No. C17-2893-1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

COWBOY CHURCH OF LIMA,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR RESPONDENTS

Team 90
Counsel for Respondents

QUESTIONS PRESENTED

I. Whether, under the doctrine of ripeness, the Federal Emergency Management Agency can be exposed to lawsuits by relief applicants before the agency has the opportunity to make a final determination regarding the applicant's eligibility for relief and when the applicant's need for assistance has dissipated due to private donations?

II. Whether the Establishment Clause of the First Amendment bars the Federal Emergency Management Agency from providing relief to the Cowboy Church of Lima, a tax-exempt religious organization that provides some secular services?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEALS CASES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

ADMINISTRATIVE REGULATIONS AND OTHER AUTHORITIES

OPINIONS BELOW

The decision of the Central District Court of Lima granting FEMA's motion for summary judgment and dismissal is unreported and is referenced in the Record. R. at 10. The October 1, 2017 decision of the United States Court of Appeals for the Fourteenth Circuit affirming the district court's decision is unreported and can be found in the Record. R. at 2-21.

STATEMENT OF JURISDICTION

The Fourteenth Circuit Court of Appeals properly entered judgment in favor of the respondents. R. at 17. The petitioner then filed a timely petition for a writ of certiorari, which this Court granted. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves interpretation and application of Article III, U.S. Const. art, III, § 2, and the First Amendment to the United States Constitution, U.S. Const. amend I. This case also involves the following sections of the United States Code: 5 U.S.C. § 704 and 42 U.S.C. § 5172. Relevant portions of these sources have been reproduced in the attached Appendix.

STATEMENT OF THE CASE

Statement of the Facts

The Cowboy Church of Lima owns eighty-eight acres of land situated on the outskirts of the Township of Lima[1] in New Tejas. R. at 3. On the grounds are a rodeo arena that seats 500 people, a chapel, an event center with seating for 120 people, and numerous other storage buildings. *Id.* The land is tax-exempt under the New Tejas Property Code's Religious Exempt Property provision. *Id.* The Cowboy Church of Lima is a 501(c)(3) tax-exempt organization according to the Internal Revenue Service. *Id.*

Approximately eight years after the Cowboy Church of Lima opened, the church finally began allowing the Township of Lima to host some secular township events in the chapel, including city council meetings. *Id.* Chaplain Hudson allowed the township to host these events in the chapel for free, "stating that his church and its buildings were open to anyone, anytime." R. at 3-4. The Cowboy Church of Lima began to host additional events, both civic and private, in the chapel. R. at 4. Eventually, through annual bake sale fundraisers, the church collected enough private donations to expand its facilities and added an event center annex to the chapel in 2005. *Id.* Chaplain Hudson applied for tax-exempt status for the event center as a government building, but the county denied the application. *Id.* Together,

[1] The record is inconsistent in its reference to Lima. It is referred to as both a township and a city. In this brief, any reference to the Township of Lima and/or the City of Lima should be interpreted as referring to the same municipality.

the chapel and the event center comprised a 5,500 square foot structure, with the chapel and the event center comprising 2,250 square feet each. *Id.* In 2008, the City of Lima considered building its own events center but opted not to since it had use of the Cowboy Church of Lima's facility. *Id.* The Cowboy Church of Lima continued to allow several organizations including the Township of Lima, the Lions Club, and the Rotary Club, and private individuals to use the event center for various religious and secular purposes. R. at 7. However, according to Chaplain Hudson, the event center was primarily used for religious purposes. R. at 9. The event center was also designated as an emergency relief shelter, R. at 7, but the record is unclear as to whether the facility was ever used for this purpose.

On August 13, 2016, Hurricane Rhodes struck one hundred miles away from the Township of Lima, bringing with it significant rainfall and flooding. R. at 2-3. Two days later, the flood waters reached the Township of Lima, where the Cowboy Church of Lima is located. *Id.* In preparation for the flooding, Chaplain Hudson and his staff first went to the chapel and removed the religious materials from the chapel to the storage sheds on the property. R. at 4. Then, they went to the event center and moved the furniture and kitchen supplies to the storage shed and other items to a higher location in the event center. *Id.*

On the night of August 15, 2016, the flood reached the Cowboy Church of Lima. *Id.* At least three feet of water, debris, and possibly raw sewage and chemicals, flowed throughout the chapel and event center facility, destroying walls, flooring, furniture, and other items. R. at 5. When the floods receded two days later, Chaplain Hudson

and the staff evaluated the damage and almost immediately began removing water-logged sheetrock, insulation, and flooring from the chapel and event center. *Id.* Within a week, everything was removed from the entire facility. *Id.* Chaplain Hudson's step-brother, a structural engineer, evaluated the facility for structural damage, and "concluded there was likely structural damage to the chapel and event center . . . [and] repairs needed to be made in the next few months or there was a risk the structure might fail." R. 5-6. Despite its proximity to the Motta River, the Cowboy Church of Lima elected to not obtain flood insurance. R. at 6.

President Barack Obama declared Hurricane Rhodes a natural disaster on August 19, 2016, triggering the assistance of Federal Emergency Management Agency ("FEMA") under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5172(a)(1)(B)). *Id.* In New Tejas, FEMA relief is administered through FEMA's Public Assistance Program in accordance with FEMA's Public Assistance Program and Policy Guide. R. at 11. The next day, upon his attorney's advice, Chaplain Hudson applied with FEMA. *Id.* On August 23, 2016, Chaplain Hudson also filed for a Small Business Administration loan. *Id.*

On August 25, 2016, an adjuster contracted by FEMA evaluated the Cowboy Church of Lima to determine the extent of the damage. *Id.* The contractor "estimated the event center was used somewhere between 45% and 85% of the time for community projects unrelated to the church . . . the chapel was used about 85% to 95% of the time for religious purposes." R. at 7. The contractor also told Chaplain Hudson "she hated that FEMA does not cover monetary assistance for churches . . .

