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 # 80
Counsel of Record

THIS PAGE PRINTED ON LIGHT BLUE PAPER

QUESTIONS PRESENTED

I. Whether the Federal Emergency Management Agency ("FEMA") can be subject to lawsuits prior to determining whether or not an entity is eligible to receive relief or is such a lawsuit barred by the doctrine of ripeness.

II. Whether the Establishment Clause of the First Amendment bars the Cowboy Church of Lima from receiving the public benefit of relief under the Federal Emergency Management Agency's Public Assistance Program.

PARTIES TO THE PROCEEDINGS

Petitioner, Cowboy Church of Lima, is a 501(c)(3) entity located within the Township of Lima, in the County of Nyada, New Tejas.

Respondent, Federal Emergency Management Agency, is an executive agency housed within the Department of Homeland Security and is responsible for the promulgation, administration, and enforcement of the challenged policies. Respondent W. Craig Fugate, is the Administrator of the Federal Emergency Management Agency and is sued in his official capacity only.

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OPINIONS BELOW

The opinion of the United States District Court for the Central District of New Tejas is unreported. The unreported opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 2–21.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 1, 2017. Petitioner timely filed a petition for writ of certiorari, which this Court granted. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable portions of The Robert T. Stafford Disaster Relief and Emergency Assistance Act, which govern this case appear in the Appendix at 36.

STATEMENT OF THE CASE

A. Introduction to the Stafford Act and FEMA Public Assistance Program.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act") authorizes "[t]he President" to "make contributions" to the owner or operator of "a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses." 42 U.S.C. § 5172(a)(1)(B). The Public Assistance Program ("PA Program") is FEMA's largest grant program under the Stafford Act[1], and its regulations and policies are contained in the FEMA Public Assistance Program and Policy Guide ("PA Policy Guide"). *See generally* Federal Emergency Management Agency, FP 104-009-2, *Public Assistance Program and Policy Guide* (2016). Under the Stafford Act, federal assistance becomes available once (1) the President declares a major disaster exists in the State, and (2) FEMA dispenses federal financial assistance in the State through the Public Assistance Program ("PA Program") in accordance with the PA Policy Guide.

Eligible organizations under the PA Program include private nonprofit entities that (1) "show that it has [a] current letter ruling from the U.S. Internal Revenue Service granting tax exemption under sections 501(c) . . . of the Internal Revenue Code of 1954" and, (2) the entity must "own[] or operate[] an eligible facility." R. at 3; FEMA Policy Guide at 12–13, 17 (citing 44 C.F.R. § 206.221(f)).

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[1] *See* FEMA, *New Public Assistance Delivery Model*, Federal Emergency Management Agency (Nov. 19, 2017, 10:25 PM), https://www.fema.gov/new-public-assistance-delivery-model (indicating the PA Program is FEMA's largest grant program, representing 51% of all grants given).

An "eligible facility" is either: (1) "[a] facility that provides a critical service, which is defined as education[al], utility, emergency, or medical," or (2) "[a] facility that provides non-critical, but essential governmental services and is open to the general public." *Id.* at 12. Eligible "non-critical" services include "museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature." 44 C.F.R. § 206.220(e)(7).

FEMA also recognizes "mixed-use facilities . . . . that provide both eligible and ineligible services." FEMA Policy Guide at 17. Eligibility for mixed-use facilities "is dependent on the *primary* use of the facility," which requires "*more* than 50 percent of the physical space in the facility is dedicated" to eligible services. *Id* (emphasis added). "If FEMA determines that 50 percent or more of physical space is dedicated to ineligible services, the entire facility is ineligible. [But,] [i]f the facility is eligible, FEMA prorates funding based on the percentage of physical space dedicated to eligible services." *Id.* at 17. Here, the lower courts recognized that FEMA placed the Church's application for funding in the preliminary denial pile indicating that the Church's facilities were ineligible for funding even under the "mixed-use" standard. R. at 10.

The PA Program funds repairs of eligible facilities, for both emergency work and permanent work. *Id.* at 20. Permanent work is "work required to restore a facility to its pre-disaster design (size and capacity) and function in accordance with applicable codes and standards." *Id.* at 20. As a preliminary matter, eligible

private nonprofit entities, such as the Cowboy Church of Lima, must apply for a Small Business Administration ("SBA") disaster loan before seeking PA Program funding for permanent work. *Id.* at 18. Further, PA Program funds are only available if the SBA loan application is denied, or for the portion of permanent work the SBA loan does not cover. *Id.* After applying for the SBA loan, eligible facilities must then submit a Request for Public Assistance form to FEMA within 30 days of the President's disaster proclamation. *Id.* at 131. The Church has satisfied all requirements, as recognized by the courts below, and described in detail *infra*. R. at 3–9.

