No. C17-2893-1

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 CERT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

No. C17-2893-1

BRIEF FOR THE PETITIONER

Team 82
Counsel for the Petitioner

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

1. Does a facial challenge to the Federal Emergency Management Agency's established mixed-use standard meet the prudential and constitutional requirements of ripeness?

2. Does the Establishment Clause prohibit the Federal Emergency Management Agency from providing disaster relief to repair facilities used primarily for religious purposes especially when such facilities provide other eligible services to the community?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Courts of Appeals Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

Secondary Sources

OPINIONS BELOW

The decision of the United States District Court for the Southern District of New Tejas granting summary judgment is unreported. The decision of the United States Court of Appeals for the Fourteenth Circuit in *Cowboy Church of Lima, Inc. v. FEMA* is unreported, but appears at pages 2–21 of the record.

JURISDICTION

This case is a petition from a judgment entered by the United States Court of Appeals for the Fourteenth Circuit. R. at 18. The United States Court of Appeals for the Fourteenth Circuit entered judgment on October 1, 2017. R. at 2. Petitioners filed the Petition for Writ of Certiorari, which this Court granted. R. at 1.

This Court has jurisdiction pursuant to Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In relevant part, 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 . . . ." U.S. CONST. amend. I.

In relevant part, § 702 of the Administrative Procedure Act states, "[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C.A. § 702.

In relevant part, § 704 of the Administrative Procedure act states, "[A] final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C.A. § 704.

The Robert T. Stafford Disaster Relief and Emergency Assistance 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). As stated in the Stafford Act, "[i]t is the intent of the Congress, by this Act, to provide an orderly and continuing means of assistance . . . to alleviate the suffering and damage which result from such disasters." 42 U.S.C. § 5121.

STANDARD OF REVIEW

The Fourteenth Circuit Court of Appeals erred as a matter of law by: 1. Affirming the District Court's decision granting summary judgment in favor of FEMA; and 2. Ordering the District Court to dismiss the action. R. at 18. Questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 557–58 (1988).

STATEMENT OF THE CASE

I. Factual Background

A. Cowboy Church of Lima

The Cowboy Church of Lima ("the Church") is a cowboy ministry located in the Township of Lima ("Lima"), New Tejas. R. at 3. The Church's 88-acre property features multiple structures. R. at 3. The chapel ("the chapel") occupies 2,500 square feet and is attached to an event center ("the event center") which takes up an additional 2,500 square feet and seats 120 people. R. at 3–4. The property also includes a few additional storage buildings and a rodeo arena large enough to seat about 500 people. R. at 3.

Chaplain Finn Hudson ("Chaplain Hudson") is the "head of the church" and manages the property. R. at 3. The Church's property is designated as XV – Religious Exempt Property under the New Tejas Property Code. R. at 3. Accordingly, property tax is not collected on any of the Church's property. R. at 3. Since its construction in 1990, the Church has been designated as a 501(C)(3), tax-exempt organization. R. at 3. During that time, the Church has always complied with the relevant tax reporting requirements and has maintained that designation. R. at 3.

In this close-knit community of just 4,150 residents, the Church plays a prominent role. R. at 3. The Church facilities are the largest event spaces in town, and the Church has generously opened its doors to the community for decades by hosting a variety of public meetings and events. R. at 3–4. Since 1998, the Church has hosted city council meetings at the chapel, and though the Lima mayor initially

offered to pay a rental fee, Chaplain Hudson has never accepted any compensation for use of the space. R. at 3–4. Similarly, the event center is used widely by members of the Lima community: when City Council considered constructing its own public event center, the proposal failed because residents felt their needs were already adequately served by the Church's event center. R. at 4.

In addition to these events, the Church also operates many of its own programs. At the chapel, the Church hosts religious activities including Sunday worship services, concerts, bar and bat mitzvahs, holiday festivals, receptions, and funerals. R. at 7. During the week, however, the chapel hosts a mixture of religious and non-religious events. R. at 7. The chapel is even available for non-denominational weddings. R. at 7.

The Church also provides access to the event center for a variety of uses. Local groups such as the Lions and Rotary Clubs use the venue for their meetings. R. at 7. Community members use the space for birthday and retirement parties, substance abuse meetings and marriage counseling, school dances and glee club concerts. R. at 7. The event center was also designated as a polling location for county elections. R. at 7. The Church is thus an active participant in community life, providing facilities for both religious and secular activities.

B. Hurricane Rhodes

On August 13, 2016, an unprecedented storm crashed through the state of New Tejas, dumping over forty-five inches of rain in just thirty-six hours R. at 2–3. The hurricane initially made landfall one hundred miles north of Lima, but within two days, a nearby dam had burst and flooding surged into the township. R. at 3–4.

During the storm, Chaplain Hudson and the Church staff scrambled to secure the facility from the oncoming flooding. R. at 4. The group removed religiously-significant articles from the chapel, securing them in a nearby shed. R. at 4. The group also moved furniture and supplies from the event center to a separate storage building before securing remaining items as high as possible to avoid water damage. R. at 4. Unfortunately, however, these preparations were not enough: flood waters breached the chapel and event center around 11:45 pm August 15, 2016. R. at 4. Water drenched the entirety of the indoor facilities, and remained in the buildings until around 9:30 am on August 17, 2016. R. at 4.

When it was safe to reenter the facility at 10:45 am the following day, Chaplain Hudson and his staff began to evaluate the damage. R. at 5. The group determined that major remediation would be necessary, and by 1:15 pm that day, they worked to swiftly remove dangerous and damaged materials from the chapel and event center. R. at 5.

During the clean-up process, Chaplain Hudson became concerned that the damage might be even more extensive than he initially anticipated. Chaplain Hudson brought in his brother-in-law Kurt Hummel, a local structural engineer, to investigate. R. at 5. After inspecting the property, Mr. Hummel concluded that both buildings had likely experienced significant structural damage and could possibly collapse without major repairs. R. at 6.

C. FEMA's Response to Hurricane Rhodes

In the wake of Hurricane Rhodes' devastation, President Barack Obama declared a state of emergency in New Tejas and classified the hurricane as a major

natural disaster. R. at 6. This designation was the prerequisite for the Federal Emergency Management Agency (FEMA) to respond to the crisis, which the agency did promptly. R. at 6.

1. FEMA's Public Assistance Program ("PA Program")

The Public Assistance Program ("PA Program") is FEMA's largest grant program under the Stafford Act, which enables the agency to provide relief funds in response to major disasters or emergencies declared by the President. R. at 11; FED. EMERGENCY MGMT. AGENCY, FP 104-009-2, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE 1 (2016) (hereinafter "PA GUIDE"). The program seeks to fund both immediate recovery and the permanent restoration of communities affected by federally-declared disasters. R. at 11; 12; PA GUIDE, 5 (describing the PA Program's purpose as providing funds: "so that communities can quickly respond to and recover from major disasters or emergencies declared by the President").

Through the PA Program, FEMA grants disaster relief funds to a person or organization "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." 42 U.S.C.A. § 5172 (West, Westlaw current through P.L. 115-82). To be eligible for relief under the PA Program, a private nonprofit ("PNP") applicant must: 1. Operate an eligible facility; and 2. Be an eligible organization. PA GUIDE, 11–16.

First, the PNP must demonstrate that it operates facilities which themselves are eligible for disaster relief. PA GUIDE 11. "An eligible PNP facility is one that provides educational, utility, emergency, medical, or custodial care . . . and other

essential governmental-type services to the general public . . . ." PA GUIDE, 15. As the PA Guide explains, "[f]acilities established or primarily used for . . . religious . . . activities are not eligible" for relief. PA GUIDE, 11.

In general, FEMA will not provide relief funds in support of ineligible services. 44 C.F.R. § 206.221(e)(7). For facilities that provide a mixture of eligible and ineligible services, FEMA uses the mixed-use facility standard ("mixed-use standard") to determine what, if any, portion of the facilities may be eligible for relief. PA GUIDE, 16. The "primary use" of the facilities will be dispositive of whether they are eligible for relief. *Id.*; R. at 12. To be eligible, "more than 50 percent of the physical space" in the mixed-use facility must be "dedicated" to eligible services. PA GUIDE, 16; R. at 12. If the physical space is used for both eligible and ineligible services, FEMA will next investigate the portion of "operating time" dedicated to eligible and ineligible services. PA GUIDE, 16; R. at 12. The facility's primary use is "the use to which more than 50 percent of the operating time is dedicated in that physical space." R. at 12; *see also* PA GUIDE, 16. If FEMA finds that the facility is primarily used for eligible services, the facility will be eligible for relief, but the amount of the relief will be prorated "based on the percentage of physical space dedicated to eligible services." R. at 12; *see also* PA GUIDE, 16. If, however, FEMA determines that the facility's primary use is the provision of ineligible services, "the entire facility is ineligible." R. at 12; *see also* PA GUIDE, 16. Thus, because religious activities are an "ineligible service," any facility

whose primary purpose is the conduct of religious activities would be ineligible for the PA Program.