[and] she had never heard of FEMA granting an exception because of the Church and State Separation doctrine." *Id.* The contractor indicated that the wait time for a FEMA eligibility determination could be a few weeks. R. at 8.

The same day the contracted adjuster visited the Church, Chaplain Hudson consulted with his attorney, who advised him "FEMA would surely deny his application" and that he should "take action." *Id.* Two days later, Chaplain Hudson decided to sue FEMA, stating "it was not fair that his church would not be covered by FEMA." *Id.* On August 29, 2016 – ten days after the flood reached the Church, R. at 4, and just four days after the initial assessment by the FEMA contractor, R. at 6 – the Cowboy Church of Lima sued FEMA in the Central District Court of Lima.[2] R. at 8. FEMA had not yet determined whether the Cowboy Church of Lima was eligible for relief funding, R. at 10, but stopped processing the claim while the lawsuit was pending. R. at 8.

During the lawsuit discovery process, Chaplain Hudson testified that the donations the church received were not enough and the Cowboy Church of Lima needed additional assistance. R. at 9. Chaplain Hudson further noted "that the event center was mostly used for church-related activities . . . if he had to guess, he would say 60% of the event center usage was for church-based events." *Id.* The contracted

[2] The record is inconsistent in the naming of the trial court; it is referred to as both the United States District Court for the Central District of New Tejas and as the Central District Court of Lima. Any reference to either court name should be interpreted as a reference to the trial court, regardless of its proper name.

adjuster concluded, after talking to the city planner, that "the event center was used 80% of the time for FEMA-eligible purposes and the chapel was used over 90% of the time for non-FEMA eligible purposes." R. at 10. The FEMA Regional Director said that FEMA put the church in a "preliminary denial category, but . . . ultimately the event center might have been granted FEMA assistance." R. at 10. He also stated that FEMA would have made a final determination as to the Cowboy Church of Lima's eligibility by September 30, 2016 or by October 14, 2016 at the latest. *Id.*

While the litigation progressed through the courts, the Cowboy Church of Lima continued with clean-up and rebuilding efforts. R. at 9. The congregation, local community, and other cowboy churches donated time, money, and materials to assist the Church. *Id.* Less than one year after being damaged by Hurricane Rhodes, the Cowboy Church of Lima reopened its doors to the public, R. at 8, without any assistance from FEMA. R. at 15.

Procedural History

On August 29, 2016, the Cowboy Church of Lima sued FEMA in the Central District Court of Lima. R. at 8. United States Attorney Sebastian Smythe subsequently filed a Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Civil Procedure 12(b)(1) Motion against the Cowboy Church of Lima. R. at 9. On November 2, 2016, the district court judge denied the government's motion, finding that "after some discovery, a Motion of Summary Judgment would be 'more appropriate.'" *Id.*

After a discovery period, the government moved for summary judgment and dismissal. R. at 10. The district court judge granted summary judgment, finding that

the Establishment Clause barred recovery for the Cowboy Church of Lima and denied the government's ripeness claim. *Id.* The Cowboy Church of Lima appealed, asking the United States Court of Appeals for the Fourteenth Circuit to reverse the summary judgment. R. at 10-11. FEMA also appealed and asked for dismissal based on the Ripeness Doctrine. R. at 11.

On October 1, 2017, the Fourteenth Circuit affirmed the district court's grant of summary judgment in favor of FEMA. R. at 2, 17. That court found that the case before it was not ripe for adjudication, stating it was "extremely reluctant to wade into these troubled waters without affording FEMA the opportunity to make a final determination in this case." R. at 15. That court also refused to accept the Cowboy Church of Lima's application of *Trinity Lutheran* to the facts of this case and affirmed the summary judgment order in favor of FEMA. R. at 16-17. Ultimately, this Court granted the Cowboy Church of Lima's petition for certiorari for its October 2017 term.

SUMMARY OF THE ARGUMENT

The Cowboy Church of Lima's ("the Church") claim against the Federal Emergency Management Agency ("FEMA") is not ripe for judicial review. The purpose of the ripeness doctrine is to prevent courts from prematurely deciding legal issues before an agency makes a final determination and before the complaining party has suffered a concrete harm. Should this Court decide the present issue now, it would be making the decision without the knowledge of FEMA's final determination regarding the Church's eligibility and before the Church has suffered any actual hardship. FEMA never made a final determination as to the Church's

eligibility for FEMA relief, and thus the Church has not yet been affected by FEMA's standard. Furthermore, the Church has fully rebuilt without FEMA assistance, demonstrating it did not suffer any hardship. For these reasons, this Court should find that the doctrine of ripeness bars the Church's issue from being adjudicated at this time.

The Establishment Clause of the First Amendment to the United States Constitution bars FEMA from providing public funds to the Church. The Establishment Clause prohibits the government from providing public funding to religious organizations. FEMA has established a mixed-use standard by which it evaluates applications for assistance. The mixed-use standard plainly states that if a facility provides over fifty percent of FEMA-non-eligible services, the facility is not eligible for FEMA relief. The Church does not meet this standard, and thus is not eligible for relief. Providing public funding to the Church at this time would run afoul of the Establishment Clause because it would appear that FEMA endorses the Church's religious nature. However, because FEMA allows religious organizations that meet the mixed-use standard to receive funding, FEMA does not violate the Free Exercise Clause. FEMA's mixed-use standard is constitutional because it balances the fine line between the prohibition of the Establishment Clause and the guarantee of the Free Exercise Clause; however, the Church is not eligible for FEMA relief because it does not satisfy the standard. For these reasons, this Court should find that while FEMA's mixed-use policy is constitutional, the Church does not meet the standard, and thus the Establishment Clause bars FEMA from assisting the Church.

Respondents kindly request that this Court affirm the Fourteenth Circuit's grant of summary judgment in favor of FEMA.

