No. C17-2893-1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

COWBOY CHURCH OF LIMA,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR PETITIONER

Team No. 77
Counsel for Petitioner

QUESTIONS PRESENTED

I. The Doctrine of Ripeness allows pre-enforcement review of regulations when the claim is fit for judicial consideration and when non-adjudication causes hardship for the parties. The Cowboy Church of Lima's claim raises constitutional questions and FEMA's policies force the Church to alter its primary conduct. Does the Doctrine of Ripeness allow pre-enforcement review of the Church's free exercise claim?

II. The Establishment Clause prohibits funding religious organizations when the funding has no secular purpose, has the primary effect of advancing religion, and fosters excessive government entanglement with religion. FEMA's Public Assistance Program provides a generally available public benefit through a one-time grant to certain major disaster victims. Does the Establishment Clause permit FEMA to provide aid to a church? If so, would denying the Church aid based solely on religion violate the Free Exercise Clause?

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The order from the United States District Court for the Central District of New Tejas granting Respondent's motion for summary judgment is unreported. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 2–21.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered its decision on October 1, 2017. This Court granted Petitioner's timely petition for a writ of certiorari in October, 2017. This Court has appellate jurisdiction under 28 U.S.C. § 1254(1) (2012) and subject-matter jurisdiction under 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The pertinent constitutional and statutory provisions include Amendment I to the United States Constitution and various sections of the Stafford Act, which are reprinted in Appendix A to this brief. See App. A, *infra*, A-1.

The pertinent provisions of Title 44 of the Code of Federal Regulations are reprinted in Appendix B to this brief. See App. B, *infra*, B-1.

The pertinent portions of FEMA's Public Assistance Program and Policy Guide are reprinted in Appendix C to this brief. See App. C, *infra*, C-1–C-7.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Church's Vital Role in the Community

The Cowboy Church of Lima ("the Church"), a private nonprofit organization sitting on 88 acres in rural New Tejas, is the gathering place for the small town of Lima. (R. 2.) To Lima's citizens, the Church's campus represents more than a place of worship. The Church's event center is where Lima's high school sweethearts share their first dance, where the Lions Club holds its semi-annual pancake breakfasts, where Lima citizens exercise their constitutional right to vote. (R. 7.) The Church hosts banquets, Quinceañeras, retirement parties, glee club concerts, substance abuse support meetings, and counseling sessions. (R. 7.) The event center is even an emergency relief shelter. (R. 7.)

In 1998, when the Church's campus was only a chapel, Lima Mayor Rachel Berry asked to use the chapel for community events that were too large for any other space in the town (including city council meetings). (R. 3.) Chaplain Finn Hudson obliged, refusing the Mayor's offer to pay rent to use the chapel and insisting that the Church's facilities were open to "anyone, anytime." (R. 4.) The growing need for event space in Lima prompted the Church to expand its facilitates in 2005 to include an event center adjoining the chapel, as well as a small rodeo arena and various storage buildings. (R. 3, 4.) The event center was so widely used by Lima's citizens, in fact, that the citizens ultimately decided against constructing a second, government-owned event center. (R. 4.) The Church's event center was more than enough to accommodate the sleepy town of Lima.

B. Hurricane Rhodes

On August 13, 2016, Hurricane Rhodes pummeled the western shore of New Tejas one hundred miles north of Lima. (R. 2.) The devastating storm dropped more than forty-five inches of rain over 36 hours, resulting in the failure of the Flanagan Dam. (R. 3.) The failing dam pushed water into the Motta River, overflowing the Motta's banks and causing disastrous flooding across the region. (R. 4.) On August 19, President Obama declared the storm a major natural disaster. (R. 6.)

Two days after Hurricane Rhodes made landfall, the flood waters reached Lima. (R. 3.) As the water surged toward the Church's campus, Chaplain Hudson and the staff raced to rescue property from the chapel and event center. (R. 3). The flood waters breached the event center's doors just before midnight that same day and continued to flow throughout both facilities for a day-and-a-half, reaching as high as three-and-a-half feet. (R. 4, 5.) The effects were disastrous.

When the waters receded, Chaplain Hudson and his staff assessed the damage. (R. 5.) The flooding coated the chapel and event center in a layer of mud, silt, grass, sewage, and chemicals—destroying carpet, flooring, drywall, insulation, doors, furniture, and pews. (R. 5.) Over the next week, the staff removed four feet of sheetrock and insulation from the walls, all the flooring, and every freestanding item. (R. 5.) As his staff worked tirelessly to address the cosmetic damage, Chaplain Hudson could not shake the feeling that something more was amiss. (R. 5.)

Chaplain Hudson called Kurt Hummel, a structural engineer, to assess the chapel and event center for structural damage. (R. 6.) Mr. Hummel "concluded there was likely structural damage" to the buildings, and advised Chaplain Hudson that

immediate repairs were necessary to prevent the buildings from collapsing. (R. 6.) Unfortunately, neither building was insured for flood damage, as they were both located outside the 100-year flood plain. (R. 6.)

C. The Church's FEMA Application

By declaring Hurricane Rhodes a natural disaster, President Obama made Federal Emergency Management Agency ("FEMA") relief available to the affected regions. (R. 6.) That same day, Chaplain Hudson sought out the Church's attorney, Arthur Abrams, who advised the Chaplain to immediately apply for FEMA aid. (R. 6.) The Chaplain submitted an online application for FEMA relief the next day. (R. 6.)

A few days later, FEMA-contracted adjuster, Quinn Fabray, called Chaplain Hudson to schedule a tour of the facilities. (R. 6.) During the tour, Ms. Fabray asked questions about the chapel and event center's use. (R. 6.) Ms. Fabray estimated that the Church used the event center somewhere between 45% and 85% of the time for community events not tied to the Church. (R. 6.) Ms. Fabray also estimated that the Church used the chapel about 85% to 95% of the time for religious purposes. (R. 7.)

After the inspection, Ms. Fabray mentioned to Chaplain Hudson that "she hated that FEMA does not cover monetary assistance for churches" due to the "Church and State Separation doctrine." (R. 7.) Distraught, Chaplain Hudson expressed his fear that the Church might close because of its inability to fund repairs. (R. 7–8.) Ms. Fabray told the Chaplain "not to get his hopes up," and estimated that FEMA would respond to the Church's application within a few weeks. (R. 8.)

Ms. Fabray's comments prompted Chaplain Hudson to rush to the Church's attorney. (R. 8.) Mr. Abrams echoed Ms. Fabray's comments: "FEMA would surely deny [the Church's] application." (R. 8.) Mr. Abrams advised Chaplain Hudson that the only way to protect the Church's rights would be to sue FEMA. (R. 8.) After prayer and consultation with his congregation, Chaplain Hudson decided that the Church would challenge FEMA's policy. (R. 8.)

II. FEMA PUBLIC ASSISTANCE PROGRAM

The Church's possible ineligibility stems from FEMA's regulatory scheme. The Robert T. Stafford Disaster Relief and Emergency Assistance Act authorizes the Executive Branch to provide aid to "private nonprofit facilit[ies] damaged or destroyed by a major disaster for repair, restoration, reconstruction, or replacement of the facility and for associated expenses." Robert T. Stafford Disaster Relief & Emergency Assistance Act (Stafford Act) § 406(a)(1)(B), 42 U.S.C § 5172(a)(1)(B) (2012). FEMA provides its assistance in New Tejas through the Public Assistance Program ("PA Program"). Stafford Act § 403(a)(4), 42 U.S.C. § 5170b(a)(4). The PA Program is FEMA's largest grant program; its primary purpose is to assist communities recovering from major disasters. (R. 11.) The PA Program and Policy Guide ("Policy Guide") is a comprehensive compilation of the applicable Stafford Act provisions, FEMA regulations, and FEMA policies that govern the PA Program. FEMA, FP 104–009–2, Public Assistance Program and Policy Guide 7 (2016) [hereinafter Policy Guide].

Among the entities eligible for PA Program aid are private nonprofit organizations ("PNPs"). 44 C.F.R. § 206.222(b) (2017); Policy Guide 2. PNP

eligibility requires tax-exempt status under section 501(c), (d), or (e) of the Internal Revenue Code and ownership or operation of an "eligible facility." 44 C.F.R. § 206.221(f)(1); Policy Guide 10–11. An eligible facility is one that provides eligible services. 44 C.F.R. § 206.221(e); Policy Guide 11.

Eligible services include (1) "critical service[s], which [are] defined as education, utility, emergency, or medical" and (2) "non-critical, but essential governmental service[s]." Policy Guide 11 (citing 44 C.F.R. § 206.221(e)). Facilities offering the latter must be open to the public. 44 C.F.R. § 206.221(e)(7); Policy Guide 11. "Non-critical, but essential governmental service[s]" include museums, zoos, community centers, libraries, homeless shelters, rehabilitation facilities, and more. 44 C.F.R. § 206.221(e)(7); Policy Guide 13. *Ineligible* services include religious activities, religious education, and religious services, as well as political education, job counseling, and vocational training. Policy Guide 14.

