluding eligibility for assistance in its time of need. By providing a policy that assists all private nonprofit organizations but churches, the purpose of the legislation is no longer about helping those in need, but focuses on who the government will not help and allow to fail: religious organizations.

#### ***b. The effect of the FEMA assistance policy inhibits religious organizations from receiving disaster relief.***

If the particular statute or government action meets the first prong of the *Lemon* test, the analysis moves to the second prong of the *Lemon* test. This prong concentrates on whether the "principal or primary effect" of a statute or government action "advances or inhibits religion." *Lemon*, 403 U.S. at 612–13. While the first prong analyzes the legislative intent or reason why the law or regulation was put into effect, the second prong of the *Lemon* test scrutinizes the practical or realistic application of the law or regulation. *See, e.g., Doe*, 173 F.3d at 289 (scrutinizing the application of school policy using the *Lemon* test, allowing the local clergy into schools to counsel students during school hours gave preferential treatment to a certain religion and, consequently, violated the second prong of the *Lemon* test). The second prong of the *Lemon* test illustrates the need for the government to display a neutral front when religious aspects are involved. *See* James A. Rapp, Education Law § 2.01(4)(a) (Matthew Bender perm. ed., rev. vol. 2004). This Court has not mandated a bright-line analysis for determining what classifies as neutral, but the Court has

determined that, at a minimum, one religion cannot be preferred by the government over another. *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). The prohibition on religious preferences extends to preference for atheism or nonreligion as well. *See id.* In *Agostini*, this Court used three criteria to evaluate whether government aid has the effect of advancing religion: (1) it does not result in governmental indoctrination; (2) it does not define its recipients by reference to religion; and (3) it does not create an excessive entanglement. 521 U.S. at 234.

After heavy criticism of the *Lemon* test and the introduction of supplemental alternatives like the endorsement and coercion tests, discussed *infra*, the Court recently revived the neutrality principle in *Rosenberger v. Rector*, where the Court invalidated a public university funding program regulation. 515 U.S. 819 (1995). While the funding program was open to all certified campus newspapers, the university denied access to the funding program for a religious newspaper because allowing the funding to proceed to the religious newspaper would be a violation of the Establishment Clause. *Id.* However, this Court determined that the university violated the Establishment Clause by denying the religious newspaper access to the funding program because the public university was favoring secular organizations over religious organizations. *Id.* at 831, 834–35.

The *Rosenberger* case is directly analogous to the case at bar because FEMA's programs favor secular organizations over sectarian organizations. Under the FEMA policy, the Private Nonprofit Ineligible Services specifically single out religious activities as the main exclusion. *See* FEMA Policy Guide at 14 (Table 3). In order for

one religious organization to qualify, religious activities must not be the primary use of the facility. R. at 12. Therefore, the effect of the FEMA regulations is preferring secular organizations over sectarian organizations, which is an impermissible practice in conflict with the Constitution.

#### *c. Allowing Cowboy Church to receive FEMA assistance does not create excessive government entanglement with religion.*

The *Lemon* test underwent slight modifications in *Agostini*. 521 U.S. 203. *Agostini* examined only the first two factors of the original *Lemon* test and recast the third prong of the original *Lemon* test (the excessive entanglement provision) as a factor to evaluate within the second prong of the original *Lemon* test (the primary effect prong). *Agostini*, 521 U.S. at 808.

Analysis of the entanglement prong of the *Lemon* test focuses on whether the government action (in this case, a government regulation) promotes or creates an excessive government entanglement with religion. Entanglement is considered in the course of assessing whether a program has an impermissible effect of advancing religion. *Agostini*, 521 U.S. at 232 (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 674 (1970); *Lemon*, 403 U.S. at 612–613). In *Lemon*, the Court laid out various factors for determining whether a government action resulted in excessive entanglement with religion: (1) examining the character and purposes of the institutions that are benefited; (2) the nature of the aid that the government provides; and (3) the resulting relationship between the government and the religious authority. *Lemon*, 403 U.S. at 615. The purpose of the entanglement prong analysis is to determine the degree of the relationship between the benefitting institution and

the religion, and whether the government entity giving the benefit can be neutral with respect to religion in general. *See id.* at 614. For example, in *Lemon*, the Court determined that due to the state maintaining supervisory authority over the school in reviewing financial records, the classes taught, teacher salaries, and material used in classes, the state was excessively entangled with the parochial school, a religious institution. *See generally Lemon*, 403 U.S. at 624–25.