ARGUMENT

The issue here turns on whether FEMA's mixed-use facility standard is constitutional under the First Amendment. In essence, FEMA uses the mixed-use standard to determine whether private nonprofit facilities that provide both eligible and ineligible services are eligible for relief. Whether a mixed-use facility is eligible for FEMA relief depends on the "primary use" of the facility. If more than fifty percent of the facility's space or time is dedicated to religious activities, the entire facility is ineligible for relief. The Church asserts that it has a justiciable claim against FEMA, arguing that the mixed-use standard violates the Church's First Amendment rights. FEMA maintains that this issue is not ripe for adjudication because the agency has not yet made a determination regarding the Church's eligibility for relief and that the Establishment Clause bars FEMA from providing relief to the Church because it does not provide enough secular services to the general community.

Standard of Review

This Court should conduct a *de novo* review of the Fourteenth Circuit's grant of summary judgment. The issues here revolve around interpretation of statutory and constitutional provisions and agency action. Under the Administrative Procedure Act, a "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. *De novo* review is appropriate when

"there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

I. THIS CASE IS NOT RIPE FOR ADJUDICATION BECAUSE FURTHER FACTUAL DEVELOPMENT IS NEEDED REGARDING THE COWBOY CHURCH OF LIMA'S CLAIM AND THE COWBOY CHURCH OF LIMA HAS NOT PROVEN THAT IT HAS SUFFERED A HARDSHIP DUE TO FEMA'S POLICY.

Administrative regulations and decisions are only ripe for judicial review when "made reviewable by statute" or when it is a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §704. A "preliminary . . . agency action or ruling not directly reviewable is subject to review on the review of the final agency action." *Id.* Under the Administrative Procedure Act ("APA"), "agency action includes any . . . agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Abbott Labs. v. Gardner*, 387 U.S. 136, 150 (1967) (overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)) (quoting 5 U.S.C. §§ 551(4), 551(13)) (internal quotations omitted). The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49.

Whether or not an issue is ripe for adjudication depends, in part, on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of

withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003), citing *Abbott Labs.*, 387 U.S. at 149 (1967). Both of these prongs must be satisfied before a court can review the issue. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1581 (Fed. Cir. 1993). "The appropriateness of an issue for judicial review depends upon such factors as: whether the agency action is final; whether the issue presented for decision is one of law which requires no additional factual development; and whether further administrative action is needed to clarify the agency's position, for example, when the challenged prescription is discretionary so that it is unclear if, when or how the agency will employ it." *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986).

This Court should find that this matter is not ripe for adjudication. This case fails the two-prong test this Court established in *Abbott Laboratories* in that the issue is not fit for judicial determination nor is there a hardship to the parties. Additionally, the Church lacks standing to bring this issue before the Court since there is no live controversy here and the issue is now moot. For these reasons, this Court should find that this matter is not ripe for adjudication and need not consider the second question on certiorari.

A. The Cowboy Church of Lima's Claim Is Not Ripe for Adjudication Because The Issue Is Not Fit for A Judicial Decision At This Time Since Further Factual Development Is Necessary.

In determining whether an issue is fit for judicial review, this Court has looked to whether "the issue tendered is purely a legal one." *Abbott Labs.*, 387 U.S. at 149. An issue is more likely to be found fit for adjudication when no "further

administrative proceedings are contemplated." *Id.* This Court also evaluates whether "immediate judicial review . . . could hinder agency efforts to refine its policies." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998). Additionally, this Court considers whether further factual development would "significantly advance [its] ability to deal with the legal issues presented." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 82 (1978). Absent a statutory provision that allows for judicial review, administrative regulations are generally not ripe for adjudication "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to claimant's situation in a fashion that harms or threatens to harm [the claimant]". *Lujan v. Nat'l. Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

In *National Park Hospitality Ass'n,* this Court noted that the regulation in question was "nothing more than a 'general statemen[t] of policy' designed to inform the public." 538 U.S. at 809 (quoting 5 U.S.C. § 553(b)(3)(A)). There, the petitioner, a nonprofit trade association, challenged a National Park Service regulation that attempted to disregard the Contract Disputes Act of 1978. *Id.* at 804-05. The petitioner "brought a facial challenge to the regulation and is not litigating any concrete dispute," so this Court asked the parties to brief whether the case is ripe for adjudication. *Id.* at 807. This Court found that issue was not ripe for adjudication at that time and the parties should "await a concrete dispute about a particular concession contract." *Id.* at 812.

Furthermore, "[j]udicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise." *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980). In *Ohio Forestry Ass'n*, this Court held that the Sierra Club's challenge to a plan by the Forest Service asserting the plan allowed too much destruction to the forest was "not yet ripe for judicial review." 523 U.S. at 728. There, the Forest Service created a plan that permitted logging and clearcutting in accordance with the plan's guidelines. *Id.* at 729. In an effort to modify the plan, the Sierra Club employed various administrative remedies but to no avail and the Sierra Club sued the Forest System. *Id.* at 730. There, this Court established a new factor to consider when determining ripeness: "whether judicial intervention would inappropriately interfere with further administrative action," *id.* at 733, and held that "[h]earing the Sierra Club's challenge now could thus interfere with the system that Congress specified for the agency to reach forest logging decisions," *id.* at 736.

Turning to the current case, judicial review of the Church's claim against FEMA at this juncture would constitute the "abstract disagreement over administrative policies" that this Court sought to avoid through the ripeness doctrine. *Abbott Labs.*, 387 U.S. at 148. FEMA never made a final agency decision in this case. R. at 10. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (noting that for an agency action to be "final," the action must mark the end of the agency's decisionmaking process). Here, the Church asserts a facial challenge to FEMA's Public Assistance Program rules outlined in the Public Assistance Program and Policy Guide,

particularly the mixed-use standard. These standards are not final agency action by FEMA, but rather constitute a "general statemen[t] of policy designed to inform the public." *See Nat'l Park Hosp. Ass'n.*, 538 U.S. at 809. The FEMA Regional Director stated "that FEMA does have the ability to make different aid determinations on a case-by-case basis." R. at 10. Therefore, the standards established by FEMA's Public Assistance Program and Policy Guide do not constitute final agency action, and thus this Court cannot review the action. Further, the Church does not assert a concrete controversy, because FEMA had not yet made any determination regarding the church's eligibility for relief at the time the Church filed the lawsuit. R. at 10. In this respect, the Church is much like the petitioner in *Nat'l Park Hosp. Ass'n* because both the Church and that petitioner brought a facial challenge of a policy by which they had not yet been harmed.