The Policy Guide calls facilities that provide both eligible and ineligible services "mixed-use facilities." *Id.* at 16. A mixed-use facility's eligibility depends on the facility's "primary use"—the use for which more than 50% of the physical space (or 50% of the operating time for shared spaces) is dedicated. *Id.* FEMA reduces any aid granted to a mixed-use facility by the percentage of space dedicated for ineligible services. *Id.* A facility that is 60% eligible, for instance, would have its grant reduced by 40%. *See id.* If a facility's primary use is for *ineligible* services, however, then the entire facility is ineligible for PA Program aid. *Id.* So, if a PNP

uses a facility 50.1% of the time for an ineligible service, the PNP will not receive *any* aid to repair damage to that facility caused by a major natural disaster. *See id.*

Considering the PA Program's eligibility policies, the chapel is likely ineligible for aid based on the usage estimated by Ms. Fabray (85% to 95% religious). *Id.* (R. 7.) Conversely, the event center may be eligible under the mixed-use facility policy and the usage estimated by Ms. Fabray (15% to 55% religious). Policy Guide 16. (R. 6.) Because religious activity is an ineligible service, FEMA will, at best, grant the Church aid for only one of its damaged buildings. Policy Guide 16. Even then, FEMA will reduce that aid by the percentage of religious use. *Id.* Because the Church conducts too much religious activity, it will likely not receive much-needed PA Program aid. *See id.*

III. PROCEEDINGS BELOW

The Church filed suit against FEMA on August 29 in the United States District Court for the Central District of Lima, claiming FEMA's policies discriminate based on religion and violate the Free Exercise Clause. (R. 9.) After the Church filed its lawsuit, FEMA immediately stopped processing the Church's application. (R. 8.) Discovery revealed that Ms. Fabray's final report to FEMA stated that the Church uses the event center 80% of the time for eligible services and uses the chapel 90% of the time for ineligible services. (R. 10.) Furthermore, FEMA Regional Director, Jesse St. James, admitted that he placed the Church in a "preliminary denial category," pending further review of the event center's eligibility. (R. 10.)

After discovery, FEMA moved for summary judgment on two theories: (1) the case was not ripe for adjudication and (2) FEMA's policy excluding churches from eligibility was necessary to maintain Establishment Clause interests. (R. 10.) The district court granted summary judgment for FEMA, rejecting FEMA's ripeness argument, but siding with FEMA on its Establishment Clause argument. (R. 10.) The Church timely appealed to the United States Court of Appeals for the Fourteenth Circuit, seeking reversal and remand. (R. 10–11.) FEMA cross-appealed, seeking dismissal under the Doctrine of Ripeness. (R. 11.)

On appeal, the Fourteenth Circuit considered whether the Church's claim was ripe and whether the Establishment Clause prevented FEMA from funding a church. (R. 13, 15.)

A divided court of appeals reversed the district court's decision on the ripeness issue, believing further factual development was necessary to rule on the Church's claim, even though the claim presented a purely legal issue. (R. 14.) The court further stated that there was no hardship caused by withholding review because the Church reopened while its claim was pending, meaning FEMA funds were "not essential" to the chapel and event center's repairs. (R. 15.)

The divided court affirmed the district court's decision on the Establishment Clause issue, but primarily discussed the Free Exercise Clause and this Court's holding in *Trinity Lutheran*. (R. 17.) The circuit court found that FEMA's policy was not "premised on express discrimination based on religion." (R. 16.) In reaching its decision, the circuit court reasoned that because the Church does not pay taxes as

permitted by the Free Exercise Clause, it should not receive government aid under the Establishment Clause. (R. 17.) But the court reached this decision without relying on any legal authority. (R. 17.)

Judge Sylvester dissented. (R. 17.) Addressing ripeness, Judge Sylvester observed that the issues underlying the Church's claim remain the same regardless of factual development. (R. 18.) Judge Sylvester also characterized PA Program aid as a "generally available benefit," and reasoned FEMA should not use the Church's religious identity as an excuse for withholding much-needed aid. (R. 20.) Withholding the benefit, Judge Sylvester concluded, amounted to discrimination based on religion and a violation of the Free Exercise Clause. (R. 21.)

SUMMARY OF THE ARGUMENT

I. RIPENESS

The Fourteenth Circuit incorrectly found the Church's claim was not ripe. This Court should reverse the Fourteenth Circuit on the ripeness issue. Ripeness is uniquely a question of timing, asking when pre-enforcement review of a statute or regulation would be appropriate. A pre-enforcement claim is ripe when the claim satisfies a two-pronged test: (1) the underlying issue must be fit for judicial consideration and (2) withholding consideration of the pre-enforcement claim must result in hardship to the parties. The Church satisfies both prongs.

The Church's free exercise claim is fit for judicial consideration because the Church asks this Court to consider two purely legal questions: Does the Establishment Clause bar churches from receiving PA Program funding? And do FEMA's policies violate the Free Exercise Clause by discriminating based on religion? Additionally, the Church's claim challenges final agency action and does not need additional factual development to make the underlying issues more concrete.

Furthermore, the Church suffers hardship if this Court withholds pre-enforcement review. The inevitability of regulatory enforcement constitutes hardship and enforcement of FEMA's policies is certainly impending. Additionally, FEMA's policies force the Church to choose between funding and faith. This choice creates hardship for the Church. Finally, delayed adjudication of the Church's claim frustrates the PA Program's primary purpose: helping communities rebuild after natural disasters.

II. ESTABLISHMENT AND FREE EXERCISE CLAUSES

The Fourteenth Circuit erred when it upheld the district court's decision based on the Establishment Clause. This Court should reverse the Fourteenth Circuit's decision and find that FEMA's policies violate the Free Exercise Clause. Providing generally available aid to churches does not violate the Establishment Clause. Conversely, excluding churches from a public benefit based on religion violates the Free Exercise Clause.

Funding a religious organization through the PA Program satisfies the three-pronged *Lemon* Test and therefore does not violate the Establishment Clause. First, because Congress expressly articulated the Stafford Act's purpose, the PA Program advances a secular legislative purpose. Second, because the PA Program's primary effect is aiding in recovery after natural disasters, it neither advances nor inhibits religion. Finally, because the PA Program awards a one-time grant, it does not foster excessive government entanglement with religion.

Excluding the Church from PA Program aid simply because the Church is a church violates the Free Exercise Clause. The PA Program expressly discriminates against churches because it utilizes religion as a criterion for eligibility. This forces churches to make an unconstitutional choice: faith or funding. Further, because the PA Program denies churches aid based on status, not on use, it violates the Free Exercise Clause. This express discrimination based on religion triggers strict scrutiny. Finally, because FEMA's policy excluding religious organizations does not advance a compelling governmental interest and is not narrowly tailored, it fails strict scrutiny.

ARGUMENT AND AUTHORITIES

I. THE CHURCH'S FREE EXERCISE CLAIM IS RIPE BECAUSE IT PRESENTS AN ISSUE FIT FOR JUDICIAL CONSIDERATION AND BECAUSE THE FAILURE TO RESOLVE THE CLAIM WILL RESULT IN HARDSHIP FOR THE CHURCH.

The Fourteenth Circuit incorrectly held that the Church's claim was not ripe. This Court should reverse the Fourteenth Circuit. "[R]ipeness is peculiarly a question of timing," asking when pre-enforcement review of a statute or regulation is appropriate. *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). The Doctrine of Ripeness protects courts from premature adjudication of abstract issues and protects agencies from unnecessary judicial interference. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). This Court, in *Abbott Laboratories v. Gardner*, articulated a two-pronged test to determine when a case is ripe: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Id.* at 149. The ripeness test "involve[s] the exercise of judgment, rather than the application of black-letter rule." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 814 (2003) (Stevens, J., concurring).

The Church's free exercise claim is neither abstract nor premature. Instead, it is squarely fit for judicial consideration: the Church's claim is a purely legal issue; the Church's claim challenges final agency action; the Church's claim does not need any further factual development. Furthermore, the Church faces hardship if this Court withholds consideration of its claim. The enforcement of the PA Program's mixed-use facility policy is certainly impending. FEMA will either deny the Church's application or, at the very best, approve the Church's application but

reduce the overall grant because of the Church's religious activities. As discussed *infra* Section II.B, both scenarios violate the Church's free exercise rights. The PA Program places the Church in the impossible dilemma of deciding between receiving PA Program aid and continuing as a church. Finally, delaying adjudication frustrates the primary purpose behind the PA Program: helping communities rebuild after natural disasters. The inevitability of FEMA's adverse decision, the forced choice between funding and faith, and the frustration of the PA Program's purpose constitute hardship requiring judicial intervention.

The Church presents this Court with a claim fit for judicial consideration—a claim that, if not ruled on, will cause the Church hardship. This Court should find the Church's claim ripe.

A. The Church's claim is fit for judicial consideration.

A case is not ripe unless the underlying issue is fit for judicial consideration. *Abbott Labs.*, 387 U.S. at 149. This requirement prevents courts "from entangling themselves in abstract disagreements." *Id.* at 148. While there is no established test for when a pre-enforcement claim is fit for judicial consideration, this Court usually finds fitness where (1) the underlying issue is "purely legal" in nature, *id.* at 149; (2) the regulations involved are "final agency action" within the meaning of the Administrative Procedure Act, *id.* (citing 5 U.S.C. § 704 (2012)); and (3) no further factual development is necessary to assist the court in deciding the claim. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81–82 (1978).

1. *The Church's claim raises purely legal issues.*

A claim raising a purely legal issue is ordinarily ripe because the underlying issue is fit for judicial consideration. *Abbott Labs.*, 387 U.S. at 149. A purely legal issue is one in which adjudication "would [not] necessarily be facilitated if [it was] raised in the context of a specific" application of a regulation. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967). If a court must depend on a claim's factual setting to answer the underlying issue, then that issue is not purely legal. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736 (1998). Issues that hinge on either statutory interpretation, *Gardner*, 387 U.S. at 170, or a statute or regulation's constitutionality, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014), however, are purely legal issues.

Where a court's analysis of an issue depends on deciding too many variables, uncertainties, and complex alternatives, the issue is not purely legal. *Ohio Forestry Ass'n*, 523 U.S. at 736. In *Ohio Forestry Ass'n*, environmental groups sued the National Forest Service, claiming a plan developed by the Service authorized illegal logging and clearcutting on federal land. *Id.* at 731. The Court reasoned that evaluating the plan before the plan's application "would require time-consuming judicial consideration of the details of an elaborate, technically based plan." *Id.* at 736. Such review would "take place without benefit of the focus that a particular [application] could provide." *Id.* The issue was not one of statutory interpretation (a purely legal issue), but one depending on facts unavailable to the Court because of the suit's premature nature. *See id.* The claim was, therefore, not fit for judicial consideration. *Id.* at 739.