B. The Cowboy Church of Lima is an Eligible Organization with Eligible Facilities

The Cowboy Church of Lima sits on 88 acres and includes a rodeo arena that seats 500 people, storage buildings, and a chapel that seats 120 people that has an attached event center. R. at 3. The church was built in 1990. *Id.* In 1998, the Mayor of Lima, Rachel Berry, approached Chaplain Finn Hudson and asked if the township could use the chapel for events each year. *Id.* Mayor Berry explained that the chapel was the only building in Lima large enough to accommodate city council meetings. *Id.* Chaplain Hudson welcomed Lima to use the chapel, and over time, the chapel's community usage grew. R. at 4. Due to the Church and community's growing needs for space, the Church began raising funds through private donations and an annual bake sale. *Id.* These funds enabled the Church to expand and add an event center annex to the chapel in 2005. *Id.* The Township of Lima treated the Church's event center as their own, and even rejected proposals to build a

community event center because most community members did not think the city needed a second. *Id.*

C. Hurricane Rhodes Destroys the Church.

Then, on August 13, 2016, tragedy struck the Township of Lima when Hurricane Rhodes made landfall 100 miles north. R. at 2. Rainfall generated by the storm breached the Flanagan Dam, unleashing catastrophic flooding across the region. R. at 2–3. Like others throughout New Tejas, the Church's property was devastated. R. at 5. Floodwaters filled the Church chapel and event center—rising as high as three feet—and remained for two days. *Id.* After examining the facilities, Kurt Hummel, a local home designer and structural engineer determined the chapel and event center would need immediate repair lest the buildings collapse. R. at 6. Fortunately, aid was made available throughout New Tejas on August 19, 2016, when President Barack Obama declared Hurricane Rhodes a natural disaster, thereby allowing FEMA to assist the community through its PA Program. *Id.*

D. The Church Applies For FEMA Funds

On August 20, 2016, Chaplain Hudson timely applied for FEMA relief to help with the cost of repairs for the event center and chapel. R. at 6. Then on August 24, 2016, Quinn Fabray, an adjuster contracted by FEMA, contacted Chaplain Hudson to tour the facilities and assess the damage incurred. *Id.* Chaplain Hudson informed Fabray that the event center was used for a variety of events including

but not limited to: birthday parties, banquets, meetings of the Lions Club and the Rotary Club, quinceañeras, retirement parties, glee club concerts, rodeo meetings, a polling location for county elections, large city council meetings, school dances, substance abuse support meetings, marriage and family counseling sessions. R. at 7. Moreover, the facility is also designated as an emergency relief shelter. *Id.* Chaplain Hudson also explained that while the chapel was used for religious events on Sundays, during the week the chapel was utilized for a mixture of religious and secular events including: concerts, holiday festivals, dances, and non-religious meetings. *Id.* After the tour, Fabray informed Chaplain Hudson that because of the Church's religious identity, their application would likely be denied. *Id.*

E. The Church Sues FEMA for Its Discriminatory Policy.

On August 29, 2016, upon advice of counsel, the Church sued FEMA. *Id.* In response, FEMA immediately suspended processing the Church's claim. *Id.* Nevertheless, in his deposition, FEMA Regional Director Jesse St. James conceded that the event center was used 80% of the time for FEMA-eligible purposes. R. at 10. Moreover, St. James mentioned that while the chapel was used for non-FEMA eligible purposes a majority of the time, FEMA still placed the Church in a preliminary denial category because of its religious affiliation. *Id.*

Unaided by FEMA, community volunteers and donations enabled the Church to reopen its doors to the public a year after the tragedy, but unfortunately the

chapel was beyond the repair capabilities of volunteer crews and remains in disrepair. R. at 8–9.

F. The Disposition Below

The district court found the matter ripe for review and granted respondent's motion for summary judgment on their establishment clause claim. R. at 10. On appeal, the court of appeals affirmed the motion for summary judgment and also ordered the district court to enter an order dismissing for lack of subject matter jurisdiction because the Church's claim was not yet ripe. R. at 17. Petitioner now appeals, and this Court has granted certiorari. R. at 1.

SUMMARY OF THE ARGUMENT

I. The court of appeals erred in its order to the district court to enter an order dismissing for lack of subject matter jurisdiction because the case at hand is ripe for review. This Court has subject matter jurisdiction because the matter is ripe for judicial review. The matter is ripe for judicial review because the issue is fit for judicial review, and because withholding consideration would result in hardship to the church. The issue is fit because FEMA's past decisions and explicit policy make waiting for a decision futile. Further, the issue presented is fit for judicial decision because it presents a pure question of law, the mixed-use standard under FEMA's PA Program constitutes final agency action, and the church has no other adequate remedy. Finally, the issue is ripe because withholding judicial consideration will result in hardship to the church. The hardship to the church is both particular to the church, and qualifies as significant hardship of a strictly legal kind. For these reasons, this Court should affirm the district court's finding that the matter is ripe for judicial review and reverse the decision of the court of appeals on the first issue.

II. The courts below erred in holding that providing funding to the Cowboy Church of Lima violates the Establishment Clause of the First Amendment. The Establishment Clause of the First Amendment does not bar the Cowboy Church of Lima from receiving assistance under the FEMA Public Assistance Program, because as in *Trinity Lutheran*, FEMA's restrictions are discriminatory in nature and violate the First Amendment. Moreover, FEMA's policy violates the Establishment Clause under the test created in *Lemon v. Kurtzman* because it

penalizes the Church's religious activity, and excessively entangles the federal government in religious activity. Further, the Establishment Clause does not bar the Church from receiving the generally available public benefit under FEMA's PA Program because FEMA is not funding religious activity, and any religious benefits derived are merely incidental. Finally, FEMA's failure to provide the Church with assistance violates the Free Exercise clause because it denies the church of a generally-available public benefit based solely on the Church's religious identity. As such, FEMA's policy is facially discriminatory and cannot satisfy strict scrutiny. Worse still, FEMA's policy harms and integral part of the Lima community and would result in a loss to the community at large. For these reasons, this Court should reverse the decision of the court below on the second issue.