By bringing the lawsuit when it did, the Church precluded FEMA from exercising its agency authority. The Fourteenth Circuit noted that "the fundamental problem with this case" is "that FEMA was not allowed to fully make an administrative determination." R. at 13. When the Church filed the lawsuit against FEMA, FEMA "immediately stopped processing the claim . . . while waiting on the determination of the legal process." R. at 8. As this Court stated in *Ohio Forestry Ass'n*, allowing "judicial intervention would inappropriately interfere with further administrative action." 523 U.S. at 733. This Court should find this issue is not yet ripe for adjudication, and allow FEMA to make a final determination before deciding the issue of whether the Establishment Clause bars the Church from obtaining

FEMA relief. Had the Church not sued FEMA and stopped the determination process, it is quite possible that FEMA may have granted some assistance to the church for rebuilding the events center. R. at 10.

Additionally, the Church's lawsuit against FEMA is based on a hypothetical situation. Thus, according to this Court's precedent, the issue here is not ripe for judicial review. *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 89-90 (1947) (stating "[a] hypothetical threat is not enough.") If a "purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81(1985)). The Church's claim is not based on an actual denial of relief by FEMA. Instead, the Church presumed the preliminary statements made by the FEMA-contracted adjuster and the Church's attorney, R. at 7-8, were indicative of what FEMA's response would be. It appears that Chaplain Hudson mistook the contracted adjuster's personal experience and opinion as an official statement of FEMA policy. The decision to file the lawsuit was a hasty decision made by Chaplain Hudson a mere ten days after his church was impacted by the hurricane. R. at 4. Had the Church waited to file the suit until it had more facts to assert against FEMA, this Court may be more apt to find the Church's challenge against FEMA ripe for adjudication.

Whether an issue is ripe for adjudication is "a question of timing." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974). The *Blanchette* Court noted that

"we will be in no better position later than we are now to confront" the issue at hand. 419 U.S. at 145. The same cannot be said for this case. This Court will undoubtedly be in a better position later than it is now to consider the Church's assertion against FEMA. Further facts, including FEMA's final decision on the Church's application for relief, are necessary to this Court's inquiry. The Fourteenth Circuit Court stated that it was "extremely reluctant to wade into these troubled waters without affording FEMA the opportunity to make a final determination in this case." R. at 15. This Court should be, too, and hold that this issue is not ripe for adjudication.

B. This Issue Is Not Ripe For Adjudication Because The Cowboy Church of Lima Has Not Endured A Hardship Due To FEMA's Standard.

This Court is not likely to find hardship where the regulation does not affect the plaintiff's primary conduct. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 810. Further, this Court has looked at whether any practical harm has been done as a result of the challenged regulation. *Id.* Hardship is less likely to be found when the impact of the regulation is not "felt immediately by those subject to it in conducting their day-to-day affairs." *Gardner v. Toilet Goods Ass'n*, 387 U.S. 158, 164 (1967).

"[T]he test of ripeness . . . depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the regulation's present effect on those seeking relief." *Id.* In *Toilet Goods Ass'n*, an organization of cosmetics manufacturers sued the Secretary of Health, Education, and Welfare and the Commissioner of Food and Drugs, alleging that the government officials acted outside their statutory authority. *Id.* at 159. There, this Court stated that because the regulation did not affect the "primary conduct" of the complaining organization

when "conducting their day-to-day affairs," the regulation at issue did not impose a hardship on the organization. *Id.* at 164. this Court held "that judicial review . . . is inappropriate at this stage because, applying the standards set forth in *Abbott Laboratories v. Gardner*, the controversy is not presently ripe for adjudication." *Id.* at 160-61. Further, this Court said an administrative hearing would be a more appropriate venue in which to address the organization's claim. *Id.* at 165-66 ("[W]e think it wiser to require them to exhaust this administrative process through which the factual basis of the inspection order will certainly be aired and where more light may be thrown on the Commissioner's statutory and practical justifications for the regulation.")

The policies asserted by FEMA in its Public Assistance Program and Policy Guide, particularly the mixed-use facilities standard, do not affect the Church's "primary conduct." The standard does not prohibit the Church from being a church or hosting events. FEMA simply has guidelines that facilities must meet if they would like to be eligible for assistance in the wake of emergencies. In *Nat'l Park Hosp. Ass'n*, this Court stated that "the regulation here leaves a concessioner free to conduct its business as it sees fit." 538 U.S. at 810. The same can be said for the FEMA standard that the Church disputes here. FEMA regulations do not create legal rights or obligations for the Church; FEMA just requires that organizations seeking to avail themselves of FEMA's services meet certain criteria. This does not impose any hardship on the Church. In fact, the Church was able to rebuild and reopen through private fundraising, R. at 8-9, without any assistance from FEMA. R. at 15.

The Church has not suffered any direct harm as a result of FEMA's standards. The FEMA mixed-use standard does not impose The Church claims that it needed FEMA relief for immediate repairs, R. at 15, or it was at risk of folding. R. at 8. However, FEMA operates on a reimbursement system, 42 U.S.C. § 5147, so the Church would have had to pay for the emergency repairs regardless of whether it ended up being eligible for later assistance or not. The Fourteenth Circuit was "not persuaded that [the Church] could not wait until FEMA made a final determination of the Church's eligibility." R. at 15. This Court should not be either. Additionally, the Church received assistance from the community, proving FEMA funding was not essential to the Church's rebuilding. R. at 15. Thus, no actual harm was done to the Church by FEMA's policy. Had the Church waited for FEMA's determination before filing a lawsuit against the agency, perhaps the Church would have received some assistance for its event center. Perhaps this issue would best be solved through an administrative hearing, as this Court recommended in *Toilet Goods Ass'n*, as it would allow more facts to come to light as to whether the Church suffered a hardship. However, currently, this Court should be hard-pressed to find that a hardship existed and thus find that the issue is not ripe for adjudication.