Second, once the PNP proves that it operates an eligible facility, it must prove that it is a fully eligible organization. PA GUIDE, 11. To show that it is an eligible organization, the PNP must provide either a "current letter ruling from the U.S. Internal Revenue Service granting tax exemption under section 501(c)" of the Internal Revenue Code, or "[d]ocumentation from the State substantiating it is a non-revenue producing, nonprofit entity organized or doing business under State law." *Id.* If the PNP successfully meets both requirements, FEMA considers the organization eligible for relief under the PA Program.[1] Applicants must submit a Request for Public Assistance form to FEMA no more than thirty days after the President has issued a disaster proclamation. R. at 13.

2. The Church's Application for Emergency Funds

Because the Church was located outside of the 100-year flood plain, and thus deemed unlikely to flood, neither the event center nor the chapel possessed flood insurance at the time of the storm. R. at 6. Accordingly, on August 20, 2016, just a few days after the storm had passed, Chaplain Hudson filed an application for FEMA relief funds to help finance reconstruction of the Church property. R. at 6.

On August 24, 2016, FEMA adjuster Quinn Fabray contacted Chaplain Hudson to arrange a tour of the Church property. R. at 6. Ms. Fabray visited the Church on August 25, 2016 and assessed the hurricane damage. R. at 6. Ms. Fabray

[1] FEMA conducts additional inquiries into the scope of work to be performed and its cost before ultimately awarding relief funds. These inquiries, however, are subject to a PNP applicant's successful completion of the two "eligibility" inquiries. PA GUIDE, 11.

estimated that the event center was used for non-religious purposes anywhere between 45–85% of the time. R. at 7. At this time, Ms. Fabray also estimated that 85–95 % of the chapel's uses were religious in nature. R. at 7.

Importantly, during Ms. Fabray's visit, she explained to Chaplain Hudson that FEMA would not provide monetary assistance to churches. R. at 7. Ms. Fabray explained that, to her knowledge, the agency had never granted an exception. R. at 7. Once Ms. Fabray's report was finalized, FEMA denied the Church's application on a preliminary basis. R. at 10.

After Chaplain Hudson confirmed with his attorney that FEMA would not allocate relief funds to religious organizations, the Church filed this action, at which time FEMA stopped further processing of the Church's application. R. at 8.

II. Procedural History

On August 29, 2016, the Church filed suit against FEMA in the Central District Court of Lima. R. at 8. FEMA filed motions to dismiss both claims under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1). R. at 9. The parties held a status conference on November 2, 2017, during which Judge Beiste denied the motions, allowing discovery to proceed. R. at 9. After the discovery period, FEMA again moved for summary judgement on the theories that: 1. The case was not ripe for review; and 2. The Establishment Clause barred the relief the Church sought. R. at 10. Judge Beiste denied the motion to dismiss, concluding that the court had subject matter jurisdiction of the agency's decision, thereby enabling the court to render a decision. R. at. 10. Then, Judge Beiste granted summary judgment,

determining that the Establishment Clause barred recovery for the Church. R. at 10.

The Church appealed the grant of summary judgment, while FEMA appealed seeking dismissal under the Ripeness Doctrine. R. at 10–11. On appeal, the Fourteenth Circuit affirmed the District Court's conclusion that the Establishment Clause barred FEMA from awarding funds to the Church. R. at 17. The court also ordered the District Court to dismiss the action, finding that the case was not ripe for adjudication. *Id.*

The Church subsequently petitioned this Court for a writ of certiorari, which this Court granted. R. at 1.

SUMMARY OF THE ARGUMENT

The lower courts incorrectly held that the Church's claim was not ripe for judicial review. Because the Church's claim against FEMA meets both the prudential and constitutional requirements of ripeness, this Court should reverse the courts below and instead find the claim ripe for review.

First, the Church's facial claim meets the prudential requirements under the doctrine of ripeness because it is fit for judicial decision and withholding review would cause the Church hardship. The Church's claim is an issue fit for judicial decision because it is: 1. A purely legal issue that would not benefit from additional factual development; and 2. The Church is challenging FEMA's mixed-use standard, which is sufficiently final for judicial decision. Additionally, withholding judicial review would cause hardship upon the Church and similar religious entities. Thus,

because both prudential requirements under the doctrine of ripeness are satisfied, the Church's claim is ripe for review.

Second, the Church's facial claim against FEMA's mixed-use standard meets the constitutional requirement of ripeness. The constitutional requirement of ripeness requires a party to suffer injury in fact, which the Church and similar religious organizations indeed suffered because of the mixed-use standard. Thus, the Church's claim is ripe for review under both prudential and constitutional requirements of ripeness, and the lower courts erred in holding otherwise.

The lower courts also failed to adequately consider whether FEMA could provide PA Program funds to religious organizations like the Church without violating the Establishment Clause. Contrary to the agency's assessment, the provision of these disaster relief funds is constitutionally permissible: neither the purpose nor the effect of providing disaster relief violates the requirements of the Establishment Clause. Accordingly, this Court should hold that providing such funds complies with the Establishment Clause.

Not only is the provision of these funds to religious organizations constitutional under the Establishment Clause, but withholding them violates the Free Exercise Clause. The PA Program is an otherwise-neutral and generally available public benefit. By singling out religious groups for unequal treatment, the PA Program imposes a unique burden on religion. As this Court has explained, any such burden must be subjected to a strict scrutiny analysis. The Fourteenth Circuit failed to employ this exacting standard when considering the Church's claim, and

had it done so, it would have concluded that FEMA's mixed-use standard cannot satisfy the requirements of strict scrutiny. The court thus erred by holding the policy constitutional.

Accordingly, this Court must reverse the decision of the Fourteenth Circuit regarding both the ripeness issue and the Church's Free Exercise claim.

ARGUMENT

I. Under both prudential and constitutional ripeness requirements, the Cowboy Church of Lima's claim is not barred by the doctrine of ripeness.

This Court should find that the Church's claim against FEMA is not barred by the doctrine of ripeness. In doing so, the Court should hold that issuing a judicial decision on the Church's claim would not violate either the prudential or constitutional requirements of ripeness. This is true even though FEMA did not make a final determination on the Church's specific relief request; rather, the agency's final action (and the action in question before this Court) is its promulgation of the "Mixed-Use Facility" standard ("mixed-use standard") in its 2016 Public Assistance Program and Policy Guide ("PA Guide"). PA GUIDE, 16. Because review of the Church's claim regarding this mixed-use standard meets all the requirements of ripeness, this Court should find the Church's claim ripe for review.

Under the Administrative Procedure Act ("APA"), "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C.A. § 702. In the present case, the Church asserts that it was legally wronged by FEMA and is adversely affected by the agency's mixed-use standard. R. at 8. The APA further provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C.A. § 704. Here, FEMA's mixed-use standard is a final agency action for which there is no adequate remedy besides judicial review. Thus, the Church brought the present case to challenge the agency's policy. However, before this Court can review the merits of the Church's claim, it must first deem the Church's claim ripe for judicial review. This claim is ripe for judicial review because it meets both the prudential and constitutional requirements of ripeness.

First, the Church's claim against FEMA is ripe for judicial review because it satisfies the two prudential requirements of the doctrine of ripeness: 1. The Church's challenge to the mixed-use standard is an issue fit for judicial decision; and 2. Withholding review of the Church's claim would cause hardship to the Church. Second, the Church's claim meets the constitutional requirements of ripeness because: 1. The Church suffers injury in fact; and 2. The Church has standing in court.

Because the Church's challenge to FEMA's mixed-use standard meets both the prudential and constitutional requirements of the doctrine of ripeness, this Court should find the claim ripe for judicial review. This holds true even though FEMA did not make a final determination of the Church's relief eligibility: the

agency action in question is the mixed-use standard itself, not FEMA's incomplete application of this standard to the Church.

A. The Cowboy Church of Lima's claim satisfies the prudential requirements of the doctrine of ripeness, and is thus ripe for judicial review.

Because the Church's claim against FEMA satisfies all the prudential requirements of the doctrine of ripeness, it is ripe for judicial review. As this Court articulated in *Reno v. Catholic Social Services., Inc.*, there are "prudential reasons for refusing to exercise jurisdiction." 509 U.S. 43, 58 (1993). Furthermore, in *Abbott Labs. v. Gardner*, this Court stated that the doctrine's "basic rationale is to prevent the courts… from entangling themselves in abstract disagreements over administrative policies, and…to protect agencies from judicial interference[.]" 387 U.S. 136, 148-49 (1977). These prudential concerns also ensure that courts are not "wasting scarce judicial resources in attempts to resolve speculative or indeterminate factual issues." *Senty-Haugen v. Goodno*, 462 F.3d 876, 889 (8th Cir. 2006).

