No. C17-2893-1

In the Supreme Court of the United States

COWBOY CHURCH OF LIMA,
Petitioner,

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM NUMBER 81

Counsel for Petitioner

QUESTIONS PRESENTED

i. Under the doctrine of ripeness, is a Church's challenge of a Federal Emergency Management Agency policy that bars religious organizations from obtaining assistance following devastation of the Cowboy Church of Lima's property ripe for judicial review where the issues presented are purely legal and, without prompt resolution, the Church would collapse?

ii. Under the First Amendment, does the Establishment Clause allow the Cowboy Church of Lima to receive Federal Emergency Management Agency disaster relief where the aid is a generally available public benefit aimed at promoting health and safety?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

United States Supreme Court

Circuit Courts Of Appeals

CONSTITUTIONAL AND STATUTORY PROVISONS

MISCELLANEOUS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is not reported, but can be found at (R. 2–21.)

JURISDICTION

The judgment of the Court of Appeals for the Fourteenth Circuit was entered on October 1, 2017. (R. at 2–21.) The Cowboy Church of Lima filed a petition for a writ of certiorari, which this Court granted. (R. at 1.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the United States Constitution provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Const. art. III, § 2, cl. 1.

The First Amendment to the United States Constitution provides:

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

Const. amend. I.

STATEMENT OF THE CASE

A. The Cowboy Church of Lima is used as a multi-purpose event space for community events in the Township of Lima.

The Cowboy Church of Lima ("the Church") has existed in the Township of Lima ("Lima") since 1990, residing on an eighty-eight-acre plot of land just outside Lima. (R. at 3.) The Church has a number of buildings, including a small rodeo arena that seats 500 people, a chapel with an attached event center that seats 120 people, and numerous storage buildings. (*Id.*) Since its inception in 1990, the Church has been recognized as a tax-exempt 501(c)(3) organization and has always complied with all tax-exempt reporting requirements. (*Id.*) Additionally, the Church does not pay any property taxes because it is recognized as a Religious Exempt Property under the New Tejas Property Code. (*Id.*)

In 1998, Lima Mayor Rachel Berry ("Berry") asked the Church's Chaplain, Finn Hudson ("Hudson"), if the Church would be able to host a few township events each year since it had the largest event space. (*Id.*) Berry offered to pay a "fair rent" for the events but Hudson declined, stating that the Church grounds were open to the public at any time. (R. at 3–4.) Thereafter, the Church was regularly used for both civic and private events. (R. at 4.) In 2005, through funds raised both from a public bake sale and private donations, the Church was able to add an event center annex to its chapel. (*Id.*) The event center hosts a number of community events including, but not limited to, birthday parties, meetings of the Lions Club and the Rotary Club, retirement parties, school dances, and counseling meetings for substance abuse and marriage. (R. at 7.) The event center also hosts election polls and large city council

meetings. (*Id.*) The event center is also recognized as an emergency relief shelter. (*Id.*)

In 2006, the Church sought to have the event center recognized as a tax-exempt government building, but its application was rejected. (R. at 4.) Two years later, Lima attempted to build a new event center, but the city council voted it down after raising concerns that having two event centers in Lima was unnecessary. (*Id.*)

B. Hurricane Rhodes floods Lima, causing severe damage to the Church.

On August 13, 2016, Hurricane Rhodes hit Lima with an unprecedented amount of water, causing a nearby dam to fail and flood the city. (R. at 2–3.) At 11:45 pm on August 15, 2016, the flood waters breached the doors of the Church and flooded all 5,500 square feet of the building, half of which was used as the event center and the other half was used as the chapel. (R. at 4.) The water remained in the Church for nearly thirty-four hours until 9:30 am on August 17, 2016. (R. at 5.) The interior of the building was flooded with at least three feet of water and the entire building was littered with mud, silt, grass, plant debris, and potential raw sewage and chemicals. (*Id.*) Additional damage to the Church included the destruction of all flooring, drywall, insulation, furniture, and various other items within the building. (*Id.*) Three large outdoor trees next to the chapel fell down as a result of the flood waters. (*Id.*) In the aftermath of the flood, the Church staff removed the destroyed items from the building, some of which were used solely for religious purposes and others used solely for civic purposes. (*Id.*)

Hudson immediately sought the advice of his friend Kurt Hummel ("Hummel"), a structural engineer, to evaluate any potential structural damage to the building. (*Id.*) Hummel concluded that there was likely structural damage and that repairs needed to be made within the next few months to avoid the risk of the entire building collapsing. (R. at 6.) The Church did not have flood insurance because it was deemed to be outside the 100-year flood plain. (*Id.*)

C. The Church applies for disaster relief through the Federal Emergency Management Agency and begins to make necessary repairs to the building.

On August 20, 2016, the day after President Barack Obama declared Hurricane Rhodes a national disaster, Hudson timely filed for relief under Federal Emergency Management Agency ("FEMA"). (*Id.*) Hudson also applied for a Small Business Administration ("SBA") loan, (*id.*), however nonprofits may receive FEMA funds for emergency work regardless of whether it has applied for an SBA loan, (R. at 13.) Four days after filing for relief under FEMA, a FEMA adjuster called to schedule a tour of the Church in order to assess the damage and determine the loss suffered. (R. at 6.)

During the tour, the adjuster estimated that the event center portion of the Church was used between 45% and 85% of the time for Lima community events unrelated to the Church. (R. at 7.) The adjuster estimated that the chapel portion of the Church was used between 85% and 95% of the time for religious purposes. (*Id.*) Prior to leaving the Church, the adjuster told Hudson that, although she hated that FEMA does not extend relief to churches, she had never heard of FEMA granting an exception because of the Church and State Separation doctrine. (*Id.*)

The Church's congregation and members of the Lima community began making repairs to the Church in order to reopen to the public. (R. at 8.) However, the flood not only caused severe structural damage, but also, caused the roof of the building to collapse. (R. at 9.) All time spent and any materials used in the repairs were donated but, according to Hudson, were still not enough to fully repair the Church and the repair bills were continuing to increase. (*Id.*) Hudson believes that if FEMA does not provide the Church with additional relief that it will be forced to close its doors. (R. at 8.)