Claims hinging on statutory interpretation, and not on specific facts, involve purely legal issues. *Abbott Labs.*, 387 U.S. at 149. In *Abbott Laboratories v. Gardner*, this Court considered whether a suit by a group of pharmaceutical companies seeking pre-enforcement review of a regulation was ripe. *Id.* at 148. The companies argued the Commissioner of Food and Drugs exceeded his regulatory power under the Federal Food, Drug, and Cosmetic Act by promulgating certain regulations. *Id.* The primary issue was simply whether the Commissioner properly interpreted the Act. *Id.* The Court, articulating its two-part ripeness test for the first time, reasoned that the issue was fit for judicial consideration because it was one of statutory interpretation—a purely legal issue. *Id.* at 149.

The same principle applies to constitutional challenges to statutes and regulations: they are purely legal issues fit for judicial consideration. *See, e.g.*, *Susan B. Anthony List*, 134 S. Ct. at 2347. In *Susan B. Anthony List*, a political advocacy organization challenged the constitutionality of a statute prohibiting false statements during political campaigns. *Id.* at 2338. Before the state even enforced the statute against the organization, the organization sued, claiming the statute violated its First Amendment rights. *Id.* at 2339. This Court summarily decided that the constitutional challenge to the statute was a purely legal issue fit for judicial consideration; the statute either violated the First Amendment, or it did not. *Id.* at 2347.

The Church's claim raises two purely legal issues: Does the Establishment Clause bar churches from receiving PA Program funding? (R. 18.) And does the

mixed-use facility policy violate the Free Exercise Clause by discriminating based on religion? (R. 18.) This Court does not need any further factual development to decide those two issues. Unlike the issue in *Ohio Forestry Ass'n*, the Church's claim does not require "time-consuming judicial consideration of the details of an elaborate, technically based plan." As Judge Sylvester correctly explained in her dissent, this Court does not have to decide if the Church's facilities qualify under the mixed-use facility policy—that question is irrelevant to the purely legal issues underlying the Church's claim. (R. 18.) The Establishment Clause either prohibits funding churches, or it does not. The Free Exercise Clause either prohibits discrimination through the mixed-use facility policy, or it does not.

Like the issues in *Abbott Laboratories* and *Susan B. Anthony List*, the issues underlying the Church's claim are constitutional questions interpreting an agency regulation; therefore, the issues are purely legal. Judge Sylvester's hypothetical lawsuit (from her dissenting opinion) perfectly encapsulates the purely legal nature of the issues in this case: Hypothetically, if the Church received PA Program funding, a party with standing could sue FEMA and claim that funding a church violates the Establishment Clause. (R. 18.) The issue in this hypothetical lawsuit is identical to the issue presented here. (R. 18.) The plaintiff would change, but the issue would stay the same. This means the underlying issue is purely legal and does not require the context of a specific application. The importance of the constitutional questions—not the question of the Church's eligibility—makes this claim fit for judicial consideration, satisfying the first requirement for ripeness.

2. *The Policy Guide constitutes final agency action.*

When the challenged regulation is final agency action as defined by the Administrative Procedure Act ("APA"), a pre-enforcement claim is fit for judicial consideration. *Abbott Labs.*, 387 U.S. at 149. Under the APA, "[a] person suffering legal wrong . . . or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (2012). The APA limits judicial review, however, to "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy [at law]." *Id.* § 704 (emphasis added).[1] This Court has long interpreted "the 'finality' element in a pragmatic way," often taking a "flexible view of finality." *Abbott Labs.*, 387 U.S. at 149–51 (citing *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956); *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Columbia Broad. Sys. v. United States*, 316 U.S. 407 (1942)). To be "final," an agency action must first be "the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113 (1948)). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

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[1] The APA defines "[a]gency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof or the failure to act." 5 U.S.C. § 551(13). A "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4).

a. The Policy Guide is the culmination of FEMA's decision-making process.

"Final agency action" under the APA must be the culmination of the agency's decision-making process, meaning the action is definitive and not informal, tentative, or interlocutory. *Abbott Labs.*, 387 U.S. at 151; *Bennett*, 520 U.S. at 178. For instance, in *Abbott Laboratories*, this Court found that the regulation issued by the Commissioner of Food and Drugs was "promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties." 387 U.S. at 151. This, the Court determined, showed the regulation was final agency action because it was definitive and not tentative or informal. *Id.*

An agency's ability to amend or revise final agency action does not make the action any less final. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016). In *Hawkes Co.*, this Court found that jurisdictional determinations ("JDs") issued by the Corps regarding the presence of "waters of the United States" on the owner's land constituted final agency action. *Id.* at 1812. This was true even though the Corps could revise JDs based on new information. *Id.* at 1814. The ability to revise final agency action, the Court reasoned, "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Id.*

The Policy Guide represents the culmination of FEMA's decision-making process and is "final agency action." The Stafford Act authorizes the President to provide assistance to major disaster victims through the PA Program. Stafford Act § 406(a)(1)(B), 42 U.S.C § 5172(a)(1)(B) (2012); Policy Guide 1. FEMA publishes some of the rules governing PA Program eligibility in Title 44 of the Code of Federal

Regulations. Policy Guide 7. Before publishing the Policy Guide, "FEMA generally publishes proposed PA policy language in the *Federal Register* for public comment." Stafford Act § 325, 42 U.S.C. § 5165; Policy Guide 7. Just like the regulations in *Abbott Laboratories*, the Policy Guide is a comprehensive recitation of the governing statutes, FEMA regulations, and FEMA policies. (R. 11.)

Although the Policy Guide can be (and has been) revised, the publication still represents the culmination of FEMA's decision-making process. The 2016 Policy Guide applies to major disasters declared in 2016. Policy Guide vii. FEMA amended the Policy Guide and published the 2017 Policy Guide in April, 2017. FEMA, FP 104–009–2, Public Assistance Program and Policy Guide vii (2017). Just like the revised JDs in *Hawkes Co.*, the Policy Guide's revisability does not make it any less the culmination of FEMA's decision-making process.

b. The policies and regulations in the Policy Guide limit certain PNPs' eligibility for PA Program aid.

Final agency action must also be "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Bos. Marine Terminal Ass'n*, 400 U.S. at 71). The action must somehow affect the legal landscape under an agency's purview. *Id.* For instance, in *Bennett*, the Biological Opinion promulgated by the Fish and Wildlife Service altered the way in which the Klamath Project (a federal reclamation scheme) operated. *Id.* at 159. The regulation carried direct consequences for those subject to it. *Id.* Similarly, in *Abbott Laboratories*, the labeling regulation promulgated by the Commissioner of Food and Drugs immediately affected the pharmaceutical

companies' day-to-day activity. 387 U.S. at 152. Failure to comply with the new regulation would result in substantial civil penalties and costs. *Id.* In both cases, the legal consequences of the promulgated regulations satisfied the second prong of the "final agency action" test and both regulations were reviewable under the APA. *Bennett*, 520 U.S. at 178; *Abbott Labs.*, 387 U.S. at 152.

The policies and regulations compiled in the Policy Guide create legal consequences by declaring eligible certain categories of PNPs and certain facilities, particularly through the mixed-use facility policy. PNPs are only eligible for PA Program aid if the PNP is tax-exempt under the Internal Revenue Code and if it owns or operates an "eligible facility." 44 C.F.R. § 206.221(f)(1); Policy Guide 10–11. Eligible facilities are ones providing either (1) eligible critical services or (2) eligible non-critical, but essential governmental-type services. 44 C.F.R. § 206.221(e); Policy Guide 11. Facilities primarily used for religious activities, however, are not eligible. Policy Guide 11. "PNP facilities that provide both eligible and ineligible services are considered mixed-use facilities," and mixed-use facility eligibility depends on the facility's primary use. *Id.* at 16. A facility's primary use is "the use for which *more* than 50 percent of the physical space in the facility is dedicated." *Id.* If the primary use is dedicated to ineligible services (such as religion), then the entire facility is ineligible for PA Program aid. *Id.* But even if FEMA finds the mixed-use facility eligible, FEMA reduces the grant by the percentage of space dedicated to ineligible services. *Id.* The mixed-use facility policy, therefore, creates legal consequences for PNPs that offer ineligible services by limiting access to a public benefit program.

The Policy Guide essentially prohibits facilities used for religious purposes from receiving aid after major disasters.

The Policy Guide reflects the culmination of FEMA's decision-making process. Furthermore, the Policy Guide creates legal consequences for natural disaster victims. Therefore, the Policy Guide reflects final agency action. This conclusion tracks the pragmatic approach to finality this Court frequently takes. The finality of the challenged FEMA policies makes the Church's free exercise claim fit for judicial consideration.

3. *No further factual development is necessary for this Court to decide the Church's claim.*

In some cases, a claim will raise a purely legal issue challenging final agency action, but the court may still find "that further factual development would 'significantly advance [its] ability to deal with the legal issues presented.'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)). In such cases, the claim may not be ripe "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Courts often find, however, that additional facts would not significantly advance the court's ability to answer the legal issue if it would be "in no better position later than [it is] now." *Duke Power Co.*, 438 U.S. at 82 (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143–45 (1974)).