To avoid this premature and wasteful "entangling" in administrative action, an issue must be ripe before a court can review it. *Abbott Labs.*, 387 U.S. at 148-49; *Reno*, 509 U.S. at 58. This Court in *Abbott Labs* created a two-part analysis to determine if a claim is ripe for judicial review under prudential considerations: 1. Whether the issue is fit for judicial decision; and 2. Whether withholding court consideration causes hardships to the parties. *Abbott Labs.*, 387 U.S. at 149. Because the Church's claim against FEMA regarding its application of the mixed-use standard is fit for judicial review, and because it would cause hardship to the

Church if this Court withheld consideration, the Church's claim meets the prudential standards of ripeness. This Court must therefore hold that it can and should review the Church's claim.

1. The Church's challenge to FEMA's mixed-use standard is an issue fit for judicial decision

The Church's challenge to FEMA's mixed-used standard is fit for judicial decision, and thus satisfies the first prudential requirement of the doctrine of ripeness. For an issue to be fit for judicial decision, it must meet two requirements: 1. The issue must be purely legal (one that would not benefit from more concrete or additional factual development); and 2. The agency action must be sufficiently final. *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568 (1996); 2 Fed. Proc., L. Ed. § 2:320. The Church's claim against FEMA meets both of these standards: the Church's challenge to the mixed-use standard is a purely legal issue that would not benefit from additional fact finding, and FEMA's promulgation of the mixed-use standard is sufficiently final. Because both requirements are met, the Church's claim is fit for judicial decision, thus satisfying this Court's first prudential ripeness requirement (fitness of this issue).

a. Because the Church's claim against FEMA's mixed-use standard is purely legal and would not benefit from additional factual development, it is a fit issue for judicial decision.

The Church's challenge to FEMA's mixed-use standard is purely legal and is thus fit for judicial decision. The Church's facial challenge to FEMA's standard would not benefit from additional or more concrete fact finding because the Church challenges the standard itself, and the standard is clearly articulated in FEMA's PA

Guide. PA GUIDE, 16. Because the Church's challenge to FEMA's mixed-use standard is a purely legal issue that would not benefit from additional fact finding, this Court should deem the Church's claim as fit for judicial decision.

For an issue to be purely legal and fit for review, "it will not be clarified by further factual development," and the issue will "not be contingent upon future uncertainties or intervening agency action." *Thomas,* 473 U.S. at 568 (1996); 2 Fed. Proc., L. Ed. § 2:320. In other words, the Court must be able to "conduct its examination . . . without any further deference to the agency." Ripeness: The Abbott Laboratories Inquiry, Government Contracts Disputes § 14:14 (2017 ed.).

In addition to this Court's articulation of the rule, the D.C. Circuit and the Seventh Circuit have also held that "a purely legal claim in the context of a facial challenge . . . is 'presumptively reviewable.'" *Cement Kiln Recycling Coalition v. E.P.A.*, 493 F.3d 207, 215 (D.C. Cir. 2007) (quoting *National Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003)); *see Owner-Operator Indep. Drivers Ass'n. Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580 (7th Cir. 2011).

Courts have applied this standard in several contexts. In *Whitman v. American Trucking Ass'ns*, the plaintiffs asked this Court to review final rules promulgated by the Environmental Protection Agency ("EPA") that the agency drafted pursuant to the Clean Air Act. 531 U.S. 457, 457 (2001). The Court found that the claim was ripe for review because "the question is purely one of statutory interpretation that would not benefit from further factual development." *Id.* at 458. Because the issue only required the Court to analyze the agency's final rule relating

to the underlying statute, and the analysis would not benefit from additional fact finding, the Court deemed it ripe for review.

In *Abbott Labs*, the Court also found that the plaintiff's claim was purely legal and would not benefit from additional factual development. *Abbott Labs.*, 387 U.S. at 136. Again, the plaintiff asked the Court to review its challenge to an agency's policy: the plaintiff challenged proposed regulations published by the Commissioner of Food and Drugs in accordance with the Federal Food, Drug, and Cosmetic Act. *Id.* at 137-38. The Court held that the issue was purely legal because it turned on "whether the statute was properly construed by the Commissioner." *Id.* at 149. Thus, this Court reinforced its holding from *Whitman* that reviewing an agency's statutory interpretation is a purely legal issue ripe for review.

Similarly, in *Cement Kiln*, the D.C. Circuit deemed the plaintiff's challenge to EPA regulations to be purely legal, and thus ripe for review. 493 F.3d at 211. The circuit court held that facial challenges to an agency action are presumptively reviewable, and that "'[c]laims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues.'" 493 F.3d at 215 (quoting *Atlantic Slates Legal Found.,* Inc. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003)). Because the specific claim was a facial challenge alleging that the EPA's actions were arbitrary, capricious, and contrary to law, the court found the issue purely legal.

In the present case, the Church's facial challenge to FEMA's mixed-use standard presents a purely legal issue that would not benefit from additional factual development. To begin, the Church asks this Court to review the mixed-use

standard as promulgated by FEMA's guidance in the PA Guide. PA GUIDE, 16. The PA Guide synthesizes FEMA's interpretation of the Stafford Act and its eligibility requirements. PA GUIDE, 6, 9 (listing all of the statutes implicated in the Policy Guide and explaining that FEMA only provides assistance to eligible applicants as prescribed in 44 C.F.R. § 206.222.) Thus, FEMA's mixed-use standard is the agency's interpretation of how the PA Program's resources must be allocated under the authorizing statutes and regulations. Just like the plaintiff in *Abbott Labs*, the Church here merely asks this Court to determine if FEMA "properly construed" these statutory provisions. R. at 16. And, like the ripeness issue in *Whitman*, the Church asks the Court to analyze the agency's final action. Though the challenged action in *Whitman* was a rule rather than policy guidance as the Court sees here, this distinction is not relevant to the analysis of whether the action is purely legal. For these reasons alone, this Court should find that the Church's claim challenging FEMA's mixed-use standard are purely legal.

Additionally, the Church facially challenges the mixed-use standard because the standard violates the Free Exercise Clause of the Constitution. R. at 16. This Court should adopt the D.C. Circuit and Seventh Circuit's presumption that facial challenges, such as this one, are purely legal issues. *See Cement Kiln*, 493 F.3d at 215; *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d at 580. Such an application is logical because it operationalizes the Court's standard of only reviewing purely legal issues that would not benefit from additional factual

development—facial challenges, by definition, focus on the final agency action and its lawfulness in the abstract, rather than as applied to the plaintiff-specific facts. Thus, this Court should adopt this standard and hold that the Church's claim is presumptively purely legal.

b. FEMA's mixed-use standard is sufficiently final and thus fit for judicial decision.

FEMA's mixed-use standard is sufficiently final, indicating that the Church's challenge to the standard is fit for judicial review. Section 704 of the APA explicitly requires the agency action to be final before a court can review it. 5 U.S.C.A. § 704. This finality analysis is also integral to the Court's ripeness doctrine. 13 Bus. & Com. Litig. Fed. Cts. § 140:30 (4th ed.). Because the mixed-use standard meets this finality requirement, the Church's claim is fit for judicial decision, and thus ripe for review.

For an agency action[2] to be final, it must "mark the consummation of the agency's decisionmaking process…and [the] action must be one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 33 U.S. 103, 113 (1948)). The agency action cannot be "merely tentative or interlocutory." *Bennett*, 520 U.S. at 178. If the agency has issued "a definitive statement of its position, determining the rights and obligations of the parties," then that action is final for purposes of judicial review despite the

[2] Agency action includes "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. §§ 551(4), 551(3). The PA Guide falls into this category.

"possibility of further proceedings in the agency" to resolve subsidiary issues. *Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983); *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006). This Court has applied the finality element of ripeness in a "pragmatic way." *Abbott Labs.*, 387 U.S. at 149-50. Thus, the finality inquiry involves both formalistic and pragmatic considerations.

In *Bennett*, this Court found that both requirements of finality were met: the agency action marked the consummation of its decision-making process, and the action created legal consequences. *Bennett*, 520 U.S. at 178. There, the Secretary of the Interior published a Biological Opinion under the Endangered Species Act of 1973. In this Biological Opinion, the Secretary identified plaintiff's behavior as endangering two fish species. The Court held that it was "uncontested" that the Opinion consummated the agency's decision-making process. *Id.* It also held that the Opinion created direct and legal consequences because the plaintiff could only proceed if it complied with "prescribed conditions." *Id.*

Similarly, in *Frozen Food Express v. United States*, this Court analyzed the Interstate Commerce Commission's ("ICC") order that specified which commodities fell within the statutory class of 'agricultural commodities.' 351 U.S. 40, 76 (1956). Even though the ICC order had no authority except to give notice of how the agency interpreted relevant statutes, this Court still found the order sufficiently final for review purposes. *Id.*; *Abbott Labs.*, 397 U.S. at 150–51. Thus, even an agency action that simply gives notice of the agency's interpretation of relevant statutes can mark

the consummation of the agency decision-making process, and create rights, obligations, and legal consequences.