In comparison, the Court held in *Aguilar v. Felton* that New York City's program using federal funds to finance a program which involved sending public school teachers and other professionals into religious and other public schools to provide remedial instruction and guidance violated the entanglement prong because (1) the program would require a "pervasive monitoring by public authorities;" (2) the program required too much administration cooperation between the government and parochial schools; and (3) the program might increase the dangers of "political divisiveness." 473 U.S. 402, 413–14 (1985). However, the Court stated later in *Agostini* that administrative cooperation between the government and the religious institution, and the possibility that the program might increase the dangers of political divisiveness, are insufficient criteria by themselves to create excessive entanglement because those two things will be present no matter what services are offered. *Agostini*, 521 U.S. at 233–34. Therefore, the only concern this Court took issue with under the entanglement analysis is the pervasive monitoring by public authorities. This is significantly relevant to the case at bar since FEMA's program is a single award of funds, whereas the Title 1 service was the reoccurring payment of

funds. Consequently, there would not be a continuous monitoring of the government funds here, since it is a single, non-reoccurring payment.

***d. The endorsement test does not apply.***

While the *Lemon* test is the test formally adopted by the Court, there are two other informal, yet prominent, tests. The endorsement test first appeared in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*. 465 U.S. at 687 (O'Connor, J., concurring) (City of Pawtucket did not violate the Establishment Clause when a nativity scene was incorporated in the city's intricate holiday display). In *Allegheny v. ACLU*, this Court adopted Justice O'Connor's endorsement test as a supplement to the *Lemon* test. 492 U.S. 573, 620 (1989). The purpose of the endorsement test is to provide a more flexible approach to the *Lemon* test that will enable the Court to consider "unique circumstances to determine whether it constitutes an endorsement . . . of religion." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

The endorsement test is not the applicable choice of test in the case at bar because it is primarily used in matters of expression. *See Allegheny*, 492 U.S. 573; *see also* Charles Haynes et al., *The Challenge of Interpreting the Establishment Clause*, Thomson Gale (2005), http://www.encyclopedia.com/law/legal-and-political-magazines/challenge-interpreting-establishment-clause. Additionally, questions that involve the distribution of government funds are usually analyzed under the neutrality principle as part of the *Lemon* test's effect prong. *See* Marcia S. Alembik, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, Ga. L. Rev. 1171, 1183 (2006).

### *e. The coercion test does not apply.*

Due to concerns that the endorsement test might strike down too many government policies that only incidentally or indirectly benefited religion, Justice Kennedy established an alternative way of analyzing a specific set of circumstances against the Establishment Clause: a government action violates the Establishment Clause when the government compels individuals to participate in religious activities or where the government's actions directly benefit a particular sect to such a dangerous extent so as to establish a state or federal religion. *See Allegheny v. ACLU*, 492 U.S. at 659 (Kennedy, J., concurring). While Justice Kennedy's analysis did not occur in the majority opinion, the majority of the Court applied this coercion test in *Lee v. Weisman*. *See* 505 U.S. 577, 598–99 (1992).

In *Weisman*, the majority of the Court used the coercion test to invalidate a nonsectarian prayer at a public school graduation. The coercion test extends the scope of the endorsement test by examining the actual effect of a government's action, instead of invalidating a practice because it merely appeared to have the effect of endorsing religion and then having a small possibility the endorsement could lead to coercion. *See generally Bd. of Educ. v. Mergens*, 496 U.S. 226, 261–62 (1990) (Kennedy, J., concurring) (explaining that the coercion test should be applied rather than endorsement test to find a religious high school club compliant with the First Amendment). However, the coercion test does not apply to the case at bar because the government is not compelling citizens to use the Cowboy Church for its secular activities or to attend its sectarian activities. *See* R. at 4.

