

No. __-____

In the Supreme Court of the United States

HARVEST FAMILY CHURCH, HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF GOD,

Applicants,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY, and WILLIAM B. LONG, Administrator
of the Federal Emergency Management Agency,

Respondents.

APPENDIX

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ENTERED

December 07, 2017

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**HARVEST FAMILY CHURCH, *et al.*,*Plaintiffs,*

v.

FEDERAL EMERGENCY MANAGEMENT
AGENCY, *et al.*,*Defendants.*§
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CIVIL ACTION H-17-2662

MEMORANDUM OPINION AND ORDER

Pending before the court are: (1) a motion for preliminary injunction (Dkt. 12) filed by plaintiffs Harvest Family Church, Hi-Way Tabernacle, and Rockport First Assembly of God (collectively, “Plaintiffs”); (2) Plaintiffs’ motion for temporary restraining order and request for hearing (Dkt. 59); and (3) an unopposed motion for leave to submit an amici brief (Dkt. 56) filed by Americans United for Separation of Church and State, American Civil Liberties Union, ACLU Foundation of Texas, Inc., Anti-Defamation League, Baptist Joint Committee for Religious Liberty, and Interfaith Alliance Foundation. Having considered the motions, the responses, the replies, the various amici briefs, and the applicable law, the court is of the opinion that (1) the motion for preliminary injunction should be DENIED; (2) the motion for temporary restraining order should be DENIED; (3) the request for hearing regarding the temporary restraining order should be DENIED; and (4) the motion for leave to submit an amici brief should be GRANTED.

I. BACKGROUND

This is a First Amendment case. Plaintiffs, three churches, sue defendant Federal Emergency

Management Agency (“FEMA”) alleging that a FEMA policy violates their rights under the Free Exercise Clause of the First Amendment. Dkt. 11 ¶¶ 74–85.

On August 25, 2017, Hurricane Harvey made landfall in Texas. Dkt. 12 at 8. Harvey caused widespread damage to countless Texans, including the three plaintiff churches. *Id.* at 8–10. Collectively, Plaintiffs suffered damage to structures such as sanctuaries, a steeple, and a fellowship hall. Dkt. 11 ¶¶ 57–59, 72–73. The flooding and damage sustained during the storm left Plaintiffs’ facilities in need of repair. Dkt. 12 at 11.

The federal government immediately began to respond to the storm. *Id.* at 8. One form of relief available was under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”). *Id.* at 3. The Stafford Act authorizes the President of the United States to provide federal assistance when a natural disaster exceeds the state or local government’s ability to respond. *Id.* Specifically, the Act includes a Public Assistance Program (“PA Program”), which allows for certain “private nonprofit” organizations (“PNPs”) to receive disaster relief grants from FEMA. Fed. Emergency Mgmt. Agency, Public Assistance Program and Policy Guide (2017), [https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf) (“Policy Guide”).

To receive disaster relief grants, a PNP must own or operate an “eligible facility.” *Id.* at 12. Among other requirements, an eligible facility includes “[a] facility that provides a non-critical, but essential government service.” *Id.* The Policy Guide lists eligible services, but also designates some services as ineligible. *Id.* Specifically, “[f]acilities established or primarily used for political, athletic, religious, recreational, vocational, or academic training, conferences, or similar activities are not eligible.” *Id.*

When a PNP provides multiple services to its community, FEMA must determine the facility's primary use by reviewing the its "[tax] documentation," "[p]re-disaster charter, bylaws, and amendments," and "[e]vidence of longstanding, routine (day-to-day) use (e.g., a calendar of activities)." *Id.* FEMA explains:

"Primary use" is the use for which *more* than 50 percent of the physical space in the facility is dedicated. FEMA evaluates the entire structure when determining primary use; it does not separately address individual areas, such as floors, basements, or wings. Common space, such as bathrooms, hallways, lobbies, closets, stairways, and elevators, is not included when calculating mixed-use space.

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

Id. at 17.

Plaintiffs concede that they use more than 50 percent of the physical space in their facilities for religious activities. Dkt. 12 at 12. However, they argue that they meet all the other funding requirements, and are thus denied funding because they are religious institutions. *Id.*

Plaintiffs ask the court to grant a preliminary injunction or temporary restraining order "relieving them from FEMA's exclusion policy" because it is unconstitutional. *Id.* at 25. Rather than responding to Plaintiffs' constitutional arguments, FEMA continuously asserts that Plaintiffs lack a concrete injury, which, in turn, strips the court of jurisdiction over the matter and negates the irreparable harm element for injunctive relief. *See* Dkts. 30, 62. Additionally, amici have filed briefs supporting and opposing Plaintiffs' motions. Dkts. 25, 29, 56.

II. LEGAL STANDARD

A party seeking a temporary restraining order or preliminary injunction under Rule 65 of the

Federal Rules of Civil Procedure has the burden to show four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any prejudice the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest. *Bluefield Water Ass’n, Inc. v. City of Starkville*, 577 F.3d 250, 252–53 (5th Cir. 2009); *Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 285 (5th Cir. 1999). Injunctive relief, particularly at the preliminary stages of litigation, is an extraordinary remedy that requires an unequivocal showing of the need for the relief to issue. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). Thus, injunctive relief should only be granted where the movant has “clearly carried the burden of persuasion.” *Bluefield Water*, 577 F.3d at 253.

III. ANALYSIS

A. Justiciability

To the extent that FEMA still asserts that this case is not justiciable, the court disagrees. FEMA responds to both motions for injunctive relief by arguing that the court lacks jurisdiction to hear the matter because Plaintiffs have not suffered a concrete injury. Dkt. 30 at 17–18; Dkt. 62 at 9. Specifically, FEMA argues that (1) Plaintiffs’ applications for funding have not been denied, but are rather on hold while FEMA reviews the policy, and (2) FEMA is working on implementing a new policy that may render Plaintiffs claims moot. Dkt. 62 at 7–8.

“To achieve standing, a plaintiff must have suffered an injury in fact, and generally, ‘must submit to the challenged policy’ before pursuing an action to dispute it.” *LaClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005) (citations omitted). “However, strict adherence to the standing doctrine may be excused when a policy’s flat prohibition would render submission futile.” *Id.* In the instant case, Plaintiffs have submitted to the challenged policy by filing applications for funding. Dkt. 12

at 12. Even though FEMA is in a holding period and has stopped denying applications, the policy's plain language states that a facility primarily used for religious activity cannot receive funding. Policy Guide at 12. Plaintiffs concede that they use their facilities primarily for religious activity. Dkt. 12 at 12. Undoubtedly, FEMA will deny funding to Plaintiffs under the current policy. *See LaClerc*, 419 F.3d at 414. Thus, Plaintiffs have standing.

For the same reasons, the case is also ripe. *See id.* As the policy is currently written, it would be futile to wait for FEMA to deny Plaintiffs' applications. *See id.* The question before the court—whether the denial of funds to Plaintiffs violates their constitutional rights—is purely legal and needs no further factual development. *Id.* FEMA asserts that the policy is in the process of being changed. However, any change to FEMA's policy is speculative and does not impact the challenge to the current policy. Thus, the case is ripe for adjudication.

The potential policy change also does not moot the case. As the Supreme Court has held, “voluntary cessation of a challenged practice does not moot a case unless ‘subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693 (2000)). The updated policy is still speculative, and FEMA fails to make it “absolutely clear” that the allegedly wrongful behavior would not recur. Thus, FEMA's decision to change its policy does not moot the case.

B. Substantial Likelihood of Success on the Merits

While Plaintiffs have the burden of persuasion on each element of injunctive relief, the court need only consider the first as Plaintiffs do not show a substantial likelihood of success on the

merits.¹ Plaintiffs argue that they satisfy this element because FEMA’s policy violates the Free Exercise Clause of the Constitution. Dkt. 12. The court disagrees.

Plaintiffs argue that *Trinity Lutheran* controls. *Id.* at 22. In *Trinity Lutheran*, a church that owned a daycare center wanted to replace its playground’s surface by participating in Missouri’s Scrap Tire Program. 137 S. Ct. 2012, 2017 (2017). However, Missouri had a policy of denying grants to any applicant owned or controlled by a religious entity. *Id.* The church sued the state for violating its right under the Free Exercise Clause of the First Amendment. *Id.* at 2018. The Court held that the state’s policy violated the Free Exercise Clause because it denied the church an otherwise available public benefit on account of its religious status. *Id.* at 2025.

Plaintiffs argue that FEMA’s policy has the same effect as Missouri’s policy in *Trinity Lutheran*. Dkt. 12 at 14. They argue that FEMA denies the churches an otherwise available public benefit on account of their religious status. *Id.* However, *Trinity Lutheran* is distinguishable from the instant case. *Trinity Lutheran* involved the funding of a playground, not a religious activity. *See* 137 S. Ct. at 2024 n.3. In fact, four justices joining the majority even acknowledged that “[the Court] does not address religious uses of funding.” *Id.*

Instead, this case is similar to *Locke v. Davey*. 540 U.S. 712, 124 S. Ct. 1307 (2004). In *Locke*, the state of Washington created a scholarship to help certain students afford post-secondary education. *Id.* at 715. Washington awarded a scholarship to one student, but then refused to give him the funds because he chose to pursue a devotional theology degree. *Id.* at 717. The student

¹According to Judge Ellison’s memorandum and order, FEMA needed to respond on the merits by December 1, 2017, or risk conceding Plaintiffs’ likelihood of success on the merits. Dkt. 45. While FEMA did not respond and thus conceded Plaintiffs’ likelihood of success on the merits, the court is still obligated to apply the correct law to the facts before it. *See Indus. Dev. Bd. of Section v. Fuqua Indus., Inc.*, 523 F.2d 1226, 1240 (5th Cir. 1975) (“[A] trial court has the ultimate responsibility to apply the law to the uncontested facts before it.”).

argued that the denial of funds violated his rights under the Free Exercise Clause. *Id.* at 720. *Locke* held that Washington’s denial of funding was constitutionally permissible. *Id.* at 724. The Court held that the student was not entitled to a presumption of unconstitutionality and that the government was not hostile toward religion for enforcing its anti-establishment goals. *See id.* at 722–24.

Trinity Lutheran provides important guidance on *Locke*. 137 S. Ct. at 2023. As the Court notes, the *Locke* plaintiff was not denied a scholarship because of what he was, but “because of what he proposed *to do*—use the funds to prepare for the ministry.” *Id.* In *Trinity Lutheran*, on the other hand, the church planned to use the funds to resurface a playground. *Id.* The funds were not denied because of what they would be used for—a non-religious use—but because of the church’s status as a religious institution. *Id.* at 2025. Thus, the policy forced the church to choose between being a church and receiving a government benefit. *Id.* at 2024.

In the instant case, FEMA’s policy is closer to the scholarship in *Locke*. Plaintiffs would use the FEMA funds to rebuild facilities used primarily to promote religious activities. *See* Dkt. 11 ¶¶ 47, 57–59, 72–73. Plaintiffs need repairs to church sanctuaries, a church steeple, and a fellowship hall. *Id.* ¶¶ 57–59, 72–73. Plaintiffs even acknowledge that for at least one of the churches, the repairs are needed to resume religious services. *Id.* ¶ 73. Thus, Plaintiffs plan to use the funds for religious purposes, like the *Locke* student did. 540 U.S. at 717.

Further, FEMA’s policy even distinguishes based on use, rather than status or identity. Policy Guide at 12. The policy requires a PNP’s facility to provide “eligible” services. *Id.* FEMA’s denial of funding is not because of Plaintiffs’ status as religious institutions, but rather because they primarily use their facilities for religious activities. *Id.* Thus, the funding from FEMA would be used to further those religious activities. The policy even contemplates situations when a church would receive funding. *See id.* at 14, 171. The policy states that a community center operated by

a religious institution would receive funding if the facility provides eligible services. *Id.* at 14. Or, if a church operates a school and has multiple facilities, FEMA would consider each facility separately for determining the eligibility of funds. *Id.* at 171. Plaintiffs do not have to choose between being a church and receiving a government benefit because FEMA’s funds are not contingent on Plaintiffs’ status as churches. Rather, FEMA’s funds are contingent on how Plaintiffs plan to use the funds—here, rebuilding facilities used for religious activities. Dkt. 11 ¶ 47.

As the Court recognized in *Locke* and reaffirmed in *Trinity Lutheran*, the government has a historical and justifiable interest in avoiding an establishment of religion and using public funds to support religion. *Locke*, 540 U.S. at 722; *Trinity Lutheran*, 137 S. Ct. at 2023. The difference the Court draws between *Trinity Lutheran* and *Locke* is that *Trinity Lutheran* involved playgrounds and was not an “essentially religious endeavor,” like that of pursuing a religious education. *Trinity Lutheran*, 137 S. Ct. at 2023. Thus, the government had different interests in the two cases. *See id.* Here, the funding would be used to repair church facilities so that Plaintiffs could use their facilities for their primary service, which Plaintiffs admit is providing religious activities. Dkt. 11 ¶ 47.

Plaintiffs also briefly argue that FEMA’s policy is unconstitutional because it is not neutral. Dkt. 12 at 16 (citing *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (1993)). To the extent that Plaintiffs argue the *Lukumi* reasoning governs this dispute, the court disagrees. *Lukumi* involved criminal sanctions that sought to suppress ritualistic practices of a particular group. *See id.* at 524–28. As the Court described in *Locke*, the law targeted a specific religious practice by a specific religious group. 540 U.S. at 720. Further, *Locke* declined to extend *Lukumi* beyond “not only [*Lukumi*’s] facts but [*Lukumi*’s] reasoning.” *Id.*

The instant case is clearly distinguishable. First, FEMA’s policy does impose criminal or civil sanctions on any type of religious service or rite. *See id.* Second, FEMA’s policy does not deny

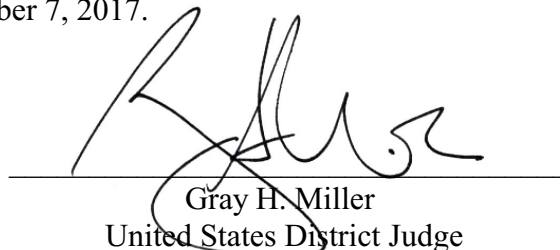
funding only to entities whose facilities are primarily used for religious activities. Policy Guide at 12. Instead, facilities used for “political, athletic, religious, recreational, vocational, or academic training, conferences, or similar activities are not eligible.” *Id.* Thus, *Lukumi* does not control.