D. FEMA's Public Assistance Program and Policy Guide.

On August 19, 2016, President Barack Obama declared the floods caused by Hurricane Rhodes as a natural disaster. (R. at 6.) FEMA's Public Assistance Program ("PA Program") exists to provide assistance to communities that are recovering from natural disasters and emergencies declared by the President. (R. at 11.) One of its primary purposes is to permanently restore community infrastructure that has been destroyed as a result of a natural disaster. (*Id.*)

As a threshold requirement, to be eligible for FEMA relief funds, a private nonprofit organization must be designated by the IRS as tax exempt and must "own or operate an eligible facility." (*Id.*) An organization is an eligible facility if it (1) provides a critical service, such as education, utility, emergency, or medical, or (2) provides a non-critical but essential government service and is open to the general public. (*Id.*)

For mixed-use facilities, FEMA requires that the primary use of the facility be used for eligible services more than fifty percent of the time. (R. at 12.) If the facility meets this requirement, FEMA prorates the funds based on the percentage of time that the facility is used for eligible services. (*Id.*)

E. The Church initiates litigation against FEMA and the district court grants FEMA's motion for summary judgment.

On August 29, 2016, after consulting with the Church's attorney, Arthur Abrams ("Abrams"), the Church filed a lawsuit against FEMA in the Central District Court of Lima, staying the Church's previous FEMA application. (R. at 8.) During Hudson's deposition, he stated that it would be difficult for him to estimate how much the event center was used for community events since he only attended church-related events. (R. at 9.) He eventually guessed that the event center was used roughly sixty percent of the time for church-based events. (*Id.*)

The final report of the FEMA adjuster was released during FEMA Regional Director Jesse St. James's ("James") deposition. (R. at 10.) The report, which included extensive interviews with Lima community members and a sworn statement by Lima City Planner Mike Chang, stated that the Church's event center was used eighty percent of the time for FEMA-eligible purposes and the chapel was used over ninety percent of the time for non-FEMA-eligible purposes. (*Id.*) James admitted to putting the Church into a preliminary denial category but that he had planned to review the file himself. (*Id.*) Admittedly, James stated that FEMA missed its internal deadline of September 30, 2016 to review the Church's application, but that

October 14, 2016 may have been another date on which a determination as to the Church's eligibility would have been made. (*Id.*)

At the close of discovery, FEMA moved for summary judgment, arguing that (1) the case was not yet ripe for adjudication and (2) FEMA's church exclusion policy was valid under the Establishment Clause of the First Amendment. (*Id.*) The district court acknowledged that it had subject matter jurisdiction over the case and denied FEMA's ripeness claim. (*Id.*) However, the district court judge granted summary judgment in favor of FEMA stating that the Establishment Clause barred the Church's recovery. (*Id.*) The Church appealed to the Fourteenth Circuit Court of Appeals. (R. at 2.)

F. The Fourteenth Circuit affirms the summary judgment in favor of FEMA.

The Fourteenth Circuit held that the case was barred by the prudential ripeness doctrine because the Church had not yet been officially denied FEMA aid and the court could not identify an undue hardship to the Church resulting from withholding judicial review until the official denial. (R at 14–15.) The court then held that summary judgment was appropriate because, under the First Amendment's Establishment Clause, the Church was not allowed access to government funds. (R. at 16–17.) The Church appealed, and this Court granted certiorari. (R. at 1.)

SUMMARY OF THE ARGUMENT

I.

The ripeness doctrine established by this Court has a constitutional as well as a self-imposed, prudential component. The constitutional ripeness analysis requires

the plaintiff to prove that it suffered an injury in fact that is actual and imminent. Here, the Church suffered an injury because FEMA's policy of barring relief from facilities that are primarily used for religious purposes violates the Church's right to free exercise under the First Amendment. Even though the Church had not yet been formally denied FEMA aid, this injury is actual and imminent because it was inevitable that the Church would be denied aid based on FEMA's mixed-use policy, which bars applicants from relief if a facility is used primarily for religious purposes. Thus, the Church satisfied the constitutional ripeness requirements.

For the prudential ripeness analysis, courts consider whether the issue presented is fit for judicial review and whether the party would suffer hardship if judicial review were denied. The issue here—whether the Establishment Clause of the First Amendment bars FEMA from granting the Church public assistance—is fit for judicial review because it is purely legal, based on FEMA's final agency action of promulgating the mixed-use policy, and further factual development would not significantly advance this Court's ability to resolve the dispute. Additionally, the Church continues to suffer hardship while awaiting resolution of this issue because its facilities have yet to be completely restored and repair bills continue to escalate. Finally, even if this Court is not persuaded that the Church satisfies prudential ripeness considerations, this Court should waive the prudential ripeness issue because it is discretionary.

II.

In holding that the Establishment Clause of the First Amendment barred the Church from receiving FEMA disaster relief, the Fourteenth Circuit completely disregarded all of this Court's past Establishment Clause precedent. First, it ignored this Court's decades-old and consistently restated rule that religious groups are entitled to receive general government services, such as police and fire protection. Indeed, disaster relief is clearly the type of general public service this Court deems permissible because, like police and fire protection, it is focused on the protection of lives and property. Further, considering that FEMA regularly relies on churches and religious groups to provide massive quantities of aid during disasters, it defies all notions of fairness that FEMA refuses to give aid to organizations that are too "religious." Even more, the Founders of this country who wrote the Establishment Clause never remotely expressed the notion that churches should not receive generally available aid.

While this Court has a long line of Establishment Clause cases dealing with the financial support of religious schools, those cases should not control. First, doing so would disregard the significant differences between funding a sectarian school for children and providing disaster relief to a crumbling building. Second, applying the onerous and unpredictable Establishment Clause tests associated with the school cases would create a chilling effect in the distribution of critical government aid. Third, the school setting implicates a heightened Constitutional scrutiny that is not applicable to general public services.

Lastly, even if this Court applies its most common Establishment Clause test, the *Lemon*/*Agostini* test, FEMA aid is still not barred by the Constitution. First, the FEMA PA Program has an express secular purpose of providing reconstruction aid after times of disaster. Second, disaster relief has a primary secular purpose that neither creates the illusion of government indoctrination nor excessively entangles church and state.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S GRANT OF SUMMARY JUDGMENT BECAUSE THE CHURCH'S CHALLENGE TO FEMA'S POLICY BARRING CHURCHES FROM RECEIVING RELIEF IS RIPE FOR JUDICIAL REVIEW.