STANDARD OF REVIEW

Petitioner, the Cowboy Church of Lima ("the Church") appeals from: (1) the court of appeals' order to the district court to enter an order dismissing the case for lack of subject matter jurisdiction (R. at 17), and (2) the granting and affirmation of Respondent's motion for summary judgment (R. at 10, 17). Concerning the order to dismiss for lack of subject matter jurisdiction, the lower court's factual findings are reviewed for *clear error*, and legal conclusions are reviewed *de novo*. *See Fountain v. Karim*, 838 F.3d 129, 134 (2d. Cir. 2016); *see also Cartwright v. Garner*, 751 F.3d 752, 760 (6th Cir. 2014); *In re Eckstein Marine Serv., L.L.C.*, 672 F.3d 310, 314 (5th Cir. 2012).

Concerning the motion for summary judgment, the lower court's legal conclusions are reviewed *de novo*, and the evidence and all factual inferences from that evidence are viewed in the light most favorable to the movant. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citations omitted). All reasonable doubts about the facts are resolved in favor of the nonmoving party. *Id.* Further, because FEMA's policy denies a generally available benefit based solely on the Church's religious identity, the policy is subject to strict scrutiny. *See Trinity Lutheran Church of Columbia, Inc., v. Comer*, 137 S. Ct. 2012, 2019 (2017) (citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (citations omitted)).

Because FEMA's actions consisted of a final agency action under the Administrative Procedure Act ("APA")—making this case ripe for judicial review—and because the Church is not barred from receiving funds from FEMA, this Court should reverse the judgment of the Court of Appeals for the Fourteenth Circuit.

ARGUMENT AND AUTHORITIES

I. The Issue is Ripe for Judicial Review Because the Issue is Fit for Review, and Withholding Court Consideration Will Result in Hardship to the Cowboy Church of Lima.

The Church filed suit seeking funding from the Federal Emergency Management Agency ("FEMA") after the church and event center flooded. R. at 8–9. As a threshold matter, this Court must determine whether the Church's claim is ripe for immediate judicial review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (indicating injunctive and declaratory remedies are discretionary and courts reluctantly apply them to administrative determinations unless they arise from controversies ripe for judicial resolution). Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n. v. Dep't of the Interior*, 538 U.S. 803, 807–08 (2003) (citing *Ohio Forestry Ass'n., Inc. v. Sierra Club*, 523 U.S. 726, 732–33 (1998)); *Abbott*, 387 U.S. at 148–49. The doctrine is drawn from both Article III limitations on judicial power and prudential reasons for refusing to exercise jurisdiction. *Nat'l Park Hosp. Ass'n.*, 538 U.S. at 808 (2003) (citing *Reno v. Catholic Soc. Serv., Inc.* 509 U.S. 43, 57, n. 18 (1993) (citations omitted)).

Determining whether a case is ripe for judicial review requires the court to (1) evaluate the fitness of the issues for judicial decision and (2) assess the hardship to the parties of withholding court consideration. *Abbott*, 387 U.S. at 149. Under the APA, absent some statutory provision allowing immediate judicial review, a regulation is generally not considered ripe for judicial review until some action applying the regulation to a claimant's situation threatens to harm or actually harms him. *See* 5 U.S.C. §§ 702, 706; *see also Nat'l Park Hosp. Ass'n.*, 538 U.S. at 808 (citing *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990)). The Church's claim satisfies this standard.

A. The Issues Presented are Fit for Judicial Review.

The Church's claim satisfies the first ripeness requirement because the challenged agency action is fit for judicial review. Under *Abbott's* first prong, a case is generally fit for review when the parties present a substantial controversy with conflicting cognizable legal claims. *See, e.g.*, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–42 (1937) (holding that adverse legal interests exist when parties assert opposing legal rights). These claims must manifest a concrete dispute, a mere hypothetical or speculative allegation. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979).

1. This Case is Fit for Judicial Review Because it Presents a Pure Question of Law.

Cases that present pure questions of law, and require little factual development are more likely to be ripe. *Freedom to Travel Campaign v. Newcomb*,

82 F.3d 1431, 1434 (9th Cir. 1996) (citing *Thomas v. Union Carbide Agri. Prods. Co.*, 473 U.S. 568, 581 (1985)). In explaining this, the D.C. Circuit stated that there could be no other action that "would bring the issues into greater focus or assist [a court] in determining them." *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000). In *Abbott*, this Court held that the plaintiff's challenge to a pharmaceutical industry regulation was ripe for review because the facts of the case were clear, and additional facts would not aid this Court in determining whether the regulation was permissible under the statute. *Abbott*, 387 U.S. at 149. Ultimately, the fitness prong of the ripeness test ensures there is a sufficiently developed controversy enabling this Court to efficiently and accurately rule. Wm. Grayson Lambert, *Toward a Better Understanding of Ripeness and Free Speech Claims*, 65 S.C. L. Rev. 411, 423 (2013) (citing *Abbott*, 387 U.S. at 148).

2. *The Mixed-Use Standard Under FEMA's PA Program Constitutes Final Agency Action.*

An agency action includes any rule defined by the Administrative Procedure Act ("APA") as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Abbott*, 387 U.S. at 149 (quoting 5 U.S.C. § 704). Agency action becomes final within the meaning of the APA when the action "mark[s] the consummation of the agency's decision-making process." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotations omitted). The action must not be "of a merely tentative or interlocutory nature," and the action "must be one by which rights or obligation have been

determined, or from which legal consequences will flow." *Id.* Section 704 of the Administrative Procedure Act ("APA") states that an agency action is subject to judicial review when (1) made reviewable by statute or (2) when the agency's action is final and there is no other adequate remedy available within a court of law. 5 U.S.C. § 704. Because there is no statutory provision providing for immediate judicial review, this Court's jurisdiction is contingent on this Court's determination that (1) FEMA acted summarily, and (2) the Church has no other adequate remedy available.