For the purposes of the temporary restraining order and preliminary injunction, the court need not determine whether the policy is constitutional. *See Bluefield Water*, 577 F.3d at 252–53. Rather, the court must determine whether Plaintiffs show a substantial likelihood of success on the merits. *Id.* at 252. Because Plaintiffs’ potential funding was denied based on use rather than their status as churches, *Trinity Lutheran* is distinguishable while *Locke* is controlling. Further, because Plaintiffs base their constitutional argument on *Trinity Lutheran* and *Lukumi*, they do not show a substantial likelihood of success.

IV. CONCLUSION

Injunctive relief is an extraordinary remedy and requires Plaintiffs to make an unequivocal showing of their entitlement to relief. *Valley*, 118 F.3d at 1050. Because Plaintiffs do not show a substantial likelihood of success on the merits, the motions for preliminary injunction (Dkt. 12) and temporary restraining order (Dkt. 59) are DENIED. The motion for leave to submit an amici brief (Dkt. 56) is GRANTED. The request for hearing (Dkt. 59) on the motion for temporary restraining order is DENIED.²

Signed at Houston, Texas on December 7, 2017.



Gray H. Miller
United States District Judge

²This case does not involve a relevant factual dispute, and thus no oral hearing is needed. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996).

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY MANAGEMENT
AGENCY, WILLIAM B. LONG,
Administrator of the Federal Emergency
Management Agency,

Defendants.

Civil No. 17-cv-2662

Hon. Gray H. Miller

NOTICE OF APPEAL

Notice is hereby given that Harvest Family Church, Hi-Way Tabernacle, and Rockport First Assembly of God, Plaintiffs in the above-captioned case, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Court's Order (ECF No. 67) denying Plaintiffs' Emergency Motion for Temporary Restraining Order and Renewed Preliminary Injunction, entered in this action on December 7, 2017.

Respectfully submitted,

s/Eric C. Rassbach

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Dated: December 7, 2017

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on December 7, 2017, the foregoing notice of appeal was served on counsel for all parties by means of the Court's ECF system.

/s/ Eric C. Rassbach

Eric C. Rassbach

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH, *et al.*,

Plaintiffs,

v.

FEDERAL EMERGENCY MANAGEMENT
AGENCY, *et al.*,

Defendants.


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CIVIL ACTION H-17-2662

ORDER

Pending before the court is a motion for an injunction pending appeal filed by plaintiffs Harvest Family Church, Hi-Way Tabernacle, and Rockport First Assembly of God. Dkt. 70. For the same reasons set forth in the court's memorandum opinion and order (Dkt. 67) entered on December 7, 2017, the motion for injunction pending appeal is DENIED.

Signed at Houston, Texas on December 8, 2017.



Gray H. Miller
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HARVEST FAMILY CHURCH, et al.,

Plaintiffs-Appellants,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, et al.,

Defendants-Appellees.

No. 17-20768

**OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL**

At 11:57 p.m. on Thursday, December 7, plaintiffs filed an emergency motion with this Court, seeking an injunction pending appeal within two business days, by Monday, December 11. Specifically, plaintiffs seek an order enjoining the Federal Emergency Management Agency (FEMA) from enforcing a policy that excludes facilities used primarily for religious worship from eligibility for its Public Assistance (PA) program. Plaintiffs seek this extraordinary relief undeterred by the fact that FEMA has affirmatively decided to change that policy, and is not denying any applications for assistance by houses of worship while the Office of Management and Budget (OMB) completes its review of FEMA's new policy, which is expected to be accomplished in a matter of weeks.

Plaintiffs' request for extraordinary relief should be denied. They cannot establish irreparable injury, and certainly cannot show a degree of irreparable harm so imminent that emergency relief is necessary. First, as noted, the policy plaintiffs challenge here is not injuring them because FEMA is not enforcing it against plaintiffs. As FEMA has made clear, it has not and will not deny plaintiffs' applications for public assistance while its new policy is under development. There is no threat, let alone an imminent one, that plaintiffs will be denied reimbursement under the PA program.

Plaintiffs' contention that their applications "remain in limbo" likewise fails to demonstrate irreparable injury. Any delay in processing plaintiffs' applications resulting from FEMA's decision to change its policy will not, as plaintiffs claim,

prevent them from proceeding with demolition and construction. The PA program is a reimbursement program, and does *not* require applicants to receive a decision on their applications before engaging in the emergency repairs—plaintiffs can repair their churches now. If plaintiffs ultimately prevail in their challenge to the existing PA grant policy and remove that barrier to eligibility, plaintiffs would likely receive reimbursement under the program. Plaintiffs’ injury is, at most, a monetary injury, and it is settled that monetary injury is not irreparable. For all these reasons and those explained below, plaintiffs are not entitled to the extraordinary relief they seek here.

STATEMENT

1. FEMA’s Administration of the Public Assistance Program

Congress enacted the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”) to “provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which results from . . . disasters.” 42 U.S.C. § 1521(b). As relevant here, the Stafford Act authorizes FEMA’s administration of the Public Assistance program, which provides federal grant assistance to State, Territorial, Indian Tribal, and local governments, in addition to eligible “private nonprofit facilit[ies].” *Id.* § 5122(11).

The Stafford Act defines a “private nonprofit facility” as including “private nonprofit educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and

disabled) and facilities on Indian reservations, as defined by the President.” *Id.* § 5122(11)(a). The Act also states that the term “private nonprofit facility” “includes any private nonprofit facility that provides essential services of a governmental nature to the general public (including museums, zoos, performing arts facilities, community arts centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, broadcasting facilities, and facilities that provide health and safety services of a governmental nature), as defined by the President. *Id.* § 5122(11)(b).

In implementing this statutory definition, FEMA’s current policy (which is now under review, *see infra* pp. 8-10) provides that “[f]acilities established or primarily used for political, athletic, religious, recreational, vocational, or academic training, conferences, or similar activities are not eligible.”¹ However, a nonprofit facility that provides alcohol and drug treatment services, residential services, or food assistance programs may be considered an eligible facility, even if that facility is operated by a religious organization. Indeed, FEMA has awarded public assistance to many religiously affiliated organizations, including houses of worship. *See* ECF No. 30-2 (“Stronach Decl.”), at ¶ 30 & Ex. 1 (listing FEMA public assistance grants to religiously affiliated organizations from 2012–2017).

¹ *See* FEMA *Public Assistance Program and Policy Guide, 2017* (“Policy Guide”), [https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf) (Apr. 2017), at 12, 14.

To the extent a facility provides multiple kinds of services, FEMA looks to the “primary use” of the facility to determine whether the facility is eligible for PA grants. *See* Policy Guide at 17. “Primary use” is the use for which more than 50 percent of the physical space in the facility is dedicated. *Id.* In cases where the same physical space of a facility is used for both eligible and ineligible services, the “primary use” of the facility is the use for which more than 50 percent of the operating time is dedicated to eligible services in that shared physical space.² *Id.*

In addition to being an eligible facility, a grant recipient must also perform eligible work. Specifically, FEMA provides grant funding for two types of work: (1) emergency work and (2) permanent work. *See* Policy Guide at 20. Emergency work is defined as “work which must be done immediately to save lives and to protect improved property and public health and safety, or to avert or lessen the threat of a major disaster.” 44 C.F.R. § 206.201(b). Emergency work includes (a) debris removal in the public interest; and (b) emergency protective measures such as flood fighting or temporary emergency repairs to prevent further damage to an eligible facility and its contents. *See* 42 U.S.C. § 5170b; 44 C.F.R. § 206.225; Policy Guide at 44, 59–60.

² In some circumstances, a private nonprofit may be reimbursed for costs associated with providing emergency services after a declared disaster, even though its facility may not otherwise be eligible for PA grants. *See* Stronach Decl. at ¶ 50. For example, a private nonprofit that provides emergency sheltering of disaster survivors may be reimbursed for costs associated with that emergency service if that sheltering was done at the request of the State. FEMA recognizes that sheltering occurs in facilities “with large open spaces, such as schools, churches, community centers, armories, or other similar facilities.” *See* Policy Guide at 67.

Permanent work is “restorative work that must be performed through repairs or replacement, to restore an eligible facility on the basis of its predisaster design and current applicable standard.” 44 C.F.R. § 206.201(i); *see* Policy Guide at 20; Stronach Decl. at ¶ 14.

To request PA funding for PA work, an applicant must submit a Request for Public Assistance to the State (or Tribe) who is the grant recipient. 44 C.F.R. § 202.202(a). The grant recipient then sends the Request for Public Assistance to FEMA’s Regional Administrator within 30 days after designation of the area where damage occurred, unless FEMA extends that deadline. *Id.* § 202.202(c), (f)(2); *see* Policy Guide at 131. A private nonprofit applicant must also submit to the State or Tribe recipient a Private Nonprofit Facility Questionnaire, proof of non-profit status, proof of ownership or proof of legal responsibility to repair the incident-related damage, and a list of services provided in the facility, when and to whom. *See* Policy Guide at 132.

FEMA reviews, with assistance from the grant recipient, the Request for Public Assistance to determine whether the applicant is eligible for PA funding. *See* 44 C.F.R. § 206.207(b)(1)(iii)(C). If FEMA approves the Request for Public Assistance, FEMA will work with the applicant to prepare a Project Worksheet for each project for which the applicant seeks assistance. *Id.* § 206.202(d). This worksheet must identify the eligible scope of work and include the actual costs of the eligible work or the estimated costs for the work. *Id.*; *see also* Policy Guide at 134–42. The applicant

must maintain all documentation supporting the projected costs, and the applicant must provide documentation of insurance coverage, if applicable. *See* Policy Guide at 141; 44 C.F.R. § 206.250. “Actual and anticipated insurance recoveries shall be deducted from otherwise eligible costs.” 44 C.F.R. § 205.250(c).

Before FEMA obligates any funds to the recipient, the recipient must complete and send to FEMA an Application for Federal Assistance and an Assurances for Construction Programs. 44 C.F.R. § 206.202(e)(1). Once those forms are received, FEMA will obligate funds to the State or Tribal recipient based on the approved Project Worksheets. *Id.* The recipient will then approve sub-grants to applicants based on the Project Worksheets approved for each applicant. *Id.*

The PA Program is a reimbursement program. The PA grant process can be lengthy, especially in large-scale disasters resulting in a high volume of applicants. *See* Stronach Decl. at ¶ 19. It is not atypical under normal circumstances for it to take several years for funds to be obligated. *Id.* Accordingly, applicants should not wait for a determination from FEMA that it has approved their Request for Public Assistance, and applicants certainly should not wait for an obligation of funds, to complete necessary emergency work or repairs. Indeed, during the reconciliation process, FEMA ensures that it only provides reimbursements for actually-expended and documented costs. FEMA will not provide PA grants for the repair of damage caused by deterioration, deferred maintenance, the applicant’s failure to take measures

to protect a facility from further damage, or negligence. *See* 44 C.F.R. § 206.223(e); Policy Guide at 20–21.

2. Hurricane Harvey

On August 25, 2017, Hurricane Harvey made landfall in southern Texas as a Category 4 storm. That same day, the President issued a Disaster Declaration for parts of Texas. *See* Stronach Decl. at ¶ 58. This Disaster Declaration began the 30-day clock for Texas to submit Requests for Public Assistance to FEMA on behalf of applicants.

On September 1, 2017, FEMA extended the Request for Public Assistance deadline to 90 days from the Disaster Declaration, or November 22, 2017. *See* Stronach Decl. at ¶ 59. In addition, although the cost-sharing arrangement under the Stafford Act for both emergency work and permanent work is 75 percent Federal and 25 percent State, *see* 42 U.S.C. § 5170(b); § 5172(b); § 5173(d), the President amended the Disaster Declaration on September 2, 2017 to authorize a 90 percent Federal cost share for debris removal and a 100 percent Federal cost share for emergency protective measures performed within 30 days from the Disaster Declaration, or September 24, 2017. *See* Stronach Decl. at ¶ 60. After September 24, 2017, the Federal cost share would be reduced to 90 percent. *Id.*

3. Plaintiffs' Complaint and Initial Preliminary Injunction Motions

Plaintiffs in this case are churches in Texas that were affected by Hurricane Harvey. They brought this action on September 4, 2017, contending that FEMA's

policy “categorically exclude[d] houses of worship from equal access to disaster relief grants because of their religious status,” in violation of the Free Exercise Clause of the First Amendment. ECF No. 1, ¶ 1. At that time, however, none of the plaintiffs had filed an application for PA grant assistance, and the district court denied their request for a preliminary injunction on that ground. *See* ECF No. 21 (Status Conference Transcript), at 7:24–8:4, 8:13–16.

Plaintiffs subsequently filed an amended complaint and a renewed preliminary injunction motion, explaining that they had submitted applications that same day. ECF No. 12. Plaintiffs requested preliminary relief by September 30, 2017, “[d]ue to the time-sensitive nature of the demolition, repairs, and rehabilitation efforts, along with the upcoming reduction in FEMA cost-shares for Public Assistance Grants for emergency protective measures.” *See id.* at 2.

4. FEMA’s Pending Policy Review

On September 29, 2017, defendants filed a motion for stay of proceedings pending FEMA’s reconsideration of its PA grant policies. *See* ECF No. 24. Specifically, defendants stated that they were “considering making changes” to the PA grant program which could “moot Plaintiffs’ claims.” *Id.* at 1. FEMA stated that, while it reconsidered its policy, it would “not deny pending applications from houses of worship under the current policy.” *Id.* FEMA also opposed plaintiffs’ renewed motion for preliminary injunction because, given FEMA’s reconsideration of its PA grant policy and the structure of the PA program as a reimbursement program,

plaintiffs faced no “real,” “substantial,” or “immediate” threat of irreparable injury. *See* ECF No. 30, at 24, 27.