The judicial power of federal courts is limited to resolving "Cases" and "Controversies" as defined by Article III of the United States Constitution. U.S. Const. art. III, § 2, cl. 1. From this limitation, this Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The irreducible minimum of Article III standing requires proof of an injury-in-fact that is traceable to the alleged unlawful conduct and redressable by the relief requested. *Lujan*, 504 U.S. at 559–60. Article III standing "is an essential and unchanging part of the case-or-controversy requirement." *Id.* at 560. The prudential standing doctrine, on the other hand, does not arise out of constitutional requirements. *See Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated on other grounds by Lexmark*, 134 S. Ct. at 1377. Rather, prudential standing "embraces several judicially self-

imposed limits on the exercise of federal jurisdiction." *Id.*; *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc. (Valley Forge)*, 454 U.S. 464, 471 (1982) (defining prudential standing requirements as those "that the Court itself has erected and which were not compelled by the language of the Constitution").

The ripeness inquiry contains both a constitutional and a prudential component. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 US 803, 808 (2003) ("The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" (quoting *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993))). As such, many of the factors of the injury-in-fact test overlap with prudential ripeness considerations. *Allen*, 468 U.S. at 751; *see also Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 80 (1978) ("[T]he basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.").

Here, the Fourteenth Circuit declined to address Article III standing and focused exclusively on prudential ripeness considerations. (R. at 13 n.1.) Because many of the factors of the Article III injury-in-fact test overlap with prudential ripeness considerations, *Allen*, 468 U.S. at 751, we address both doctrines in turn.

A. The Church's Challenge Meets Article III Ripeness Requirements.

For Article III standing, this Court uses a three-part test, requiring the plaintiff to show: (1) it has "suffered an injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) "a

causal connection between the injury and the conduct complained of"; and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal quotations and citations omitted). The requirement of actual, particularized injury is treated by this Court as the core of the standing determination. *See Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472. The constitutional component of the ripeness inquiry coincides squarely with standing's injury-in-fact prong. *See* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 172 (1987) ("In measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing analysis.") Thus, a plaintiff can meet its constitutional ripeness requirement by proving that it "suffered an injury in fact" that is "concrete and particularized" and "actual or imminent." *See Lujan*, 504 U.S. at 560.

This Court has defined an "injury in fact" as "an invasion of a legally protected interest." *Id.* Further, this Court has required that the injury fall within "the zone of interests to be protected" by a statute or constitutional guarantee. *Valley Forge*, 454 U.S. at 475 (internal quotations and citation omitted). Here, the Church has a constitutionally protected interest in free exercise of religion, guaranteed by the Free Exercise Clause of the First Amendment. *See* U.S. Const. amend. I. And the Church has suffered an invasion to that interest because the "mixed-use" standard promulgated under FEMA's 2016 Public Assistance Program and Policy Guide[1] bars

[1] Because Hurricane Rhodes took place in August 2016, we look to the 2016 version of FEMA's Public Assistance Program and Policy Guide.

aid to the Church on the basis of its primary use as a religious facility. *See* FEMA, *Public Assistance Program and Policy Guide*, FP 104-009-2 (2016), at 16 [hereinafter *PAPPG*]. The Church's complaint that FEMA's policy is discriminatory against religious organizations falls within the zone of interests protected by the Free Exercise Clause. [2] *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017).

Additionally, this Court has stated that a plaintiff's injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted). An injury need only be "imminent" at the time the case is brought, *see id.*, and "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). In the context of an application for a benefit, like the Church's application for FEMA aid,

> [i]f it is 'inevitable' that the challenged rule will 'operat[e]' to the plaintiff's disadvantage—if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule—then there may well be a justiciable controversy that the court may find prudent to resolve.

Reno, 509 U.S. at 69 (O'Connor, J., concurring) (quoting *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974)); *see also Blanchette*, 419 U.S. at 143 (stating that

[2] The Church has always alleged and continues to allege that its right to free exercise of religion was infringed upon via FEMA's "mixed-use" policy which would lead to certain denial of its application for aid. The sole basis of the Fourteenth Circuit's denial of the Free Exercise claim was FEMA's interest in not violating the Establishment Clause by granting aid to the Church. Thus, if the Establishment Clause does not prevent FEMA from granting aid to the Church, then the Church's right to free exercise of religion was clearly violated.

"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 Church's injury is not hypothetical or speculative. Rather, this Court can make a firm prediction that FEMA would have denied all or at least some of the aid that the Church applied for based on FEMA's "mixed-use" standard. According to FEMA's 2016 Public Assistance Program and Policy Guide, eligibility of mixed-use, private nonprofit ("PNP") facilities—like the Church—"is dependent on the *primary* use of the facility," which is defined as "the use for which more than [fifty] percent of the physical space in the facility is dedicated." *PAPPG*, at 16. When a PNP's facility consists of more than one building, FEMA will "evaluate each building independently, even if all are located on the same grounds," *PAPPG*, at 15, and if fifty percent or more of the physical space of the facility is dedicated to ineligible services, "the entire facility is ineligible," *PAPPG*, at 16.

The Church's facility consists of an event center and a chapel that are equal in size; both of which were severely damaged by Hurricane Rhodes. (R. at 4–5.) FEMA likely would have found that the Church's entire facility was ineligible because it was established and primarily used for religious activities and denied the Church's application for aid on that basis. *See PAPPG*, at 11 ("Facilities established or primarily used for . . . religious . . . training, conferences, or similar activities are not eligible . . . ."). Indeed, FEMA's adjustor determined that the Church's event center was used primarily for FEMA-eligible purposes; but, because the chapel was used primarily for non-eligible religious purposes, FEMA had put the Church's application

into a preliminary denial category. (R. at 10.) While FEMA's Director stated that he planned to review the application to determine if the *event center* might have been eligible, the Church still would have been denied aid for the damage to the *chapel* based on its primary use as a religious facility. *See PAPPG*, at 16 (explaining that if a public nonprofit operating multiple facilities is found to be eligible for relief, "FEMA prorates funding based on the percentage of physical space dedicated to eligible services."). Therefore, even if FEMA had granted the Church aid to restore the event center, it would have prorated the funding to apply only to the event center. *See id.* This would amount to a complete denial of aid for the damage done to the chapel based on the chapel's religious use.

It is inevitable that FEMA's "mixed-use" standard would have operated to the Church's disadvantage either by a complete denial of aid to the Church, or by a partial denial of aid to the restoration of the chapel. Because of the inevitability of injury based on the challenged rule, "it is irrelevant to the existence of a justiciable controversy that there will be a time delay" and the challenge is ripe for judicial review. *See Blanchette*, 419 U.S. at 143; *Reno*, 509 U.S. at 69 (O'Connor, J., concurring).