### 2. Even if some of the Cowboy Church facilities do not qualify for government aid, at least a portion of the property does qualify.

If part of Cowboy Church's facilities are ineligible for relief, at least some of the property is still eligible. It is not an all-or-nothing question, but rather a building-by-building analysis. Congress carefully scrutinized the position that religious and secular functions are inseparable and therefore government grants would inevitably advance religion, but Congress found that position unconvincing. *See Tilton*, 403 U.S. at 680–81.

Illustrating the legal analysis on this point, *Tilton v. Richardson* provides an analogous situation because it deals with government aid going to a private institution. 403 U.S. 672. The focus of the analysis in *Tilton* turned on the question of whether the government action or regulation's principal or primary effect advances state religion. *Tilton*, 403 U.S. at 679. This means that this Court is not concerned with whether the religious institution simply accrues an incidental benefit as a consequence of the legislative program. *See id.* The Court held that while construction grants surely benefit religious institutions in the sense that the construction of buildings will assist them to perform their various functions, this is merely incidental, and these types of governmental assistance are continually upheld. *See id.*; *Everson*, 330 U.S. 1, *Bradfield*, 175 U.S. 291.

On the chance this Court decides that funds may be distributed only to secular aspects, the Cowboy Church will still qualify for distribution of financial aid from FEMA. Chaplain Hudson and the staff of Cowboy Church proactively removed various objects from the buildings, saving them from destruction due to the rising

waters. *See* R. at 4. They were able to save sectarian items—Bibles, hymnals, religious pamphlets, and other religious paraphernalia—as well as secular items, such as chairs and kitchen supplies. *Id.* Most of the significant damage that is immediate and presents a danger has to do with the structure of the chapel and the event center themselves. *See* R. at 5. However, the chapel and event center are used for nonreligious purposes as well and therefore can be considered secular. *See* R. at 4. While the flooding damaged some religious supplies, overall repair costs surpassed the point that Cowboy Church would be able to pay, and thus Cowboy Church is left unable to pay for the restoration, absent FEMA assistance. *See* R. at 8.

Even if FEMA provides partial assistance for the secular aspects of the property, the government is still not indirectly subsidizing religion. The actual issue is whether the aid itself has an impermissible content, not whether aid that would have gone to fund the secular aspects may now be diverted by Cowboy Church to fund the secular materials. *See Mitchell v. Helms*, 530 U.S. 793, 795–96 (2000). The Court in *Mitchell* noted that government aid funding secular uses diverted to religious uses is not per se impermissible. See 530 U.S. at 795–96 (citing *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 18–23 (1993)). Consequently, in the event that this Court finds the government aid may not be used to fund the restoration of the chapel itself, the aid towards the other buildings and non-secular aspects shall not be withheld merely because FEMA might claim, without any evidentiary support, that Cowboy Church will divert the funding.

**3. FEMA's policy violates the First Amendment's Establishment Clause.**

While a government regulation providing the realistic opportunity for a religious institution to qualify for federal aid in the wake of a natural disaster would pass the *Lemon* test and the additional interpretational guidelines this Court has provided as guidance under the Establishment Clause, the current FEMA regulation barring federal aid for religious institutions violates the effect prong and entanglement prong of the original *Lemon* test, as well as the neutrality principle identified in subsequent jurisprudence. Therefore, the current FEMA policy denying a religious institution from qualifying for federal aid if more than fifty percent of the facility's use is for religious activity, despite hosting most town events—both government and private—violates the Establishment Clause of the First Amendment and is therefore unconstitutional.

In *Everson*, the Court dictated that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." 330 U.S. at 18.

***a. The effect of the FEMA assistance policy is to preclude Cowboy Church from receiving disaster relief because it is a religious organization.***

Under the effect prong of the *Lemon* test, the question the court should analyze is whether it would be objectively reasonable for the government action to be construed as sending primarily a message of disapproval of religion. *See Allegheny*, 492 U.S. at 592; *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). Further, government neutrality, which is necessary for the Establishment Clause, is violated

as much by government disapproval of religion as it is by government approval of religion. *See Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1999).