Additionally, on several occasions, the D.C. Circuit has classified guidance documents as final agency action because they reflect a "settled agency position" and have "legal consequences for those subject to regulation." *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 380 (D.C. Cir. 2002); *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000). For example, in *General Electric Co.*, the D.C. Circuit found the EPA's guidance document on permissible risk assessment techniques for disposal of chemicals sufficiently final for judicial review. *Gen. Elec. Co.*, 290 F.3d at 380. The guidance marked the consummation of the EPA's decision-making process despite the fact that it could be altered in the future: "if the possibility…of future revision…could make agency action not final…,then it would be hard to imagine any agency rule—and particularly one that must be updated periodically…—would ever be final as a matter of law." *Id.*

FEMA's mixed-use standard as articulated in the PA Guide is sufficiently final, and thus reviewable. The PA Guide "combines all Public Assistance (PA) policy into a single volume and provides an overview of the PA Program implementation process." PA GUIDE, vii. The Guide is meant to: "provide clear and concise policy language to minimize multiple interpretations" and "increase consistent and efficient PA program eligibility determinations of Applicants." *Id.* It also reflects FEMA's adherence to and interpretation of several federal statutes and

FEMA regulations (Stafford Act, 2 C.F.R. § 200.338, and 44 C.F.R. § 205.200(b)). PA GUIDE, 6-7.

Furthermore, the document refers to itself is a "guidance document" and even states the dates to which the guidance document will apply (all incidents declared on or after January 1, 2016). *Id.* at vii. It also states that FEMA "will make updates to this guide on an annual basis." *Id.* Chapter Two, which contains the mixed-use standard itself, discusses "liability criteria for Public Assistance (PA) funding and provides comprehensive PA policy to use when evaluating eligibility." *Id.* at 10. Thus, the PA Guide is a guidance document: it refers to itself as such, and it provides FEMA's "statement of general or particular applicability" with "future effect designed to implement, interpret, or prescribe" the Stafford Act and relevant statutes. PA GUIDE, vii; 5 U.S.C. § 551(3)-(4).

The PA Guide thus satisfies the two requirements of the finality inquiry. First, the PA Guide consummates FEMA's decision-making process on how the agency will apply eligibility requirements in the year 2016. The PA Guide as a whole, and the mixed-use standard specifically, provide "definitive statement[s] of [FEMA's] position" on how the agency will determine applicant eligibility for relief funds. Just as this Court held in *Bell*, such a document with definitive statements of agency position qualifies as consummation of the agency's process and is a final agency action. Here, one need only look at the PA Guide's Forward to see that the Guide is meant to reflect FEMA's consummated decision-making process for relief allocation: the Guide combines all PA policy, provides concise policy language, and

is meant to increase consistent eligibility determinations. PA GUIDE, viii, 6-7, 16. The mixed-use standard in particular is not speculative or merely suggestive: it explicitly states the agency's requirements for relief eligibility, and offers no alternatives. *Id.* at 16.

Additionally, the PA guide does more than simply give notice of FEMA's interpretation of relevant statutes. Rather, it provides clear and concise standards defining how FEMA will implement its policies and allocate relief funds. In *Frozen Express*, this Court held final an even less commanding authority (one that merely gave notice of the agency's interpretation of a statute). 351 U.S. at 76. By contrast, FEMA's PA Guide here, which gives explicit compliance instructions, is sufficiently final. Because the PA Guide contains definitive statements of FEMA's positions, and does more than merely give notice of the agency's interpretation of relevant statutes, it represents the consummation of the agency's decision-making process.

Second, the PA Guide also creates rights, obligations, and legal consequences for the Church and similarly-situated religious organizations. Just like the agency action in *Bennett* which provided prescribed conditions, the PA Guide provides "prescribed conditions" that religious entities must meet to qualify for relief. For example, only facilities that are used for religious purposes less than 50% of the time are eligible for any amount of relief from FEMA under the PA Program. PA GUIDE, 16. Any applicant, including the Church, could only qualify for FEMA relief if it met these prescribed conditions. *Id.* Thus, rights and legal consequences flow

from the PA Guide because it effectively dictates which organizations qualify for the right to relief, and the procedures necessary to obtain that legal right.

Furthermore, the fact that FEMA reviews and updates the PA Guide on an annual basis is not a barrier to this Court finding the PA Guide sufficiently final for review purposes. The language in the PA Guide indicates that FEMA's interpretation and articulation of its relief standards stands for at least a year. PA GUIDE, vii. The possibility of future revision is not dispositive: an agency action may still be final even if the agency periodically revises the policy. *Gen. Elec. Co.*, 290 F.3d at 380. Here, the PA Guide is final FEMA guidance for the year 2016, and is thus sufficiently final for judicial review.

Because the PA Guide is a guidance document that consummates FEMA's 2016 decision-making process regarding relief eligibility, and entities applying for relief face the legal consequences of these determinations, the PA Guide and the mixed-use standard therein constitute final agency action. This Court should hold that FEMA's mixed-use standard is sufficiently final for review, and thus a fit issue for judicial decision.

2. Withholding review of FEMA's mixed-use standard would cause hardship to the Church and similar religious organizations.

Withholding review of FEMA's mixed-use standard would cause hardship to the Church and similarly-situated private nonprofit religious organizations. Thus, the Church's claim against FEMA meets the second prudential requirement of the doctrine of ripeness.

For ripeness purposes, this Court examines the potential hardships in two ways: the potential impact of complying with a rule the challenging party believes is invalid, and the party's risk of enforcement action and subsequent penalties if it chooses not to comply. *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1988). Because the Church does not face any enforcement actions or penalties for failing to meet the mixed-use standard, only the first consideration (the impact of complying with the rule) is relevant here.

For a party to suffer hardship under a ripeness analysis, this Court requires that the party face "adverse effects of a strictly legal kind." *Id.* (emphasis added). Adverse effects of a strictly legal kind include: commanding a party to do something or commanding a party to refrain from doing something; granting, withholding, or modifying any formal legal license, power, or authority; subjecting a party to civil or criminal liability; and creating legal rights or obligations. *Id.* (citing *United States v. Los Angeles & Salt Lake R. Co.*, 273 U.S. 299, 309–310 (1927)). However, a party can also experience hardship if it faces significant practical harm. *See Ohio Forestry*, 523 U.S. at 733; *see also Natural Resources Defense Council v. Abraham*, 388 F.3d 701,706 (9th Cir. 2004). Thus, either a strictly legal hardship or a significant practical harm can be sufficient to show hardship, thereby satisfying the second prudential ripeness requirement.

This Court has applied this hardship rule in several contexts. In the *Ohio Forestry* case, this Court considered a resource plan promulgated by the United States Forest Service. 523 U.S. at 726. Although this plan did not itself authorize

the logging of trees, it made logging more likely due to logging goals and determination of logging methods. *Id.* Several environmental organizations challenged the plan. However, this Court found that the challenge was unripe for review, partially because the parties would not face significant hardship if the Court withheld review. *Id.* at 728. In analyzing the potential hardships, this Court found that there were insufficient legal and practical harms. Without the creation of a new legal right to cut down trees, or the abolition of the right to object to this practice, the Court concluded the plaintiff suffered no purely legal hardship. *Id.* at 727. The Court also held that the plaintiff did not suffer severe practical harm because the plan didn't elicit "modif[ied]…behavior to avoid future adverse consequences." *Id.* Additionally, the Court did not find sufficiently severe practical harm because the plaintiff would "have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Id.* at 734. Thus, severe practical harm occurs when a plaintiff must modify its behavior to avoid future adverse consequences, or when it does not have opportunity to bring its challenge when its harm is more imminent or certain.

In the present case, the Church faces significant hardship if this Court withholds review. Although FEMA's mixed-use standard does not create purely legal harms for the Church, it does cause severe practical harm. Because withholding review would cause the Church severe practical harm, and thus significant hardship, this Court should find the Church's claim ripe for review. Unlike the plaintiffs in *Ohio Forestry*, the Church did have to modify its behavior to

avoid future adverse consequences. To prevent costly destruction and deterioration of its building, the Church had to seek privately-funded donations in lieu of FEMA relief. R. at 8–9. These privately-funded donations took significantly longer to collect and implement than relief from the PA program would have. R. at 8. The Church was therefore unable to open its doors to the community during the time of crisis, and experienced further delays in reopening due to its necessitated reliance on private donations. R. at 8. For a Church that places high esteem on its ability to serve its community, such a delay in reopening is a substantial hardship. R. at 7. Because the Church was explicitly told by a FEMA adjuster it would not receive FEMA relief due to its religious status, the Church modified its behavior (sought private donations from the community) to avoid future adverse consequences (costly deterioration of its facilities and further delay in reopening). R. at 7–8. As this Court's holding in *Ohio Forestry* demonstrates, such modifications meet the substantial hardship requirement justifying review.