B. The Church's Challenge Meets Prudential Ripeness Requirements.

Once a plaintiff has met the Article III standing requirements, courts may conduct a prudential ripeness analysis. *See Reno*, 509 U.S. at 57 n.18. To determine whether a challenge to an administrative policy is ripe for judicial review, this Court established two factors: (1) the fitness of the issue presented for judicial review and (2) the hardship to the parties if the Court withholds consideration. *Abbott*

Laboratories. v. Gardner (Abbott Labs), 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). This Court has never held that either of the *Abbott Labs* factors is essential or entitled to more weight than the other; rather, the factors are weighed on a sliding scale. *See, e.g.*, *Reno*, 509 U.S. at 71 (O'Connor, J., concurring).

1. The issue presented is fit for judicial review.

This Court has identified multiple considerations that are probative under the first *Abbott Labs* factor of fitness for judicial review. The most prominent consideration is whether the issue raised is legal or factual. *See, e.g.*, *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 201 (1983); *Abbott Labs*, 387 U.S. at 149; *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162–63 (1967) (holding that a purely legal question is "the type of legal issue that courts have occasionally dealt with without requiring a specific attempt at enforcement"). Additionally, this Court considers the degree to which the challenged regulation can be categorized as "final agency action" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 704. *See, e.g.*, *Abbott Labs*, 387 U.S. at 149; *Toilet Goods Ass'n*, 387 U.S. at 162. Another relevant consideration is the extent that "further factual development" is necessary to resolve the claim. *Nat'l Park Hospitality Ass'n*, 538 U.S. at 812; *see also Reno*, 509 U.S. at 59 n.19.

Applying these considerations in its prudential ripeness analysis, the Fourteenth Circuit held that "the question presented here may be 'a purely legal one' and the 'mixed-use' standard promulgated under FEMA's Public Assistance Program and Policy Guide may constitute 'final agency action' within the meaning of § 10 of

the APA, 5 U.S.C. § 704." (R. at 14). But the circuit court held that the challenge was not fit for judicial review because the court "believe[d] that further factual development would 'significantly advance [its] ability to deal with the legal issues presented.'" (*Id.* (quoting *Duke Power Co.,* 438 U.S. at 82). The court was correct in its determination on the first two considerations, but erred in its analysis of the third.

The issue raised here—whether the Establishment Clause of the First Amendment bars FEMA from granting aid to a religious organization—is purely legal. *Cf. Toilet Goods Ass'n*, 387 U.S. at 162 (holding that the issue of whether a regulation was promulgated beyond the agency's statutory power was "a purely legal question"). Additionally, FEMA's "mixed-use" policy can be accurately categorized as "final agency action" under the APA, which defines an agency rule as "an agency statement of general or particular applicability and future effect . . . describing the organization, procedure, or practice requirements of [the] agency." *See* 5 U.S.C. § 551(4); *see also Abbott Labs*, 387 U.S. at 150 (stating that courts take a "flexible view of finality"). FEMA's Public Assistance Program and Policy Guide announces FEMA's policy that it will not grant relief to an applicant whose facility is primarily used for religious purposes. *See PAPPG*, at 11, 15–16. Thus, the policy constitutes final agency action because it describes FEMA's procedure and practice requirements regarding granting aid. *See* 5 U.S.C. § 551(4). This is true even without a formal denial of the Church's application, because specific application of FEMA's policy to the Church is not necessary to meet the "final agency action" requirement. *Cf., e.g.*, *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980) (holding that a facial challenge

to the variance provision of an EPA pollution-control regulation was ripe even "prior to application of the regulation to a particular [company's] request for a variance"); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956) (holding that an FCC regulation announcing the commission's policy that it would not issue a television license to an applicant already owning five such licenses was a final agency action, even though no specific application was before the Commission).

Lastly, further factual development is not necessary for this Court to resolve the claim. In *Blanchette*, this Court held that a challenge attacking the constitutionality of an act was ripe before it was applied to the plaintiff, explaining that the Court would "be in no better position later" to confront the issue because the operation of the statute against the plaintiffs was inevitable. 419 U.S. at 143–45. The present case is analogous to *Blanchette* because the application of FEMA's policy to the Church was similarly inevitable. As explained above, FEMA's "mixed-use" standard would have been applied to the Church's disadvantage either by a complete denial of aid to the Church, or by a partial denial of aid to the restoration of the chapel. A formal denial of the Church's application would not "significantly advance" the Court's ability to resolve the purely legal issue presented where the facts are fleshed out without a formal denial. *Cf. Duke Power Co.*, 438 U.S. at 81–82 ("Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution."). This is distinguishable

from *National Park Hospitality Association*, where the court held that further factual development was necessary to resolve a dispute because both parties relied on different factual scenarios to support their positions regarding the legality of a regulation. 538 U.S. at 812 ("[J]udicial resolution of the question presented here should await a concrete dispute in a particular factual context.").

2. The Church will suffer hardship if review is withheld.

Under the second *Abott Labs* factor of hardship, the Court looks to whether the challenged regulation affects the primary conduct of the party seeking review and the potential negative effects on the party if review is withheld. *See Abbott Labs*, 387 U.S. at 153–54. Here, denial of prompt judicial review has imposed and continues to impose a substantial hardship on the Church by forcing them to rely solely on donations of time and materials from the community to make essential repairs to prevent the event center and chapel from collapsing. (R. at 8–9.) As the dissent recognized, in light of Hummel's evaluation of the structural damage to the facilities, Hudson felt "immense pressure to remediate [the] property immediately or face permanent property loss." (R. at 19.) The Church did not have the luxury to wait on FEMA's dilatory review of its application and final determination of the Church's eligibility for relief. During the pendency of the district court case below, the chapel's roof collapsed due to the damage that went unrepaired. (R. at 9.) Although the Church has recently been able to reopen its doors due to donations from the community, (R at 8–9), the Church is still in need of aid to finish the repairs and restore the structures, (R. at 9). Without immediate relief, repair costs will continue to accumulate and the Church risks closing its doors for good. (R. at 9.)

C. Even if This Court Finds that the Church's Challenge Does Not Meet Prudential Ripeness Requirements, This Court Should Use Its Discretion to Waive Those Requirements.