In a subsequent filing, defendants explained that FEMA would “continue to process applications from houses of worship deemed eligible under the current policy,” and to the extent an eligibility review determined that a private nonprofit house of worship was *not* eligible for a PA grant, FEMA would place such an application ““on hold”” as FEMA reconsidered its policy. ECF No. 40, at 2–3 (quoting Second Stronach Decl., Ex. 1)). FEMA assured that “[e]ach timely applicant will receive a complete eligibility determination regardless of when FEMA evaluates its application.” *Id.* at 4. FEMA further clarified that, while plaintiffs had asserted that the “government” had denied their applications, plaintiffs had only spoken to officials from the State of Texas and the Texas Division of Emergency Management (TDEM)—not FEMA. *Id.* at 1. FEMA made clear that *it* is the only entity with the authority to deny PA grant funding requests, and FEMA had not issued any such denial to plaintiffs. *See id.*; Second Stronach Decl. at 3–5. On November 22, 2017, defendants filed a status update, which informed the Court that FEMA had affirmatively decided to change its PA grant policy, and that FEMA had submitted a revised PA grant policy to the Office of Information and Regulatory Affairs (OIRA) within the OMB. *See* ECF No. 54. In addition, FEMA noted that Congress had introduced legislation that would make houses of worship eligible for disaster relief funding, and the Administration had supported this legislation. *Id.* at 2.

5. The District Court's Denial of Preliminary Relief

Judge Ellison recused himself from the case on November 30, 2017. On December 1, 2017, plaintiffs filed a motion for temporary restraining order (TRO), even though plaintiffs' motion for a preliminary injunction was still pending. ECF No. 59-1.

On December 7, 2017, the district court denied plaintiffs' motions for a preliminary injunction and TRO because plaintiffs had failed to establish a likelihood of success on the merits. ECF No. 67. The district court did not consider the remaining prongs of the preliminary injunction test, including whether plaintiffs had suffered an irreparable injury. *See id.*

ARGUMENT

Injunctions pending appeal, which are an “extraordinary” form of relief, are “never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Instead, the party requesting such an injunction must make a “clear showing” that he “is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest,” *id.* at 20-24, and must prove each of those factors. *See, e.g., Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009). Plaintiffs fail that test. They cannot show the requisite irreparable harm, or that the balance of equities and the public interest supports granting an injunction pending appeal (let alone an emergency injunction). For those reasons, this Court should deny plaintiffs' motion,

without addressing the other preliminary injunction factors. *See, e.g., Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 203 (5th Cir. 2003).

1. Plaintiffs Have Not Demonstrated Irreparable Injury

It is hornbook law that a preliminary injunction cannot be entered on a mere “possibility” of irreparable harm. Instead, a party must “demonstrate that irreparable injury is *likely* in the absence of an injunction,” *Winter*, 555 U.S. at 22, and that the threat of irreparable injury is “real,” “substantial,” and “immediate.” *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983). Plaintiffs’ alleged injuries fall far short of these requirements.³

a. The “practical” concerns plaintiffs assert (Mot. 27) are without foundation. As FEMA advised the district court, it has received plaintiffs’ applications for public assistance and opened an account for each application. *See* Second Stronach Decl., ECF No. 40, at ¶ 3. None of those applications has been denied; instead, each has been put on hold, pending review by the OMB and the OIRA of FEMA’s affirmative decision to change the policy plaintiffs challenge in this suit. *See id.* at ¶¶ 4-6; Def.s’ Status Update, ECF No. 54, at ¶ 4; citing Turi Decl., ECF No. 54-1, at ¶¶ 3-4 (FEMA

³ Plaintiffs make the remarkable contention (Mot. 27) that FEMA conceded this prong of the preliminary injunction test before the district court papers. But FEMA repeatedly argued in the district court that plaintiffs were not entitled to injunctive relief because they could not demonstrate irreparable injury. *See* PI Opp., R30 pp. 17-21; TRO Opp, R62 pp. 7-10; Sur-Reply Mem., R40 pp. 1-3; Stay Mot., R24 p. 1-2.

“has reconsidered the policies challenged” in this lawsuit “concerning the eligibility of houses of worship for Public Assistance grant funding”).

FEMA’s decision to change the policies plaintiffs challenge in this suit, the review of which FEMA anticipates will be completed by the end of December 2017, *see* Turi Decl., at ¶ 5, confirms that plaintiffs neither have suffered, nor will suffer, any irreparable harm relating to their allegations in this case. *See Franciscan All., Inc. v. Price*, 2017 WL 3616652, at *5 (N.D. Tex. July 10, 2017) (granting motion for a stay while agency reconsidered the rule challenged by plaintiffs); *Colo. Christian Univ. v. Sebelius*, 2013 WL 93188, at *5 (D. Colo. Jan. 7, 2013) (recognizing that a safe harbor period during which a policy would not be enforced adequately “protected” the plaintiff from harm while the policy was reconsidered); *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, 2007 WL 4118136, at *11 (D. Or. July 25, 2007) (granting stay of proceedings to promote judicial economy and efficiency where alternate review process was pending that could moot one of the plaintiff’s claims for relief).

Plaintiffs contend (Mot. 27) that the status quo precludes them from making “immediate emergency repairs,” but that contention also is groundless. The PA program at issue is a reimbursement program, and can involve a lengthy grant process, especially in large-scale disasters that involve a high volume of applicants. *See* PI Opp, ECF No.30, p. 7, *citing* Stronach Decl., ECF No. 30-2, ¶ 19 (noting that it is not atypical for it to take several years for funds to be obligated). Accordingly, as FEMA advised the district court, applicants should not wait for a determination from

FEMA that it has approved an application for PA benefits to complete necessary emergency work or repairs. *See* PI Opp, ECF No.30, p. 7.

Indeed, by regulation, FEMA is not authorized to provide PA grants for the repair of damage (such as mold) caused by deterioration, deferred maintenance, the applicant's failure to take measures to protect a facility from further damage, or negligence. *See* 44 C.F.R. § 206.223(e) & Policy Guide at 20-22. Moreover, any harm plaintiffs might allegedly suffer from delay in making emergency repairs also would not qualify as "irreparable" because that harm could be remedied by reimbursement (or an order requiring reimbursement). The federal courts "have long recognized that . . . an injury is 'irreparable' only if it cannot be undone through monetary remedies." *Enter. Int'l, Inc. v. Corporacion Estatala Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). Simply stated, if plaintiffs ultimately win this case, the barrier to their receipt of grant money will be removed and they may well receive grant money reimbursing them for their repair expenses. That is the very definition of a "reparable" injury.

Citing various communications with representatives of the state of Texas and/or the TDEM), plaintiffs assert (Mot. 8-9) that they have already been denied PA grant funding. That is not so. While Texas officials, through TDEM, assist PA applicants in applying for disaster relief, state officials do not speak for FEMA, and FEMA—not Texas or TDEM—makes the ultimate eligibility determination for each applicant. *See* Def's. Sur-Reply, ECF No.40, p. 1, *citing* Second Stronach Decl., ECF

No.40, at ¶¶ 3-5. As noted, FEMA has not yet made any such determination regarding plaintiffs' applications. *See id.*

Plaintiffs also attempt to identify irreparable injury by arguing (Mot. 9) that FEMA policy “makes grant funding contingent on FEMA’s pre-clearance of certain types of projects,” such as “emergency demolition.” But FEMA policy does *not* require applicants seeking PA funding for Emergency Work (which is what plaintiffs advised the district court they are seeking here)⁴ to delay performing work until FEMA approves the proposed work. *See* TRO Opp., ECF No. 62 p. 5. Rather, for emergency demolition to private structures, FEMA merely requires the applicant to “provide confirmation” that it has satisfied certain legal processes and permitting requirements (such as indemnifying the government) before FEMA will provide PA funding. Policy Guide at 75-76.

b. Plaintiffs also contend (Mot. 27) that they will suffer irreparable harm in the absence of an injunction pending appeal because their First Amendment rights are

⁴ Applicants for Permanent Work grants *may* jeopardize funding by not obtaining FEMA pre-clearance before performing work, but here, plaintiffs have applied only for Emergency Work grants. *See* Pls.’ PI Reply, ECF No.34, at 5 (“Applying for SBA loans is a predicate only to receiving Permanent Work grants, and the Churches are applying for Emergency Work PA Grants”). Moreover, funding for Permanent Work grants may be available without FEMA-preclearance, if the Applicant “ma[de] every effort to afford FEMA the opportunity to perform EHP [environmental and historic preservation] reviews prior to the start of construction.” Policy Guide at 87. In addition, an applicant for Permanent Work funding is not ordinarily supposed to wait to make repairs until funding is received if doing so will result in increased costs due to negligent delays. *See* 44 C.F.R. § 206.223(e); Policy Guide at 20-21, 84.

allegedly being violated. “[I]nvocation of the First Amendment,” however, “cannot substitute for the presence of an imminent, non-speculative irreparable injury.” *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th Cir. 2016). To make that showing, plaintiffs must demonstrate that their “First Amendment interests are either threatened or in fact being impaired *at the time relief is sought*.” *Id.* at 227–28 (emphasis added).

Plaintiffs have made no such showing. As noted, plaintiffs are not currently suffering any irreparable harm, given that their applications have not been denied—nor will they be denied—during the hold period in which FEMA is working to get its new policy approved and implemented. In their amended complaint, plaintiffs sought an injunction prohibiting FEMA “from enforcing the FEMA church exclusion policy against the Churches and other houses of worship.” First Amended Complaint, at 20. As there is no danger of FEMA “enforcing” the policy while the new policy is under consideration, plaintiffs do not need the requested relief, and certainly do not need this Court to exercise its extraordinary power to issue an emergency injunction.

Moreover, it is at best speculative that plaintiffs’ First Amendment rights will ever be palpably under threat. FEMA has “affirmatively decided to change the challenged policy,” and has already submitted its new policy for review. *See supra* pp. 8-10. Plaintiffs’ PA grant applications are likely to be evaluated under that new policy, and as a result, any suggestion that plaintiffs are under imminent threat of having their First Amendment rights violated is based on pure speculation. Conjecture of that type does not establish irreparable injury, even in a First Amendment case, because

the alleged injury *may never occur*. *See Google*, 822 F.3d at 226–29. For all the above reasons, therefore, plaintiffs plainly cannot show that the “extraordinary remedy” of an injunction pending appeal is necessary to prevent any irreparable harm to them—and plaintiffs certainly have not shown that such relief is necessary by December 11, 2017.

2. Plaintiffs Also Fail to Show that the Balance of Harms and the Public Interest Support an Injunction Pending Appeal.

Plaintiffs also have failed to show that any irreparable injury to them would outweigh the harm that an injunction pending appeal would cause defendants and the public interest. *See generally Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986); *Southdown, Inc. v. Moore McCormack Res., Inc.*, 686 F. Supp. 595, 596 (S.D. Tex. 1988).⁵ Plaintiffs’ sole argument on these points rests on their assertion that they are suffering religious discrimination at the hands of FEMA’s current policy. *See* Mot. 29. But, as discussed, that policy is not currently being enforced, and is in the process of being changed. Enjoining the government while it finalizes these changes is therefore unnecessary, and it would introduce unnecessary uncertainty into a process that is already well underway. For the same reasons, it would better serve the public interest to allow the government to continue to work through changing its current

⁵ Plaintiffs (Mot. 28) also wrongly suggest that FEMA waived this point by not raising it below. *See* PI Opp., ECF No.30, at 21-22; TRO Opp., ECF No. 62, at pp. 10-11.

policy without the unnecessary burden of a temporary restraining order or preliminary injunction issued against it.

CONCLUSION

For these reasons, this Court should deny plaintiffs' motions for an injunction pending appeal and, in the alternative, for expedited briefing.

Respectfully submitted,

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DECEMBER 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing opposition complies with the requirements of Fed. R. App. P. 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 4,390 words according to the count of Microsoft Word.

/s/ Matthew M. Collette
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2017, I electronically filed the foregoing with the Clerk of the Court through the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and will be served through the CM/ECF system.

/s/ Matthew M. Collette

Counsel for Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



No. 17-20768

A True Copy
Certified order issued Dec 11, 2017

Stacy W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

HARVEST FAMILY CHURCH; HI-WAY TABERNACLE; ROCKPORT
FIRST ASSEMBLY OF GOD,

Plaintiffs - Appellants

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY; WILLIAM B. LONG,
Administrator of the Federal Emergency Management Agency,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, JONES, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the appellants' opposed motion for injunction pending resolution of their appeal from the district court's denial of a temporary restraining order and preliminary injunction is DENIED.

IT IS FURTHER ORDERED that the appellants' opposed motion to expedite the appeal is GRANTED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

No. 4:17-cv-2662

Jury Demanded

FIRST AMENDED COMPLAINT

Come now Plaintiffs Harvest Family Church, Hi-Way Tabernacle, and Rockport First Assembly of God (the “Churches”), by and through their attorneys, and state as follows for their first amended complaint:

NATURE OF THE ACTION

1. This is a challenge to the policy of the Federal Emergency Management Agency (“FEMA”) that excludes houses of worship from equal access to disaster-relief grants because of their religious status. The policy violates the Free Exercise Clause of the First Amendment, including under *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

2. The people of Texas have just suffered one of the greatest natural disasters in U.S. history, with many dead, thousands displaced, and billions of dollars in damage. Millions of homes, businesses, government buildings, and places of worship have been heavily damaged or destroyed. Hurricane Harvey, like Hurricane Katrina before it, will have after-effects for decades to come.

3. To its credit, the federal government has stepped in to help the people of Texas, who are already very busy helping one another with the recovery process. One of the leading resources for disaster relief has been houses of worship. Indeed, Plaintiff Hi-Way Tabernacle is currently in use as a shelter for dozens of evacuees, a warehouse for disaster relief supplies, a distribution center for thousands of emergency meals, and a base to provide medical services. FEMA has accordingly rightly recognized that houses of worship have an essential role as places of refuge during the storm, and as nerve centers of recovery afterwards.

4. One would think, then, that houses of worship would also get federal government disaster-relief help on an equal basis with other private nonprofit societal institutions such as community centers and zoos. Yet FEMA policy explicitly denies equal access to FEMA disaster relief grants for houses of worship solely because of they are houses of *worship*—that is, because of their religious nature. If FEMA applies its policy to Hurricane Harvey, as it did to Superstorm Sandy and Hurricane Katrina, hundreds of churches, synagogues, and other houses of worship will be denied equal access to FEMA relief.

5. The Constitution does not allow this exclusionary policy to continue. Under the Free Exercise Clause of the First Amendment—particularly as interpreted by the Supreme Court decision in *Trinity Lutheran Church*—government may not discriminate against a church, or a synagogue, or a mosque simply because of its *status* as a place of active religious teaching and worship.

6. Plaintiff Churches—Harvest Family Church in Cypress, Hi-Way Tabernacle in Cleveland, and Rockport First Assembly of God in Rockport—ask this Court to order FEMA to treat them on equal terms with other non-profit organizations in accepting, processing, evaluating, and acting on their disaster relief applications. The churches are not seeking special treatment; they are seeking a fair shake. And they need to know now whether they have any hope of counting on FEMA or whether they will continue to be excluded entirely from these FEMA programs.