Furthermore, the Church is also distinct from the plaintiffs in *Ohio Forestry* because the Church cannot bring its "legal challenge at a time when harm is more imminent and more certain." 523 U.S. at 734. No passage of time would make the Church's claim more ripe than it is now: it already experienced delay in receiving relief, it already modified its behavior to obtain alternative sources of aid, and it already remediated its lack of aid with private donations. R. at 7–8. If this Court requires otherwise, no similarly-situated church would have a ripe challenge without first awaiting a near-certain denial by FEMA, and allowing its facilities

succumb to mold, mildew, and structural damage. R. at 5–6, 9, 19. While the majority opinion claims that the Church could have waited for FEMA's final determination of its PA application, R. at 14, doing so would have been an exercise in futility[3] since churches are never granted monetary assistance under this program. R. at 7. The Church's harm will never be more imminent or certain. Thus, withholding review causes the Church and similar religious entities substantial hardship. Accordingly, this Court should find the Church's claim ripe for review.

B. The Church suffers injury in fact from FEMA's mixed-use standard, and thus meets the constitutional requirements of the doctrine of ripeness.

The Church's claim against FEMA satisfies the constitutional requirements of the doctrine of ripeness because the Church suffers injury in fact and thus has standing before the Court. The constitutional requirement of ripeness is grounded in Article III's limitations on judicial power to review cases and controversies. U.S. CONST. art. III, § 2; *Reno*, 509 U.S. at 58 n.18. To ensure that the issue is ripe and the judiciary does not overstep its limited powers, this Court requires standing via injury in fact. 1 Cyc. Of Federal Proc. § 2:16 (3d ed.) (stating that "the constitutional component of the ripeness inquiry is often treated under the rubric of standing…with the injury in fact prong."; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 (2010). Thus, for the Church's claim against FEMA to

[3] In 2000, this Court stated that one exception to the ripeness requirement occurs when administrative exhaustion "would prove futile." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1,12-13 (2000); *see McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992). While the Church's claim against FEMA's mixed-use standard is ripe for review, alternatively, FEMA's preliminary denial of the Church's PA application would meet this "futile" ripeness exception, and would thus still be reviewable by this Court.

meet the constitutional requirements of the doctrine of ripeness, the Church must have standing with an injury in fact. Because the Church has suffered an injury in fact, its claim is ripe under Article III constitutional ripeness requirements.

Section 702 of the APA Act titled "Right of Review" states that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C.A. § 702. However, not all that are adversely affected or aggrieved by agency action have standing in a court of law or suffer injury in fact. For a complainant to have standing and suffer injury in fact under the APA, the interest the complainant seeks to protect must be "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998); 5 U.S.C.A. § 702.

APA plaintiffs need only demonstrate that their interests fall within the "general policy" or "zone of interests" of the underlying statute. *Nat'l Credit Union*, 522 U.S. at 489, (quoting *Data Processing*, 397 U.S. at 157). This Court states that "the test itself is not meant to be especially demanding." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 400 (1987). Rather, the test should serve as a barrier for plaintiffs whose interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit." *Id.* at 399–400. In applying the "zone of interests" test, this Court does not ask whether Congress specifically intended for the statute to

benefit the particular plaintiff. *Nat'l Credit Union*, 522 U.S. at 480. Instead, the Court should find standing and injury in fact when the interests are "arguably . . . to be protected" by the statutory provision. *Id.*

This Court and the lower federal courts have applied this "zone of interests" analysis in several applicable cases. In *National Credit Union*, this Court found standing and injury in fact when commercial banks sued the National Credit Union Administration for relaxing statutory restrictions on financial institution membership. 522 U.S. at 480. The Court reasoned that regulating membership of these financial institutions is an "unmistakable" interest served by the underlying statute, even if Congress did not specifically intend to benefit commercial banks. *Id.* Because the commercial banks' interests in limiting market membership was "arguably…to be protected" by the underlying statute, this Court found standing and injury in fact. *Id.*

The Ninth Circuit applied these same principles in *Graham v. FEMA* when it found that victims of natural disasters "most certainly fall within the Stafford Disaster Relief Act's Zone of interests" and thus had injury in fact when they claimed unlawful withdrawal of disaster relief funds. 149 F.3d 997, 1004 (9th Cir. 1998). In coming to this conclusion, the Ninth Circuit determined that one of the purposes of the Stafford Act is to make "grants to individuals or families adversely affected by a major disaster." *Id.* Because the Stafford Act was "primarily designed" to help individuals "obtain disaster relief," the plaintiffs claiming that FEMA unlawfully withdrew disaster relief suffered injury in fact and had standing. *Id.* at

1005. The court stated that the plaintiffs' interests were "in no way marginally related to or inconsistent with the purposes implicit in the statute." *Id.* at 1004 (quoting *Clarke*, 479 U.S. at 399). Thus, circuit courts have explicitly held that FEMA denying or withdrawing relief funds unlawfully can qualify as injury in fact.

Furthermore, this Court found that a party has standing and suffers injury in fact in the equal protection context "when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group[.]" *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). This Court clarified that the "injury in fact" in such cases is the denial of equal treatment due to the barrier, and not "the ultimate inability to obtain the benefit." *Id.* The barrier itself is the injury, regardless of whether the individual ultimately receives the benefit. Thus, this Court recognizes that parties who face higher barriers to obtaining a government benefit suffer injury in fact, and have standing in federal court.

The Church has standing and suffers injury in fact in the current case. As declared by Congress in the most recent version of the Stafford Act, "[i]t is the intent of the Congress, by this Act, to provide an orderly and continuing means of assistance…to alleviate the suffering and damage which result from such disasters." 42 U.S.C. § 5121. Thus, the Church's claim that FEMA's mixed-use standard inhibited its ability to obtain disaster relief funds to alleviate its suffering and damage is within the Act's zone of interest: these are the types of interests that Congress intended "arguably…to be protected." The Church's claim against FEMA

is in no way "marginally related" to or "inconsistent" with the purposes of the Stafford Act. Rather, it directly involves the primary purpose of the Stafford Act: the provision of federal assistance to alleviate the Church's suffering and damage.

Additionally, this Court's holding in *Northeastern Florida* further demonstrates that the Church suffers injury in fact and has standing in the current case. Although the *Northeastern Florida* holding occurred in an equal protection context, it parallels perfectly with the Church's lawsuit. As in that case, FEMA's improper mixed-use standard creates an unfair burden to the Church and similar religious institutions in obtaining relief funds. R. at 11–12. FEMA's mixed-use standard erects a barrier making it more difficult for religious organizations to obtain the relief benefit than for non-religious organizations. R. at 11–12; PA GUIDE, 16. This barrier, and not the ultimate outcome of the sought-after benefit, is the Church's injury in fact.

Because the Church's claim is within the Stafford Act's zone of interest, and because FEMA's barrier to aid causes an injury in fact, the Church suffers injury in fact and has standing. Thus, the Church meets the constitutional requirements of ripeness under Article III. Because the Church's claim meets both the prudential and constitutional requirements of the doctrine of ripeness, this Court should find that the Church's claim is ripe for review, and proceed to the merits of its Establishment Clause argument.

II. Granting relief to the Cowboy Church of Lima and similar religious organizations to facilitate the remediation of their facilities would not violate the Establishment Clause.

Allocating relief funds to the Cowboy Church of Lima would not violate the Establishment Clause. 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 . . ." U.S. CONST. amend. I. The Founders believed "that a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

To safeguard these Establishment Clause principles, this Court has synthesized its various requirements into a streamlined, two-pronged analysis: 1. Whether the challenged action had a "secular legislative purpose;" and 2. Whether the challenged action had the "primary effect" of advancing or inhibiting religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)); *see also Lemon v. Kurtzman*, 403 U.S. 602 (1971) (notably, though the *Lemon* test originally proposed a three-prong analysis, this Court has since parsed the standard down to the articulated two-prong test). In applying this two-prong analysis, the provision of funds to entities such as the Church through the PA Program would not violate either prong.

A. The PA Program has both a secular purpose and effect, and thus providing relief to religious organizations under this program would not violate the Establishment Clause.