Courts take a "flexible view of finality" and, at times, allow even the enactment of a regulation without enforcement to qualify as final. *Abbott*, 387 U.S. at 150–51 (citing *Frozen Food Express v. United States*, 351 U.S. 40, 76 (1956); *United States v. Storer Broad. Co.*, 351 U.S. 192, 198 (1956)). As an illustration, in *Abbott*, the plaintiffs, a group of drug manufacturers, challenged Food and Drug Administration regulations, prior to enforcement, which required drug companies to display the generic chemical name on any materials where the brand name of the drug appeared. *Abbott*, 387 U.S. at 138–39. This Court held even unenforced regulations are subject to judicial review provided the plaintiff meet certain criteria. *Abbott*, 387 U.S. at 139–41. Further, this Court requires the APA's "generous review provision" receive a "hospitable interpretation." *Abbott*, 387 U.S. at 140–41 (citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).[2] In *United*

[2] In *Shaughnessy*, this Court stated: "Such a restrictive construction of the finality provision of the present Immigration Act would run counter to [§] 10 and [§] 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to

States v. Storer Broadcasting Co., the Court held to be a final agency action an FCC regulation announcing a Commission policy that it would not issue a license to an applicant already owning five such licenses, even though no specific application was before the Commission for review. *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956). There the Court stated: "The process of rulemaking was complete. It was a final agency action … by which Storer claimed to be aggrieved." *Id.* at 198.

3. *There is No Other Adequate Remedy Available at Law.*

The APA provides specifically not only for review of agency action made reviewable by statute but also for review of "final agency action for which there is no other adequate remedy in court." *Abbott*, 387 U.S. at 140 (citing 5 U.S.C. § 704). Adequate remedy is a term signifying available damages sufficient to making a plaintiff whole. *Bowen v. Massachusetts*, 487 U.S. 879, 925 (1988) (Scalia, J., dissenting). As a general rule, challenges to agency action will not be affected by the "other adequate remedy" provision because they contest statutes or regulations that do not provide for damages. *Bowen*, 487 U.S. at 926, n.4 (citing *Abbott*, 387 U.S. 136).

In the present case, the Church seeks funding from FEMA's PA Program to rebuild its church and event center. FEMA's policy does not grant any alternative

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judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act. And as the Court said in the *Heikkila* case, the Procedure Act is to be given a 'hospitable' interpretation. . . . And it would certainly not be in keeping with either of these Acts to require a person ordered deported to go to jail in order to obtain review by a court." *Shaughnessy*, 349 U.S. at 51.

claims that the Church could pursue, leaving no other adequate remedies. *See Abbott*, 387 U.S. at 140. Even if another remedy were available to the Church, it would not be adequate given the structural damages to the church and event center. The Church's structural engineer concluded there was likely structural damage to the chapel and event center and that repairs were needed to be made in the next few months or there was a risk the structure would fail and parts of the buildings could collapse. R. at 6. Because FEMA performed a final agency action when it released its final report and there is no other adequate remedy available to the Church, the provisions of section 704 of the APA are satisfied and the issues are fit for judicial review.

B. The Issue is Ripe Because Withholding Court Consideration Will Result in Hardship to the Cowboy Church of Lima.

Withholding judicial review will impose a preventable hardship on the Church. *Ohio Forestry*, 523 U.S. at 733. The second prong of the ripeness test examines whether the parties will suffer hardship if judicial resolution is withheld. *Abbott*, 387 U.S. at 149. This prong considers whether the action in question creates an immediate and direct conflict for the parties. *See Skull Valley Brand of Goshute Indians v. Neilson*, 376 F.3d 1223, 1237 (10th Cir. 2004) (quoting *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498–99 (10th. Cir. 1995) (internal quotation marks omitted)). While the required showing that hardship to the parties would ensue absent a ruling from the judiciary lacks any precise definition, courts have developed general, applicable principles. Wm.

Grayson Lambert, *Toward a Better Understanding of Ripeness and Free Speech Claims*, 65 S.C. L. Rev. 411, 423 (2013) (citing *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (citing *Winter v. Cal. Med. Review, Inc.*, 900 F.2d 1322, 1324 (9th Cir. 1990) (concluding that considerations of ripeness are based on the court's discretion))); *Dietary Supplemental Coal., Inc. v. Sullivan*, 972 F.2d 560, 562 (9th Cir. 1992).