7. Moreover, the Churches seek expedited relief for several reasons. First, their houses of worship are heavily damaged right now and they need to make time-sensitive decisions right now about how to rebuild. It is for this reason that FEMA policy emphasizes that effective disaster relief requires coordination with FEMA as soon as possible after a disaster. Second, FEMA relief grants for emergency protective measures are scheduled for a ten-percent cut 30 days after the President's Texas disaster declaration.

8. This may be the first case this Court will hear regarding Hurricane Harvey disaster relief, but it is surely not the last. It is therefore imperative that the courts ensure that FEMA's aid is distributed in accordance with the Constitution.

JURISDICTION AND VENUE

9. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361. This action arises under the Constitution and laws of the United States. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

10. Venue lies in this district pursuant to 28 U.S.C. § 1391(e). A substantial part of the events or omissions giving rise to the claim occurred in this district, and Plaintiffs Harvest Family Church and Rockport First Assembly of God are located in this district.

IDENTIFICATION OF PARTIES

11. Harvest Family Church is located in Cypress, Texas, a town within Harris County.

12. Hi-Way Tabernacle is located in Cleveland, Texas, a town within Liberty County.

13. Rockport First Assembly of God is located in Rockport, Texas, a town within Aransas County.

14. Defendants are appointed officials of the United States government and United States governmental agencies responsible for creating and enforcing the challenged policy.

15. Defendant William B. Long is the Administrator of FEMA. In this capacity, he has responsibility for the operation and management of FEMA. Administrator Long is sued in his official capacity only.

16. Defendant Federal Emergency Management Agency is an executive agency of the United States government housed within the Department of Homeland Security and is responsible for the promulgation, administration, and enforcement of the challenged policies.

FACTUAL ALLEGATIONS

I. The Churches

17. Harvest Family Church is a young church. It started in 2011 with just 20 members and today has about 200 members from diverse backgrounds.

18. Hi-Way Tabernacle has been operating for over 15 years and has a congregation of about 300 members.

19. Rockport First Assembly of God has grown in recent years from about 25 members to about 125 members today.

20. Each of the Churches are open to the public, are involved in their communities, and perform a number of public services.

II. FEMA's Public Assistance Program

21. 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).

22. To trigger the availability of federal assistance, the President must first declare that a major disaster exists in a State. FEMA then administers federal

financial assistance in that State through its Public Assistance Program (“PA Program”) in accordance with FEMA regulations and FEMA policies contained in FEMA’s Public Assistance Program and Policy Guide, [https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf) (“FEMA Policy Guide”).

23. The PA Program is FEMA’s largest grant program under the Stafford Act. Its purpose is to assist communities responding to and recovering from major disasters or emergencies declared by the President. The program provides emergency assistance to save lives and protect property, and assists with permanently restoring community infrastructure affected by a federally declared incident.

24. As relevant here, to be eligible for the disaster aid under the PA Program, a private nonprofit organization “must show that it has [a] current letter ruling from the U.S. Internal Revenue Service granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code of 1954” and the organization must “own[] or operate[] an eligible facility.” FEMA Policy Guide at 12-13, 17 (citing 44 C.F.R. § 206.221(f)).

25. An “eligible facility” is either (1) “A facility that provides a critical service, which is defined as education, utility, emergency, or medical,” or (2) “A facility that provides non-critical, but essential governmental services AND is open to the general public.” *Id.* at 12.

26. Eligible “non-critical” services include “museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature.” 44 C.F.R. § 206.220(e)(7).

27. For “mixed-use facilities” “that provide both eligible and ineligible services,” eligibility “is dependent on the *primary* use of the facility,” which means “*more* than 50 percent of the physical space in the facility is dedicated” to eligible services. FEMA Policy Guide at 17. “In cases where the same physical space is used for both eligible and ineligible services, the primary use is the use for which more than 50 percent of the operating time is dedicated in that shared physical space.” *Id.*

28. “If FEMA determines that 50 percent or more of physical space is dedicated to ineligible services, the entire facility is ineligible. If the facility is eligible, FEMA prorates funding based on the percentage of physical space dedicated to eligible services.” *Id.* at 17.

29. For eligible facilities, the PA Program provides funds for both “Emergency Work” and “Permanent Work.” *Id.* at 20.

30. Emergency Work is “that which must be done immediately to: Save Lives; Protect public health and safety; Protect improved property; or Eliminate or lessen an immediate threat of additional damage.” *Id.* at 43. Emergency work is divided into two categories: (A) “debris removal” and (B) “emergency protective measures.” *Id.* Debris removal may also be authorized “to ensure economic recovery of the affected community.” *Id.* at 44.

31. Permanent work “is work required to restore a facility to its pre-disaster design (size and capacity) and function in accordance with applicable codes and standards.” *Id.* at 20.

32. To qualify for the PA Program, repair work must (1) “Be required as a result of the declared incident;” (2) “Be located within the designated area, with the exception of sheltering and evacuation activities;” and (3) “Be the legal responsibility of an eligible Applicant.” *Id.* at 20.

33. Eligible private nonprofit facilities that provide eligible non-critical services must apply for a Small Business Administration (“SBA”) disaster loan before seeking PA Program funds for Permanent Work. PA Program funds are available only for the portion of Permanent Work that an SBA loan does not cover, or if the SBA loan application is denied. However, nonprofits may seek and receive PA Program funds for Emergency Work regardless of whether they have applied for an SBA loan. *Id.* at 18.

34. Eligible facilities must ordinarily submit a Request for Public Assistance form to FEMA within 30 days of the President’s disaster proclamation. *Id.* at 131. But on September 1, 2017, the President extended the deadline by 60 days, to November 22, 2017.

35. Despite the extension, FEMA policy emphasizes the “necessity to collaborate with Applicants early in the PA Program implementation process,” preferably “as soon as possible” after a disaster declaration. *Id.* at 131.

III. FEMA's discrimination against houses of worship

36. A broad range of nonprofit facilities are eligible for the PA Program. FEMA's definition of eligible "community centers" is particularly expansive.

37. The types of eligible activities include:

- "art services" including "arts administration, art classes, [and] management of public arts festivals";
- "educational enrichment activities" such as "car care, ceramics, gardening, . . . , sewing, stamp and coin collecting";
- "social activities" such as "community board meetings, neighborhood barbeques, [and] various social functions of community groups"; and
- "performing arts centers with the primary purpose of producing, facilitating, or presenting live performances."

FEMA Policy Guide at 14.

38. Yet for houses of worship, FEMA's policy is "simple: No churches need apply."

Trinity Lutheran Church, 137 S. Ct. at 2024.

39. FEMA's policy provides that "[f]acilities established or primarily used for . . . religious . . . activities are not eligible." FEMA Policy Guide at 12. "Religious activities" is defined to include "worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large." *Id.* at 15.

40. By their very nature, houses of worship are established and primarily used for religious activities. The FEMA policies described in the previous paragraph thus amount to a categorical ban on disaster relief under the PA Program to active houses of worship. Indeed, they are a form of religious disqualification.

41. FEMA has repeatedly enforced its church exclusion policy against houses of worship. Its policy guides since at least 1998 have explicitly and consistently informed the public that houses of worship are ineligible to receive PA Program grants.

42. FEMA has also repeatedly upheld its policy against houses of worship that applied to FEMA for PA Program grants, received initial denials, and appealed the denials within FEMA's internal appeal process.

43. For example, although a Unitarian Universalist church in New Orleans that was destroyed by Hurricane Katrina had been used for "community center types of activities," FEMA found it ineligible because it believed that the building was "established for religious purposes, regardless of other secular activities held at the facility." See Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015) https://www.fema.gov/appeal/288379?appeal_page=analysis. FEMA determined the church's purpose by reference to the church's articles of incorporation, bylaws, IRS tax exemption letter, business filing with the Louisiana secretary of state, and insurance policies. *Id.* Because those documents listed it as a "church" that was meant to practice "the principles of the Unitarian Universalist faith," FEMA found the church ineligible: "Consistent with RRDP 9521.1, FEMA has found ineligible, as community centers, facilities established for religious purposes, regardless of other secular activities held at the facility." *Id.* FEMA accordingly disregarded the church's "claimed secular events"—such as potluck dinners, dance

programs, and a camera club—because it perceived them as secondary to “the church’s religious operations.” *Id.*

44. Similarly, although Mount Nebo Baptist Church provided “literacy programs, clothing distribution, food and nutrition programs, teen retreats, health and wellness programs, and operat[ed] as a wellness center,” FEMA denied aid to its Katrina-destroyed facilities because the church did not prove to FEMA’s satisfaction that “over fifty percent” of its activities were non-religious. Final Decision, Mount Nebo Bible Baptist Church (Mar. 13, 2014), https://www.fema.gov/appeal/283775?appeal_page=analysis. Moreover, FEMA stated that “the policy defines ‘established’ as ‘the purpose for which a facility was instituted,’ which FEMA determines by reference to an applicant’s “pre-disaster charter, bylaws, or other well-documented evidence to determine the facility’s purpose.” FEMA concluded that the church was established for a religious purpose because its articles of incorporation stated that its purpose was “to promote the teachings of the Gospel of Jesus Christ” and its incorporation letter from the secretary of state identified it as a “Non-Profit Religious Corporation.” *Id.*

45. FEMA has issued numerous similar rulings against houses of worship. The common thread in each is that “a church does not meet FEMA’s definition of an eligible PNP facility.” See Final Decision, Middleburgh Reformed Church (Nov. 12, 2013) <https://www.fema.gov/appeal/283579>; see also Final Decision, Philadelphia Ministries <https://www.fema.gov/appeal/286079> (Apr. 7, 2015) (denying aid to church because the “main feature” of the facility was a “church sanctuary” and “the facility

was established as a church,” despite the fact that about a third of the facility was “dedicated for homeless shelter services”); *see also* Final Decision, Chabad of the Space Coast (June 27, 2012), https://www.fema.gov/appeal/219590?appeal_page=letter (denying aid because synagogue “appeared to be geared to the development of the Jewish faith”); *accord* Final Decision, Victory Temple Worship Center (July 8, 2003), <https://www.fema.gov/appeal/218874> (ruling against church because its facilities were “not primarily used for eligible secular services”).

46. As houses of worship, each of the Churches was established for religious purposes. The Churches are therefore categorically banned by the FEMA church exclusion policy from receiving disaster relief under the PA Program based solely on their religious status.

47. As houses of worship, each of the Churches uses more than 50% of its physical space more than 50% of the time for religious activities. The Churches are therefore categorically banned by the FEMA church exclusion policy from receiving disaster relief under the PA Program based solely on their religious status.

48. But for being houses of worship—that is, places established for religious purposes in which people gather to engage in religious activities—all three of the Churches’ buildings would be eligible for FEMA disaster relief grants. All three Churches own their damaged buildings and are non-profits that have received I.R.C. § 501(c)(3) recognition from the IRS. All three are in counties—Harris, Liberty, and Aransas—that have been declared by the President to be a disaster area eligible for

federal funds. And all three open their buildings to the general public and provide services that, but for their religious character and purpose, are considered eligible community services by FEMA.

49. Were the Churches not religious, their prohibited “worship” services would instead be eligible as “social activities to pursue items of mutual interest”; the impermissible “religious instruction” during religious services would be permissible as “educational enrichment activity”; children’s church and women’s Bible study groups would qualify as a “service or activity intended to serve a specific group of individuals”; and meetings between the clergy and other church leaders would be a “community board meeting.”

50. On information and belief, if the Churches were to cease all religious activity in their houses of worship—*i.e.*, if they were to convert those houses of *worship* to houses of any other activity those buildings would become assistance-eligible.

51. The FEMA church exclusion policy thus discriminates against otherwise eligible entities simply because they are religious and “put[s them] to a choice between being a church and receiving a government benefit.” *Trinity Lutheran Church*, 137 S. Ct. at 2024.

52. This discrimination is particularly irrational in the disaster relief context. As FEMA and its officials have stated in the past, “[c]hurches . . . serve an essential role in disaster recovery” and, indeed, “the local church, the local synagogue, the local faith based community, the local mosque” are often among the “real first responders” to disasters. See <https://www.fema.gov/news-release/2011/07/08/sba-may-help->

[churches-nonprofits-associations](#) and https://www.fema.gov/media-library-data/1386343317410-9c998ad2f85ba25a3f93ca5fbce8df65/ThinkTank_July2013.txt

(2013 speech by then-FEMA Deputy Director Rich Serino).

53. That has been just as true in the aftermath of Hurricane Harvey. Houses of worship and religious organizations are playing a key role in emergency relief and recovery efforts. See, e.g., <http://abc13.com/weather/list-of-shelters-around-houston-area/2341032/> (listing numerous Houston-area houses of worship serving as emergency shelters). President Trump rightly lauded this service recently, noting how “[h]ouses of worship have organized efforts to clean up communities and repair damaged homes.” President Donald J. Trump, *A Proclamation: National Day of Prayer for the Victims of Hurricane Harvey* (Sept. 1, 2017).

54. Indeed, as it did in the aftermath of Hurricanes Rita and Ike, Hi-Way Tabernacle is currently serving as a staging center for FEMA and local government relief efforts. Despite suffering significant flooding and damage, the Tabernacle quickly got its facilities to a serviceable state and immediately began taking in evacuees. As of September 4, the church was sheltering between 60 and 70 people, with more expected. The Tabernacle’s gym has been transformed into a warehouse for the county, storing and distributing food, water, hygiene products, and clothing. Over 8,000 FEMA emergency meals have been distributed from the Tabernacle’s facilities. Relief workers are using the facilities to provide both medical services and haircuts to victims. The Tabernacle has been informed that governmental disaster relief helicopters may be landing on its property as well.

IV. The Churches' need for Emergency Work and Permanent Work

55. On August 25, 2017, the President declared that Hurricane Harvey had caused a major disaster in Texas. See FEMA Release No. HQ017-060, <https://www.fema.gov/news-release/2017/08/25/president-donald-j-trump-approves-major-disaster-declaration-texas>. And on August 27, 2017, the President amended the declaration to include the counties in which the Churches are located: Aransas, Harris, and Liberty Counties. Funding was made available in those counties “for Individual Assistance and assistance for debris removal and emergency protective measures” under the PA Program. See Amendment No. 1 to Notice of a Major Disaster Declaration, Internal Agency Docket No. FEMA-4332-DR, <https://www.fema.gov/disaster/notices/amendment-no-1-4>.