In his dissent, Circuit Judge Sylvester argues that flood victims are made to suffer actual hardship due to FEMA's requirements. R. at 19. The worries this dissenter presents are baseless in this case. The judge opines that flood victims must wait for a FEMA determination "while their property is destroyed by mold, bacteria, and trapped moisture, and they are under immense pressure to remediate their

property immediately or face permanent property loss." *Id.* Chaplain Hudson and the staff of the Church began remediation on the chapel and event center within a few hours of the flood waters receding from the facilities. R. at 5. This immediate response by the Church served to limit the Church's actual hardship. Additionally, the Church was able to clean up and rebuild without any FEMA assistance. R. at 15. Given these facts, the Church did not suffer any hardship that would have been mitigated or prevented by quicker action by FEMA. The Church is seeking relief for an injustice that has not occurred. Thus, this Court should find that this issue is not ripe for adjudication because further factual development is necessary and the Church has not suffered an actual hardship due to FEMA's standards.

C. This Issue Is Not Ripe For Judicial Review Under Article III Because There Is No Actual Case or Controversy Here.

The ripeness doctrine also has a constitutional basis in Article III. *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992). Under Article III, "the constitutional requirement for ripeness is injury in fact." *DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 297 (D.C. Cir. 1989). In order for an issue to be ripe, a live case or controversy must exist. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 138 (1974). "Under Article III, federal courts may only adjudicate cases or controversies and may not render advisory opinions." *Hinrichs*, 975 F.2d at 1333 (internal citation omitted). Additionally, "[c]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id.* "Article III standing requires that a plaintiff must have suffered (1) "injury in fact – an

invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical – (2) which is 'fairly traceable' to the challenged act, and (3) 'likely' to be 'redressed by a favorable decision.'" *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (1996).

In *National Treasury Employees Union*, the Union challenged a law in court, alleging that the law was unconstitutional, despite the law having not yet taken effect. *Id.* at 1425. In fact, the Union filed the lawsuit the same day the bill was signed. *Id.* The earliest the law could have impacted the Union would have been approximately eight months after it brought the suit. *Id.* The court commented that it "d[id] not believe this alleged injury is sufficiently imminent to create a current justiciable controversy." *Id.* at 1430.

The Church lacks Article III standing to bring this claim against FEMA because the Church fails to meet the test established in *National Treasury Employees Union*. The injury that the Church claims is "hypothetical," not "imminent." *Id.* FEMA has yet to make a final decision as to whether the Church is eligible. R. at 10. Thus, the Church's argument that it was harmed by FEMA is merely hypothetical until FEMA actually finds the Church is not eligible. Further, even if FEMA were to deny the Church's application now, the injury that the Church claims to have sustained by FEMA's action is not "likely to be redressed by a favorable decision." *Id.* The damage to the Church has already been repaired without FEMA's assistance. R. at 15.

Further, like the asserted injury in *National Treasury Employees Union*, the injury that the Church asserts is not "sufficiently imminent to create a justiciable controversy." 101 F.3d at 1430. In that case, the complaining party filed the lawsuit prematurely, before the party would have been subjected to the law. *Id.* at 1425. Similarly, the Church filed this lawsuit just four days after the initial assessment of the Church by the FEMA contractor. R. at 6. The FEMA contractor had told Chaplain Hudson that FEMA would need a few weeks to evaluate the application. R. at 8. The FEMA Regional Director stated that it would have taken FEMA at least a month to respond to the Church's application. R. at 10. The Church prematurely filed suit because it filed the lawsuit before FEMA had an opportunity to evaluate the Church's application. Thus, the Church did not suffer an injury in fact due to FEMA. Further, the Church's claim did not demonstrate that injury was "sufficiently imminent," and thus the issue is not a justiciable controversy for this Court to consider.

Even if this Court finds that the issue is ripe on its face, the Church now lacks standing to bring the case. No case or controversy exists here because the Church was made whole again. Thus, any FEMA funding would be duplicative, and the Church would not be eligible. *See* Public Assistance Program & Policy Guide at 39 ("FEMA is legally prohibited from duplicating benefits from other sources. If the Applicant receives funding from another source for the same work that FEMA funded, FEMA reduces the eligible cost or de-obligates funding to prevent a duplication of benefits."). For these reasons, this Court should find that FEMA cannot be subjected to lawsuits prior to making a final determination regarding an applicant's request for relief.

Thus, the issue here is not ripe for adjudication at this time. Respondents respectfully ask this Court to affirm the Fourteenth Circuit's grant of summary judgment in favor of FEMA.

II. THE ESTABLISHMENT CLAUSE BARS FEMA FROM PROVIDING PUBLIC FUNDS TO THE COWBOY CHURCH OF LIMA BECAUSE PREVENTING THE GOVERNMENT FUNDING OF RELIGIOUS ORGANIZATIONS IS EXACTLY WHAT THE ESTABLISHMENT CLAUSE PROHIBITS.

The First Amendment to the Constitution of the United States reads, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This provision is comprised of what are commonly referred to as the Establishment Clause and the Free Exercise Clause. The Establishment Clause protects against "three main evils . . . 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'r of City of N.Y.*, 397 U.S. 664, 668 (1970)). In contrast, the Free Exercise Clause has been interpreted to mean "first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990).

This Court should find that the Establishment Clause bars FEMA from providing relief to the Church. Congress granted FEMA the authority to maintain a relief program to assist certain private nonprofit facilities in the wake of major disasters by way of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"). 42 U.S.C. § 5172(a)(1)(B). FEMA's mixed-use facilities standard is a reasonable interpretation of the Stafford Act, as it strikes an appropriate balance

between the constitutional confines of the Establishment and Free Exercise Clauses. As such, this Court should defer to FEMA's discretion under *Chevron*. While FEMA's mixed-use standard is a reasonable interpretation of the Stafford Act and in compliance with the Establishment Clause, the Church does not meet the standard. Furthermore, the mixed-use standard does not violate the Free Exercise Clause because it neither prohibits nor penalizes religious organizations like the Church. For these reasons, this Court should find that the Establishment Clause bars FEMA from providing public funding to the Church.