Specifically, mere financial loss is considered an insufficient hardship to warrant immediate review. *See, e.g.*, *Dietary Supplemental Coal., Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir.1992) ("To meet the hardship requirement, a party must show that withholding judicial review [ ] would entail more than possible financial loss.") But, financial losses that force parties to modify behavior to comply with laws or regulations, demand immediate judicial review. In *Abbott*, this Court noted that legal compliance required the company to alter merchandising, destroy existing printed materials, and purchase new printing equipment and supplies—a significant financial burden. *Abbott*, 387 U.S. at 152. Because regulatory compliance required significant steps, this Court determined that withholding immediate judicial imposed significant hardship on the company. *Id.* at 152–53. But, without the compliance costs, the company would not have faced a hardship requiring judicial review. *Id.*

In determining whether withholding consideration would impart a significant hardship on the Church, this Court evaluates the "degree and nature of the regulation's present effect on those seeking relief." *Toilet Goods Ass'n v.*

Gardner, 387 U.S. 158, 164 (1967). If agency action results in consequences "felt immediately by those subject to it in conducting day-to-day affairs," then withholding court consideration imposes significant hardship. *Id.* Therefore, a challenge's timing is critical. *Id.* If requiring a challenge at a later time would result in "irremediably adverse consequences," the hardship prong is satisfied. *Id.* Otherwise, a challenger is forced to wait until the harm is more certain and imminent to seek judicial review. *See Ohio Forestry Ass'n., Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) ("The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain."). Ultimately, this Court has stated that a showing of hardship is dependent on the creation of "adverse effects of a strictly legal kind" arising out of agency action. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 809 (citing *Ohio Forestry Ass'n., Inc.*, 523 U.S. at 733). Withholding court consideration in the present cases would impose significant hardship on the Church.

Moreover, in determining whether withholding court consideration would impart a hardship of a "strictly legal kind", this Court must decide that the agency action results in consequences that would qualify as harm under the law. *Ohio Forestry Ass'n.*, 523 U.S. at 733. As this Court recognized in *United States v. Los Angeles & Salt Lake R. Co.*, to show harm of a strictly legal kind, the provision must: (1) command one to do something or refrain from doing something, (2) grant, withhold, or modify a formal legal license, power, or authority, (3) subject someone

to civil or criminal liability, or (4) create legal rights or obligations. *United States v. Los Angeles & Salt Lake R. Co.*, 273 U.S. 299, 309–10 (1927).

Here, FEMA's policy mandates that the Church no longer participate in their religious activities to be eligible for funding to rebuild their church and event center. Further, this Court has acknowledged that the loss of First Amendment freedoms, even for a minimal period of time, unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 374 (1976). Because the hardship imparted on the Church stems directly from the requirement that the Church denounce its religious status and results in the loss of First Amendment freedoms, the hardship resulting from withheld court consideration is of a sufficiently legal kind for a ripeness determination. *See Ohio Forestry Ass'n*, 523 U.S. at 733 (noting that an environmental group faces legal harm where agency action grants an entity the legal right to cut trees).

II. The Establishment Clause of the First Amendment Does Not Bar the Cowboy Church of Lima From Receiving Assistance Under the FEMA PA Program, Because as in *Trinity Lutheran*, FEMA's Restrictions are Discriminatory in Nature and Violate the First Amendment.

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The separation of church and state is subject to limitation, especially where the Establishment and Free Exercise Clauses conflict. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (citing *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)). Taken

together, these clauses are designed to prevent the intrusion of either religion or government into the precincts of the other, and are premised on the notion that both best achieve their aims if left free from the other. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The Establishment Clause of the First Amendment prohibits state or federal governments from creating a church, passing laws which aid or prefer one religion over another, forcing or influencing a person's attendance or absence from church, or participating in the affairs of any religious organization or groups. *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 15–16 (1947). The Founders specifically intended the Establishment Clause to "erect a wall of separation between Church and State." *Everson*, 330 U.S. at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

Recently, this Court has addressed whether a state governmental entity may discriminate against a church because of religious status. In *Trinity Lutheran*, this Court addressed whether the United States Constitution allows Missouri's Department of Natural Resources ("DNR") to refuse an otherwise-available reimbursement grant for playground improvement simply because the applicant is a church.[3] *Trinity Lutheran*, 137 S. Ct. at 2012 (2017). This Court held that the DNR's policy violated Trinity Lutheran's rights under the Free Exercise Clause of

[3] Missouri's DNR had a "strict and express" policy of denying grants to applicants controlled by a church or other religious entity. That policy, according to the Department, was compelled by Article 1, Section 7 of Missouri's State Constitution, which states: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof. . . ." *Trinity Lutheran*, 137 S. Ct. at 2018.

the First Amendment by denying Trinity Lutheran an otherwise-available public benefit on account of its religious status. *Id.* at 2019–25. As such, the Church asks this Court to reverse the lower court's decision to grant summary judgment dismissing the Church's free-exercise claim.

A. FEMA's Policy Violates the Establishment Clause Under the Test Created in *Lemon v. Kurtzman*.

The landmark case for Establishment Clause issues is *Lemon v. Kurtzman*, where this Court established what is commonly referred to as the "Lemon Test." *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the Lemon test, the government does not violate the Establishment Clause if: (1) the action's primary effect neither advances nor inhibits religion, (2) the action does not foster excessive government entanglement with religion, and (3) the government action must have a secular purpose. *Lemon*, 403 U.S. at 612–13. The government's failure to satisfy any of the three prongs violates the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). While the Church concedes FEMA's policy satisfies a secular purpose, Respondent cannot meet their burden under the first and second prong of the Lemon Test for the following reasons.

1. The Primary Effect of FEMA's Policy Inhibits Religion by Penalizing the Church's Religious Activity.

Public aid may have a primary effect of advancing religion when it flows to institutions where religious activity is so pervasive that a substantial portion of its function is dedicated to a religious mission. *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). Lemon's effect prong

demands the principal or primary effect of the government action must neither advance nor inhibit religion. *Lemon*, 403 U.S. at 612. The effect prong focuses on the actual result of the government action rather than the motivation behind the action. *Lemon*, 403 U.S. at 612–13.