The PA Program has both a secular purpose and effect, as required by the Establishment Clause. To determine whether a policy violates either prong, the Court considers how an "objective observer" would view both the statute's purpose

and its effect. *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). If the objective observer would perceive that the government's policy has either the purpose or effect of endorsing religion, the policy violates the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring).

Here, an objective observer would not find a violation of either prong had FEMA provided disaster relief to the Church. First, an objective observer would not perceive that the PA Program's stated or apparent purpose is to endorse religion, and no part of the PA Program funding scheme demonstrates an alternative purpose. Furthermore, even if FEMA had provided the Church with disaster relief funds, this action would not have altered the PA Program's secular purpose.

Second, no objective observer would conclude that the effect of the PA Program is the endorsement of religion. Any potential entanglement between the government and religion through the administration of the PA Program would be tenuous at best, and certainly not excessive. In summary, neither the purpose nor the effect prong of the Establishment Clause analysis would be violated if FEMA were to provide the Church and similar religious organizations relief through its PA Program. Accordingly, FEMA would not have violated the Establishment Clause by providing PA Program relief funds to the Church.

1. The PA Program's purpose is secular, thereby satisfying the purpose prong of this Court's Establishment Clause analysis.

The PA Program's purpose is secular, as affirmed by its text, the circumstances surrounding its enactment, and the Program's implementation. Therefore, the PA Program does not violate the purpose prong of this Court's

Establishment Clause analysis. Furthermore, even if FEMA provided PA Program relief funds to the Church, doing so would not impermissibly alter the Program's secular purpose.

To determine whether a government program has a secular purpose, this Court evaluates whether both the explicitly-stated legislative purpose, and the apparent purpose as demonstrated by surrounding circumstances, treat religion with neutrality. *McCreary*, 545 U.S. at 860; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).

At all times, the government must treat religion with neutrality. *McCreary*, 545 U.S. at 860. As this Court has explained, "government neutrality between religion and religion, and between religion and nonreligion" is the "touchstone" of the purpose analysis. *Id.* (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). The government must act neutrally "in matters of faith, and neither favor nor inhibit religion." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 299 (1963) (citation omitted). When the government acts with the purpose of "advancing religion," rather than with neutrality, such actions violate the Establishment Clause because the government's "ostensible object is to take sides." *McCreary*, 545 U.S. at 860 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 37, 335 (1987)). Thus, government policies that take sides between religion and religion, or between religion and nonreligion, constitute an endorsement or disapproval of religion, which violates the Establishment Clause.

To determine whether a government policy is intended to endorse religion, the Court must inquire into both the government's stated purpose for adopting the challenged policy, and the policy's apparent purpose as demonstrated by surrounding circumstances. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring); *McCreary*, 545 U.S. at 860–61; *Stone v. Graham*, 449 U.S. 39, 41–42 (1980). When the Court interprets a policy's legislative intent, the legislature's stated purpose for passing the contested law is ordinarily "entitled to deference." *McCreary*, 545 U.S. at 864. However, this alone is not dispositive—the Court also investigates whether the government apparently "intends to convey a message of endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring); *see also Stone*, 449 U.S. at 41–42. "Indeed, the purpose apparent from government action can have an impact more significant" than the stated purpose. *McCreary*, 545 U.S. at 860-61. Thus, the Court must look to both the stated purpose and the apparent purpose of the challenged policy to determine whether the government acted neutrally.

To analyze the stated and apparent purposes of the challenged policy, the Court asks whether the "objective observer" would perceive the policy as an endorsement of religion. *Id.* at 862 (citing *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000)). The objective observer is not treated as "omniscient." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1119 (10th Cir. 2010). However, the observer is presumed to be familiar with the policy's context, including its "text, legislative history, and implementation[.]" *McCreary*, 545 U.S. at 862

(citation omitted). Thus, the court analyzes a policy's purpose by viewing its purported neutrality through the lens of an objective observer.

This Court has previously found that laws failing this analysis violate the Establishment Clause. In *Stone*, the Court struck down a Kentucky statute requiring public schools to post a copy of the Ten Commandments on the walls of each classroom because it violated the purpose inquiry and thus the Establishment Clause. 449 U.S. 39 (1980) (per curiam). Attempting to brand the law as neutral toward religion, the statute required a small notation after the last commandment explaining "the purpose of the display." KRS § 158.178 (West, Westlaw current through the end of the 2017 regular session). As the text read, "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* Despite the legislature's purportedly neutral purpose, the Court noted that the Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths" and that posting that text on "schoolroom walls is plainly religious in nature[.]" *Stone*, 449 U.S. at 41. Thus, even though the legislature stated an allegedly neutral purpose for the policy, the Court looked to the policy's context to determine that it failed the purpose inquiry and thus violated the Establishment Clause.

By contrast, the Court upheld a city's inclusion of a nativity scene in its annual Christmas display because an objective observer would doubt that either its stated purpose or its apparent purpose constituted an endorsement of religion.

Lynch, 465 U.S. at 680. In *Lynch*, the city set up an annual Christmas display including, among other things, Santa's sleigh and house, reindeer, other Christmas-related symbols, clowns, animals, and a banner reading "SEASONS GREETINGS." *Id.* at 671. The display also included "Jesus, Mary and Joseph, angels, shepherds, [and] kings[.]" *Id.* The city's stated purpose in setting up the display was to observe the Christmas holiday season. *Id.*

The Court held that, due to the surrounding circumstances, including the nativity scene in the Christmas display—which included other secular objects associated with Christmas—did not have the stated or apparent purpose of endorsing religion. *Id.* at 681. As in *Stone*, the Court viewed the nativity scene in the surrounding context of the holiday season. *Id.* at 679. Importantly, the Court emphasized that American history shows countless examples of official references to religious heritage. *Id.* at 675–76. Both Thanksgiving and Christmas have religious origins, but the government celebrates them as national holidays which are observed by the religious and nonreligious alike. *Id.* Thus, an objective observer would conclude that the apparent purpose of the display, which featured both religious and secular objects, was to depict the origins of a national holiday. *Id.*

Here, nothing about the context of the PA Program would suggest to the objective observer that FEMA sought to endorse religion it if provided relief funds to religious organizations. The Stafford Act, which is the authorizing legislation for the PA Program, explicitly states that its purpose is: "to provide an orderly and continuing means of assistance…to alleviate the suffering and damage which result

from such disasters." 42 U.S.C.A. § 5121 (West, Westlaw current through P.L. 115-82). Further, the avowed purpose of the PA Program itself is to provide assistance "so that communities can quickly respond to and recover from major disasters or emergencies declared by the President." PA GUIDE, 5. The specific provisions authorizing the creation of the PA Program also demonstrate a purpose neutral toward religion. Those provisions authorize the President to provide relief 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." 42 U.S.C.A. § 5172 (West, Westlaw current through P.L. 115-82). The Stafford Act and PA Program are thus facially neutral toward religion, and the circumstances surrounding their adoption do not imply an inappropriate purpose to advance religion.

As in *Lynch*, an objective observer familiar with the circumstances surrounding the Stafford Act's enactment and the PA Program's implementation would not perceive that the government's purpose was to "convey a message of endorsement or disapproval of religion." 465 U.S. at 691. Rather, the objective observer would conclude FEMA's PA Program is intended to help communities respond to major disasters; the PA Program has no explicit or implied purpose to endorse or disapprove of religion.

If FEMA sheds its mixed-use standard and adopts a policy that treats religious and nonreligious organizations equally, the PA Program's purpose will remain the same. Numerous private nonprofit entities and their facilities are

currently eligible to receive relief after a disaster strikes, and the Church's facilities would be eligible but for the mixed-use standard. 44 C.F.R. § 206.221(e). Religious organizations will only incidentally benefit under the PA Program when they are unfortunate enough to fall victim to major disasters. Without evidence of an ulterior motive not present here, no reasonable observer would conclude that the PA Program's purpose is to advance religion. This remains true even if funds may be used to repair otherwise-eligible facilities that are primarily used for religious purposes. Thus, the "secular purpose" prong of the Establishment Clause inquiry is satisfied.

2. Even if the PA Program allowed facilities primarily used for religious purposes to receive relief, doing so would not violate the effect prong of this Court's Establishment Clause analysis.

Providing PA Program relief funds to the Church would not convey a message endorsing religion or excessively entangle the government with religion. Accordingly, by providing such funds, FEMA would not violate the effect prong of the Establishment Clause analysis.