In *Vernon*, a police officer who identified himself as a member of a church took actions within his law enforcement capacity that aligned with his religious beliefs: the officer refused to arrest anti-abortion demonstrators and consulted with religious elders on matter of police policy. 27 F.3d at 1389, 1399. The city that employed the police officer launched an investigation into his religious beliefs and the police officer sued, claiming the city's pursuit of the investigation had the primary effect of inhibiting or disapproving of his religion. *Id.* at 1389. Although the court in *Vernon* held that the primary purpose of the investigation was to look into the potential impermissible or illegal duty of an on-duty police officer, the court did state that "one may infer possible city disapproval of [the police officer's] religious beliefs from the direction of the investigation." *Id.* at 1398. Further, the court in *Vernon* also noted that the record was "not quite that clear" on whether a reasonable person could infer disapproval by the government on the police officer's religion. *Id.* The court cited specific references to the police officer's consultation with religious elders on issues of public policy in a press release by the city government that employed the police officer. *Id.* The court stated, "[t]he fact that the city expressly included within the scope of the investigation inquiries concerning 'consultation with religious elders on issues of public policy' suggests that the city disapproved of such consultation, possibly due to the particular religious' beliefs underlying such consultation." *Id.*

While the court in *Vernon* could not determine if the city primarily disapproved of the police officer's religion, this is important to note in this case because it is quite evident from the FEMA policy that the government disapproves of religion. The FEMA policy excludes any building that is used for primarily religious-related services. *See* FEMA Policy Guide at 11, 14. Unfortunately, the FEMA policy excludes almost every single religious institution, despite reliance on the institution's facilities from the community at large. For an example of such reliance, see R. at 4, 7.

Further, Cowboy Church began to host township events in the chapel every year, as well as city council meetings. R. 3–4. In fact, the mayor of Lima even offered to pay rent to the church for the regular use of its facilities, which Cowboy Church did not accept because the "church and its buildings were open to anyone, anytime," consequently functioning more as a community center than a church. R. at 4. Chaplain Hudson, who only attended church-related services, estimated that church-related services took up only sixty percent of the event center usage. R. at 9. But that sixty percent is an approximation made by someone who only attends church-related services. *Id.* Before making his guesstimate, Chaplain Hudson stated that "it would be difficult for him to estimate how much time the event center was used for [secular] activities." *Id.*

Cowboy Church hosted enough government activities that the religious institution itself used the energy and resources to apply for a government building exemption and the citizens of Lima voted against the township building its own community center, because they felt there was no need to have another event center

in addition to the Cowboy Church, signifying the feeling among the community that Cowboy Church was not just a religious institution, but a community center as well. *See* R. at 4. Consequently, denying assistance to a church that hosts essential community activities like city council meetings and other township events because it also provides religious activities is a disapproval of religion leading to the government inhibiting religion in no greater time of need than catastrophic flooding and hurricane recovery; FEMA's policy thus violates the Establishment Clause, and is therefore unconstitutional.

***b. FEMA's current policy provides excessive entanglement between Cowboy Church and the government that results in inhibiting religion and therefore violates the Establishment Clause.***

Similar to the *Lemon* test's effect prong, the entanglement provision of the *Lemon* test accommodates the analysis of a claim brought under a hostility to religion theory as well. *See Welch v. Brown*, 58 F.Supp.3d 1079, 1088 (E.D. Cal. 2014). The doctrine seeks to shelter churches and other religious institutions from monitoring by the government or causing those religious institutions to second guess or rethink their religious beliefs or practices in order to satisfy conditions to receiving benefits (as in *Lemon*) or as grounds for excluding benefits. See Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L.Rev. 347, 397 (1984).