Here, the effect of FEMA's policy is to inhibit religion by penalizing the Church for religious activities. Mixed-use facilities with at least 51% eligible secular activity receive prorated funding from the PA Program. FEMA Policy Guide at 17. Accordingly, even religious entities that do qualify as mixed-use facilities are still penalized according to the amount of religious activity occurring in the facility. As such, the effect of FEMA's policy inhibits religion and violates the first prong of the Lemon Test. *Lemon*, 403 U.S. at 612.

2. FEMA's Policy Fosters Excessive Entanglement Between Government and Religion Because it Defines Religious Activity.

FEMA's policy defines religious usage by stating what is and is not considered church religious activity when determining whether an entity will receive funding, which is a direct violation of the Establishment Clause. *See Locke*, 540 U.S. at 716 (upholding a state scholarship program that did not award funds to student pursuing degrees in theology as per the school's definition and not the State's). Excessive entanglement between state and religion may be defined as an impermissible merging or intermingling of the proper spheres of religion and government. *See Lemon*, 403 U.S. at 634. Here, FEMA entangles itself in the providence of the Church by attempting to define religious usage.

While FEMA may argue that a minor burden on religious exercise is permitted under *Locke's* "play in the joints," FEMA breaks what *Locke* only intended to bend. *See Locke*, 540 U.S. at 719 (indicating "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause" that are permitted as only imposing minor burdens on religious exercise in advancing a State's anti-establishment interest). In *Locke*, the State created a scholarship program for high-achieving students pursuing postsecondary education. *Locke*, 540 U.S. at 715–16. But, the program specified that "[n]o aid shall be awarded to any student who is pursuing a degree in theology." *Id.* at 716.

Writing for the majority, Justice Rehnquist contrasted *Locke* with cases in which this Court struck down laws requiring individuals to choose between receiving a government benefit and their religious beliefs. *Locke*, 540 U.S. at 720–21 (citing *Hobbie v. Unemployment Appeals Comm'n of Florida* 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Locke*, the student was not denied a scholarship because of identity or belief, but because of what he proposed to do with the funds. *Locke*, 540 U.S. at 716. Here, as noted by the dissent below, the Church can only receive FEMA funding by giving up their identity as a church. *See* R. at 19 ("The Cowboy Church of Lima would apparently be entitled to FEMA relief provided the congregation makes one small sacrifice: give up their church."). The Church's ineligibility under the PA Program is based solely on activity inherent to their identity as a church.

Worse still, *Locke*'s statute codified the State's constitutional prohibition against providing funds to students pursuing degrees that are "devotional in nature or designed to induce religious faith," but it was the private institution—not the government—that defined what constitutes a theology degree. *Locke*, 540 U.S. at 716. Here, FEMA, not the Church defines what constitutes religious activity. *See* FEMA Policy Guide at 15 (defining religious activity as including but not limited to worship, proselytizing, religious instruction.) FEMA even excludes "training individuals to pursue the same [religious] activities as full-time paying careers (for example, vocation, academic, or professional training)," the very activity *Locke* left to the private institution to define. *Id; Locke* 540 U.S. at 716. Finally, as the Church experienced, a FEMA contracted worker is charged with assessing and determining which of the Church's activities constitute religious or secular functions. *See* R. at 7–8 (stating that Fabray, the FEMA investigator estimated the chapel was used 85% to 95% for religious purposes); *see also* FEMA Policy Guide at 17 ("If *FEMA determines* that 50 percent or more of physical space is dedicated to ineligible services. . . .") (emphasis added). Defining religious belief and activity is an inherently ecclesiological activity outside the providence of an unelected government agency. *See Locke*, 540 U.S. at 721 (recognizing the training of clergy as an "essentially religious endeavor.") FEMA withholds funds under the guise of protecting the public fist, while simultaneously violating the Establishment Clause and Free Exercise Clause by defining the Church's religious activity and penalizing the church for their amount of religious activity. Accordingly, FEMA is

impermissibly entangled in defining and assessing religious activity and violates the second prong of the Lemon Test. *Lemon*, 403 U.S. at 634.

B. The Establishment Clause Does Not Bar the Cowboy Church of Lima From Receiving the Public Benefit of Relief under FEMA's Public Assistance Program Because FEMA is Not Funding Religious Activity and Any Religious Benefits Derived Are Merely Incidental.

1. *FEMA is Not Funding Religious Activity*

In *Everson*, this Court cautioned that in enforcing prohibitions against laws respecting the establishment of religion, the State must be sure that it is not prohibiting the government from extending state law benefits to citizens without regard to their religious beliefs. 330 U.S. at 16. According to this Court, a program which, in some manner, aids an institution with a religious affiliation does not necessarily violate Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (quoting *Hunt v. McNair*, 413 U.S. 734, 742 (1973); *see e.g. Bradfield v. Roberts*, 175 U.S. 291 (1899); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). Further, the Court has established that a state may reimburse parents for transportation expenses incurred in sending children to private or parochial school and may loan secular textbooks to school within the state without regard to religious affiliation without necessarily funding religious activity. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). The Church contends that the same is possible with FEMA's present policy. The Church operates a community event center which is used for FEMA-eligible purposes eighty percent of the

time. R. at 10. Assisting in the rebuilding of that structure would not result in funding religious activity or advance religion.