Where a claim's result depends on resolving ambiguities and unanswered questions in the facts, the claim is not ripe. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812. In *National Park Hospitality Ass'n*, a national park concessioner challenged the validity of a regulation declaring that contracts with concessioners were not contracts within the meaning of the Contracts Dispute Act. *Id.* at 806–07. The Court found the underlying issue to be a purely legal one challenging a final agency action, but still required further factual development to answer the issues involved. *Id.* at 812. The Court pointed to two possible factual ambiguities that would need clarifying: the uncertainty in the regulation's effect and the concessioners' reliance on specific factual scenarios in their arguments. *Id.* These ambiguities led the Court to believe that further factual development was necessary. *Id.*

Where additional facts would not actually help a court resolve the legal issues, the claim is ripe, even when there are facts that could be further developed. *Duke Power Co.*, 438 U.S. at 82. In *Duke Power Co.*, two environmental organizations sought a declaration that the Price-Anderson Act (distributing potential liability caused by a nuclear power plant malfunction) was unconstitutional because the Act did not assure adequate compensation to potential victims. *Id.* at 67–68. At the time, it was unclear how much damage a nuclear accident would cause and how much eliminating such damage would cost. *Id.* at 69–70. But the Court decided that an actual nuclear accident would not put it in a better position to answer the legal issue, even though an accident would help fill in

missing facts. *Id.* at 81–82. The Court found the plaintiffs' claim fit for judicial consideration. *Id.* at 82.

The Church's claim does not require a more concrete factual setting in which to resolve the dispute. This case is not like *National Park Hospitality Ass'n*, where the regulations' effects could vary in certain cases. All facilities primarily used for religious purposes are ineligible for PA Program aid—period. Policy Guide 11, 16. This policy does not vary with the type of religion practiced, the location of the facility, or the number of people who use the facility. The PA Program also treats mixed-use facilities identically: FEMA reduces the aid by the percentage of space dedicated to ineligible services. *Id.* at 16.

As discussed *infra* Section II.B, the *reduction itself* violates the Free Exercise Clause. This Court does not need to know the exact deduction from the Church's possible grant. It is enough to know the Church's facilities dedicate at least 1% of the physical space to an ineligible service under the mixed-use facility policy. And they do. In her final report to FEMA, Ms. Fabray concluded the Church used the chapel 90% of the time for religious purposes and used the event center 20% of the time for religious purposes (despite conflicting estimates from Chaplain Hudson). (R. 10.) But any uncertainty as to the event center's eligibility under the mixed-use facility policy is entirely irrelevant to the legal issues presented in the Church's claim. What is certain, however, is that the chapel and event center will either receive no aid under the PA Program or receive reduced aid based on the buildings' religious use. Both violate the Free Exercise Clause. *See infra* Section II.B.

The Church's free exercise claim presents two purely legal issues: Does the Establishment Clause prevent FEMA from providing aid to churches? And does denying that aid based on religion violate the Free Exercise Clause? Central to these purely legal issues is the Policy Guide, which represents FEMA's final agency action. The Church's claim needs no further factual development. Therefore, the Church's claim is fit for judicial consideration.

B. The Church will suffer hardship if this Court withholds consideration of the Church's claim.

The impact of the challenged regulations must create hardship warranting pre-enforcement review. *Abbott Labs.*, 387 U.S. at 152. Courts ask what hardship, if any, a party will suffer if the court withholds consideration. *Id.* This second requirement for ripeness is "less clear and less important." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 815 (Stevens, J., concurring). Just like the fitness prong, there is no express test for how much hardship is required for ripeness. In keeping with the principle that the ripeness test "involve[s] the exercise of judgment, rather than the application of black-letter rule," courts have found hardship in various situations. *Id.* at 814. For instance, this Court has found hardship when the enforcement of a regulation is certainly impending, *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143; where the application of the regulation affects primary conduct, *Abbott Labs.*, 387 U.S. at 152; and where delay in resolution frustrates the regulation or statute's primary purpose. *Duke Power Co.*, 438 U.S. at 82.

1. *The application of the PA Program's mixed-use facility policy and the resulting harm are inevitable.*

A party suffers hardship from delaying pre-enforcement review when the enforcement of the regulation in question is certainly impending. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143. The hardship is that a threatened injury is inevitable. *Id.* ("One does not have to await the consummation of a threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." (internal quotations omitted)).

Where a statute or regulation's enforcement is inevitable, "it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Id.* In *Regional Rail Reorganization Act Cases*, this Court considered whether various railroads' claims challenging the Regional Rail Reorganization Act of 1973 (a detailed reorganization plan for failing railroad companies) was ripe. *Id.* at 138. The failing railroad companies challenged the Act as a "taking" in violation of the Fifth Amendment *before* the lower court ordered the alleged taking (i.e. the transfer of certain rail properties to a private state-incorporated entity). *Id.* at 137. This Court found the claim ripe because the Act's enforcement requiring the alleged taking was certainly impending. *Id.* at 143. No matter what any party did, the events triggering the enforcement mechanisms in the Act were going to occur, which would, in turn, trigger the alleged taking. *Id.* at 140–41. Neither the parties nor any court could stop the alleged taking. *Id.* at 142–43. Even though the event giving rise to a constitutional claim had not yet occurred, the Court reasoned the underlying issue was "in no way hypothetical or

speculative." *Id.* at 143. Because the statute's enforcement was inevitable, this Court found the railroads' Fifth Amendment claim ripe. *Id.*

This Court also found ripe a pre-enforcement challenge to a statute prohibiting false statements during a political campaign because the enforcement was imminent and the threat of enforcement was substantial. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014). The state had not yet prosecuted the political advocacy organization for violating the statute, but the Court reasoned that it would permit "pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Id.* at 2342. Threatened administrative action, the Court reasoned, could "give rise to harm sufficient to justify pre-enforcement review," especially where the threat of future enforcement is substantial. *Id.* at 2345. This Court found the constitutional challenge to the statute ripe. *Id.* at 2347.

The enforcement of the PA Program's facility eligibility policies is inevitable. Facilities primarily used for religious purposes are ineligible. Policy Guide 16. FEMA will reduce aid to mixed-use facilities by the percentage of use dedicated to ineligible services (here, religion). *Id.* The actual percentage of space dedicated for eligible services in the chapel and event center do not make the enforcement of the PA Program's facility eligibility policies any less certain. Just like the statutes in *Regional Rail Reorganization Act Cases* and *Susan B. Anthony List*, FEMA is going to apply the PA Program policies to the Church's facilities—no matter what. The only thing delaying the policies' enforcement is time, and "it is irrelevant to the

existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." The inevitability of PA Program policy enforcement creates a hardship from delaying judicial consideration of the Church's claim.

2. *The PA Program forces the Church to choose between receiving FEMA funding and exercising religion.*

Where a regulation's impact affects an aggrieved party's primary, day-to-day conduct, courts find hardship from delaying pre-enforcement review. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 810. This is especially true where the regulation effectively forces the aggrieved party to choose between violating the regulation and altering its primary conduct. *Abbott Labs.*, 387 U.S. at 152. Therefore, where a regulation forces a party to such a choice, "the impact of the regulation[ ] upon the [party] is sufficiently direct and immediate as to render the issue" ripe. *Id.*

When a regulation forces a party to alter its primary conduct, it is unnecessary for the party to wait until enforcement to challenge the regulation; the party suffers hardship from the forced alteration of its conduct and the party's claim will be ripe. *Id.* at 153. In *Abbott Laboratories*, this Court considered whether the pharmaceutical companies would suffer any hardship if the Court withheld its review until after the Commissioner of Food and Drugs enforced his new regulations. *Id.* at 152. Delaying adjudication of the issue, the Court reasoned, placed the companies in the undesirable position of choosing between two equally bad alternatives. *Id.* The companies could comply with a potentially erroneous statute by completely recreating their drug labels and advertisements, or they could

violate the regulation and face serious civil and criminal penalties for doing so. *Id.* at 152–53. This Court found such a choice would cause severe hardship and unnecessary delay in deciding the issue. *Id.* at 153. Therefore, the Court found hardship from withholding consideration. *Id.* at 152.

Where a regulation does not affect primary conduct, it is possible that there is no hardship from withholding review of a plaintiff's claim until after enforcement. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 810. In *National Park Hospitality Ass'n*, this Court considered whether the National Park Service regulation altered the concessioner-plaintiffs' primary conduct, thus creating a hardship from delaying pre-enforcement review. *Id.* The Court found no effect on the concessioners' primary conduct. *Id.* Instead, the regulation "announce[d] the position [National Park Service] [would] take with respect to disputes arising out of concession contracts." *Id.* Nothing in the regulation impacted how the concessioners conducted their day-to-day business and there was no forced choice between conduct alteration and penalties. *Id.* Therefore, the concessioners suffered no hardship from the Court withholding consideration. *Id.*

The mixed-use facility policy's effect goes to the heart of the Church's primary conduct: religious activity. For the Church's chapel to be eligible under the mixed-use facility policy, the Church would have to substantially reduce the religious activity conducted in the chapel. Ms. Fabray concluded the Church uses the chapel 90% of the time for religious purposes. (R. 10.) To be eligible under the mixed-use facility policy, the Church would need to reduce the religious activity in the chapel

to under 50%. Policy Guide 16. This would require the Church to vastly reduce its current religious activity just to be eligible under the mixed-use facility policy. The PA Program policies' effect on the event center is the same: if the Church uses the event center more than 50% of the time for religious purposes, the Church will have to reduce its religious activity to gain eligibility.

But even reaching the threshold for mixed-use facility eligibility punishes the Church for its religious activity in the chapel and event center. Because the Church will still conduct some religious activity in its facilities, FEMA will reduce any PA Program aid by the percentage of religious activity. *Id.* To receive every dollar the Church needs for repairs, the Church would not have to *alter* its primary conduct—it would have to *cease* religious activity altogether.

The PA Program's mixed-use facility policy effectively forces the Church to choose between conducting religious activities in its facilities and receiving PA Program aid. FEMA is all but telling the Church that if it wants assistance after a natural disaster, it needs to stop being so religious. The choice between funding and faith is one the Church should not have to make. Such a choice creates hardship from delaying pre-enforcement review, especially since the choice affects the Church's primary conduct.