A. FEMA's Interpretation Of The Stafford Act Is Reasonable, And Thus This Court Should Give *Chevron* Deference To FEMA's Mixed-Use Standard.

If a statute is silent or ambiguous regarding a specific question, courts may defer to agency interpretation to fill the gap. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If Congress does not specifically address the exact question in the statute, an agency may interpret the statute. *Id.* In order to receive deference, the agency's interpretation must be a "permissible construction of the statute." *Id.*

In *Chevron*, this Court held that an agency interpretation of an ambiguous statute, which the agency was tasked with administering, will generally be upheld if the interpretation "is based on a reasonable construction of the statutory term." *Id.* at 840. Congress enacted the Clean Air Act Amendments of 1977, requiring states to regulate "stationary sources." *Id.* at 840-41. The Environmental Protection Agency ("EPA") was tasked with administering the statute and promulgated a regulation that allowed states to consider a plant as a "stationary source." *Id.* at 840. The

question for the Court was whether the EPA's interpretation of a "stationary source" was "based on a reasonable construction of the statutory term 'stationary source'" since Congress was not clear in what it meant by "stationary source." *Id.* at 840-41. This Court held that two questions must be asked when evaluating an agency's interpretation of a statute it is charged with administering:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. Further, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844. This Court ultimately held that the EPA was justified in promulgating its regulation as it was based on a reasonable construction of Congress' ambiguous phrase "stationary source." *Id.* at 866.

An interpretation of law cannot be both reasonable and unconstitutional. FEMA's interpretation of the Stafford Act and its subsequent mixed-use standard is reasonable because it maintains the degree of separation of church and state required under the Establishment Clause. FEMA, employing its agency expertise and wisdom, articulated the mixed-use policy as a means of providing relief to organizations in the wake of major disasters without running afoul of the First Amendment. The mixed-use policy allows for churches and religious organizations to receive public funding from FEMA so long as "the primary use of the facility" is dedicated to eligible services.

Public Assistance Program & Policy Guide at 15. Thus, as long as the religious organization engages in secular activities at least 50.1% of the time, the facility would be eligible for FEMA relief on a prorated basis to assist the organization with rebuilding efforts for the secular aspects of the facility. R. at 12. This mixed-use standard is a reasonable interpretation of the Stafford Act because it keeps with the intent of the Act by providing assistance to local governments and certain private nonprofit facilities, but also maintains the appropriate balance between the Religion Clauses of the First Amendment as it does not give aid directly to any religious activity nor does the standard impinge on any organization's religious liberties.

The Stafford Act is silent as to whether FEMA can assist religious organizations for "repair, restoration, and replacement of damaged facilities" through FEMA's Public Assistance Program. 42 U.S.C. § 5172. Hence, FEMA is left to interpret the Stafford Act when determining how to regulate and provide disaster relief to local governments and certain private nonprofit facilities. Congress has repeatedly left the administration of the Public Assistance Program to FEMA's discretion. In fact, Congress has considered this exact issue – whether FEMA can provide aid to churches – on numerous occasions. H.R. 592, 113th Cong. (2013); S. 1274, 113th Cong. (2013); H.R. 3066, 114th Cong. (2015). Each time, the proposed laws died before they were signed into law, indicating Congress' intent to leave the issue to FEMA's discretion. Substantially similar legislation is currently before Congress regarding a proposed amendment to the Stafford Act to expressly allow for tax-exempt houses of worship to be eligible for disaster relief and emergency

assistance. H.R. 2405, 115th Cong. (2017) and S. 1823, 115th Cong. (2017). Congress has not indicated that it intends to amend the Stafford Act to expressly allow for churches to receive FEMA assistance. Until Congress acts and expressly allows or instructs FEMA to dispense taxpayer dollars to churches, contrary to a reasonable interpretation of the Establishment Clause, this Court should defer to the agency and otherwise presume that FEMA is correct in interpreting its own regulations. *See Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (1994). Thus, under *Chevron*, this Court should defer to FEMA's interpretation of the Stafford Act and the resulting mixed-use standard.

It remains unresolved whether the Church meets FEMA's mixed-use standard for relief eligibility. FEMA has not made a final determination as to the Church's eligibility. R. at 10. Although the facility was divided equally physically, R. at 4, each side of the facility hosted both religious and secular events. R. at 7, 9. During the initial damage assessment conducted by the FEMA-contracted adjuster, the contractor "estimated the event center was used somewhere between 45% and 85% of the time for community projects unrelated to the church . . . the chapel was used about 85% to 95% of the time for religious purposes." R. at 7. Communication with the city planner demonstrated that "the event center was used 80% of the time for FEMA-eligible purposes and the chapel was used over 90% of the time for non-FEMA-eligible purposes." R. at 10.

While the FEMA contractor and the city planner have some knowledge of the operation of the Church, they are not in the best position to say what occurs at the

Church on a daily basis. Chaplain Hudson himself estimated that "60% of the event center usage was for church-based events." R. at 9. Further, under the threat of imminent flooding, Chaplain Hudson and his staff first rushed to the chapel to remove the religious materials, then went to the event center to move furniture and secular supplies. R. at 4. These facts indicate that Chaplain Hudson, the leader of the Church, views the Church as a primarily religious organization with a secondary secular function. Based on Chaplain Hudson's own admission, the Church would not be eligible for FEMA funding under the mixed-use policy. Furthermore, Nyada County refused to grant the Church's application to have the event center designated as a government building for tax purposes. *Id.* Presumably, this rejection was because the county did not view the event center as a government building because of its religious affiliation. These facts should weigh heavily in FEMA's final determination of eligibility, which the agency has not yet made.