56. Hurricane Harvey severely damaged each of the Churches.

57. Rockport First Assembly of God was the first of the Churches to be hit by Hurricane Harvey. It sustained severe damage. The steeple was blown off. The roof was destroyed. All of the sanctuary's internal ceiling, lighting, and insulation were destroyed, and the sanctuary's sound system may also be a total loss. A bathroom ceiling in the church building caved in. Several trees were blown over. The church parsonage's roof suffered significant damage. The church van was destroyed, with all of its windows blown out.

58. Harvest Family Church was also extensively damaged, suffering flooding throughout its two adjacent buildings. At the flood's peak, the area and roads around the church were completely flooded and impassable, with between two to three feet

of water surrounding the church itself. Judging by the water marks and debris lines, the interior of Harvest Family's buildings experienced at least one foot of flooding throughout, with up to 20 inches in some locations, coating the inside of the church with mud and silt. Carpets, flooring, drywall, insulation, doors, furniture, and a variety of other materials were destroyed by the flooding. A large tree next to the church was felled by the flood, and other trees on the property were also damaged and may need to be removed.

59. Hi-Way Tabernacle also experienced extensive flooding, with at least three feet of standing water in the sanctuary and significant damage throughout its facilities. As with Harvest Family, the flood destroyed carpets, flooring, drywall, insulation, doors, furniture, and other materials.

60. Each of the Churches are surrounded with significant debris from the storm, including fallen trees and tree limbs.

61. Each of the Churches may be facing structural damage that requires emergency repair.

62. Without prompt emergency debris removal and repairs, people using the Churches' facilities and grounds could face an immediate threat to their health and safety as result of broken glass, sharp metal and wood, downed trees, falling limbs, mold and mildew, slick surfaces, and structures that are weakened by high winds and flooding.

63. Without prompt emergency debris removal and repairs, the Churches' facilities will suffer even more damage. For instance, the Churches need to repair the

significant moisture infiltration problem, which will otherwise cause mold and mildew issues. Also, the Churches need to repair their roofs and external structures to avoid additional water damage. Inspection and repair is also necessary to address structural weakness concerns.

64. To mitigate and repair the storm's damage, each of the Churches immediately needs Emergency Work.

65. Each has applied to FEMA for disaster aid under the PA Program. However, each remains categorically excluded from the PA Program by the FEMA church exclusion policy.

66. The Churches also need significant Permanent Work to restore their property to their pre-disaster design and function.

67. The Churches will need repairs such as new roofs, drywall, insulation, doors, paint, carpets, flooring, electrical wiring, and sound-systems.

68. The Churches also intend to apply for SBA loans to cover part of the cost of the Permanent Work that needs to be done. But it is possible that they will not be approved for an SBA loan, or that the cost of restoring their damaged facilities will exceed what an SBA loan will cover. Furthermore, the Churches cannot wait until after the SBA processes their loan applications before seeking relief from the FEMA church exclusion policy because the Churches need to make immediate plans for funding the full cost of restoring their damaged facilities.

69. Time is of the essence with respect to the subject matter of the Churches' claim. Mold will not wait for litigation process to spread through the Churches' buildings;

storm and flood debris will not stop rotting while the government processes their claims. Therefore the Churches will need relief as soon as possible in order not to suffer irreparable harm.

70. Moreover, FEMA cost-sharing for PA grants covering emergency protective measures will be reduced from 100% to 90% after *30 days* from the President's initial disaster declaration. See Amendment No. 4 to Notice of a Major Disaster Declaration, Internal Agency Docket No. FEMA-4332-DR, <https://www.fema.gov/disaster/notices/amendment-no-4>. Thus, delay in processing the Churches' applications harms their ability to obtain available relief.

71. The Churches also have a number of time-sensitive decisions they must make right now concerning their recovery efforts.

72. For instance, First Assembly suffered such severe damage that it believes that it will have to demolish up to 5,500 square feet of its facilities, including the portions holding the church fellowship hall, kitchen, and pastoral office space. First Assembly must immediately make a number of decisions, including how much of the church building must be demolished, how that demolition should take place, and how the repairs should be documented to ensure we can have a fair opportunity to obtain FEMA relief.

73. Hi-Way Tabernacle has also been informed that flash flooding irreparably damaged the foundations of its sanctuary, and so it should be demolished as soon as possible. The sanctuary has accordingly been closed off, and the church is unable to fully move its worship services into the church gym because that space is currently

being used to house evacuees, store disaster relief supplies, provide medical services, and serve as a base of operations for FEMA to accept relief applications from others in the community. Hi-Way Tabernacle must therefore make important decisions very soon that will directly concern both its church building and its ability to resume religious services.

CLAIM

**Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Discrimination on the basis of religion
(*Trinity Lutheran Church; Lukumi*)**

74. The Churches incorporate by reference all preceding paragraphs.

75. But for the FEMA church exclusion policy, the Churches are otherwise eligible to receive disaster assistance under the PA Program.

76. The FEMA church exclusion policy expressly discriminates against otherwise eligible recipients like the Churches by disqualifying them from a public benefit solely because of their religious status, beliefs, and the religious nature of their activities.

77. The FEMA church exclusion policy imposes a penalty on the Churches for engaging in religious exercise.

78. The FEMA church exclusion policy places a substantial burden on the Churches' free exercise of religion.

79. The FEMA church exclusion policy chills the Churches' religious exercise.

80. The FEMA church exclusion policy causes the Churches substantial financial harm by rendering them categorically ineligible for the PA Program because of their religious status and religious activities.

81.The FEMA church exclusion policy violates the Churches' rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

82.Neither the PA Program nor the FEMA church exclusion policy is neutral.

83.Neither the PA Program nor the FEMA church exclusion policy is generally applicable.

84.Further, the FEMA church exclusion policy cannot be justified by a compelling governmental interest, nor is it the least restrictive means of furthering such a governmental interest. Indeed, it does not further the governments' interests at all.

85.Absent injunctive and declaratory relief against the FEMA church exclusion policy, the Churches have been and will continue to be harmed.

PRAYER FOR RELIEF

Wherefore, the Churches respectfully request that the Court:

- a. Declare that the FEMA church exclusion policy and FEMA's enforcement of the church exclusion policy against the Churches violate the First Amendment of the United States Constitution;
- b. Issue a preliminary injunction prohibiting Defendants from enforcing the FEMA church exclusion policy against the Churches and other houses of worship
- c. Issue a permanent injunction prohibiting Defendants from enforcing the FEMA church exclusion policy against the Churches and other houses of worship;

- d. Award the Churches all applicable damages, including actual and nominal damages;
- e. Award the Churches the costs of this action and reasonable attorney's fees; and
- f. Award such other and further relief as it deems equitable and just.

JURY DEMAND

The Churches request a trial by jury on all issues so triable.

Respectfully submitted this 12th day of September, 2017.

s/ Eric Rassbach

Eric C. Rassbach

(Texas Bar. No. 24013375;

S.D. Tex. Bar No. 872454)

Attorney-in-charge

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Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662

**Plaintiffs' Emergency Renewed
Motion for Preliminary
Injunction**

Pursuant to Federal Rule of Civil Procedure 65 and for the reasons set forth in the accompanying memorandum of law and on the basis of the testimony in the accompanying declarations, Plaintiffs hereby move on an emergency basis for a preliminary injunction enjoining Defendants, their agents, officers, and employees, and others working in concert with them from any application or enforcement of:

- The policy on page 12 of FEMA's Public Assistance Program and Policy Guide that "Facilities established or primarily used for . . . religious . . . activities are not eligible" for Public Assistance Program funds;
- The policies on Page 15 of FEMA's Public Assistance Program and Policy Guide that "Religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and

not the community at large,” “Religious education,” and “Religious services” are ineligible services under the Public Assistance Program; and

- Any other policy or regulation that prohibits houses of worship from being considered for grants under 42 U.S.C. § 5172 because of their religious status or the religious nature of the activities that occur in their facilities.

In addition, Plaintiffs move the Court to order Defendants, their agents, officers, and employees, and others working in concert with them to treat Plaintiffs on the same terms as non-religious nonprofit organizations and to process Plaintiffs’ FEMA grant applications without regard to their religion or religious activity, and on the same basis as non-religious nonprofit organizations. *See* 44 CFR 206.221(e)(7).

Due to the time-sensitive nature of the demolition, repairs, and rehabilitation efforts, along with the upcoming reduction in FEMA cost-shares for Public Assistance grants for emergency protective measures, Plaintiffs respectfully request that the Court grant this motion by September 30, 2017.

Pursuant to Local Civil Rule 7.1D, Plaintiffs’ counsel conferred with counsel for Defendants and Defendants continue to oppose the motion.

Pursuant to Local Civil Rule 7.5A, Plaintiff hereby requests oral argument on this motion.

Respectfully submitted this 12th day of September, 2017.

s/ Eric Rassbach

Eric C. Rassbach

(Texas Bar. No. 24013375;

S.D. Tex. Bar No. 872454)

Attorney-in-charge

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on September 12, 2017, the foregoing document was served on all counsel of record by means of the Court's ECF system.

/s/ Eric C. Rassbach

Eric C. Rassbach

CERTIFICATE OF CONFERENCE

I certify that undersigned counsel conferred with counsel for Defendants Kari D'Ottavio regarding the foregoing motion and that Defendants oppose the motion.

/s/ Eric C. Rassbach

Eric C. Rassbach

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662
Jury Demanded

DECLARATION OF PASTOR PAUL CAPEHART

1. My name is Paul Capehart. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are either within my personal knowledge, are based upon teachings of my church with which I am familiar and which I believe to be true and correct, or based on publicly available information.

2. I am the pastor of Harvest Family Church (the “Church”) in Cypress, Texas, a town just outside Houston and within Harris County.

3. My wife, Brooke, is the Church’s worship leader. Both she and I graduated from Southwestern Assemblies of God University, and we have been involved in ministry for decades. We served as full-time staff at New Life Church in Cypress,

Texas, until 2011, when we were commissioned by New Life to start Harvest Family Church.

4. The Church is a member congregation of the Assemblies of God, which is the largest Pentecostal Christian denomination in the United States, with over 3 million adherents. The Assemblies of God has grown to become one of the most robust and diverse religious communities in the world, with over 67 million adherents and 365,000 churches in 255 countries, territories, and provinces. Much of its growth in the United States has been driven by young people and immigrants, with over half of U.S. adherents now under age 35 and almost half of them ethnic minorities. And most of the Assemblies of God's growth internationally has been in the Global South.

5. Harvest Family Church reflects this dynamic of the Assemblies of God—like our surrounding community, we are young, ethnically diverse, and growing.

6. The Church started its ministry in 2011, with our first meeting in our current facility on April 24, 2011. The Church started with just 20-30 members and has grown to over 200 who regularly attend Sunday worship services.

7. We offer a place where people in Cypress and the surrounding area can connect with each other and grow in their relationship with God. We believe God loves everyone, that Jesus came, died, and rose again to offer salvation to everyone, and so we open our doors to everyone.

8. The Church's staff, leadership, ministry teams, and congregation come from a variety of walks of life, ethnic backgrounds, and economic brackets. We are, very intentionally, a house of worship for all nations.

9. The Church invests in its surrounding community. In addition to inviting everyone to participate in our events and services, we regularly plan and host seasonal community events and outreach to those around us.

10. On August 25, 2017, Hurricane Harvey made landfall in Texas as a Category 4 hurricane and started pummeling our community.

11. According to the reports I have seen:

- a. It was the strongest hurricane to make landfall in the United States since more than a decade.
- b. Hurricane Harvey's rain and storm surge dumped trillions of gallons of water on Texas and caused unprecedented flooding. One report I have seen said that the total rainfall from Harvey was over 27 trillion gallons of rain, which is reportedly enough to fill the Houston Astrodome over 85,000 times.
- c. Over 100,000 homes were damaged or destroyed by Hurricane Harvey.
- d. Thousands of people were rescued by boats, helicopters, canoes, buses, dump trucks, and even jet skis.
- e. Tens of thousands were forced to leave their homes and find refuge in emergency shelters.
- f. Current estimates put the current death toll at over 40 victims.
- g. Current estimates are that this is the most costly natural disaster in U.S. history—causing as much damage as Hurricane Katrina and Superstorm Sandy combined.

12. Hurricane Harvey led to flooding that has lasted for days. More flooding is still possible due to continued intermittent rain, saturated ground, river flows, and nearby reservoirs at or near peak capacity.

13. Our Church buildings were devastated by Hurricane Harvey.

14. At the flooding's peak, the area and roads around the Church were completely flooded and impassable. Exhibit 1 attached to this declaration contains true and correct pictures I took on August 28 of the Church's grounds and premises. Exhibit 1 accurately depicts that the Church's grounds and premises were completely underwater.

15. I estimate that the water was at least 2 to 3 feet deep in the Church's parking lot.

16. Inside the Church building, measuring by the debris lines and water marks on the walls, we had a minimum of 1 foot of water throughout and up to 20 inches in some locations.

17. A large tree next to the Church building was felled by the flooding.

18. Due to the flooding and dangerous conditions, we cancelled our on-site worship service for Sunday, August 27, and urged the families of our Church to remain home and look out for their safety and the safety of their neighbors. We still held a live-streamed worship service on the Church's Facebook site.

19. We immediately started work on repairing the Church's facilities, which consist of two side-by-side buildings. One is a single-story brick building that is

almost 40 years old, and the other is a single-story steel building that is almost 30 years old.

20. Our congregation has been “getting after it” to preserve and repair our Church building—we have been tearing out water-logged carpets, extracting puddles, removing soaked drywall and insulation, taking out destroyed furniture and materials, taking down sodden doors, and bringing in fans and dehumidifiers. The Church’s men, women, and children have showed up, put on masks, gloves, and rubber boots, and gotten to work. Exhibit 2 attached to this declaration is a true and correct depiction of the interior of the Church.

21. The damage to the Church is extensive and there is a huge amount of debris in and around the Church facility that requires immediate removal to prevent further damage to the Church and health and safety risks to its members.

22. Some emergency repairs may be necessary to address structural damage to the Church’s facilities.

23. Further, water removal will be necessary to prevent property damage and health and safety risks caused by sitting water, mildew, and mold.

24. The downed tree must be removed. Other trees and tree limbs on the Church’s property may need to be removed for safety reasons.