3. *Delayed adjudication of the Church's claim frustrates the PA Program's primary purpose.*

Delayed adjudication of a party's pre-enforcement claim causes hardship to the party seeking review when the delay frustrates the statutory scheme's primary purpose. *Duke Power Co.*, 438 U.S. at 82. In *Duke Power Co.*, this Court found

hardship where delay in resolving the underlying issue frustrated the Price-Anderson Act's primary purpose: "the elimination of doubts concerning the scope of private liability in the event of a major nuclear accident." *Id.* Similarly, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, this Court considered whether the federal Atomic Energy Act preempted a California statute regulating atomic energy. 461 U.S. 190, 198 (1983). This Court reasoned the preemption challenge was ripe because delayed resolution of the issue would frustrate the Atomic Energy Act's primary purpose: promoting commercial development of atomic energy. *Id.* at 202.

Delaying review of the Church's claim frustrates the PA Program's primary purpose: to assist owners of "private nonprofit facilit[ies] damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses." Stafford Act § 406(a)(1)(B), 42 U.S.C. § 5172(a)(1)(B). As the Fourteenth Circuit explained, "[t]he purpose of the PA Program is to assist communities responding to and recovering from major disasters or emergencies declared by the President." (R. 11.) The point behind the PA Program is to quickly and efficiently aid PNPs affected by a major disaster. Policy Guide 5. Delaying consideration of the Church's claims does nothing but frustrate the PA Program's purpose. Because the delay in considering the Church's claim frustrates the PA Program's primary purpose, there is hardship from delaying consideration of the Church's claim.

Delaying consideration of the Church's free exercise claim causes the Church substantial hardship. Not only is the enforcement of the PA Program's mixed-use facility policy certainly impending, but the policy's application forces the Church to alter its primary conduct. Furthermore, delaying review of the Church's purely legal issues prevents the Church from receiving much-needed FEMA aid.

Because of the hardship caused by delaying judicial review and because of the issue's fitness for judicial consideration (as discussed *supra* Section I.A), the Church's free exercise claim is ripe. This Court should reverse the Fourteenth Circuit.

II. THE ESTABLISHMENT CLAUSE DOES NOT BAR THE CHURCH FROM RECEIVING AID THROUGH THE PA PROGRAM AND FEMA'S POLICIES VIOLATE THE FREE EXERCISE CLAUSE.

The Fourteenth Circuit erroneously held that the Establishment Clause prohibits FEMA from providing aid to a church. This Court should reverse the Fourteenth Circuit and either rule on the Church's free exercise claim or remand this case for further proceedings. The First Amendment begins with a seemingly straightforward instruction: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The former, the Establishment Clause, creates the separation between Church and State. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The latter, the Free Exercise Clause, "requires government respect for, and noninterference with, the religious beliefs and practice of our Nation's People." *Id.*

While complementary, the two clauses, when taken to their logical ends, "tend to clash" with one another. *Walz v. Tax Comm'n of City of New York*, 397 U.S.

664, 669 (1970). Despite this tension, "there is room for play in the joints" between the two. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz*, 397 U.S. at 669). As a result, "between what the Establishment Clause permits and the Free Exercise Clause compels," the religion clauses generally work in harmony. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

Not so here.

The Establishment Clause can (and, in this case, does) violate the Free Exercise Clause. Here, the Establishment Clause does not bar the Church from receiving aid because the PA Program satisfies all three prongs of the *Lemon* Test: it advances a secular legislative purpose; it neither advances nor inhibits religion; it does not foster excessive government entanglement. Denying a church aid based solely on its religious identity, however, violates the Free Exercise Clause. This denial penalizes religion and triggers the most exacting scrutiny—which FEMA cannot withstand. While the Establishment Clause does not bar aid, the Free Exercise Clause compels it.

A. Providing generally available aid to churches does not violate the Establishment Clause.

The Establishment Clause states, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. This clause creates the wall separating church and state, preventing "the intrusion of either into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Total separation, however, is not entirely possible, and some relationship between the two is inevitable. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J.,

dissenting); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). To determine whether a law violates the Establishment Clause, courts utilize the three-pronged *Lemon* Test. *Lemon* requires that (1) the law "have a secular legislative purpose," (2) the law's "principle or primary effect . . . neither advances nor inhibits religion," and (3) the law "must not foster 'an excessive government entanglement with religion.'"[2] *Id.* at 612–13 (citing *Walz*, 397 U.S. at 674). If a law satisfies this three-pronged inquiry, it does not violate the Establishment Clause. *Id.*

The PA Program satisfies *Lemon*. First, because the PA Program's purpose is to assist communities recovering from major disasters and emergencies, it advances a clear secular purpose. Furthermore, because the PA Program is a neutral and generally available public benefit, it does not have the primary effect of advancing or inhibiting religion. Finally, because the PA Program awards a one-time grant of aid, it does not foster excessive government entanglement with religion. Because the PA Program satisfies *Lemon*, it does not violate the Establishment Clause.

1. *The PA Program advances a secular legislative purpose.*

Lemon's first prong requires that the law "have a secular legislative purpose." *Id.* at 612. This prong asks "whether [the] government's actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). Courts analyze this question through the eyes of an objective observer, utilizing traditional criteria such

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[2] *Agostini v. Felton* effectively modified *Lemon* by folding the third prong into the second. 521 U.S. 203, 233 (1997). For clarity, we address each prong separately.

as the law's text, its legislative history, and its enforcement. *McCreary Cty. v. ACLU of Ky.,* 545 U.S. 844, 862 (2005) (citing *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308 (2000)). A secular purpose is lacking only when there is "no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. Since *Lemon*, this Court has failed to find a secular purpose on only four occasions. *McCreary Cty.,* 545 U.S. at 859 (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290; *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam)).

A statute often expressly states its secular legislative purpose within the law's text itself. *See, e.g.*, *Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 654 (1980); *Lemon*, 403 U.S. at 613; *Tilton v. Richardson*, 403 U.S. 672, 678 (1971). The Stafford Act is no exception. An objective observer need look no further than the text of the Stafford Act and the Policy Guide.

Congress made its intent clear: "[T]o provide means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from" "[a]ny natural catastrophe[,] . . . fire, flood, or explosion." Stafford Act §§ 101, 102, 42 U.S.C. §§ 5121, 5122 (2012). The PA Program "assist[s] communities responding to and recovering from major disasters or emergencies." (R. 11.) It "saves lives and protect[s] property." (R. 11.) It permanently restores "community infrastructure affected by a federally-declared natural disaster." (R. 11.) Congress's intent was not to endorse religion, but to alleviate suffering caused by natural disasters. A secular

purpose is lacking only when there is "no question that the statute or activity was motivated wholly by religious considerations." No such religious motivation exists here. Because the PA Program has a clear secular purpose, it satisfies *Lemon*'s first prong.

2. *The PA Program's primary effect is neither to advance nor inhibit religion.*

Lemon's second prong requires a law's "primary effect . . . be one that neither advances nor inhibits religion." 403 U.S. at 612. While the first prong examines the law's *intended* effect, the second prong "examines its *actual* effect." *Adland v. Russ*, 307 F.3d 471, 484 (6th Cir. 2002) (emphasis added). Aid does not have the actual effect of advancing religion simply because the aid flows to a religious organization, so long as the aid's secular purpose is advanced. *Mitchell v. Helms*, 530 U.S. 793, 827 (2000). A generally available public benefit that does not favor religion does not have the primary effect of advancing religion. *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988).

This Court has eradicated the blanket policy of withholding aid from religious organizations. *Mitchell*, 530 U.S. at 826. So long as the secular purpose of providing the aid is advanced, "the religious nature of a recipient should not matter to the constitutional analysis." *Id.* at 827. The Establishment Clause does not require excluding religious organizations, and such exclusion, "born of bigotry," was buried by this Court's modern precedent. *Id*. Simply allowing churches access to generally available aid does not have the primary effect of advancing religion.

A generally available public benefit that does not favor religious applicants over other applicants does not have the primary effect of advancing religion. In *Bowen v. Kendrick*, Congress passed the Adolescent Family Life Act ("the AFLA"), which provided grants to organizations "for services and research in the area of premarital adolescent sexual relations and pregnancy." 487 U.S. at 593 (quoting S. Rep. No. 97–161, at 1 (1981)). Taxpayers alleged the program violated the Establishment Clause. *Id.* at 597. This Court found that the AFLA did not have the primary effect of advancing religion for two reasons *Id.* at 615. First, a wide variety of organizations were eligible for AFLA grants, including state agencies, hospitals, and religious organizations. *Id.* at 608. Second, the AFLA did not favor religious applicants over secular applicants, noting the program was "nothing but neutral with respect to the grantee's" religious status. *Id.* Religious institutions, this Court reasoned, "need not be quarantined" from public benefits available to all in order to satisfy *Lemon*. *Id.*

Here, granting aid to a church advances the PA Program's secular purpose despite the recipient's religious identity. Granting a church PA Program aid helps "alleviate the suffering and damage which result from" natural disasters. Stafford Act § 102, 42 U.S.C. § 5122 (2012). The PA Program allows certain PNPs to receive generally available aid and does not have the primary effect of advancing religion. Several types of PNPs are eligible under the PA Program, including museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, and rehabilitation facilities. Policy Guide 13. The PA Program is generally available to

all eligible PNPs. *Id.* at 10–11. Religious organizations "need not be quarantined" from generally available public benefits.

Furthermore, a church may only qualify for PA Program aid when the church satisfies the same requirements as any other PNP. *Id.* Therefore, the PA Program does not favor religious applicants over non-religious applicants. In fact, as discussed *infra* Section II.B, the PA Program actually *disfavors* religious applicants. Because the Establishment Clause does not require excluding religious organizations and because PA Program aid is generally available, its primary effect is neither to advance nor inhibit religion.