A Government policy violates the effect prong of the inquiry when the policy's effect is to communicate an endorsement of religion by impermissibly entangling church and state. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). Though some "interaction" between the two is inevitable, the relationship cannot be "excessive." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 674 (1970). To determine whether a government action has the effect of endorsing religion, the Court considers the nature of entanglement between church and state. *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (in particular, the Court considers the character of the

institutions benefitted, the nature of the aid provided, and the closeness of the resulting relationship between church and state). The Court ultimately asks whether an objective observer would perceive the policy as having the primary effect of fostering "excessive" entanglement between church and state. *Id.*

When applying this inquiry, this Court previously struck down two state statutes—one from Pennsylvania and the other from Rhode Island—that provided continuing cash subsidies to parochial schools. *Lemon*, 403 U.S. at 602 (the statutes allowed for reimbursement of school supplies and subsidization of teacher salaries in relation to secular activities). In Pennsylvania, more than 96% of the pupils that benefitted under the State's program attended church-related schools affiliated with the Roman Catholic Church. *Id.* at 610. Similarly, in Rhode Island about 95% of the pupils benefitting from the program attended schools affiliated with the Roman Catholic Church. *Id.* at 608. Thus, the institutions benefitting from the policies were characterized by affiliation with a single religious group. The benefit to this religious group was not incidental, but was rather the policy's direct effect. Accordingly, the Court held that both state statutes improperly entangled the government with religious institutions, and were thus unconstitutional under the effect prong of the Establishment Clause analysis. *Id.* at 603.

The Court also found the nature of the aid and the resulting relationship between church and state problematic. In *Lemon*, the direct and ongoing nature of the cash subsidies required continuous monitoring by the respective state governments. *Id.* at 621. Such continuous monitoring is not only difficult and costly

for state governments to implement, but creates an "intimate and continuing relationship between church and state." *Id.* at 622. Thus, the nature of this aid and the resulting relationship further supported the Court's holding that the statutes were unconstitutional under the Establishment Clause because they had the effect of entangling church and state. *Id.*; *see Agostini*, 521 U.S. at 232.

By contrast, the Court upheld a state policy requiring school districts to loan textbooks to parochial schools at no cost. *Board of Ed. of Cent. School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968). Given the fact that the aid in *Allen* did not require continuous monitoring by the state, but rather provided a finite good to the school for secular purposes, this Court found this program constitutional under the Establishment Clause. *Id.*

In summary, even if the government provides secular goods or services to a religious organization, it is likely unconstitutional under this Court's jurisprudence if the program requires continuous and ongoing monitoring by the state. When no such continuous and ongoing monitoring is required, no excessive entanglement between church and state exists, and this Court is likely to uphold the program as constitutional under the Establishment Clause effect prong.

In the present case, providing FEMA relief funds to religious organizations such as the Church would not have the impermissible effect of entangling the government with religion. The relief in question in the current case is a one-time cash grant with no continuing conditions. R. at 12-13. Therefore, the government does not need to implement a continuing and ongoing monitoring system that will

lead to an intimate and continuing relationship similar to the one this Court struck down in *Lemon*. Under the PA Program, church and state maintain an arm's length relationship that poses no risks of entanglement. Thus, the character of the aid provided would not create the type of relationship between church and state that has the effect of advancing religion. For these reasons, providing aid to repair the Church's otherwise-eligible facilities satisfies the effect prong of the endorsement inquiry. Because providing aid to the Church to use in repairing its otherwise-eligible facilities that are primarily used for religious satisfies both prongs of the endorsement inquiry, such action would not violate the Establishment Clause.

B. Excluding otherwise-eligible religious organizations from receiving disaster relief under the PA Program burdens their religious practice, thereby violating the Free Exercise Clause.

Not only is it permissible under the Establishment Clause to provide PA Program relief to religious organizations like the Church, but excluding these otherwise-eligible organizations based on their religion violates the Free Exercise Clause. Thus, this Court should hold that the provision of disaster relief funds to religious organizations through FEMA's PA Program does not violate the Establishment Clause and, in fact, is compelled by the Free Exercise Clause.

The Free Exercise Clause of the First Amendment states, "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I. A government policy need not prohibit religious conduct directly to violate the Free Exercise Clause: "denying a generally available benefit on account of religious identity" is an impermissible "penalty" or "burden." *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). This

Court recently reaffirmed that a government policy "target[ing] the religious for special disabilities based on their religious status" is only permissible under the Free Exercise Clause when it can survive the rigors of strict scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (internal quotation omitted).

Here, the PA Program's mixed-use standard imposes a burden on religious organizations seeking relief funds from FEMA. By denying this generally-available benefit on the basis of religion, the Program targets the religious for special disabilities. Accordingly, this Court must employ strict scrutiny when evaluating the PA Program. The government cannot justify this burden because it fails to show either: 1. That it has a compelling interest for its discriminatory regime; or 2. That the means it employed were sufficiently narrow to render this treatment constitutional. Accordingly, this Court should hold that FEMA's administration of the PA Program violates the Free Exercise Clause of the First Amendment.

1. The PA Program impermissibly burdens religious practice and thus must be subjected to strict scrutiny.

FEMA's administration of the PA Program burdens the rights of religious organizations like the Church by forcing these entities to choose between their religious beliefs and their ability to obtain relief funds following a natural disaster. As this Court has explained, a government policy may burden religious practice by requiring individuals "to choose between their religious beliefs and receiving a government benefit." *Locke v. Davey*, 540 U.S. 712, 720–21 (2004). In other words, if a government policy "condition[s] the availability of benefits" upon the individual's

forgoing of their religious principles, the government "effectively penalizes the free exercise of [the individual's] constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

When evaluating whether a challenged action burdens religious practice, the Court must tread carefully not to investigate the centrality of the particular burden to the burdened party's religious faith. As this Court has explained, it is "inappropriate" to investigate the "centrality" of the religious practiced burdened by a challenged policy. *Emp't Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 886–87 (1990). Instead, the Court must evaluate the government policy at issue to determine only whether a burden upon religion exists, and if so, subject the policy to strict scrutiny. *Id.* at 885–88.

This Court has occasionally been presented with cases where the religious burden is obvious. For example, this Court held that ordinances criminalizing animal sacrifice rituals presented a substantial burden on Santarían religious practice. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 543–45 (1993). Similarly, this Court also held that a Tennessee law barring clergy members from holding public office imposed a "substantial" and unconstitutional burden on religious practice. *McDaniel v. Paty*, 435 U.S. 618 (1978).

However, the burden need not be as blatant as in the previous cases to trigger strict scrutiny: more subtle burdens also require a strict scrutiny analysis. In *Sherbert*, this Court held that even an "incidental" hardship constitutes a burden on an individual's religious practice. 374 U.S. at 403. In that case, South Carolina

denied welfare benefits to an individual whose religious beliefs prevented her from working on Saturday. *Id.* Though the impact on the individual's religious practice was "indirect," the state's policy "force[d] her to choose between following the precepts of her religion and . . . accept[ing] work[.]" *Id.* Such a burdensome choice is untenable: "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 403–04. Thus, even a burden that indirectly, rather than directly, impedes religious practice triggers strict scrutiny analysis.

The burden in question here must undergo strict scrutiny analysis, and the lower court erroneously denied such analysis based on its narrow reading of *Trinity Lutheran*. In doing so, the Fourteenth Circuit erroneously concluded that restricting PA Program funds to religious organizations based on whether they would be <u>used</u> to repair religious facilities was distinct from excluding religious organizations based on their <u>status</u>. R. at 17 ("Religious groups are entitled to the same rights as other non-profits, provided they comply with the rules established by FEMA. Nothing in *Trinity Lutheran* affects content-neutral policies such as those promulgated by FEMA").

This status/use distinction, however, is a distinction without a difference. Furthermore, applying this distinction is inconsistent with the outcome in *Trinity Lutheran*. In *Trinity Lutheran*, a majority of this Court concluded that denying access to a public grant program based solely on an applicant's religious affiliation violated the Free Exercise Clause, and that providing the funds would have been

permissible under the Establishment Clause. *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017). In a joint concurrence, Justices Gorsuch and Thomas qualified their support for the majority opinion by expressing doubt about the utility of the status/use distinction. *Trinity Lutheran*, 137 S. Ct. at 2025–26. (Gorsuch, Thomas, JJ., concurring). As the Justices explained, this inquiry is irrelevant to determining whether the Free Exercise Clause has been violated, and "blurs in much the same way the line between acts and omissions can blur when stared at too long[.]" *Id.* Distinguishing between whether a church loses a benefit because it is Lutheran (status) or because it does "Lutheran things" (use) is irrelevant: if the organization's "Lutheran-ness" prohibits its access to a public benefit, the Free Exercise Clause is violated. *See id.* at 2026.