*Franco v. The Church of Jesus Christ of Latter-day Saints* concerned a malpractice claim based on the church's counseling advice to "forgive, forget and seek Atonement" when a church member, who was a minor, claimed sexual abuse. 21 P.3d

198, 204 (Utah 2001). The Utah Supreme Court held that the litigation process would "necessarily entangle the courts in the examination of religious doctrine, practice, or church policy." *Id.* The case is similar to the case at bar because FEMA's current policy of evaluating whether a church or building is primarily used for religious-related services is unnecessarily entangling the federal government in the examination of the churches' practice or policy. *See* FEMA Policy Guide at 11, 14. The FEMA adjuster asked numerous questions about the use of the chapel and the event center. R. at 7. Through Chaplain Hudson's answers to these questions, the FEMA adjuster numerically estimated the amount of religious use the chapel and event center hosted, before informing Chaplain Hudson that "FEMA does not cover monetary assistance for churches" and that "she had never heard of FEMA granting an exception." *Id.* This detailed examination of the church's activities, schedule, and use is an intrusive inquiry into the Cowboy Church's affairs and therefore creates an excessive entanglement.

Further, Cowboy Church's situation is analogous to the situation in *Colorado Christian University v. Weaver*, where the Colorado government examined colleges and universities to determine if they were "pervasively sectarian." 534 F.3d 1245, 1250 (10th Cir. 2008). If the government determined the college or university was pervasively sectarian, then the government would not provide scholarships to the students who wanted to attend that university or college. *Id.* at 1250. The Tenth Circuit determined the Colorado program violated the entanglement provision of the Establishment Clause because the government's inquiry to determine whether a

religious institution was pervasively sectarian resulted in intrusive governmental judgments regarding matters of religious belief and practice. *Id.* at 1256.

Similar to *Weaver*, Cowboy Church underwent extensive scrutinization in hopes of qualifying for the government benefit of FEMA aid. A FEMA adjuster had to organize and classify all the events the church hosted in order to determine whether the chapel and event center were primarily used for religious activities or secular activities. *See* R. at 7. In order to qualify for the aid, Cowboy Church could not have used the chapel or the event center for primarily religious activities. R. at 12. "Primarily" means using the facility fifty percent or more of the time. *Id.* This may cause the Cowboy Church and other religious centers to rethink their entire practice of religion and the policies they maintain, in order to have a better chance at qualifying for FEMA aid in times of catastrophe. The religious institution may refrain from holding religious activities or gathering at the church, so the religious institution does not go over the threshold level of fifty percent religious use and therefore be excluded from the public benefit, which would be an unconstitutional burden.

While there is a "play between the joints" amid the Establishment Clause and the Free Exercise Clause (discussed *infra*) of the First Amendment of the U.S. Constitution, the Establishment Clause acts more like the closed container keeping the government in check while the Free Exercise Clause acts like the vast amount of air around the container. *See Locke v. Davey*, 124 S. Ct. 1307, 1311 (2004). The purpose of the Establishment Clause is to structurally limit government power, as

well as legislating or otherwise acting on any matter respecting an establishment of religion. This allows the government sphere and the religious sphere to coexist without intrusion, relieving the individual from the potential of government coercion or harm. Therefore, the Establishment Clause is not a bar to Cowboy Church's receipt of FEMA relief, and the Fourteenth Circuit should be reversed and remanded for further proceedings on the merits.

### B. Cowboy Church is not Barred from Receiving FEMA Relief, Because FEMA's Policy Violates the Free Exercise Clause.

Cowboy Church can receive FEMA assistance because FEMA's exclusion of religious organizations from aid eligibility violates the Free Exercise Clause and is unconstitutional. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. This is known as the Free Exercise Clause, and allows a lower standard of review if the law is neutral and of general applicability. *See Emp't Div., Dept. of Human Res. of Ore v. Smith*, 494 U.S. 872, 873–74 (1990) (superseded by statute on other grounds). However, a law or governmental regulation that is not neutral nor of general application must withstand strict scrutiny. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 521 (1993). To satisfy strict scrutiny, the law or governmental regulation (1) must be justified by a compelling governmental interest; and (2) must be narrowly tailored to advance that interest. *Id.* Justice Brennan's concurrence in *McDaniel v. Paty* said that the law may still infringe with the Free Exercise Clause even when the law does not directly prohibit religious activity, but conditions the eligibility to receive the benefit on the

abandonment of the religious activity. 435 U.S. 618, 633 (1978) (Brennan, J., concurring). To achieve the minimum requirement of neutrality, the government action must not discriminate on its face. *Lukumi*, 508 U.S. at 533. "A law lacks facial neutrality if it refers to a religious practice without secular meaning discernable from the language or the text." *Id.*