This Court should exercise its discretion to waive the prudential ripeness considerations analyzed above. *Accord Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc) ("Prudential considerations of ripeness are discretionary."); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008) (holding that where a case "raises only prudential ripeness concerns," the court has "discretion to assume ripeness is met and proceed with the merits" of the claim), *abrogated on other grounds by Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). This Court has never directly addressed the issue of whether prudential ripeness is jurisdictional, but has implied that it is not jurisdictional by stating that prudential standing is not equally as important as Article III standing requirements. *See Allen*, 468 U.S. at 751.

In *Allen*, this Court declared that Article III standing—as a "core component" of standing "derived directly from the Constitution"—is more important than prudential standing doctrines. *Id.* The *Allen* Court's suggestion that prudential standing is less important than Article III standing supports the idea that prudential standing could be treated as non-jurisdictional since it is less important than the core jurisdictional questions of Article III standing. Bradford Mank, *Is Prudential Standing Jurisdictional?*, 64 Case Western Res. L. Rev. 413, 428 (2013). Additionally, in *Susan B. Anthony List v. Driehaus*, when the respondent asked this Court to hold that the petitioner's claims were non-justiciable on prudential grounds, this Court responded that "a federal court's obligation to hear and decide cases within its

jurisdiction is virtually unflagging." 134 S. Ct. 2334, 2347 (2014) (internal quotations and citation omitted). This statement implied that prudential ripeness considerations will not bar an otherwise justiciable claim. *See id.*

This Court's unclear guidance has led to the development of a circuit split regarding whether prudential ripeness is jurisdictional or discretionary. *See Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 181 90 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (arguing that prudential standing should not be jurisdictional, observing that six circuits since 1999 have held that prudential standing is non-jurisdictional, and discussing the trend in the circuit courts to treat the issue as non-jurisdictional), *cert. denied*, 133 S. Ct. 2880 (2013); Micah J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 Emory L.J. 221, 224 n.16 (2013) ("The Fifth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits have all held that prudential standing is not jurisdictional and is subject to waiver. The Second, Sixth, and D.C. Circuits have held to the contrary." (citations omitted)). This Court should adopt the holding of the majority of circuit courts and definitively rule that, because prudential standing is non-jurisdictional, it may be waived in this case so that the Court may consider the important First Amendment question raised by the Church.

II. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S GRANT OF SUMMARY JUDGMENT BECAUSE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT DOES NOT BAR CHURCHES FROM RECEIVING GENERALLY AVAILABLE DISASTER RELIEF.

Without citing any precedent for support, the Fourteenth Circuit reasoned that "under the Establishment Clause, the Cowboy Church of Lima is not allowed to access

government funds." (R. 16–17.) However, this Court has never remotely ruled in a such a way, and has consistently rejected any "conception of the Religion Clauses" that completely bars aid to religious organizations as "unfaithful to our constitutionally protected tradition of religious liberty." *McDaniel v. Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring). Instead, this Court has regularly permitted religious organizations to access a variety of government funds and services. *See, e.g., Trinity Lutheran*, 137 S. Ct. at 2019 (permitting grant for church's playground equipment); *Comm. for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646 (1980) (permitting direct reimbursement to religious school for student services); *Tilton v. Richardson,* 403 U.S. 672 (1971) (permitting grant for construction of buildings in religious college).

Even more, the Fourteenth Circuit completely disregarded the Church's right to general public benefits. While this Court has developed a variety of tests to indicate whether a government program is permissible under the Establishment Clause, it has already determined that "cutting off" religious groups from "general government services . . . is obviously not the purpose of the First Amendment." *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947). Thus, because FEMA disaster relief is merely a general government program aimed at promoting public safety, it is unquestionably permitted by the Establishment Clause, and this Court need not apply the rigorous analysis required in evaluating other types of programs. However, even if this Court chooses to apply its *Lemon*/*Agostini* test, FEMA aid is appropriate because it has both a primary secular purpose and effect.

A. The Fourteenth Circuit's Decision Violates this Court's Long-Held Precedent, the Framer's Purpose for the Establishment Clause, and Sound Public Policy.

1. This Court has consistently stated that churches can receive general government services.

While the Constitution prohibits "an establishment of religion" by Congress, U.S. Const. amend. I, this Court has said that a "system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church." *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 745 (1976). In fact, this Court has called it "absurd" to suggest "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (cites omitted). Consequently, it has long been settled that religious institutions can receive these and other "general government services" without running afoul of the Establishment Clause. *Everson*, 330 U.S. at 17–18 (highlighting religious groups' right to "police and fire protection, connections for sewage disposal, public highways and sidewalks"); *see also Mueller v. Allen,* 463 U.S. 388, 406 (1983) (same)*; Comm. For Pub. Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 781 (1973) (same)*; Walz v. Tax Comm'n of N.Y.C*, 397 U.S. 664, 671 (1970) (same).

In fact, there is such a strong presumption that religious groups are entitled to public safety services that the inquiry into whether a program is a "universal general service or subsidy of favoritism" often "turn[s] on the inevitable question" of how similar the service is to police or fire protection. *See Mitchell v. Helms*, 530 U.S. 793, 875 (2000) (Souter, J., dissenting); *Walz*, 397 U.S. at 671 (analyzing program in

reference to police and fire protection); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 272 (1968) (Fortas, J., dissenting) (same).

For instance, in its first modern Establishment Clause case, *Everson v. Board of Education*, this Court affirmed a program that allowed students of private, religious schools to use the busing programs available to public school children. 330 U.S. at 3. There, a local township used tax dollars to reimburse the bus fare to children who took public transportation to school, and permitted the children attending the local Catholic school to participate. *Id.* This Court rejected an Establishment Clause challenge to the program, stating it was merely a general government service, like fire or police protection. *Id.* at 18. In fact, the bus program functioned to "serve much the same purpose and accomplish much the same result" as a state-paid police officer ushering children across the street to school, in that it similarly sought the "school children's welfare" amidst the "very real hazards of traffic." *Id.* at 17–18. Additionally, like police and fire services, busing children was was required for the safe and proper administration of the school, but was also "indisputably marked off" from the school's "religious function." *Id.*

Further, just this year, in *Trinity Lutheran*, this Court mandated that general government benefits not be denied to a church.[3] 137 S. Ct. at 2021–22. There, Missouri had a program which provided funding for rubber playground surfaces,

[3] Trinity Lutheran primarily focused on the program's free exercise clause implications, because the "parties agree[d] that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program." *Trinity Lutheran*, 137 S. Ct. at 2019. However, the Court's holding indicates that the Constitution (under the Establishment Clause) not only allows churches to receive "generally available benefits," but that there are instances when the Constitution (under the Free Exercise clause) actually requires that churches receive them. *Id.*

purposed for the increased safety of children at play. *Id.* at 2018. The Court referenced *Everson* for the proposition that religious organizations are entitled to the benefits of "public welfare legislation" like police protection, *id.* at 2020, and held that the church must be permitted to participate in the similar "public benefit program," *id.* at 1021–22. In his concurrence, Justice Breyer emphasized that not all funding of churches is appropriate. *Id.* at 2027 (Breyer, J., concurring). However, he noted the playground program was acceptable because it functioned like "ordinary police and fire protection" in that it was exclusively designed "to secure or to improve the health and safety of children." *Id.* (cites omitted).