3. *The PA Program does not foster excessive government entanglement with religion.*

Lemon's final prong asks whether a law fosters excessive entanglement with religion. *Lemon*, 403 U.S. at 613 (citing *Walz*, 397 U.S. at 674). Such entanglement must be excessive before it violates the Establishment Clause. *Agostini*, 521 U.S. at 233. This "test is inescapably one of degree." *Walz*, 397 U.S. at 674. To determine the degree of entanglement, courts examine three factors: (1) "the character and purposes of the institutions . . . benefitted"; (2) "the nature of the aid" provided; and (3) "the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615. To violate this standard, the entanglement must be "comprehensive, discriminating, and continu[ous]." *Id.* at 618.

If a law fosters excessive government entanglement, the law violates the Establishment Clause. *Lemon*, 403 U.S. at 613. In *Lemon*, this Court considered an Establishment Clause challenge to two state laws providing funding to religious

schools. *Id.* at 607. The state laws provided direct funding to private schools and their teachers. *Id.* at 607, 609. This Court found that both laws failed each of the above factors. *Id.* at 614. First, every eligible recipient maintained a "substantial[ly] religious character." *Id.* at 616. Second, the danger of entanglement was "enhanced by the particular form of aid." *Id.* Subsidizing teachers in religious schools, the Court found, was different from providing secular books, transportation, and school lunches (each of which are facially neutral). *Id.* at 617. But it was not possible to ascertain whether aid recipients would teach in a secular or religious manner. *Id.* This distinction posed a danger "to the separation of the religious from the purely secular." *Id.* at 617. Finally, this Court found the restrictions on the aid (continuing financial relationships, audits, and analysis of expenditures) were comprehensive, discriminating, and continuing and "fraught with the sort of entanglement the Constitution forbids." *Id.* at 619–20. This created a complex relationship between the states and the aid recipients. *Id.* at 620.

This Court came to a different conclusion in *Lemon's* companion case, *Tilton v. Richardson*, 403 U.S. 672 (1971). In 1963, Congress passed the Higher Education Facilities Act, which granted federal aid to higher education institutions to construct academic facilities. *Id* at 675. Taxpayers alleged that the government funded four sectarian institutions in violation of the Establishment Clause. *Id.* at 676. Under the excessive entanglement prong, this Court applied the same three factors but with different results, "substantially diminish[ing] the extent and the potential danger of the entanglement." *Id.* at 685. First, unlike the schools at issue

in *Lemon*, each college's purpose was to provide students with secular educations. *Id*. at 687. Second, the nature of the aid provided was religiously neutral. *Id*. at 688. Finally, the construction grant was a "one-time, single-purpose" grant. *Id*. Although the government inspected the buildings, these contacts were minimal and did not create a relationship between the government and the institutions. *Id*.

The PA Program does not foster excessive government entanglement with religion because it does not implicate any of the factors identified in *Lemon*. First, the "character and purpose of the institutions" benefitted by the PA Program range from zoos to community centers and most everything in between. Policy Guide 13. Even if FEMA decides the Church is an eligible PNP organization, the PA Program aid still does not *primarily* flow to religious organizations. *See id*. Because aid flows to a wide variety of secular institutions, funding a church through the PA Program does not implicate the first entanglement factor.

Second, the nature of the aid provided under the PA Program is religiously neutral. Under the PA Program, FEMA provides aid to qualified applicants to repair and rebuild damaged structures. *Id.* at 6. Here, the aid is secular, neutral, and non-ideological. Like the aid provided in *Tilton*, "the non-ideological character" of PA Program aid lessens FEMA's entanglement. Undoubtedly, in some instances, PA Program aid will go to repairing a religious structure. But wood, nails, sheetrock, and paint are not ideological. Because the PA Program aid is religiously neutral, there is no danger of entanglement.

Finally, while interactions between an eligible PNP and FEMA occur, these meetings do not create the kind of relationship or contacts that give rise to "excessive and enduring entanglement." The PA Program process is streamlined and unobtrusive. First, the applicant submits a Request for Public Assistance. 44 C.F.R. § 206.202(c); Policy Guide 124. Once approved, FEMA facilitates a Kickoff Meeting with the aid Recipient to discuss the process. Policy Guide 126. After the Kickoff Meeting, FEMA and the Recipient "formulate incident-related damage and work into projects" and conduct a site visit. *Id.* at 127. When project formulation is complete, FEMA holds an Exit Briefing. *Id.* at 135. After the Recipient completes all projects, the Recipient sends a "closeout" confirming completion. 2 C.F.R. § 200.343 (2017); Policy Guide 138. Additionally, no excessive contacts exist between FEMA and a Recipient because, like *Tilton*, the PA Program does not involve a continuing financial relationship. PA Program aid is a one-time, single-purpose grant. And while FEMA may audit a Recipient, this is the same audit permitted when any agency awards a federal grant. *See* 2 C.F.R. § 200.336. The absence of the three factors here indicates a lack of excessive entanglement, satisfying *Lemon*'s final prong.

Because the PA Program satisfies all three prongs of *Lemon*, it does not violate the Establishment Clause. This Court should reverse the Fourteenth Circuit.

B. Excluding the Church from a public benefit simply because it is a church violates the Free Exercise Clause.

The Establishment Clause is inextricably linked to the Free Exercise Clause: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. When the government denies or limits a generally available public benefit based solely on religious identity, the government imposes a penalty on free exercise. *Trinity Lutheran*, 137 S. Ct. at 2019. Denying a group a benefit based on the group's religious use of that benefit may not violate the Free Exercise Clause, but denying a group a benefit based on a group's religious status certainly does. *Id.* at 2023. Finally, where a law targets religion and is not neutral, strict scrutiny applies. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Strict scrutiny is triggered here. Because the PA Program excludes the Church based solely on its religious identity, the PA Program violates the Free Exercise Clause. First, because the PA Program utilizes religion as a criterion for eligibility, it expressly discriminates against churches by either limiting eligibility or denying eligibility altogether. This forces the Church to choose: faith or funding. Second, because the PA Program denies or limits aid to churches based on their religious status—not their use of the aid—the program violates the Free Exercise Clause. Finally, because the PA Program expressly discriminates based on religion, it is subject to strict scrutiny, a burden the government cannot survive. Therefore, excluding the Church from the PA Program simply because of the Church's religious nature is odious to the Constitution and cannot stand.

1. *The PA Program expressly discriminates based on religion.*

Limiting or denying a generally available benefit based solely on religion constitutes a penalty on free exercise. *Trinity Lutheran*, 137 S. Ct. at 2019. Such a penalty amounts to express discrimination and violates the Free Exercise Clause. *Id.* In *McDaniel v. Paty*, a state denied a minister the ability to serve as a delegate to the state's constitutional convention. 435 U.S. 618, 621 (1978). This Court found that the law disqualified the minister solely based on religion. *Id.* at 627. He could not "exercise both rights simultaneously" because the law "conditioned the exercise of one on the surrender of the other." *Id.* at 626. This choice, the Court held, violated the minister's free exercise rights because it expressly discriminated by withholding a generally available benefit based solely on religion. *Id.*

This Court recently reaffirmed its prohibition on discrimination based on religion. In *Trinity Lutheran*, Missouri's Scrap Tire Program provided grants to organizations to resurface playgrounds with recycled tires. 137 S. Ct. at 2017. Missouri "had a strict and express policy of denying grants to any applicant owned or controlled by a church." *Id.* Because of this policy, the state denied Trinity Lutheran Church's application, even though the church ranked fifth among all applicants. *Id.* The church "was deemed categorically ineligible to receive a grant" because the program expressly discriminated based on religion. *Id.* at 2018. The state's policy, the Court found, expressly discriminated against the church: the Scrap Tire Program was a generally available public benefit and the state limited access to that benefit based solely on religion. *Id.* at 2021. Like the statute in *McDaniel*, Missouri's Scrap Tire Program forced Trinity Lutheran into an

impossible choice. *Id.* The church could either "participate in an otherwise available benefit or remain a religious institution." *Id.* at 2021–22. This Court understood that it was the forced choice itself that violated the Free Exercise Clause. *Id.* at 2022.

The PA Program likewise expressly discriminates against churches by imposing a penalty on free exercise. Like the laws in *McDaniel* and *Trinity Lutheran*, the PA Program imposes a condition which puts the Church to a choice: faith or funding. FEMA will likely deny the Church aid for the chapel because the chapel is used over 90% of the time for religious activities (an ineligible service). (R. 10.) The denial will not be based on the degree of damage, the need for aid, or a deficiency in the application. FEMA will deny the Church aid for its chapel because the chapel is too religious. This is express discrimination violating the Free Exercise Clause.

Even if FEMA grants partial PA Program aid to the Church for its event center, the reduction based on the percentage of religious activity under the mixed-use facility policy puts the Church to the exact same choice. Under the mixed-use facility policy, FEMA will reduce any aid the Church receives for the event center by 20% (the amount of religious activity conducted in the building). To receive the most aid possible, the Church would have to completely cease all religious activity in the event center. Even if FEMA does not wholly deny the Church's application, the limitation on access to PA Program aid still amounts to express discrimination and

violates the Free Exercise Clause. Whether an absolute bar or a 1% limitation—discrimination is discrimination.

2. *FEMA denies churches funding based on their religious status.*

While laws denying a public benefit based on the use of that benefit may not implicate Free Exercise Clause protection, *Locke v. Davey*, 540 U.S. 712, 725 (2004); *contra Trinity Lutheran*, 137 S. Ct. at 2025–26 (Gorsuch, J., concurring), laws denying a public benefit based on the applicant's status do. *Trinity Lutheran*, 137 S. Ct. at 2023. Although discrimination based on religious status clearly violates free exercise rights, discrimination based on religious use is not any less discriminatory: "[a]fter all, [the Free Exercise] Clause guarantees the free *exercise* of religion, not just the right to inward belief." *Id.* at 2026 (Gorsuch, J., concurring) (citing *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990)).