2. Any Religious Benefits Derived From FEMA Funding Are Merely Incidental.

This Court has consistently held that incidental benefits conferred on religious organizations are acceptable. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763–64 (1995) ("[T]here also the State claimed that its compelling interest in complying with the Establishment Clause justified the content-based restriction. We rejected the defense because the forum created by the State was open to a broad spectrum of groups and would provide only incidental benefit to religion."); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("We are satisfied that any religious benefits [. . .] would be incidental within the meaning of our cases."). In *Widmar*, this Court examined the incidental benefits of a State University offering its facilities to religious groups and speakers on similar terms available to other student groups. *Widmar*, 454 U.S. at 274. There, this Court identified two factors relevant to their decision: (1) an open forum in a public university does not confer any imprimatur of state approval on religious practices or sects, and (2) the forum is available to a broad group of nonreligious and religious speakers alike. *Widmar*, 454 U.S. at 274. This Court held that because the advancement of religion was not the forum's primary effect, any benefit conferred on religious groups would be incidental and therefore permissible. *Widmar*, 454 U.S. at 275.

Similarly, in *Capitol Square Review & Advisory Bd. v. Pinette*, Justice Scalia stated that enacting a neutral policy that happens to advance religion does not violate the Establishment Clause. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995). Further, rendering neutral laws unconstitutional simply because an observer might "confuse an incidental benefit to religious with state endorsement" would have radical implications to the Court's public policy. *Id.* at 768.

Here, FEMA funding would not go to advance religion in violation of the Establishment Clause, but would only serve to protect a community already gathering in a compromised structure. The courts below acknowledged that the Church reopened its doors to the community one year after the disaster, thanks to the generous support volunteers from the Lima community. R. at 8–9. But, as noted in Chaplain Hudson's deposition, volunteer efforts to fully restore the chapel were unsuccessful, and the structure remains compromised. R. at 9. Similarly, the primary benefit from resurfacing the playground in *Trinity Lutheran* was fewer scraped knees for community children, whereas any benefit to the Church's outdoor religious gatherings were merely incidental. *Trinity Lutheran*, 137 S. Ct. at 2025. Regardless of whether FEMA assists the Church, the Church will continue to meet, FEMA funding only serves to make those meetings safer for the community members who gather there— an incidental benefit.

C. FEMA's Failure to Provide the Cowboy Church of Lima With Assistance Constitutes the Denial of a Generally Available Benefit Based Solely on the Religious Identity of the Church.

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to strict scrutiny laws that target citizens based solely on their religious status. *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993) (internal quotation marks omitted)). The Free Exercise clause commits the government to religious tolerance. *Lukumi*, 508 U.S. at 547. Applying this principle, this Court regularly confirms that denying an available public benefit solely on account of religious identity penalizes the free exercise of religion, an act only justified by a government interest of the "highest order." *Trinity Lutheran*, 137 S. Ct. at 2019; *see e.g.*, *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (holding that a Tennessee constitutional provision preventing ministers and priest from serving as delegates to a state constitutional convention violated a candidate's First Amendment rights to the free exercise of his religion); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 18 (1947) (holding that a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and parochial school as a state cannot exclude parents from receiving the benefits of public welfare legislation because of their faith or lack thereof).

In recent years, this Court has rejected Free Exercise challenges when the law in question is neutral while carefully distinguishing those laws from those that single out the religious for disfavored treatment as in the present case. *Compare Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993) (striking

three facially neutral city ordinances prohibiting certain forms of animal slaughter because the ordinances purposefully discriminated against sacrificial rituals integral to the Santeria religion) *with Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (*superseded by statute in Holt v. Hobbs*, 135 S. Ct. 853 (2015) (rejecting a Free Exercise claim brought by two Native American church members denied unemployment benefits for violating Oregon's drug laws by ingesting peyote for sacramental purposes); *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 449 (1988) (holding the Free Exercise Clause does not prohibit the government from timber harvesting or road construction on federal land even though the government's actions would obstruct the religious practice of some Native American tribes that regard certain sites as sacred). Here, FEMA's policy forces the Church to choose between rebuilding their church and exercising its rights and receiving a government benefit. As such, FEMA's policy is facially discriminatory, cannot satisfy strict scrutiny, and violates the Free Exercise Clause.

1. *FEMA's Policy is Discriminatory on Its Face.*

FEMA's policy is facially discriminatory because it disqualifies otherwise eligible recipients from receiving public benefits solely because of its religious identity. *See Trinity Lutheran*, 137 S. Ct. at 2021. The Free Exercise clause generally prohibits laws that facially discriminate against religion. *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J. concurring) (citing *Locke*, 540 U.S. at 712 (Scalia, J. dissenting)). The fact that FEMA does not explicitly require churches to subscribe to certain views or denounce independent beliefs is irrelevant because the

Free Exercise Clause also protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)); *see McDaniel*, 435 U.S. at 633 (The "proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is also squarely rejected by precedent."). This Court has stated that laws may not discriminate against some or all religious beliefs and the Free Exercise Clause protects against laws that impose special disabilities on the basis of one's religious status. *Church of Lukumi Babalu Aye Inc.*, 508 U.S. at 533 (quoting *Smith*, 494 U.S. at 877); *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (noting that this Court's jurisprudence prohibits discrimination in the distribution of public benefits based on religious status or sincerity).

Here, FEMA's policy, contains an express, facial discrimination against religious exercise that prevents the Church from gaining access to grant money through the PA program because it is not a strictly secular organization. *Trinity Lutheran*, 137 S. Ct. at 2022. Stated another way, the express discrimination here is not the denial of funds from FEMA, rather it is the refusal to allow the Church to compete with secular organizations for funds. *Trinity Lutheran*, 137 S. Ct. at 2022 (citing *Northeastern Florida Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract")).