The immediate case is clearly analogous to both *Everson* and *Trinity Lutheran*. Like those cases, which approved general public programs promoting health and safety, the FEMA PA program's sole purpose is "to assist communities responding to and recovering from major disasters." (R. at 11.) In fact, it appears that the public safety interests of the FEMA grant program are even more significant than the programs approved in *Everson* and *Trinity Lutheran*. Unlike those cases, which were concerned with the possible dangers of walking to school and falling on the playground, the FEMA PA Program provides "emergency assistance to save lives and protect property" during the direct aftermath of a natural disaster. (*Id.*) Furthermore, like in *Everson*, where the busing program accomplished a similar result to a police officer ushering students safely across the street, the FEMA program aims to accomplish the same result as a firefighter working to save a building. Indeed, if the Establishment Clause does not prevent the fire department

from saving the Church from collapse during a fire, why should it prevent FEMA from doing the same after a hurricane? Therefore, like *Everson* and *Trinity Lutheran*, the FEMA PA Program is a similar, if not stronger, analogue to police or fire protection, and thus is appropriate under the Establishment Clause.

Respondent might argue that the FEMA grants are distinguishable from police and fire services in that they are not accessible by all citizens; instead, they are only available to qualifying 501(c), (d), or (e) private nonprofits. (*Id.*) However, basic services can be selectively distributed and still be generally available. For instance, the grant program in *Trinity Lutheran* was deemed a "generally available benefit" despite only receiving applications from qualifying nonprofits. 137 S. Ct. at 2019. Further, even the busing program in *Everson* was only available to those households with school-attending children. 330 U.S. at 3. Indeed, given the government's limited resources, many of its services are targeted to groups or populations that will benefit the most from them. Consequently, it makes little sense to limit religious groups to only accessing programs which are available to every citizen.

Neither is it dispositive that, unlike police and fire protection, FEMA aid comes in the form of money and not physical services. Such a proposition runs in direct contradiction to *Trinity Lutheran*, in which the government benefit came in the form of a monetary grant, similar to the one in this case. (*See* R. at 11.); *see also Regan,* 444 U.S. at 646 (providing direct financial assistance to school). Moreover, this line of reasoning would find the disaster relief constitutional if only FEMA was the organization physically sawing or pouring concrete. Such a distinction "would indeed

exalt form over substance," Zobrest, 509 U.S. at 13, and "create puzzling, if not perverse, incentives," *Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297 (6th Cir. 2009) ("Would we be better off if the City had sent government workers to each church, wearing uniforms identifying them as agents of the government?").

Additionally, it is profoundly inequitable to deprive religious organizations—one of this country's primary providers of disaster relief—of assistance in their own times of need. During times of natural disaster, churches and other religious groups are consistently relied upon by FEMA to provide essential services, like shelter, food, and medical care, to victims. *See* Brian C. Ryckman, *Indoctrinating the Gulf Coast: The Federal Response to Hurricanes Katrina and Rita and the Establishment Clause of the First Amendment*, 9 U. Pa. J. Const. L. 929, 932 (2007). In fact, during Hurricane Katrina and Rita, FEMA relied on churches and other religious groups to house and feed more than 500,000 people displaced by the storms. *Id.* at 945. Even in this case, the Church offered its event center "as an emergency relief shelter." (R. at 7.) However, when churches are in need of relief, FEMA has decided it is not permissible, despite having regularly benefited from their services. (*See id.*) (highlighting FEMA's "Church and State Separation" policy). Such a policy is the height of unfairness. It is faith that compels churches and religious groups to help countless people during times of disaster; it should not also be faith that disqualifies churches from receiving assistance when the flood waters breach their doors instead.

2. This Court's decisions regarding religious schools should not control over situations regarding generally available public services.

This Court has a long line of case law dealing with government funding of religious organizations, which the Court may be inclined to follow. However, these cases are almost exclusively in the context of the funding of religious education. *See, e.g.*, *Mitchell,* 530 U.S. at 838–39; *Agostini v. Felton,* 521 U.S. 203, 233–35 (1997); *Regan,* 444 U.S. at 656–59 (1980); *Nyquist*, 413 U.S. at 768; *Lemon v. Kurzman,* 403 U.S. 602, 612–13 (1971); *Tilton*, 403 U.S. at 682–84 (plurality opinion). Applying the cases from the unique context of education to general government services is inappropriate for a multitude of reasons.

First, there is a qualitative difference between funding religious education and providing disaster relief to church buildings. The government funding of schools is ultimately purposed to promote their "educational function." *Agostini*, 521 U.S. at 205. Because the mission of sectarian schools is inherently both educational and religious, it is incredibly difficult to find "logical distinction" between what is secular instruction and what is religious teaching. *See Mitchell*, 530 U.S. at 798 ("An educator can use virtually any instructional tool, even a textbook, to teach a religious message."). Consequently, Establishment Clause inquiries into religious schools often result in a thorough "examination of marginalia." *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring). In contrast, general government services do not require such a rigorous inquiry because they possess a uniform interest: the welfare of lives and property. For instance, cities enforcing public health ordinances on religious schools are not concerned about the beliefs being

promoted inside, because the promotion of the building's safety is "indisputably marked off from the religious function" of the building. *Everson*, 330 U.S. at 18. Additionally, the stakes are much greater in the public safety context. Depriving religious schools of funding merely results in, at most, diminished achievement of the organizations' religious and educational mission; to deprive religious organizations of disaster relief risks serious danger to lives and property. The immediate case serves as a prime example. Because the Church was not able to receive necessary disaster relief, its roof collapsed and it experienced serious economic hardship. (R. at 9.) Because public welfare programs require a much simpler analysis and deal with subjects concerning significant safety interests, an application of the hard and fast rule that churches can receive general government services is much more appropriate than the complex inquiry required for schools.