This Court should use the present case as an opportunity to formally adopt its support for Justice Goruch's rationale. Just as Trinity Lutheran Church was permitted to apply for a public grant with no hope of actually receiving funds, so too was the Church here allowed to apply for a PA Program grant with no meaningful opportunity to receive disaster relief funds. R. at 6. Similarly, the status/use distinction is irrelevant when applied to facilities operated by religious organizations. Though these organizations are facially eligible to apply for the PA Program, they may only receive for relief for eligible facilities. R. at 11; PA GUIDE, 11. Under the mixed-use standard, eligible facilities are only those that are not primarily used for religious purposes. R. at 12; *see also* PA GUIDE, 16. Religious organizations may have multiple facilities, but virtually every religious

organization will have a chapel or other worship space. These spaces will almost certainly be used primarily for religious purposes. *See Trinity*, 137 S. Ct. at 2029 (Sotomayor, Ginsburg, JJ., dissenting) ("A house of worship exists to foster and further religious exercise"). Accordingly, religious organizations will necessarily be excluded from the benefits of the PA Program: their facilities, by definition, will be used for religious purposes ineligible for disaster relief funds. Therefore, the mixed-use standard implicitly communicates that "[n]o churches need apply," and even if these organizations do apply, their applications will be denied. *Id.* at 2024. Thus, contrary to the Fourteenth Circuit's interpretation, FEMA's policy does exclude religious organizations based on their status, thereby burdening religious practice under this Court's jurisprudence.

Furthermore, here, as in *Trinity Lutheran*, the Church and other similarly-situated organizations are burdened through the forced choice between "being a church and receiving a government benefit." 137 S. Ct. at 2024. And as in *Sherbert*, the Church was "effectively penalize[d]" based on its religious status. 374 U.S. at 406. By denying the Church the opportunity to compete for relief funds, FEMA has impermissibly "conditioned the availability of benefits" upon the forgoing of religious beliefs and principles.

FEMA may suggest that the burden imposed by the PA Program is so minor that it is permissible under the Free Exercise Clause. Yet this argument overlooks this Court's clear mandate that when determining whether a burden has been imposed upon religious practice, the court's duty is not to investigate the

"centrality" of the burdened practice. *Smith*, 494 U.S. at 886–87. Instead, the Court must identify whether a practice has, in fact, been burdened. *Id.* If a burden of any kind exists, the Court must apply strict scrutiny. *Id.*; *see also Trinity Lutheran*, 137 S. Ct. at 2024 (explaining that when a government policy burdens religion, it will be subject to "the most rigorous scrutiny").

FEMA's conditioning of public benefits is a burden on the religious practice of the Church and similarly-situated religious organizations. Though FEMA may suggest that any such burden would be at most incidental, a finding of a higher burden is not necessary to subject the PA Program to strict scrutiny. *See Sherbert*, 374 U.S at 403. FEMA imposed a clear burden upon religious practice, triggering the application of strict scrutiny to the Church's Free Exercise claim.

2. The PA Program singles out religious organizations for unequal treatment and fails the required strict scrutiny analysis.

The PA Program's mixed-use standard impermissibly singles out religious organizations for unequal treatment and must therefore be subjected to strict scrutiny. The PA Program cannot survive this exacting inquiry, and this Court must therefore hold the policy unconstitutional.

Under strict scrutiny, a government policy will only pass muster if it is narrowly tailored to achieve a compelling state interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Under strict scrutiny's compelling interest requirement "only a state interest 'of the highest order'" can justify a "discriminatory policy." *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting *Church of the Lukumi*, 508 U.S. at 546). To satisfy this requirement, the

government must establish that its discriminatory regime is necessary to protect a "paramount interest," and that acting in a neutral way would "endanger" that interest. *Sherbert*, 374 U.S. at 406.

In addition to serving a compelling state interest, the policy must also be narrowly tailored in execution. A policy is not narrowly tailored if the government's compelling interest can be "achieved by narrower [laws] that burden[] religion to a far lesser degree," *Lukumi*, 508 U.S. at 546. To meet the requirements of the narrow tailoring inquiry, a government policy should not be overbroad; rather, it should be both "actually necessary" and "the least restrictive means among available, effective alternatives." *United States v. Alvarez*, 132 S. Ct. 2537, 2549, 2541 (2004).

This Court has analyzed whether a compelling state interest exists in several prior cases. In *Trinity Lutheran*, this Court considered a state policy analogous to the PA Program at issue here. The state of Missouri's Department of Natural Resources operated a public grant program which provided funding to qualified applicants for use in construction projects. *Trinity Lutheran*, 137 S. Ct. at 2017. When Trinity Lutheran Church, an otherwise-qualified applicant, was denied a grant on the basis of its religious status, the church sued the State alleging a violation of its free exercise rights. *Id.* at 2018. Because of the burden the State's policy imposed on the church, this Court subjected the policy to strict scrutiny. *Id.* at 2021–22. Though the State argued that its antiestablishment interest was sufficiently compelling to satisfy strict scrutiny, this Court was unpersuaded. *Id.* at 2023–24. Denying a public benefit to a religious organization "solely" in pursuit of

an antiestablishment interest, the Court explained, "goes too far . . . [and] violates the Free Exercise Clause." *Id.* at 2024. In so holding, this Court demonstrated that a State's desire to comply with a strict reading of the Establishment Clause is not sufficient to justify a Free Exercise Clause violation.

In the instance that this Court finds a compelling state interest, it next determines whether the policy's execution is narrowly tailored. For example, in *United States v. Alvarez*, the Court held unconstitutional a federal law that made it a crime to misrepresent one's military service. 132 S. Ct. at 2551. Although the government interest at stake (preserving public respect for of military service) was compelling, the Court nonetheless held that the law in question "[did] not survive [strict] scrutiny." *Id.* at 2548. A restriction on speech inherently challenges an individual's First Amendment rights, therefore the Court held that such a restriction must satisfy two requirements to be narrowly tailored: 1. The restriction must be "actually necessary;" and 2. The restriction must be "the least restrictive means among available, effective alternatives." *Id.* at 2549, 2551.

Here, as in *Trinity Lutheran*, the PA Program's mixed-use standard excludes otherwise-qualified applicants based on their religious status. *See* R. at 12; *see also* PA GUIDE, 16. Strict scrutiny requires this Court to identify a government interest sufficiently compelling to justify FEMA's disparate treatment of religious organizations through its administration of the PA Program. *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting *Church of the Lukumi*, 508 U.S. at 546). Though the agency may contend that its antiestablishment interest justifies the exclusion of religious

organizations, this, as the Court has explained, "goes too far." *Trinity Lutheran*, 137 S. Ct. at 2024. Providing such funds to remediate damaged property after a hurricane would, in fact, be permissible under the Establishment Clause, and thus FEMA can articulate no compelling reason for excluding religious organizations from the PA Program.

Even if this Court finds a compelling government interest that can support FEMA's discriminatory treatment, the means employed by the agency in pursuing this goal must still be narrowly tailored. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *see also Alvarez*, 132 S. Ct. at 2551. FEMA cannot meet this burden. The agency refuses to provide funds for the reconstruction of essential facilities solely because those facilities are used for religious purposes. R. at 12; *see also* PA GUIDE, 16. The agency could have chosen less restrictive means by, for example, refusing to fund distinctly-religious aspects of reconstruction to meet an antiestablishment goal without violating the Free Exercise Clause. Alternatively, the agency could have employed less restrictive means by providing funds directly to contractors, rather than directly to the religious organizations. Thus, the agency's approach of entirely excluding funds for religious facilities is not narrowly tailored toward a compelling government interest: the mixed-use standards violates the Free Exercise Clause and should be held unconstitutional.

In sum, FEMA would not violate the Establishment Clause by providing PA Program relief funds to otherwise-eligible organizations even if the funds would be

used for repairs to primarily-religious facilities. Providing these funds would not be an impermissible endorsement of religion. In fact, adopting a program that is truly neutral as between religion and religion, or religion and non-religion, is more faithful to the Establishment Clause than the current mixed-use standard. Under such a neutral aid policy, the PA Program would still have a predominantly secular legislative purpose, would not have the effect of advancing religion, and would not foster excessive entanglement between the government and religion.

Furthermore, denying aid to otherwise-qualified religious organizations violates the Free Exercise Clause. In its current form, the mixed-use standard imposes a unique burden on religious organizations, forcing them to choose between their religious identity and access to a public benefit program. This burden cannot withstand strict scrutiny: there is neither a compelling government interest supporting the exclusion of religious organizations, nor are the means FEMA employed narrowly tailored to any such goal. Accordingly, this Court should hold that the provision of disaster relief funds to religious organizations through the PA Program does not violate the Establishment Clause, and is also compelled by the Free Exercise Clause.

CONCLUSION

For these reasons, we respectfully request that this Court find that: 1. FEMA's policy denying relief funds to religious organizations is ripe for review; and 2. Providing such funds to the Cowboy Church of Lima and similar religious organizations would not violate the Establishment Clause and denying access to PA Program relief violates the Free Exercise Clause. Therefore, this Court should reverse the decision of the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

/s/ Team 82

Team 82
Counsel for Petitioner