25. Unless these emergency repairs are performed promptly, the Churches’ facilities could suffer even more damage.

26. My initial estimates are that emergency repairs and debris removal alone will cost tens of thousands of dollars, and maybe over a hundred thousand dollars.

27. The long-term repairs to the infrastructure of the Church's facilities will cost much more. I currently estimate that it will be at least \$300,000.

28. On August 25, 2017, President Trump issued a declaration that Hurricane Harvey had caused a major disaster in Texas. *See* FEMA Release No. HQ017-060, <https://www.fema.gov/news-release/2017/08/25/president-donald-j-trump-approves-major-disaster-declaration-texas>. On August 27, 2017, the President amended the notice of a major disaster declaration to include Harris County, where the Church is located. *See* <https://www.fema.gov/disaster/notices/amendment-no-1-4>.

29. It is my understanding that these declarations made federal funds available to disaster victims under the Public Assistance Program ("PA Program") administered by the Federal Emergency Management Agency ("FEMA"). These grants help with debris removal and emergency protective measures.

30. It is my understanding that nonprofits which meet certain criteria can apply for grants under FEMA's PA Program.

31. It is my understanding that the Church fits all of those criteria but one:

- a. The Church owns the facility that we meet in, which is located at 14950 Cypress N. Houston, Cypress, TX 77429.
- b. The Church is within a location, Harris County, identified in the President's disaster proclamation.
- c. The Internal Revenue Service has issued a determination letter recognizing Harvest Family Church's I.R.C. Section 501(c)(3) nonprofit status.

- d. The Church is open to the general public and does not charge membership or access fees of any type. While church members choose to tithe, their tithes are not required to access the Church's facilities.
- e. The Church provides important services to the community. In addition to using both of our buildings to host community activities and training events from our religious perspective, we also use the buildings to perform religious teaching, training, singing, artistic endeavors, social events, and outreach to youth, seniors, and families. All of these services are provided from our religious perspective and for a religious purpose.

32. It is my understanding that other nonprofits that are eligible for FEMA's disaster relief grants include community centers that provide services which are similar to those provided by the Church, including community enrichment activities and general social welfare activities.

33. FEMA specifically allows disaster relief grants for community centers that provide activities like art classes, sewing and stamp-collecting clubs, neighborhood barbeques, and "various social functions." Other eligible private nonprofit recipients include zoos and museums.

34. However, it is my understanding that FEMA policy categorically discriminates against religious organizations. Specifically, FEMA policy bars grants from going to otherwise eligible recipients if more than 50% of the use of a disaster-damaged facility is for religious purposes.

35. It is my understanding that this exclusionary FEMA policy is not required by either statute or federal regulation.

36. The facilities for which the Church needs immediate disaster assistance are used primarily—i.e., over 50%—for religious purposes.

37. FEMA’s eligibility guide includes a table categorically declaring that “community center services” that are “religious activities, such as worship . . . religious instruction,” or “religious education” are “ineligible.”

Table 3. PNP Ineligible Services

PNP INELIGIBLE SERVICES	
<p>COMMUNITY CENTER SERVICES</p> <ul style="list-style-type: none"> • Religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large • Training individuals to pursue the same activities as full-time paying careers (for example, vocational, academic, or professional training) • Meetings or activities for only a brief period, or at irregular intervals 	<p>OTHER COMMUNITY SERVICES</p> <ul style="list-style-type: none"> • Advocacy or lobbying groups not directly providing health services • Cemeteries • Conferences • Day care services not included in previous table of eligible services • Irrigation solely for agricultural purposes⁶⁴ • Job counseling • Property owner associations with facilities such as roads and recreational facilities (except those facilities that could be classified as utilities or emergency facilities) • Public housing, other than low-income housing • Recreation • Religious services • Parking not in direct support of eligible facility
<p>EDUCATION</p> <ul style="list-style-type: none"> • Athletic, vocational, academic training, or similar activities • Political education • Religious education⁶⁵ 	

See Public Assistance Program and Policy Guide at 15, FP 104-009-02 (April 2017)

<https://www.fema.gov/media-library-data/1496435662672->

[d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf)

38. I am aware that FEMA has repeatedly denied grants to other houses of worship because the use of their disaster-damaged facilities or materials was primarily religious. Further, it is my understanding that these denials came after

extended appeals processes and were not finally decided until months or years after the disaster occurred.

39. Thus, it is my understanding that FEMA's policy categorically bars the Church from having equal access to emergency relief grants because the Church's use of its facilities is primarily religious. It is my understanding that, but for our religious use of the facilities, the Church would be eligible to apply for the grants.

40. It is further my understanding that, to be eligible to receive FEMA grants, nonprofits must apply within 30 days of the presidential disaster declaration affecting their community.

41. Thus, it was my understanding that the Church must apply for a FEMA grant by September 26, 2017, in order to be considered.

42. I have since been informed that FEMA has extended the deadline for applications by 60 days to November 22, 2017.

43. The Church has a number of decisions that it must make right now, including how we should perform repairs and how the repairs should be documented to ensure we can have a fair opportunity to obtain FEMA relief.

44. Further, it is my understanding that FEMA says that it is a necessity for FEMA to review applications early in the PA Program implementation process and as soon as possible after a disaster.

45. Accordingly, the Church has submitted an application for a PA grant as of September 12, 2017. Exhibit 3 contains a true and correct copy of the executed FEMA facility questionnaire form.

46. To be able to make plans for its recovery efforts, and to ensure that it has a fair opportunity to maximize assistance from FEMA, the Church needs FEMA to immediately accept and process its application without regard to religion.

47. My Church is facing a disaster *right now* and needs to make long-term decisions *right now* about how we will recover from Hurricane Harvey. We cannot afford to wait months or years to find out that FEMA will follow its policy to deny us equal access to and equal consideration for emergency disaster relief grants.

48. In my view, FEMA's policy discriminates on the basis of the religious status of the Church's motivation and purpose for its services to the community. I think that it is discriminatory and demeaning for the government to punish the Church because of our religious status.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2017.

/s/ Paul Capehart

Paul Capehart

Exhibit 1







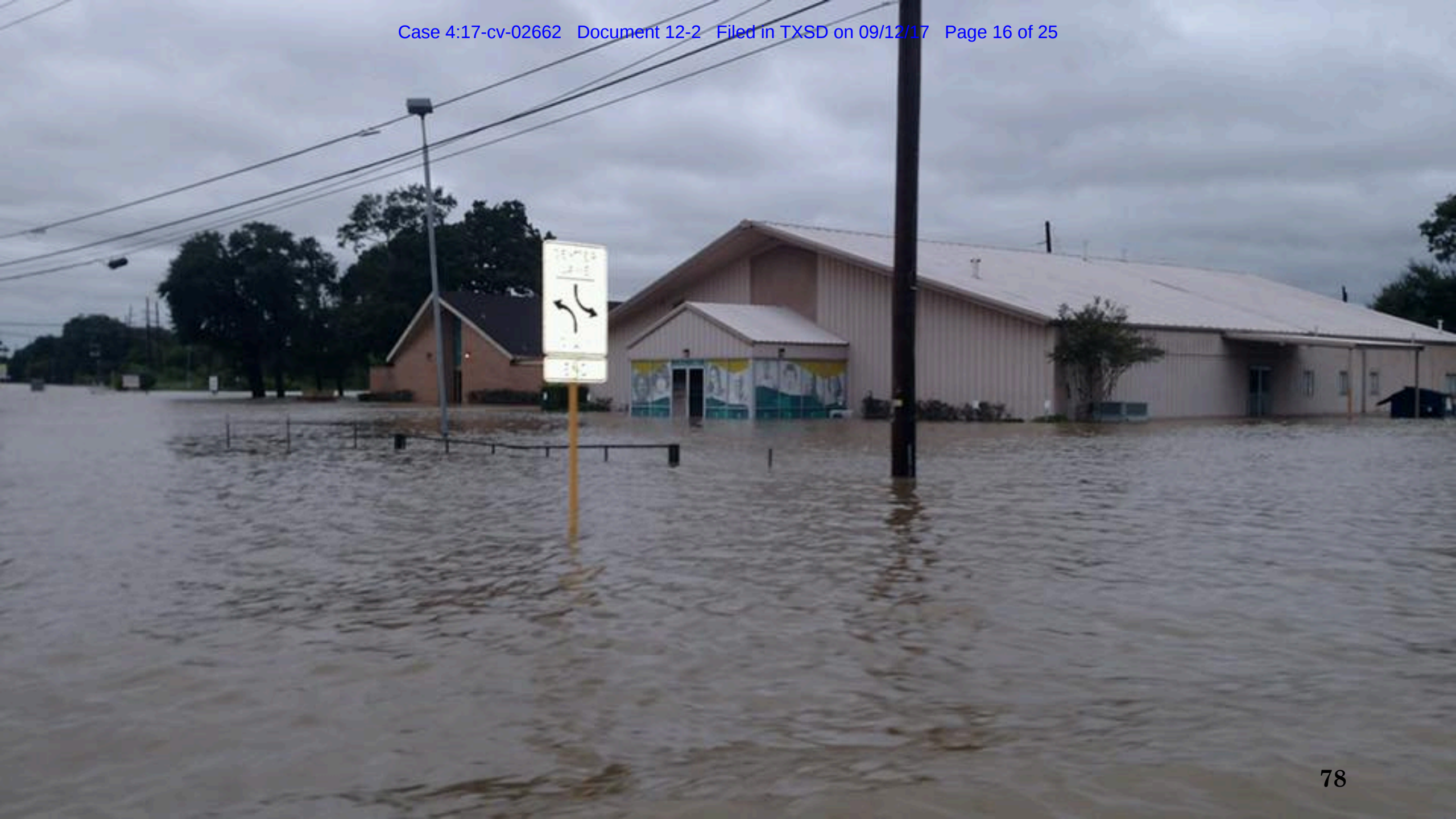




Exhibit 2











Exhibit 3

DEPARTMENT OF HOMELAND SECURITY
FEDERAL EMERGENCY MANAGEMENT AGENCY
PNP FACILITY QUESTIONNAIRE

O.M.B. NO. 1660-0017
Expires December 31, 2011

PAPERWORK BURDEN DISCLOSURE NOTICE

Public reporting burden for this form is estimated to average 30 minutes per response. The burden estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, and completing, reviewing, and submitting the form. You are not required to respond to this collection of information unless it displays a valid OMB control number. Send comments regarding the accuracy of the burden estimate and any suggestions for reducing this burden to: Information Collections Management, Department of Homeland Security, Federal Emergency Management Agency, 500 C Street, SW, Washington, DC, 20472, Paperwork Reduction Project (1660-0017). **Please do not send your completed survey to the above address.**

FEMA and State personnel will use this questionnaire to determine the eligibility of specific facilities of an approved Private Non-Profit (PNP) organization (See 44 CFR 206.221). Owners of critical facilities (i.e., power, water (including providing by an irrigation organization or facility, if it is not provided solely for irrigation purposes), sewer, wastewater treatment, communications and emergency medical care) can apply directly to FEMA for assistance for emergency work (debris removal and emergency protective measures) and permanent work (repair, restore or replace a damaged facility). Owners of non-critical facilities can apply directly to FEMA for assistance for emergency work, but must first apply to the U. S. Small Business Administration (SBA) for assistance for permanent work. If the owner of a non-critical facility does not qualify for an SBA loan or the cost to repair the damaged facility exceeds the SBA loan amount, the owner may apply to FEMA for assistance.

1. Name of PNP Organization Harvest Family Church
2. Name of the damaged facility and location Harvest Family Church
14950 Cypress N. Houston
Cypress, TX 77429
3. What was the primary purpose of the damaged facility The damaged facilities were established and primarily used for religious purposes
4. Is the facility a critical facility as described above? ☐ Yes ☒ No
5. Who may use the facility General public
6. What fee, if any, is charged for the use of the facility None
7. Was the facility in use at the time of the disaster? ☒ Yes ☐ No
8. Did the facility sustain damage as a direct result of the disaster? ☒ Yes ☐ No
9. What type of assistance is being requested? Emergency work
10. Does the PNP organization own the facility? ☒ Yes ☐ No
11. If "Yes" obtain proof of ownership; check here if attached. ☒
12. Does the PNP organization have the legal responsibility to repair the facility? ☒ Yes ☐ No
13. If "Yes", provide proof of legal responsibility; check here if attached. ☒ Yes ☐ No
14. Is the facility insured? ☒ Yes ☐ No
15. If "Yes", obtain a copy of the insurance policy; check here if attached. ☒

Additional information or comments:

Harvest Family Church uses its facilities primarily for religious activities, such as religious singing and praise; religious teaching, education, and instruction; and sharing our faith with the community.

CONTACT PERSON
Pastor Paul Capehart

DATE
Sep 12, 2017

Exhibit B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662
Jury Demanded

DECLARATION OF PASTOR CHARLES STOKER

1. My name is Pastor Charles Stoker. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are either within my personal knowledge, are based upon teachings of my church with which I am familiar and which I believe to be true and correct.

2. I am the pastor of Hi-Way Tabernacle (the “Tabernacle”) in Cleveland, Texas, a town just outside Houston and within Liberty County.

3. The Tabernacle is a member congregation of the Assemblies of God, which is the largest Pentecostal Christian denomination in the United States, with over 3 million adherents.

4. After several years of ministry, the Tabernacle began supplementing its sanctuary space by using the church gym to hold religious classes, especially for youth, on Sunday mornings. The Tabernacle has been holding classes in the gym since 2004 and can hold up to 350 people comfortably for Sunday worship services.

5. The Tabernacle invests in its surrounding community in a variety of ways. For instance, we teach English classes to native Spanish speakers, using the Bible as a text. The purpose of our classes is to serve people and to bring them to faith in Jesus.

6. The Tabernacle has also been a consistent provider of disaster relief for our area, in part because it is located immediately across the street from the Tarkington Fire Department. We provide these services to the community for a religious purpose and from our religious perspective.

7. For instance, after both Hurricane Rita and Hurricane Ike, the Tabernacle was a staging ground and distribution center for the Federal Emergency Management Agency (“FEMA”) and local county disaster relief efforts.

8. The Tabernacle has hosted dozens of 18-wheeler trucks loaded with MREs, and has distributed those resources—along with many others—to the community.

9. During Hurricane Ike, federal military-grade emergency vehicles known as HMMWVs were parked in the Tabernacle’s parking lot and permanently damaged the pavement.