Second, if this Court rejects the notion that public welfare programs are *per se* available to religious groups, it will open the door to litigation over every generally available public benefit program that churches receive. Even this Court has acknowledged that the Establishment Clause tests applied in the religious school context are infamously ambiguous and difficult to apply. *See, e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray."); *Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) ("I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to require scrutiny more commonly associated with interior

decorators than with the judiciary."). Fear of such unpredictable litigation would create a disincentive for churches to apply for and for government agencies to distribute important aid like the FEMA grants. Affirming the rule that generally available government services are available to churches avoids this chilling effect and upholds this Court's "imperative of applying neutral principles in constitutional adjudication." *Id.*

Third, there is significantly less constitutional scrutiny when dealing with programs outside of the school setting. This Court has repeatedly stated that Establishment Clause concerns are "most pronounced" within "the context of schools," *id.* at 592, because of the general principle that "elementary school children are more impressionable than adults," *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 100 (2001); *see also Edwards v. Aguillard,* 482 U.S. 578, 584–85 (1987) (noting that the Supreme Court is "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."). Therefore, because this Court's school cases were adjudicated in light of these heightened constitutional concerns, it would be inappropriate to analogize such cases to the realm of general welfare programs, which do not require such scrutiny.

3. The Founders never intended to deprive religious groups of generally available aid.

This Court regularly turns to history when attempting to determine the scope of the Establishment Clause. *See, e.g., Wallace v. Jaffrey*, 472 U.S. 38, 45 (1985); *Valley Forge*, 454 U.S. at 503; *Everson,* 330 U.S. at 9–17. Ultimately, the goal of this historical inquiry is to align the Court's Establishment Clause rules in light of "the

evils, fears, and political problems that caused that expression to be written into our Bill of Rights." *Everson,* 330 U.S. at 8.

When examining the beliefs of the era, even the strongest and most famous proponents of religious liberty, James Madison and Thomas Jefferson, never argued that religious organizations must be deprived of all government aid. This Court has often looked to Madison's *Memorial and Remonstrance Against Religious Assessments* as a guide to the Framer's intent regarding the First Amendment. *See Everson*, 330 U.S. at 12 (majority opinion); *id.* at 63 (Jackson, J., dissenting) (attaching the entirety of Madison's *Remonstrances* to the appendix). There, Madison eloquently writes against a proposed Virginian tax on all property owners, purposed for the support of a "Minister or Teacher of the Gospel" or the provision of "place[s] of divine worship." *Id.* at 74.

Even a cursory examination reveals that the program dealt with in the *Remonstrances* is significantly different from the aid at issue in this case. This Court has recognized that Madison's primary concern was the leveraging of the government's taxing power for the "aid of religion in general." *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968). For Madison, the government's specific promotion of religion, especially specific denominations of religion "violate[d] that equality which ought to be the basis of every law." *Everson*, 330 U.S. at 66. In contrast, the purpose of the FEMA PA Program is not the promotion of religion, but to provide a broad array of "institutes of public utility" with assistance in an effort to "restor[e] community infrastructure affected by a federally declared natural disaster." (R. at 11.) In fact,

this generally available, neutrally distributed program seems to embody that "equality" which Madison desired "be the basis of every law."

Respondents may still argue that, even if the FEMA program is distinguishable from the 18th century proposed tax, the Founders never would have permitted the direct government provision of a religious house of worship. However, that conflicts with the fact that both Madison and Jefferson regularly attended a weekly church service held within the Hall of the House of Representatives. *The State Becomes the Church: Jefferson and Madison*, Library of Congress, *available at* https://www.loc.gov/exhibits/religion/rel06-2.html (last accessed on November 5, 2017). If the Founders did not take issue with government resources, particularly a prominent center of American governance, being used to support an individual church, it does not seem as though they would be concerned with a generally available public safety program, which happens to have a church as one of its many beneficiaries.

B. The Fourteenth Circuit Failed to Apply the *Lemon/Agostini* Test, which Clearly Indicates FEMA Aid to Churches is Permissible.

When the Fourteenth Circuit affirmed "the holding of the lower court that the Establishment Clause barred recover [sic] for The Cowboy Church of Lima," it did so without applying a single one of this Court's long held Establishment Clause tests. (R. 16–17.)

This Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S.

687, 720 (1994) (O'Conner, J., concurring) ("Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test."). Consequently, the type of analysis chosen by this Court is usually dependent on the factual context of the program or statute in question. *See, e.g.*, *Van Orden v. Perry,* 545 U.S. 677, 683 (2005) (applying a historical analysis for Ten Commandments on government property); *Lee,* 505 U.S. at 594 (applying the "coercion test" for prayer at high school graduation); *County of Allegheny*, 492 U.S. at 600 (applying the "endorsement test" to nativity scene at courthouse).

When dealing with issues of funding religious organizations, however, this Court almost exclusively utilizes the *Lemon*/*Agostini* test. *See, e.g., Mitchell*, 530 U.S. at 796; *Regan*, 444 U.S. at 653; *Nyquist*, 413 U.S. at 768. Articulated first in *Lemon,* 403 U.S. at 612–13, and re-formulated in *Agostini,* 521 U.S. at 223, this test provides a two-part inquiry in determining whether a government program violates the Establishment Clause. First, does the program possess a secular purpose? *Id.* Second, is the principle or primary effect of the program advancing religion? *Id.* Under these criteria, the FEMA relief program is clearly Constitutional.

1. FEMA's Public Assistance Program has a clear secular purpose.

A government program is only constitutional if it is "motivated primarily, if not entirely, by a legitimate secular purpose." *Bowen v. Kendrick,* 487 U.S. 589, 602 (1988). This analysis is fairly straightforward, and often is satisfied by a mere facial examination of the statute or program in question. For instance, in *Lemon*, the Court noted that "the statutes themselves clearly state that they are intended to enhance

the quality of the secular education in all schools covered by the compulsory attendance laws." 403 U.S. at 613. *But see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (noting the "plain language of the policy" indicated the religious purpose of a prayer at a student event). The perceived validity of this text was bolstered by the Court's determination that states possess "a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Id.*

In this case, the FEMA Public Assistance program and its authorizing statute, the Robert T. Stafford Disaster Relief and Emergency Assistance Act indicate the following as their purposes:

- PA Program: "to assist communities responding to and recovering from major disasters or emergencies declared by the President." (R. at 11.)
- The Stafford Act: "authorizes the President to make contribution 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." (*Id.*) (internal quotes omitted).