Based on the conflicting preliminary estimates of facility use and eligibility, it is possible that the Church would be eligible for partial FEMA relief. Under the mixed-use policy, "[i]f the mixed-use facility is deemed eligible, FEMA prorates funding based on the percentage of physical space dedicated to eligible services." R. at 12. The FEMA Regional Director stated that he was planning to review the Church's application personally and that perhaps the event center would be eligible for relief. R. at 10. However, the Church precluded such review when it prematurely filed this lawsuit against FEMA.

To be sure, the Church would not be eligible for full FEMA relief because of the primarily religious use and purpose of the chapel. It is possible, however, that the Church would receive prorated relief for the event center, pending FEMA's final determination that the event center had a primarily secular use. FEMA's final determination would be highly dependent on the facts of the case, which is why further factual development is necessary before deciding this issue. For these reasons, this Court should find that FEMA's mixed-use standard is a reasonable interpretation of the Stafford Act, consistent with the Establishment Clause. This Court should also find that the Church does not satisfy the standard. Thus, the Establishment Clause bars FEMA from providing public funds to the Church.

B. Providing Government Aid to Churches Runs Afoul of the Establishment Clause; however, FEMA's Mixed-Use Standard Is A Neutral Application Of Constitutional Requirements.

"A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973). This Court has found that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector and Visitors of the Univ. of Vir.*, 515 U.S. 819, 839 (1995). Further, "in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Bd. of Educ. of Kiryas Joel Vill. Sch. v. Grumet*, 512 U.S. 687, 705 (1994).

This Court has allowed government "to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials" in certain circumstances without violating the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971). In *Lemon*, this Court considered whether two state statutes, which provided public aid to church schools violated the Establishment and Free Exercise Clauses. *Id.* at 606. These questionable statutes used state funding to reimburse private schools for teachers' salaries, books, materials, and also paid private school teachers a salary supplement. *Id.* The *Lemon* test provides that for a government act to be constitutional, the act (1) must have a secular purpose, (2) cannot have the primary effect of endorsing or inhibiting religion, and (3) cannot promote excessive entanglement of government and religion. *Id.* at 612-13. The Establishment Clause protects against "three main evils . . . 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 612 (quoting *Walz v. Tax Comm'r of City of N.Y.*, 397 U.S. 664, 668 (1970)). This Court ultimately held "that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government" and implicated that the state statutes there could not "be squared with the dictates of the Religion Clauses." *Id.* at 625.

In *Rosenberger v. Rector and Visitors of the Univ. of Vir.*, this Court considered "[w]hether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint." 515 U.S. at 837 (internal

quotations omitted). There, a student newspaper sought funding for printing from the university's student activities fund, but the organization's request was denied; the newspaper properly appealed the denial within the university and ultimately pursued court action. *Id.* at 827. This Court stated that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839. Ultimately, this Court held that the program did not violate the Establishment Clause as it was neutral toward religion and "respect[ed] the critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Id.* at 841 (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990)).

In *Board of Education of Kiryas Joel Village School v. Grumet*, this Court considered whether a state statute allowing the village of Kiryas Joel, a religious community, to create its own school district for its member children violated the Establishment Clause. 512 U.S. 687, 690 (1994). This Court found that it did because it failed the test of neutrality. *Id.* The Court found that although the law applied to Kiryas Joel, not the Satmar religion, it still only applied to members of the religion, thus giving the appearance of granting special privileges to that religion. *Id.* at 699. This Court noted the problem with this special legislative act "is that the legislature itself may fail to exercise governmental authority in a religiously neutral way." *Id.* at 703. Ultimately, this Court concluded that "aiding this single, small religious group

causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole." *Id.* at 705.

While it is possible for religious organizations to receive public funding without running afoul of the Establishment Clause in certain circumstances, FEMA cannot provide funding to the Church without violating the Establishment Clause. By providing relief to the Church, FEMA would engage in at least two of the "three main evils" the Establishment Clause seeks to prevent: "sponsorship [and] financial support." Although the purpose of FEMA relief is inarguably secular, providing FEMA relief to the Church would violate the other two prongs of the *Lemon* analysis. According to Chaplain Hudson, the Church was primarily a religious organization providing minimal secular services. R. at 9. Thus, any FEMA relief given to the Church would appear to endorse the religious nature of the Church. Additionally, by providing public aid to the Church, FEMA would excessively entangle itself with the Church. Providing aid here would require FEMA "inspection and evaluation of the religious content of a religious organization . . . a relationship pregnant with dangers of excessive government direction of . . . churches." *Lemon*, 403 U.S. at 620. Providing government aid directly to a church that engages in mainly religious activities is not a neutral government action as it gives the appearance that the government endorses that religion and excessively entangles government and religion.

The Church is not eligible for FEMA relief; however, that does not mean that FEMA's mixed-use policy prevents all churches from benefiting from FEMA's assistance. Like the program in *Rosenberger*, FEMA's program "respects the critical

difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" 515 U.S. at 841 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990)) (emphasis in original). FEMA's mixed-use standard is neutral towards religion and should thus survive an Establishment Clause inquiry. FEMA's mixed-use standard applies equally to religious and secular entities. The goal of the standard is not to exclude only churches from obtaining FEMA relief, but any organization that does not meet the standard. Unlike the statute in *Board of Education of Kiryas Joel Village School*, the mixed-use standard does not explicitly or implicitly favor one religion over another. For these reasons, this Court should find that the mixed-use standard is a neutral application of the Establishment Clause but the Church does not satisfy the standard, and thus, the Establishment Clause bars FEMA from providing public funds to the Church.

C. The FEMA Mixed-Use Standard Does Not Violate The Free Exercise Clause Because It Neither Prohibits Nor Penalizes The Cowboy Church Of Lima For Practicing Religion.

This Court has stated that "there is room for play in the joints" between the Religion Clauses, meaning "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 718 (2004). The Free Exercise simply states that Congress cannot create a law "prohibiting" the free exercise of religion. U.S. Const. amend I.