2. *FEMA's Policy Cannot Satisfy Strict Scrutiny.*

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. To satisfy the demands of the First Amendment, a law that is restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in direct pursuit of those interests. *McDaniel*, 435 U.S. at 628 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). A statute that targets religious conduct will rarely survive strict scrutiny. *Lukumi*, 508 U.S. at 546.

Here, FEMA expressly requires the Church to renounce its religious character by not rebuilding its church in order to receive funds in an otherwise generally available public benefit program, for which it is fully qualified. *See Trinity Lutheran*, 137 S. Ct. at 2024. Accordingly, such a condition must satisfy strict scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2024.[4] Under strict scrutiny, only a governmental interest "of the highest order" can justify FEMA's discriminatory policy. *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting *McDaniel*, 435 U.S. at 628) (internal quotation marks omitted). FEMA's interest cannot qualify as compelling where there is clear infringement on free exercise. *See Trinity Lutheran*, 137 S. Ct. at 2024. As this Court has previously stated, "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). The Free Exercise Clause's

[4] This Court has held that "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 546.

mandate of neutrality toward religion prohibits the government from deciding that "secular motivations are more important than religious motivations." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (quoting *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). Here, FEMA's policy expressly denies a qualified religious entity a public benefit solely because of religious identity. Under this Court's precedents, FEMA goes too far. *Trinity Lutheran*, 137 S. Ct. at 2024.

3. FEMA's Policy Violates the Free Exercise Clause.

Like the disqualification statutes in *McDaniel* and *Trinity Lutheran*, FEMA's policy forces the Church to choose: it may participate in an otherwise available public benefit program or remain a religious institution. *Trinity Lutheran*, 137 S. Ct. at 2021–22; *McDaniel*, 435 U.S. at 626. While the Church is free to continue operating as a church, that freedom comes at the cost of exclusion from a generally available public benefit. *Trinity Lutheran*, 137 S. Ct. at 2022. "To condition the availability of benefits … upon this appellant's willingness to…surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." *McDaniel*, 435 U.S. at 626 (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (internal quotations omitted)).

While FEMA may contend that merely declining to extend funds to the Church does not prohibit the Church from religious activity or otherwise exercising its religious rights. *See Trinity Lutheran*, 137 S. Ct. at 2022. Further, FEMA would likely argue that declining to extend funds to the Church does not pose a

meaningful burden on the Church's free exercise rights and absent that burden, FEMA is free to heed the anti-establishment objection to provide funds directly to a church. *See Trinity Lutheran*, 137 S. Ct. at 2022. While it is true that FEMA has not told the Church that it cannot subscribe to a certain set of beliefs, FEMA should recognize that the Free Exercise Clause protects against penalties on exercising one's religion. *See id.* As this Court stated in *Sherbert*, "[i]t is too late in the day to doubt that the liberties of religious and expression maybe infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 404. The Church is not claiming entitlement to a grant from FEMA; instead, the Church is asserting its right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Id.* at 405.

D. Cowboy Church is an Integral Part of the Community and as Such Should Receive FEMA Funding

Beginning in 1998, the Church opened its doors to host a variety of events at the chapel and the event center at no cost to the community. R. at 3–4. To accommodate the growing church needs and the needs of the Lima community, the church held a yearly regional bake sale. R. at 4. The Church quickly became an integral part of the community by hosting banquets, city council meetings, a polling location for county elections, and a designated emergency relief shelter. While the Church conducted Sunday school classes, youth group meeting, and Bible Study meetings on Sundays, the chapel was also used for non-religious concerts,

receptions, and father-daughter dances on weekdays. R. at 7. The chapel also hosted non-denominational weddings and the occasional non-religious meeting. R. at 7. The Church's property contained the only event center within the city of Lima and the only space large enough to accommodate the contentious city council meetings. R. at 3.

Throughout history, virtually all societies have relied on the generosity of religious and faith-based organizations to provide social services such as operating soup kitchens, caring for children, and taking care of the homeless. *See* Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1, 5 (2005) (discussing the roots of partnerships between religious affiliated entities and government). The Township of Lima has continuously relied on the Church's generosity, to the point that the Township rejected the proposed idea of building its own event center as the citizens felt there was no need for two event centers in the town. R. at 4. FEMA's discriminatory policy penalizes the Church for its generosity. FEMA's policy allows religious entities to open their doors to a variety of secular purposes, but preliminarily denies them any funding after a natural disaster solely because of their religious affiliation. R. at 10.

CONCLUSION AND PRAYER

For the forgoing reasons, Petitioner respectfully request this Court reverse the judgment of the Fourteenth Circuit Court of Appeals on both issues.

Respectfully submitted this 20th day of November, 2017,

/s/ *Team # 80*

Team # 80
Counsel for Petitioner

APPENDIX

The Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), Pub. L. No. 93-288, 88 Stat. 143 (1974), codified at 42 U.S.C. 5172(a)(1)(B), provides in relevant part:

(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.

* * *

(2) Conditions for assistance to private nonprofit facilities

(A) In General

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

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

(ii) the owner or operator of the facility—

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

(II)(aa) has been determined to be ineligible for such a loan; or

(bb) has obtained such a loan in the maximum amount for which the Small Business Administration determines the facility is eligible.

(B) Definition of critical services

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