10. The Tabernacle is again serving as a FEMA distribution center in the wake of Hurricane Harvey.

11. Despite having about 3 feet of standing water in our own sanctuary immediately following the flooding as well as water covering the floor of the church gym, the Tabernacle's members quickly drained the water in the gym so that we could provide a refuge for evacuees, start feeding both evacuees and relief workers, and continue our work as a staging ground for disaster relief efforts.

12. The Tabernacle is currently providing shelter to about 60-75 people whose homes were destroyed. The evacuees, including over ten families, are currently residing on the second floor of the Tabernacle's gym, with their mail being delivered to them there by the U.S. Post Office and their children being picked up by school buses at the Tabernacle. I informed the evacuees recently that the Tabernacle both plans to continue to provide them shelter and that its members will help them rebuild their homes.

13. Emergency relief workers are using the Tabernacle's space to provide medical services to victims. A barber shop has also been set up.

14. On about September 10, FEMA staff started using the Tabernacle to accept and process applications for FEMA aid.

15. The first floor of the Tabernacle's gym has been transformed into a warehouse for the county, storing and distributing food, water, hygiene products, clothing, fans, wet-vacuums, and even chainsaws. We have distributed several thousand MREs from FEMA.

16. The Tabernacle's kitchen is currently providing three meals a day to the evacuees. It is also providing meals for relief workers that are using the Tabernacle's facilities, including FEMA employees.

17. The federal government has parked its vehicles on the Tabernacle's property. I have been informed by the emergency relief workers that relief helicopters will likely be landing on the Tabernacle's property.

18. The Tabernacle's buildings have been significantly damaged by Hurricane Harvey.

19. At the flooding's peak, the area and roads around the Tabernacle were flooded.

20. Inside the Tabernacle's sanctuary, we had about 3 feet of standing water in the sanctuary. Exhibit 1 contains true and correct pictures of the inside of the sanctuary and accurately depicts how the sanctuary appeared.

21. As Tabernacle members have been assisting with disaster relief efforts for the community, we've also immediately started work on repairing the Tabernacle's facilities.

22. Our congregation has been tearing out damaged carpets, drywall, insulation, electrical gear, fabric, ceiling tiles, and furniture. Exhibit 2 contains a true and correct picture of some of the torn-out materials.

23. The damage to the Tabernacle is extensive and there is a huge amount of debris in and around the Tabernacle facility that requires immediate removal to prevent further damage to the Tabernacle and health and safety risks to its members.

24. The church sanctuary has recently been inspected by contractors and engineers, who informed me that the sanctuary is unsafe to repair and should be demolished as soon as possible because the foundation was compromised by flash flooding. The sanctuary has accordingly been entirely closed off.

25. Some emergency repairs may be necessary to address structural damage to the Tabernacle's facilities.

26. Further, water removal will be necessary to prevent property damage and health and safety risks caused by sitting water, mildew, and mold.

27. Unless these emergency repairs are performed promptly, the Tabernacle's facilities could suffer even more damage.

28. My initial estimates are that emergency repairs and debris removal alone will cost tens of thousands of dollars.

29. The long-term repairs to the infrastructure of the Tabernacle's facilities will also be expensive. I currently estimate that repairs will be over \$100,000.

30. Because the Tabernacle's sanctuary is now unsafe to use and its gym is being used for disaster relief efforts, we have had to cut back significantly on holding religious services. There is simply no room left. Thus, instead of holding several services throughout the week last week, we held just one one-hour worship service on September 10. We made space for the service by moving around the disaster relief supplies on the first floor of the gym. We then moved the supplies back and resumed our relief efforts.

31. On August 25, 2017, President Trump issued a declaration that Hurricane Harvey had caused a major disaster in Texas. *See* FEMA Release No. HQ017-060, <https://www.fema.gov/news-release/2017/08/25/president-donald-j-trump-approves-major-disaster-declaration-texas>. On August 27, 2017, the President amended the notice of a major disaster declaration to include Liberty County, where the Tabernacle is located. *See* <https://www.fema.gov/disaster/notices/amendment-no-1-4>.

32. It is my understanding that these declarations made federal funds available to disaster victims under the Public Assistance Program (“PA Program”) administered by the Federal Emergency Management Agency (“FEMA”). These grants help with debris removal and emergency protective measures.

33. It is my understanding that nonprofits which meet certain criteria can apply for grants under FEMA’s PA Program.

34. It is my understanding that the Tabernacle fits all of those criteria but one:

- a. The Tabernacle owns the facility that we meet in, which is located at 108 County Road 2250, Cleveland, TX 77327.
- b. The Tabernacle is within a location, Liberty County, identified in the President’s disaster proclamation.
- c. The Internal Revenue Service has issued a determination letter recognizing the Tabernacle’s I.R.C. Section 501(c)(3) nonprofit status.
- d. The Tabernacle is open to the general public and does not charge membership or access fees of any type. While church members may

choose to tithe, their tithes are not required to access the Tabernacle's facilities.

e. The Tabernacle provides important services to the community.

35. It is my understanding that other nonprofits that are eligible for FEMA's disaster relief grants include community centers that provide services which are similar to those provided by the Tabernacle, including community enrichment activities and general social welfare activities.

36. FEMA specifically allows disaster relief grants for community centers that provide activities like art classes, sewing and stamp-collecting clubs, neighborhood barbeques, and "various social functions." Other eligible private nonprofit recipients include zoos and museums.

37. However, it is my understanding that FEMA policy categorically discriminates against religious organizations. Specifically, FEMA policy bars grants from going to otherwise eligible recipients if more than 50% of the use of a disaster-damaged facility is for religious purposes.

38. It is my understanding that this exclusionary FEMA policy is not required by either statute or federal regulation.

39. The facilities for which the Tabernacle needs immediate disaster assistance are used primarily—i.e., over 50%—for religious purposes. Our facilities are primarily used to perform religious teaching, training, singing, artistic endeavors, social events, and outreach to youth, seniors, singles, and families. All of these services are provided from our religious perspective and for a religious purpose.

40. FEMA's eligibility guide includes a table categorically declaring that "community center services" that are "religious activities, such as worship . . . religious instruction," or "religious education" are "ineligible."

Table 3. PNP Ineligible Services

PNP INELIGIBLE SERVICES	
<p>COMMUNITY CENTER SERVICES</p> <ul style="list-style-type: none"> • Religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large • Training individuals to pursue the same activities as full-time paying careers (for example, vocational, academic, or professional training) • Meetings or activities for only a brief period, or at irregular intervals 	<p>OTHER COMMUNITY SERVICES</p> <ul style="list-style-type: none"> • Advocacy or lobbying groups not directly providing health services • Cemeteries • Conferences • Day care services not included in previous table of eligible services • Irrigation solely for agricultural purposes⁶⁴ • Job counseling • Property owner associations with facilities such as roads and recreational facilities (except those facilities that could be classified as utilities or emergency facilities) • Public housing, other than low-income housing • Recreation • Religious services • Parking not in direct support of eligible facility
<p>EDUCATION</p> <ul style="list-style-type: none"> • Athletic, vocational, academic training, or similar activities • Political education • Religious education⁶⁵ 	

See Public Assistance Program and Policy Guide at 15, FP 104-009-02 (April 2017)

<https://www.fema.gov/media-library-data/1496435662672->

[d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf)

41. I am aware that FEMA has repeatedly denied grants to other houses of worship because the use of their disaster-damaged facilities or materials was primarily religious. Further, it is my understanding that these denials came after extended appeals processes and were not finally decided until months or years after the disaster occurred.

42. Despite serving three times as a FEMA staging center, the Tabernacle has never received any disaster relief funds or even been encouraged by the FEMA officials using and operating within our damaged facilities to apply for them.

43. Thus, it is my understanding that FEMA's policy prevents the Tabernacle from having equal access to emergency relief grants because the Tabernacle's use of its facilities is primarily religious. It is my understanding that, but for our religious use of the facilities, the Tabernacle would be eligible to apply for the grants.

44. It is further my understanding that, to be eligible to receive FEMA grants, nonprofits must apply within 30 days of the presidential disaster declaration affecting their community.

45. Thus, it was my understanding that the Tabernacle must apply for a FEMA grant by September 26, 2017, in order to be considered.

46. I have since been informed that FEMA has extended the deadline for applications by 60 days to November 22, 2017.

47. The Tabernacle has a number of decisions that it must make right now, including how much of the church building must be demolished due to the severe damage sustained by the facilities, how that demolition should take place, and how the repairs should be documented to ensure we can have a fair opportunity to obtain FEMA relief.

48. Further, the Tabernacle is currently having to drastically curtail its worship services due to the irreparable damage to its sanctuary and the use of its gym for evacuees, disaster relief supplies, and other relief services.

49. Moreover, it is my understanding that FEMA says that it is a necessity for FEMA to review applications early in the PA Program implementation process and as soon as possible after a disaster.

50. Accordingly, the Tabernacle has submitted an application for a PA grant as of September 12, 2017. Exhibit 3 contains a true and correct copy of the executed FEMA facility questionnaire form.

51. To be able to make plans for its recovery efforts, and to ensure that it has a fair opportunity to maximize assistance from FEMA, the Tabernacle needs FEMA to immediately accept and process its application without regard to religion.

52. The Tabernacle is facing a disaster right now and needs to make long-term decisions right now about how we will recover from Hurricane Harvey. We cannot afford to wait months or years to find out that FEMA will follow its policy to deny us equal access to and equal consideration for emergency disaster relief grants.

53. In my view, FEMA's policy discriminates on the basis of the religious status of the Tabernacle's motivation and purpose for its services to the community. I think that it is discriminatory and demeaning for the government to punish the Tabernacle because of our religious status.

54. To be clear, the Tabernacle is here to help people. If our own government can help us do that, that'd be great. And if not, we're going to keep doing it. But I think that it's wrong that our government treats us unfairly just because we're Christians.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2017.

/s/ Charles Stoker
Charles Stoker

Exhibit 1





Exhibit 2



Exhibit 3

DEPARTMENT OF HOMELAND SECURITY
FEDERAL EMERGENCY MANAGEMENT AGENCY
PNP FACILITY QUESTIONNAIRE

O.M.B. NO. 1660-0017
Expires December 31, 2011

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1. Name of PNP Organization	Hi-Way Tabernacle	
2. Name of the damaged facility and location	Hi-Way Tabernacle 108 County Road 2250 Cleveland, TX 77327	
3. What was the primary purpose of the damaged facility	The damaged facilities were established and primarily used for religious purposes	
4. Is the facility a critical facility as described above?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
5. Who may use the facility	General public	
6. What fee, if any, is charged for the use of the facility	None	
7. Was the facility in use at the time of the disaster?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
8. Did the facility sustain damage as a direct result of the disaster?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
9. What type of assistance is being requested?	Emergency work	
10. Does the PNP organization own the facility?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
11. If "Yes" obtain proof of ownership; check here if attached.	<input checked="" type="checkbox"/>	
12. Does the PNP organization have the legal responsibility to repair the facility?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
13. If "Yes", provide proof of legal responsibility; check here if attached.	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
14. Is the facility insured?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
15. If "Yes", obtain a copy of the insurance policy; check here if attached.	<input checked="" type="checkbox"/>	

Additional information or comments:

Hi-Way Tabernacle uses its facilities primarily for religious activities, such as religious singing and praise; religious teaching, education, and instruction; and sharing our faith with the community. One of the ways we serve the community is through disaster relief efforts, such as by helping provide services to evacuees after major disasters.

CONTACT PERSON
Pastor Charles Stoker

DATE
Sep 12, 2017

Exhibit C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662
Jury Demanded

DECLARATION OF PASTOR BRUCE FRAZIER

1. My name is Pastor Bruce Frazier. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are either within my personal knowledge, are based upon teachings of my church with which I am familiar and which I believe to be true and correct, or based on publicly available information.

2. I am the pastor of Rockport First Assembly of God ("First Assembly"). First Assembly is a member congregation of the Assemblies of God.

3. In the last several years, First Assembly has grown from a congregation of 25 people to 125 people who attend Sunday worship services.

4. First Assembly regularly serves its community in a variety of ways. For instance, this summer alone, First Assembly held “Freedom Feast” to celebrate Independence Day, hosted a vacation Bible school camp for children in the community, coordinated and provided food for family beach nights, supported a community walk-a-ton, and—most recently—held a back-to-school event with games, BMX attractions, and distributed free food and school supplies. All of these events are conducted from our religious perspective and for a religious purpose. Most of them were held at First Assembly’s church building.

5. First Assembly is located in Rockport, Texas.

6. On August 26, 2017, Hurricane Harvey made landfall near Rockport as a Category 4 hurricane, with winds of up to 130 miles per hour.

7. First Assembly’s buildings were significantly damaged by the hurricane.

8. The driving wind and rain destroyed First Assembly’s roof. Exhibit 1 contains true and correct pictures of the damage to First Assembly’s roof and accurately depicts a portion of the damage.

9. The wind and rain also blew off the church’s steeple. Exhibit 2 contains a true and correct picture of the steeple on the ground beside the church building and accurately depicts the steeple’s current condition.

10. Because of the damage to the roof, all of the sanctuary’s interior ceiling, lighting, and insulation were irreparably damaged. The church’s sound system may have also been destroyed. The bathroom ceiling in the church caved in.

11. The damage is so extensive that almost every part of the building but the sanctuary is irreparable. The church fellowship hall (where we held religious events, meals, and meetings), the church kitchen, and the church's offices were all extensively damaged. When the wind destroyed the roof over those areas, the resulting water damage from the rain destroyed everything from the ceiling to the floors.

12. We believe that we will have to demolish about 5,500 square feet of space due to the wind and water damage. We have already begun some of the emergency demolition. Exhibit 3 contains true and correct pictures of a portion of the demolition and accurately depicts how it appeared.

13. The church parsonage's roof sustained severe damage.

14. The church van was destroyed, with all of the windows blown out. Exhibit 4 contains a true and accurate picture of the van and accurately depicts damage that the van sustained.

15. The wind and rain also uprooted and destroyed several trees on First Assembly's property. Exhibit 5 contains true and correct pictures of the uprooted trees and accurately depicts how they appeared.

16. First Assembly has started work on repairing the church's buildings.

17. Our congregation has been working to fix the roof, and tearing out damaged drywall, insulation, electrical gear, and ceiling tiles. Exhibit 1 contains true and correct pictures of some of the repair work and accurately depicts that work.