Laws that deny a benefit based on use may not violate the Free Exercise Clause. In *Locke*, a state provided scholarships to high-achieving students. 540 U.S. at 716. Students could not, however, use the scholarships to pursue theological degrees. *Id.* A scholarship recipient refused to certify that he would not pursue a degree in theology; in turn, the state refused to award him the scholarship. *Id.* at 717. The recipient sued the state under the Free Exercise Clause. *Id.* at 718. The state did not limit the scholarships to certain recipients, it simply limited the scholarship's use, choosing "not to fund a distinct category of instruction." *Id.* at 721. Students could still receive aid, but they could not use it for "vocational religious instruction." *Id.* at 725. Because the state limited access to the scholarship

based on the money's use and not on the recipient's identity, this Court held that the program did not violate the Free Exercise Clause. *Id.*

This Court came to the opposite conclusion in *Trinity Lutheran*. 137 S. Ct. at 2023. "Trinity Lutheran was denied a grant simply because of what it was—a church," and not because of how the church would use the grant, as in *Locke*. *Id.* The Court implemented the status-use distinction articulated in *Locke*, albeit to a different end: the state violated the Free Exercise Clause by denying a church access to a generally available grant based on the church's religious status. *Id.* at 2025.

But perhaps the Free Exercise Clause should not distinguish between status and use. While a majority of Justices signed onto Chief Justice Robert's opinion in *Trinity Lutheran*, only a plurality agreed with footnote 3: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3 (plurality). Justices Thomas and Gorsuch disagreed with footnote 3, reasoning the status-use distinction places too strict a burden on free exercise: "I don't see why it should matter whether we describe [the Scrap Tire Grant] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way." *Id.* The lack of a majority for footnote 3 indicates at least a willingness to question the status-use distinction's validity.

Perhaps the door has been left open because Justice Gorsuch makes a valid point—discrimination is discrimination. But if this Court continues the status-use distinction, there is no question as to which side of the line FEMA's policies fall. FEMA denies churches aid based on status, because of who they are—not because of what they will do with the aid. The Church's religious identity is the only factor preventing it from eligibility under the PA Program. (R. 13.) FEMA does not base its eligibility decisions on which approved projects a PNP undertakes (like debris removal, carpet replacement, drywall repair, and yes, even playground resurfacing). *See* Policy Guide 11. FEMA expressly denies (or limits through the mixed-use facility policy) aid for churches simply because of who they are. Unquestionably, the PA Program excludes churches based on status and status alone. Just like *Trinity Lutheran*, such exclusion violates the Free Exercise Clause.

Although FEMA's policies exclude churches based on religious status, an opposite holding by this Court makes FEMA's actions no less discriminatory. If this Court determines that FEMA denies aid to churches based on use, this Court has an opportunity to shut the door on the arbitrary distinction between discrimination based on status and discrimination based on use. In either case, FEMA is denying access to a generally available public benefit based solely on religion. This is express discrimination and violates the Free Exercise Clause.

3. *Strict scrutiny applies to the Church's claim and FEMA cannot satisfy the rigorous standard.*

Laws that are neutral and generally applicable do not raise free exercise concerns. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990). A law

that targets religion, however, is subject to strict scrutiny. *Lukumi*, 508 U.S. at 546. To survive strict scrutiny, the government must show a compelling governmental interest that is narrowly tailored to advance that interest. *Id.* at 531–32. Laws targeting "religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." *Id.* at 546. This is no such case.

a. FEMA's policies are not neutral and strict scrutiny therefore applies.

"Valid and neutral laws of general applicability" do not raise free exercise concerns. *Smith,* 494 U.S. at 879. This Court has consistently distinguished neutral laws from laws that single out religion for disfavored treatment. *Trinity Lutheran*, 137 S. Ct. at 2020. In *Employment Division, Department of Human Resources v. Smith*, this Court upheld a law denying unemployment benefits to individuals who smoked peyote for religious purposes. 494 U.S. at 874. The Court noted that laws imposing "special disabilities on the basis of religio[n]" violate the Free Exercise Clause. *Id.* at 877. But the law at issue in *Smith* did not target religion at all. *Id.* at 882. Instead, the law forbade *all persons* from smoking peyote—for religious purposes or otherwise; the law was neutral and generally applicable and did not violate free exercise. *Id.*

Laws that expressly discriminate against religion, however, are not neutral. *Trinity Lutheran*, 137 S. Ct. at 2021. In *Trinity Lutheran*, Missouri's Scrap Tire Program had a simple and expressly discriminatory rule: churches need not apply. *Id.* at 2024. The policy of express discrimination, this Court found, meant the law was not neutral and therefore imposed a penalty on free exercise. *Id.* at 2021. Such a penalty, the Court held, triggers strict scrutiny. *Id.*

Unlike the law at issue in *Smith* and like the policy in *Trinity Lutheran*, the PA Program is not neutral. Instead, as discussed *supra* Sections II.B.1 and II.B.2, the PA Program imposes a special disability based on religion. FEMA expressly discriminates based on religion by limiting (and, in some cases, denying) aid for churches. FEMA's policy amounts to a penalty on free exercise. This Court should, therefore, examine FEMA's policies under strict scrutiny.

b. FEMA's policies fail strict scrutiny.

To satisfy strict scrutiny, the government must show a compelling interest and the law must be narrowly tailored to further that interest. A compelling state interest is an interest "of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2024 (citing *McDaniel,* 435 U.S. at 628). In *Trinity Lutheran*, Missouri offered its "preference for skating as far as possible from religious establishment concerns" as a compelling governmental interest. *Id.* For the second time, this Court found that anti-establishment interests "cannot qualify as compelling." *Id.*; *see also Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

The government must also show the law is narrowly tailored to advance its interest. *Lukumi*, 508 U.S. at 531–32. A law is narrowly tailored when it is no broader than absolutely necessary to achieve the government's compelling interest. *See id.* A law that is overinclusive or underinclusive is not narrowly tailored. *Lukumi*, 508 U.S. at 546. A law that is underinclusive fails to prohibit analogous conduct that would also further the government's compelling interest. *Id.* Similarly, a law is overinclusive when the government's interest could be achieved by more narrow means that would "burden[ ] religion to a far lesser degree." *Id.*

In support of the PA Program, FEMA argues the exclusion is "necessary to preserve the sanctity of the Establishment Clause." (R. 10.) Far from novel, this alleged compelling interest has been expressly rejected by this Court on two separate occasions. FEMA's purported interest must suffer the same fate. Because FEMA's interest is not one "of the highest order," it fails the first prong of strict scrutiny.

The PA Program fails strict scrutiny's second prong because it is both over and underinclusive. The PA Program is overinclusive because it restricts otherwise eligible facilities from receiving full funding, even when the facility is 99% eligible. A community center used one night a week for a men's bible study will receive less than its full grant, even though the community center is neither a religious facility nor owned by a religious organization. The policy excludes too many. Further, the PA Program is underinclusive because it still funds PNPs that conduct religious activity. If FEMA's goal is the preservation of the Establishment Clause, funding PNPs which are 49% ineligible is wildly underinclusive. FEMA's interest would make more sense if it denied aid altogether to facilities conducting religious activities. But they do not.

FEMA cannot support its policies with a compelling governmental interest. The PA Program is also not narrowly tailored. Therefore, the PA Program fails strict scrutiny and violates the Free Exercise Clause.

CONCLUSION

Petitioner respectfully requests this Court reverse the Fourteenth Circuit on both the ripeness and Establishment Clause issues. Because the Church's claim presents an issue fit for judicial consideration and because withholding consideration of that claim results in hardship for the Church, the Church's claim is ripe. Furthermore, because the PA Program has a secular purpose, does not have the primary effect of advancing religion, and does not foster excessive government entanglement, funding the Church does not violate the Establishment Clause. Finally, Petitioner asks this Court to find that FEMA's policies discriminate based on religion and, therefore, violate the Free Exercise Clause. At the very least, this Court should remand this case for further proceedings on Petitioner's free exercise claim.

Respectfully Submitted,

Team No. 77
Counsel for Petitioner

Dated: November 20, 2017

APPENDIX A

Constitution and Statutory Provisions

U.S. Const. amend. I

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

Stafford Act § 401(a)(4), 42 U.S.C. § 5170b(a)(4) (2012)

> (a) In general
>
> Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster, as follows:
>
> > * * *
> > (4) Contributions
> >
> > Making contributions to State or local governments or owners or operators of private nonprofit facilities for the purpose of carrying out the provisions of this subsection.

Stafford Act §406, 42 U.S.C. § 5172(a)(1)(B) (2012)

> (a) Contributions
>
> > (1) In general
> >
> > The President may make contributions—
> >
> > > * * *
> > > (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.

APPENDIX B

Code of Federal Regulations

44 C.F.R. § 206.202(c) (2017)

(c) Request for Public Assistance (Request). The recipient must send a completed Request (FEMA Form 90–49) to the Regional Administrator for each applicant who requests public assistance. You must send Requests to the Regional Administrator within 30 days after designation of the area where the damage occurred.

44 C.F.R. § 206.221(e)(7) (2017)

(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.

44 C.F.R. § 206.221(f)(1) (2017)

(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[.]

44 C.F.R. § 206.222(b) (2017)

The following entities are eligible to apply for assistance under the State public assistance grant:

* * *

(b) Private non-profit organizations or institutions which own or operate a private nonprofit facility as defined in § 206.221(e).