Under the Establishment Clause, the current FEMA policy is not neutral because it specifically excludes facilities used for primarily religious activities. *See supra*. The same principle applies in the context of Free Exercise Clause analysis; the policy inhibits religious exercise. In *Church of Lukumi Babalu Aye*, this Court reviewed a city ordinance prohibiting the ritual slaughter of animals. 508 U.S. at 524. The ordinance was not neutral or generally applicable because it used words like "sacrifice" and "ritual" and the object of the ordinance was worship. *See id.* at 533–34. This is directly analogous to the case at bar because FEMA's policy categorically excludes religious organizations. *See* FEMA Policy Guide at 14 (Table 3). Therefore, the policy is not neutral.

Even assuming there is a compelling governmental interest in this case, FEMA's policy is not narrowly tailored. As in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Cowboy Church faces an injury in fact because the church is a member of the community and the decision to exclude it from receiving financial aid must withstand strict scrutiny. 137 S. Ct. 2012, 2022 (2017). While the Cowboy Church asserts the loss of a benefit, the Cowboy Church was not able to compete for the funding on an equal basis with the other businesses and nonprofits that were also

eligible for this program. As a result, Cowboy Church suffered a loss because the policy does not allow any churches the opportunity to participate in the program due to their inherently religious nature. *See* FEMA Policy Guide at 11, 14.

Religious activities and services usually take place multiple times a week, while governmental services, like city council meetings, happen on an intermittent and infrequent basis.[3] In order for a facility to qualify under the current FEMA policy, the facility cannot be primarily used for religious activities. R. at 12. "Primary use" has been defined as meaning "the use to which more than 50 percent of the operating time is dedicated." *Id.* However, the way the policy is worded is a guise for disqualifying any religious institution from receiving public aid because the nature of religious worship usually has multiple services a week while governmental activities, like city council meetings, are less frequent. *See* n.3. Taking a simple proportion of the number of times the facility was used as a religious institution and the number of times the facility was used as a government facility will surely discount any church, mosque, synagogue, or other religious institution from qualifying for emergency aid. Consequently, FEMA's current policy detailing an oversimplified proportion of use fails the second requirement of strict scrutiny: a governmental purpose must be achieved through the least restrictive means. Using a more objective standard of comparison that takes into account the simultaneous necessity of secular

[3] *See* City of Allen, *City Council*, http://www.cityofallen.org/917/City-Council (last visited Nov. 17, 2017); City of Commerce, *City Council*, https://commercetx.org/contact-form/city-council/ (last visited Nov. 17, 2017); City of College Station, *City Council*, http://www.cstx.gov/index.aspx?page=2444 (last visited Nov. 17, 2017).

uses and sectarian uses and the instances where each would use a facility aligns more accurately with modern society's expectations and circumstances. *See* R. at 7.

Recalling Justice Brennan's cautionary warning in his *McDaniel* concurrence, the FEMA policy infringes on the Free Exercise Clause here because it conditions aid eligibility on Cowboy Church virtually abandoning its sectarian functions, something that is wholly impossible for a church to do. *See* 435 U.S. at 633 (Brennan, J., concurring). There is perhaps no great evidence of the harm and hardship this policy imposes on Cowboy Church than the fact that even after volunteer support, it still may be forced to close if it does not receive FEMA aid. *See* R. at 8 (Chaplain Hudson feeling that "if funds were not provided by FEMA, the Cowboy Church of Lima might fold."); 9 ("volunteers from the community helped with some repairs and costs but the donated volunteer hours were not enough to restore the chapel."). Accordingly, the Free Exercise Clause unconstitutionally precludes Cowboy Church's receipt of FEMA relief, and the Fourteenth Circuit should be reversed and the case remanded for further proceedings.