When the freedom to exercise religion "comes at the cost of automatic and absolute exclusion from the benefits of a public program for which [a church] is

otherwise fully qualified" for, then the Free Exercise Clause has been violated. *Trinity Lutheran*, 137 S. Ct. 2012, 2022 (2017). In *Trinity Lutheran*, a church challenged the Missouri Department of Natural Resources' "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* at 2017. There, the church applied for the state's Scrap Tire Program, a grant program that provided reimbursement to qualifying nonprofits that bought rubber playground surfaces made from recycled tires. *Id.* The church ranked fifth among forty-four applicants, yet was rejected simply because it was a church. *Id.* at 2018. The church sued the state Department of Natural Resources, alleging a violation of the Free Exercise Clause. *Id.* at 2018. The government argued that it simply chose not to give the church a subsidy and was under no obligation to provide any subsidies in the first place. *Id.* at 2022. This Court stated that "[t]he State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character . . . The Department's policy violates the Free Exercise Clause." *Id.* at 2024. This Court concluded by stating "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution." *Id.* at 2025.

When a government sponsored program does not "suggest[] animus toward religion," this Court is likely to uphold the program under the Free Exercise Clause. *Locke*, 540 U.S. at 725. In *Locke*, Washington established a scholarship program to assist exceptional students in attending college within the state. *Id.* at 715. The program expressly prohibits recipients from using the scholarship to obtain a degree

in theology, as using state funding to obtain a degree in theology would undoubtedly violate the Establishment Clause. *Id.* at 716. However, recipients are free to use the scholarship at religious institutions and are able to take devotional theological classes. *Id.* at 724-25. A recipient sued state officials, alleging a violation of the Free Exercise Clause, because he wanted to pursue a degree in pastoral ministries while on scholarship. *Id.* at 717-18. This Court found that the scholarship program did not violate the Free Exercise Clause because recipients were still free to practice their religious beliefs even if they could not obtain a degree in theology using state funding. *Id.* at 725.

The Church's reliance on *Trinity Lutheran* is misplaced. The policy in question in *Trinity Lutheran* "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." 137 S. Ct. at 2021. The policy in that case was overly broad; FEMA's mixed-use standard is not. FEMA's standard does not discriminate against applicants solely because of their religious nature. FEMA's practice is to award relief to facilities that meet its standard of engaging in mixed-use – that is, facilities that provide both religious and secular services. Public Assistance Program & Policy Guide, 15-17. FEMA's policy does not require the Church to "choose between their religious beliefs and receiving a government benefit." *See Locke*, 540 U.S. at 720-21. Rather, the Church would meet eligibility requirements for FEMA relief when the religious use of its facility did not exceed fifty percent. R. at 12.

The Church was not "automatic[ally] and absolute[ly]" excluded from receiving public benefits as was the church in *Trinity Lutheran*. FEMA established a standard by which to evaluate all organizations – secular and religious – that apply for FEMA relief. Just because a church does not meet the standard, does not mean that FEMA violated the Free Exercise Clause. Rather, this means the church did not engage in enough meaningful secular activities to qualify for public funding. As a federal government agency, FEMA's funding is limited, and the agency must be prudential when it awards funding to organizations.

Here, FEMA must decide between providing aid to the Church, a religious organization providing some secular services, and other organizations in Lima and the surrounding communities such as schools and the processing and packing plant in the center of the town, which were also likely damaged in the hurricane. To be sure, the Church in this case has not been denied any funding yet; however, it is most likely that the Church would not meet the standard. Yet, this denial of relief to the Church would not constitute a violation of the Free Exercise Clause because FEMA does not impose a categorical ban on providing relief to religious organizations.

The current case is more like *Locke*, where this Court found no Free Exercise Clause violation regarding a state scholarship program that did not allow recipients to use the funding to pursue degrees in theology because the program did not prohibit recipients from practicing their religious beliefs. 540 U.S. at 725. There, recipients could still attend religious schools and take theology courses but could not pursue degrees in theology. *Id.* at 724-25. Here, the Church could still exercise its religious

beliefs and practices, but at least fifty percent of its operating time would need to be devoted to secular services in order to be eligible to reap the benefits of FEMA's assistance. While it is possible that FEMA's mixed-use standard could be applied in ways that would run afoul of the Religion Clauses, until the Church can prove that its Free Exercise Clause was violated, the Church cannot argue that FEMA's action is unconstitutional. *See Ill. Bible Colleges Ass'n v. Anderson*, 870 F.3d 631, 637 (7th Cir. 2017) ("It is possible that State officials could apply these statutes to plaintiffs in ways that would pose problems under the Establishment or Free Exercise Clauses. But unless and until plaintiffs seek certifications of approval, plaintiffs cannot plausibly allege that the statutes have been applied to them in unconstitutional ways.")

Contrary to Circuit Judge Sylvester's dissent in the Fourteenth Circuit opinion, R. at 19, the Church need not give up its church to be entitled to FEMA relief. In no way does FEMA's standard absolutely deny religious organizations from obtaining relief. If FEMA denies the Church's application, it will not be because the Church is a church. Rather, the denial would be based in the fact that the Church needs to engage in more secular activities in addition to its religious activities to be eligible under the mixed-use standard.

FEMA's standard complies with the dictates of both the Establishment Clause and the Free Exercise Clause. However, the Church simply does not satisfy the standard. If FEMA gave public funding to the Church, FEMA would be acting contrary to constitutional principles outlined in the First Amendment to the United

States Constitution. For these reasons, this Court should find that the Establishment Clause bars FEMA from providing relief to the Church.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court AFFIRM the decision of the Fourteenth Circuit Court of Appeals.

Dated: November 20, 2017

Respectfully submitted,

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Team 90
Attorneys for Respondents

APPENDIX

U.S. Const. art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a Party . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact . . . .

U.S. Const. amend I

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

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action . . . .

42 U.S.C. § 5172. Repair, restoration, and replacement of damaged facilities

(a) Contributions

(1) In general

The President may make contributions-- . . .

(B) . . . 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.