Like in *Lemon*, where the plain text of the policy clearly indicated a secular purpose, the express language of this program and the corresponding statute demonstrate a secular purpose: public assistance in the aftermath of a natural disaster. Further, like in *Lemon*, where the Court indicated the purpose was bolstered by the legitimate concern of school attendance, here, the concern to "save lives and protect property,"

(*id.*), seems even more legitimate. Thus, the FEMA PA Program very likely passes the first prong of the *Lemon/Agostini* test.

2. FEMA disaster relief does not have the primary effect of advancing religion.

The "primary effects" prong of the *Lemon/Agostini* test is not satisfied just because "some benefit accrues to a religious institution as a consequence of the legislative program." *Tilton*, 403 U.S. at 679. Instead, in *Agostini* and the following cases, this Court "articulated three primary criteria to guide the determination whether a government-aid program impermissibly advances religion: (1) results in governmental indoctrination, (2) defines its recipients by reference to religion, or (3) creates an excessive entanglement." *Mitchell*, 530 U.S. at 845; *see Agostini*, 521 U.S. at 234.

First, FEMA assistance in fixing a building's structure does not result in government indoctrination. "[W]hether governmental aid to religious schools results in governmental indoctrination" is "ultimately a question [of] whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809 (plurality). While the link between government action and subsequent indoctrination can be broken by distributing aid through the private choice of an individual, *see, e.g., Witters v. Wash. Dept. of Servs. for Blind,* 474 U.S. 481, 483 (1986), this Court's *Mitchell* plurality indicated all that is required to satisfy this factor is the possession of "neutral criteria" in distributing the aid, *Mitchell*, 530 U.S. at 809 (plurality). However, in her *Mitchell* concurrence, Justice O'Connor noted the importance of neutrality but commented it may not be

sufficient to prove a lack of indoctrination. *Id.* at 839 (O'Connor, J., concurring). Instead, there must no evidence in the record that the recipient "divert[ed]" the secular aid to a religious purpose. *Id.* at 840–41.

In this case, FEMA aid satisfies the criteria of both the *Mitchell* plurality and O'Connor's concurrence. Most importantly, the PA Program is distributed according to neutral criteria which are silent as to religion.[4] In order to be eligible for the grants, an organization must prove two things, which are completely unrelated to religion: that it is a nonprofit organization with current tax exempt status, and that it owns or operates an eligible facility. (R. at 11.) Even more, the qualifications to be an "eligible facility" does not make reference to religion either. (*Id.*) Instead, eligibility is dependent on the entirely secular criteria of whether the facility provides a "critical service" like education, utility, emergency, or medical services, or eligible "non-critical" services, none of which reference religion. (R. at 12.) Thus, the *Mitchell*'s plurality requirement to be neutral is satisfied.

Further, under Justice O'Connor's concurrence, the FEMA grant also almost completely forecloses the possibility that aid will be diverted to a religious use. In *American Atheists*, the Sixth Circuit found there was "no *possibility* of diversion" in a program in which a church received a grant for the aesthetic refurbishing of its exterior. 567 F.3d at 293 (emphasis original). The court stated that, unlike "a

[4] The actual PA Program's distribution criteria are not "silent" as to religion. (R. at 7 (noting FEMA's "Church and State Separation doctrine").) However, to answer the question posed by the writ of certiorari ("Does the Establishment Clause of the First Amendment bar the Cowboy Church of Lima from receiving the public benefit of relief under the Federal Emergency Management Agency's Public Assistance Program?" (R. at 1)), it is necessary to hypothesize a PA Program that does not bar religious organizations. Assuming the PA criteria are left unchanged other than striking the prohibitive policy, they would be silent.

teacher, a sign-language interpreter or even an overhead projector," the "repairs to walls, doors, awnings and parking lots" could not possibly be converted towards religious use. *Id.* Similarly here, the PA Program only funds those costs associated with post-disaster repairs. (R. at 11.) Had the Church received aid to repair its roof, those funds could not have been diverted toward the religious endeavors of the church. Thus, like *American Atheists*, the FEMA program avoids government participation in religious indoctrination.

Second, FEMA does not define its grant recipients by religion. This second factor "looks to the same facts" as the first—the criteria used to distribute the aid—to determine a slightly different question: whether the government benefit aid has "the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Am. Atheists*, 567 F.3d at 293; *Agostini*, 521 U.S. at 231. "Such an incentive is not present where the aid . . . is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Mitchell*, 530 U.S. at 795. Indeed, if the aid is going to "the religious, irreligious, and areligious" it would indicate that no such incentive exists. *Id.* Here, the FEMA PA Program is expressly available to an incredibly wide spectrum of "institutes of public utility such as 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." (R. at 12.) Given that the program regularly gives to non-religious organizations, there does not remotely

appear to be an incentive to "undertake religious indoctrination." Thus, this criterion is satisfied.

Third, FEMA aid does not create an excessive entanglement between government and religion. Entanglement is not mere "[i]nteraction between church and state" but the "excessive" involvement between the two. *Agostini*, 521 U.S. at 232. For instance, in *Tilton*, this Court found that a program did not create pervasive interaction between the state and a religious college because it was "one-time single purpose construction grant with only minimal need for inspection." 403 U.S. at 673.

The case at hand is clearly analogous to *Tilton*. Like that case's construction grants, FEMA PA funding is not ongoing, but can only be invoked after a "major disaster" for the discrete costs of "repair, restoration, reconstruction, or replacement" of qualifying facilities. (R. at 12.) Further, while there is an initial tour "to make a determination of the loss suffered," there is no ongoing duty to report to FEMA after the distribution of funds. (*See* R. at 6.) Thus, like *Tilton*, the PA Program's minimal need for inspection indicates a lack of pervasive entanglement with religion.

Therefore, the FEMA PA Program possesses a primary, if not exclusively, secular effect. Because both prongs of the *Lemon*/*Agostini* test are satisfied, this Court should hold that FEMA disaster relief is permissible under the Establishment Clause.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals for the Fourteenth Circuit granting summary judgment to FEMA.

Respectfully submitted.

Team 81

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