APPENDIX C

Other Sources

FEMA, FP 104–009–2, Public Assistance Program and Policy Guide (2016) (relevant portions) (internal citations omitted)

(page 1)
CHAPTER 1: OVERVIEW

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, as Amended (Stafford Act), Title 42 of the United States Code (U.S.C.) § 5121 et seq., authorizes the President to provide Federal assistance when the magnitude of an incident or threatened incident exceeds the affected State, Territorial, Indian Tribal, and local government capabilities to respond or recover.

* * *

(page 5)
II. Public Assistance Program Authorities

The mission of FEMA's PA Program is to provide assistance to State, Territorial, Indian Tribal, and local governments, and certain types of PNP organizations so that communities can quickly respond to and recover from major disasters or emergencies declared by the President.

* * *

(page 7)
D. Public Assistance Policy

FEMA issues policy to articulate the Agency's intent and direction in applying statutory and regulatory authority to guide decision-making, achieve desired outcomes, and ensure consistent implementation of programs across the Nation. FEMA generally publishes proposed PA policy language in the Federal Register for public comment prior to publishing in this document. PA policy is included in Chapter 2 of this document. This document also references other FEMA policies that apply to both the PA Program and other FEMA programs.

FEMA will make updates to this publication on an annual basis, as necessary, and will conduct a comprehensive review no less than every 3 years.

* * *

(page 10)
CHAPTER 2: PUBLIC ASSISTANCE POLICY

* * *

II. Applicant Eligibility

* * *

D. Private Nonprofit Organizations

Only certain PNPs are eligible Applicants. To be an eligible PNP Applicant, the PNP must show that it has:

• A current 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;

* * *

(page 11)

Additionally . . . prior to determining whether the PNP is eligible, FEMA must first determine whether the PNP owns or operates an eligible facility. For PNPs, an eligible facility is one that provides an eligible service as listed below:

•A facility that provides a critical service, which is defined as education, utility, emergency, or medical . . . or

•A facility that provides a non-critical, but essential governmental service AND is open to the general public.

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Table 2. PNP Eligible Non-critical, Essential Governmental-Type Services

PNP ELIGIBLE NON-CRITICAL, ESSENTIAL GOVERNMENTAL-TYPE SERVICES	

Community centers established and primarily used for the purpose of offering the following services (or similar) to the community at large:
• Art services authorized by a State, Territorial, Tribal, or local government, including, but not limited to:
  ○ Arts administration
  ○ Art classes
  ○ Management of public arts festivals
  ○ Performing arts classes
• Educational enrichment activities that are not vocational, academic, or professional training; examples include hobby or at-home pursuits, such as:
  ○ Car care
  ○ Ceramics
  ○ Gardening
  ○ Personal financial and tax planning
  ○ Sewing
  ○ Stamp and coin collecting
• Multi-purpose arts programming
• Senior citizen projects, rehabilitation programs, community clean-up projects, blood drives, local government meetings, and similar activities
• Services and activities intended to serve a specific group of individuals (e.g., women, African-Americans, or teenagers) provided the facility is otherwise available to the public on a non-discriminatory basis
• Social activities to pursue items of mutual interest or concern, such as:
  ○ Community board meetings
  ○ Neighborhood barbecues
  ○ Various social functions of community groups
  ○ Youth and senior citizen group meetings
• Community centers operated by a religious institution that provides secular activities, such as fundraising, activities that help the community at large
	• Child care
	• Day care for individuals with disabilities or access and functional needs (for example, those with Alzheimer's disease, autism, muscular dystrophy)
	• Food assistance programs
	• Health and safety services
	• Homeless shelters
	• Libraries
	• Low-income housing (as defined by Federal, State, Territorial, Tribal, or local law or regulation)
	• Museums:
	  ○ Constructed, manufactured, or converted with a primary purpose of preserving and exhibiting a documented collection of artistic, historic, scientific, or other objects
	  ○ Buildings, associated facilities, fixed facilities, and equipment primarily used for the preservation or exhibition of the collection, including:
	  ➢ Permanent infrastructure, such as walkways and driveways of outdoor museum-type exhibition areas
	  ➢ Historic buildings, such as barns and other outbuildings, intended for the preservation and exhibition of historical artifacts within a defined area
	  ➢ Permanent facilities and equipment that are part of arboretums and botanical gardens
	  ➢ Infrastructure, such as utilities, and administrative facilities necessary for support
	  ○ The grounds at museums and historic sites are not eligible.
	  ○ Open natural areas/features or entities that promote the preservation/conservation of such areas are not eligible.
	• Residential and other services for battered spouses
	• Residential services for individuals with disabilities
	• Senior citizen centers
	• Shelter workshops that create products using the skills of individuals with disabilities
	• Zoos
	• Performing arts centers with a primary purpose of producing, facilitating, or presenting live performances, including:
	  ○ Construction of production materials
	  ○ Creation of artistic works or productions
	  ○ Design
	  ○ Professional training
	  ○ Public education
	  ○ Rehearsals
	• Public broadcasting that monitors, receives, and distributes communication from the Emergency Alert System

Facilities that do not provide medical care, but do provide: • Alcohol and drug treatment • Assisted living • Custodial care, even if the facility is not open to the general public (including essential administration and support facilities) • Rehabilitation	
With the exception of custodial care facilities and museums, administrative and support buildings essential to the operation of PNP non-critical services are NOT eligible facilities.	

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Table 3. PNP Ineligible Services

PNP INELIGIBLE SERVICES	
COMMUNITY CENTER SERVICES • Religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large • Training individuals to pursue the same activities as full-time paying careers (for example, vocational, academic, or professional training) • Meetings or activities for only a brief period, or at regular intervals	**OTHER COMMUNITY SERVICES** • Advocacy or lobbying groups not directly providing health services • Cemeteries • Conferences • Day care services not included in previous table of eligible services • Irrigation solely for agricultural purposes[61] • Job counseling • Property owner associations with facilities such as roads and recreational facilities (except those facilities that could be classified as utilities or emergency facilities) • Public housing, other than low-income housing • Recreation • Religious services • Parking not in direct support of eligible facility
EDUCATION • Athletic, vocational, academic training, or similar activities • Political education • Religious education[62]	

III. Facility Eligibility

In general a facility must be determined eligible in order for work to be eligible.

* * *

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B. Private Nonprofit Facility

An eligible PNP facility is one that provides educational, utility, emergency, medical, or custodial care, including for the aged or disabled, and other essential governmental-type services to the general public. * * *

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1. Mixed-Use Facility

PNP facilities that provide both eligible and ineligible services are considered mixed-use facilities. Eligibility of mixed-use 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. "Primary use" is the use for which more than 50 percent of the physical space in the facility is dedicated. FEMA

evaluates the entire structure when determining primary use; it does not separately address individual areas, such as floors, basements, or wings. Common space, such as bathrooms, hallways, lobbies, closets, stairways, and elevators, is not included when calculating mixed-use space.

If FEMA determines that 50 percent or more of physical space is dedicated to ineligible services, the entire facility is ineligible. If the facility is eligible, FEMA prorates funding based on the percentage of physical space dedicated to eligible services. The Applicant is responsible for the balance of costs to restore the facility and must restore the entire facility to receive funding for repairs to the eligible-use portions of the facility. * * *

(a) Mixed-Use Space

In cases where the same physical space is used for both eligible and ineligible services, the primary use is the use for which more than 50 percent of the operating time is dedicated in that shared physical space.

* * *

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CHAPTER 3: PUBLIC ASSISTANCE PROGRAM ADMINISTRATION

I. Initial Collaboration

* * *

B. Applicant Briefing

As soon as possible following the President's declaration, the Recipient conducts briefings for all potential Applicants (i.e., State, Territorial, Tribal, and local government entities and private nonprofits [PNPs]). The Recipient is responsible for notifying potential Applicants of the date, time, and location of the Applicant Briefing. During these briefings, the Recipient provides high-level information regarding the PA Program, such as:

- Application procedures
- Project funding
- Hazard mitigation
- Administrative requirements
- Procurement requirements
- Environmental and historic preservation (EHP) compliance requirements
- General eligibility criteria
- Documentation requirements

- Recordkeeping

To obtain maximum benefit from the information presented at the briefing, a potential Applicant should:

- Send representatives from its management, emergency response, public works, and accounting/finance/procurement operations; and
- Designate a primary point of contact to interact with the Recipient and FEMA.

C. Request for Public Assistance

If a State, Territorial, Tribal, or local government entity or PNP wishes to seek PA funding, it must first submit a Request for Public Assistance (RPA) to FEMA, through the Recipient, within 30 days of the respective area being designated in the declaration. The RPA (FEMA Form 9049) is the form to apply for the PA Program; FEMA also refers to it as a pre-application. Given the necessity to collaborate with Applicants early in the PA Program implementation process, FEMA's expectation is that the Recipient collect RPAs as soon as possible after the respective area is designated in the declaration or at the conclusion of the Applicant Briefing. However, FEMA accepts RPAs up to the 30-day deadline. If a Tribal Government is its own Recipient, it submits its RPA directly to FEMA. FEMA may extend the deadline for submitting an RPA if the Recipient submits a request in writing with justification based on extenuating circumstances beyond the Applicant's or Recipient's control.

* * *

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II. Project Formulation

FEMA and the Recipient work with the Applicant to formulate incident-related damage and work into projects (i.e., subawards) based on logical groupings of the damage and work. This process is a collaborative effort beginning at the Kickoff Meeting and concluding with an Exit Briefing.

* * *

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F. Exit Briefing

FEMA and the Recipient conduct an Exit Briefing with the Applicant when project formulation is complete and all claimed damage is documented.

* * *

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IV. Project Funding

* * *

C. Project Reconciliation and Closeout

The purpose of closeout is for the Applicant to certify that all work has been completed. FEMA closes Large Projects individually as each is completed. FEMA closes all Small Projects together when the last Small Project is completed. To ensure a timely closeout process, the Applicant should notify the Recipient immediately as it completes each Large Project and when it has completed its last Small Project.