### C. Denying Disaster Relief to Cowboy Church Purely Because it is a Religious Organization Offends the Public Policy and Changing Attitudes of Modern Society.

While the framers of the Constitution sought to avoid repeating the same sort of church-state dichotomy that had led to persecution in England and further interference by the Crown in colonial America, the nation has evolved over the last 200-plus years. Church facilities are now used for more than "worship, proselytizing, [or] religious instruction." *See* FEMA Policy Guide at 14. Cowboy Church's facilities not only host church services, "Sunday school classes, youth group meetings, and

adult Bible study meetings," but also birthdays, banquets, parties, concerts, meetings, dances, counseling sessions, festivals, receptions, and serves as an emergency relief shelter. R. at 7.

In times of disaster, churches are a focal point, "serv[ing] an essential role in disaster recovery," sometimes as a shelter or key organizational base. *See* FEMA, 1980-110, *SBA May Help Churches, Nonprofits, Associations* (July 8, 2011), https://www.fema.gov/news-release/2011/07/08/sba-may-help-churches-nonprofits-associations. Even the President of the United States has expressed support for churches to be eligible for FEMA relief. *See* Donald J. Trump (@realDonaldTrump), Twitter (Sept. 8, 2017, 7:56), https://twitter.com/realdonaldtrump/status/906320446882271232?refsrc=email&s=11 ("Churches in Texas should be entitled to reimbursement from FEMA Relief Funds. . . ."). The President also described the importance of churches in "organiz[ing] efforts to clean up communities and repair damaged homes." Office of the Press Secretary, The White House, President Donald J. Trump Proclaims September 3, 2017, as a National Day of Prayer for the Victims of Hurricane Harvey and for our National Response and Recovery Efforts (Sept. 1, 2017).

FEMA's denial of relief to Cowboy Church due to its status as a religious organization is not in line with the views of modern society. This is a case about disaster relief, and nothing more. The financial assistance offered by FEMA does not go to church marketing, membership recruitment, or any sort of proselytizing

activities; it goes toward rebuilding structures devastated by Hurricane Rhodes and the subsequent, unprecedented flooding.

Neither of the First Amendment's Religion Clauses precludes Cowboy Church from receiving FEMA disaster relief. Denial rests instead on an outdated administrative policy that is not in harmony with the views and attitudes of the present day. Therefore, the Fourteenth Circuit's decision should be reversed, and the case remanded.

## CONCLUSION

This Court should reverse the Fourteenth Circuit's judgment in all respects, and remand for further proceedings on the merits. Cowboy Church's claim is ripe for judicial adjudication and is not barred by either of the First Amendment's Religion Clauses.

Respectfully submitted,

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Attorneys for Petitioner

## APPENDIX TABLE OF CONTENTS

# APPENDIX A

## Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

**U.S. CONST. amend. I**

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

# APPENDIX B

## Article III, Section 2, Clause 1. Jurisdiction of Courts

**U.S. CONST. art. III., § 2, cl. 1**

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

# APPENDIX C

**44 C.F.R. § 206.221(e)(7) (2003)**

**(e)** Private nonprofit facility means any private nonprofit educational, utility, emergency, medical, or custodial care facility, including a facility for the aged or disabled, and other facility providing essential governmental type services to the general public, and such facilities on Indian reservations. Further definition is as follows:

> **(7)** Other essential governmental service facility means museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature. All such facilities must be open to the general public.

## APPENDIX D

**44 C.F.R. § 206.221(f) (2003)**

**(f)** Private nonprofit organization means any nongovernmental agency or entity that currently has:

> **(1)** An effective ruling letter from the U.S. Internal Revenue Service, granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code of 1954, or
>
> **(2)** Satisfactory evidence from the State that the nonrevenue producing organization or entity is a nonprofit one organized or doing business under State law.

# APPENDIX E

## Actions Reviewable

**5 U.S.C. § 704 (2012)**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.