18. I would provide more pictures of the damage, but electricity and cell phone coverage have continued to be intermittent in Rockport, limiting my ability to provide pictures to this Court.

19. The damage to First Assembly is extensive and there is a huge amount of debris in and around the church facility that requires immediate removal to prevent further damage to the facility and health and safety risks to church's members. A substantial portion of the church's building will have to be demolished. Some emergency repairs may be necessary to fix structural damage to the buildings.

20. Further, water removal will be necessary to prevent property damage and health and safety risks caused by sitting water, mildew, and mold. Parts of the building are already beginning to mildew.

21. Unless these emergency repairs are performed promptly, First Assembly's facilities could suffer even more damage.

22. I estimate that emergency repairs and debris removal alone will cost tens of thousands of dollars, and perhaps over a hundred thousand dollars. Performing the emergency re-roofing work on the church's main building, which is necessary to avoid further damage to the structure, will alone cost approximately \$40,000.

23. The long-term repairs to the infrastructure of First Assembly's facilities will cost much more.

24. On August 25, 2017, President Trump issued a declaration that Hurricane Harvey had caused a major disaster in Texas. *See* FEMA Release No. HQ017-060, <https://www.fema.gov/news-release/2017/08/25/president-donald-j-trump-approves->

[major-disaster-declaration-texas](#). On August 27, 2017, the President amended the notice of a major disaster declaration to include Aransas County, where the Tabernacle is located. See <https://www.fema.gov/disaster/notices/amendment-no-1-4>.

25. It is my understanding that these declarations made federal funds available to disaster victims under the Public Assistance Program (“PA Program”) administered by the Federal Emergency Management Agency (“FEMA”). These grants help with debris removal and emergency protective measures.

26. It is my understanding that nonprofits which meet certain criteria can apply for grants under FEMA’s PA Program.

27. It is my understanding that First Assembly fits all of those criteria but one:

- a. First Assembly owns the facility that we meet in, which is located at 813 E. Laurel St., Rockport, TX 78382.
- b. First Assembly is within a location, Aransas County, identified in the President’s disaster proclamation.
- c. The Internal Revenue Service has issued a determination letter recognizing First Assembly’s I.R.C. Section 501(c)(3) nonprofit status.
- d. First Assembly is open to the general public and does not charge membership or access fees of any type. While church members may choose to tithe, that is not required to access First Assembly’s facilities.
- e. First Assembly provides important services to the community.

28. It is my understanding that other nonprofits that are eligible for FEMA’s disaster relief grants include community centers that provide services which are

similar to those provided by First Assembly, including community enrichment activities and general social welfare activities.

29. FEMA specifically allows disaster relief grants for community centers that provide activities like art classes, sewing and stamp-collecting clubs, neighborhood barbeques, and “various social functions.” Other eligible private nonprofit recipients include zoos and museums.

30. However, it is my understanding that FEMA policy categorically discriminates against religious organizations. Specifically, FEMA policy bars grants from going to otherwise eligible recipients if more than 50% of the use of a disaster-damaged facility is for religious purposes.

31. It is my understanding that this exclusionary FEMA policy is not required by either statute or federal regulation.

32. The facilities for which First Assembly needs immediate disaster assistance are used primarily—i.e., over 50%—for religious purposes. Our facilities are primarily used to perform religious teaching, training, singing, artistic endeavors, social events, and outreach to youth, seniors, singles, and families. All of these services are provided from our religious perspective and for a religious purpose.

33. FEMA’s eligibility guide includes a table categorically declaring that facilities which are primarily used for “religious activities, such as worship . . . religious instruction,” or “religious education” are “ineligible.”

Table 3. PNP Ineligible Services

PNP INELIGIBLE SERVICES	
<p>COMMUNITY CENTER SERVICES</p> <ul style="list-style-type: none"> • Religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large • Training individuals to pursue the same activities as full-time paying careers (for example, vocational, academic, or professional training) • Meetings or activities for only a brief period, or at irregular intervals 	<p>OTHER COMMUNITY SERVICES</p> <ul style="list-style-type: none"> • Advocacy or lobbying groups not directly providing health services • Cemeteries • Conferences • Day care services not included in previous table of eligible services • Irrigation solely for agricultural purposes⁶⁴ • Job counseling • Property owner associations with facilities such as roads and recreational facilities (except those facilities that could be classified as utilities or emergency facilities) • Public housing, other than low-income housing • Recreation • Religious services • Parking not in direct support of eligible facility
<p>EDUCATION</p> <ul style="list-style-type: none"> • Athletic, vocational, academic training, or similar activities • Political education • Religious education⁶⁵ 	

See Public Assistance Program and Policy Guide at 15, FP 104-009-02 (April 2017)

<https://www.fema.gov/media-library-data/1496435662672->

[d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf)

34. Thus, it is my understanding that FEMA's policy categorically bars First Assembly from having equal access to emergency relief grants because First Assembly's use of its facilities is primarily religious. It is my understanding that, but for our primarily religious use of the facilities, First Assembly would be eligible to apply for the grants.

35. I am aware that FEMA has repeatedly denied grants to other houses of worship because the use of their disaster-damaged facilities or materials was primarily religious. Further, it is my understanding that these denials came after extended appeals processes and were not finally decided until months or years after the disaster occurred.

36. It is further my understanding that, to be eligible to receive FEMA grants, nonprofits must apply within 30 days of the presidential disaster declaration affecting their community.

37. Thus, it was my understanding that First Assembly must apply for a FEMA grant by September 26, 2017, in order to be considered.

38. I have since been informed that FEMA has extended the deadline for applications by 60 days to November 22, 2017.

39. First Assembly has a number of decisions that we must make right now, including how much of the church building must be demolished due to the severe damage sustained by the facilities, how that demolition should take place, and how the repairs should be documented to ensure we can have a fair opportunity to obtain FEMA relief.

40. Further, it is my understanding that FEMA says that it is a necessity for FEMA to review applications early in the PA Program implementation process and as soon as possible after a disaster.

41. Accordingly, First Assembly has submitted an application for a PA grant as of September 12, 2017. Exhibit 6 contains a true and correct copy of the executed FEMA facility questionnaire form.

42. To be able to make plans for its recovery efforts, and to ensure that it has a fair opportunity to maximize assistance from FEMA, First Assembly needs FEMA to immediately accept and process its application without regard to religion.

43. First Assembly is facing a disaster right now and needs to make long-term decisions right now about how we will recover from Hurricane Harvey. We cannot afford to wait months or years to find out that FEMA will follow its policy to deny us equal access to and equal consideration for emergency disaster relief grants.

44. In my view, FEMA's policy discriminates on the basis of the religious status of First Assembly's motivation and purpose for its services to the community. I think that it is discriminatory and demeaning for the government to discriminate against our church because of our religious status.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2017.

/s/ Bruce Frazier

Bruce Frazier

Exhibit 1

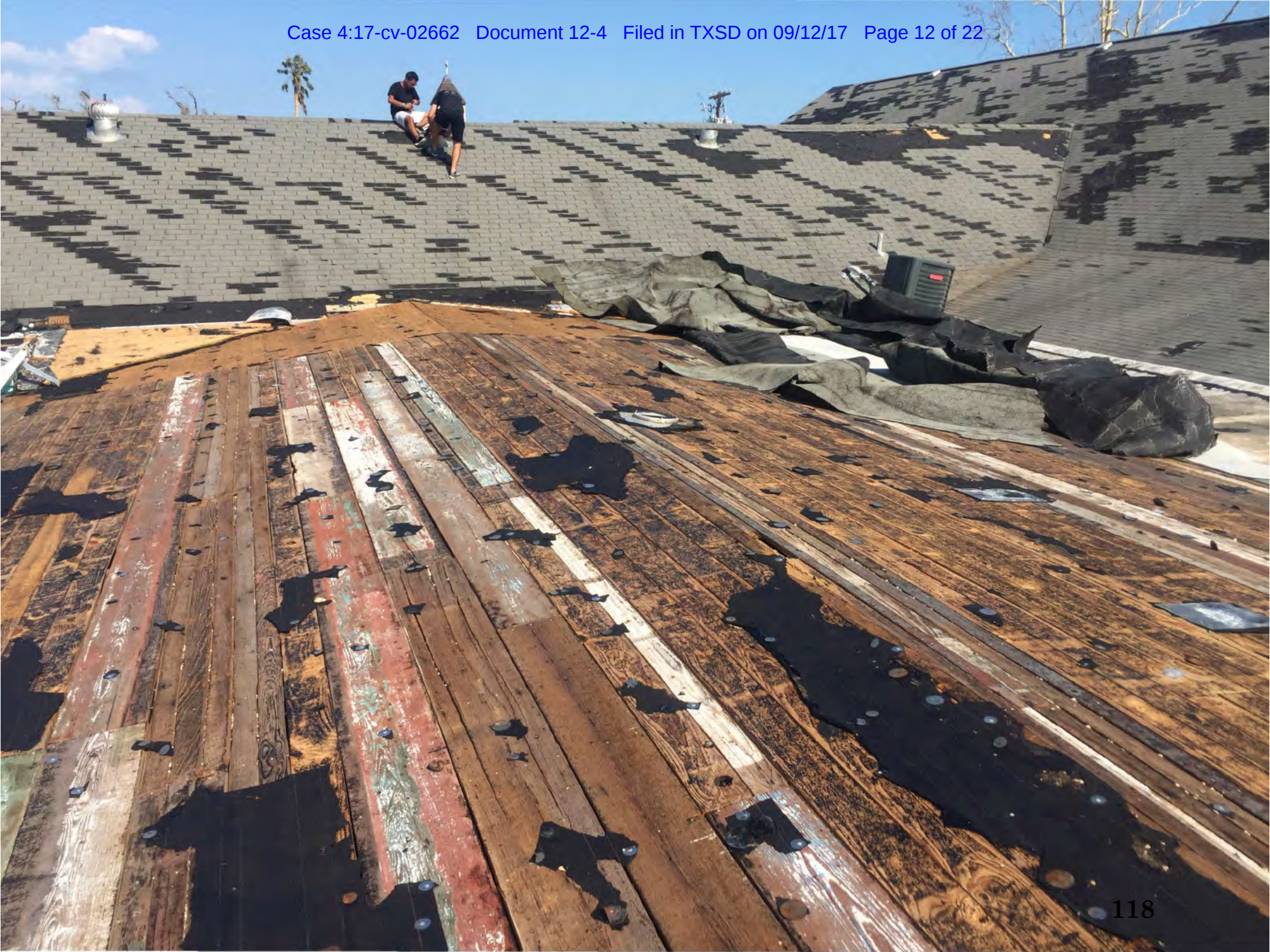


Exhibit 2



Exhibit 3



Exhibit 4



Exhibit 5



Exhibit 6

DEPARTMENT OF HOMELAND SECURITY
FEDERAL EMERGENCY MANAGEMENT AGENCY
PNP FACILITY QUESTIONNAIRE

O.M.B. NO. 1660-0017
Expires December 31, 2011

PAPERWORK BURDEN DISCLOSURE NOTICE

Public reporting burden for this form is estimated to average 30 minutes per response. The burden estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, and completing, reviewing, and submitting the form. You are not required to respond to this collection of information unless it displays a valid OMB control number. Send comments regarding the accuracy of the burden estimate and any suggestions for reducing this burden to: Information Collections Management, Department of Homeland Security, Federal Emergency Management Agency, 500 C Street, SW, Washington, DC, 20472, Paperwork Reduction Project (1660-0017). **Please do not send your completed survey to the above address.**

FEMA and State personnel will use this questionnaire to determine the eligibility of specific facilities of an approved Private Non-Profit (PNP) organization (See 44 CFR 206.221). Owners of critical facilities (i.e., power, water (including providing by an irrigation organization or facility, if it is not provided solely for irrigation purposes), sewer, wastewater treatment, communications and emergency medical care) can apply directly to FEMA for assistance for emergency work (debris removal and emergency protective measures) and permanent work (repair, restore or replace a damaged facility). Owners of non-critical facilities can apply directly to FEMA for assistance for emergency work, but must first apply to the U. S. Small Business Administration (SBA) for assistance for permanent work. If the owner of a non-critical facility does not qualify for an SBA loan or the cost to repair the damaged facility exceeds the SBA loan amount, the owner may apply to FEMA for assistance.

1. Name of PNP Organization	Rockport First Assembly of God	
2. Name of the damaged facility and location	Rockport First Assembly of God 813 E. Laurel St. Rockport, TX 78382	
3. What was the primary purpose of the damaged facility	The damaged facilities were established and primarily used for religious purposes	
4. Is the facility a critical facility as described above?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
5. Who may use the facility	General public	
6. What fee, if any, is charged for the use of the facility	None	
7. Was the facility in use at the time of the disaster?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
8. Did the facility sustain damage as a direct result of the disaster?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
9. What type of assistance is being requested?	Emergency work	
10. Does the PNP organization own the facility?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
11. If "Yes" obtain proof of ownership; check here if attached.	<input checked="" type="checkbox"/>	
12. Does the PNP organization have the legal responsibility to repair the facility?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
13. If "Yes", provide proof of legal responsibility; check here if attached.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
14. Is the facility insured?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
15. If "Yes", obtain a copy of the insurance policy; check here if attached.	<input checked="" type="checkbox"/>	

Additional information or comments:

Rockport First Assembly of God uses its facilities as a center for the community. We primarily provide religious activities, such as religious singing and praise; religious teaching, education, and instruction; and sharing our faith with the community. Our facilities were established for a religious purpose and over 50% of our activities are religious activities.

Pictures of our insurance policy and documentation of our nonprofit status are attached. I was not able to provide electronic copies of the documents because our computers and internet access are down and we do not have access to a functioning scanner. The portion of our church building containing the offices was one of the worst damaged. For that same reason, I was limited in what documents I could provide--our files have been moved several times by volunteers during our restoration efforts, making it difficult to find some forms. While I believe that the church's deed is currently on file in a safe deposit box at our bank, which has not-reopened since Hurricane Harvey struck. I have provided every document that I can, and will provide more when I can if requested.

CONTACT PERSON
Pastor Bruce Frazier

DATE
Sep 12, 2017

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662
Jury Demanded

DECLARATION OF DANIEL BLOMBERG

1. My name is Daniel Blomberg. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are within my personal knowledge.

2. I am an attorney at the Becket Fund for Religious Liberty and serve as one of the firm's counsel for the Plaintiff Churches in the above-captioned lawsuit.

3. After the September 8, 2017 hearing where this Court instructed the Plaintiffs to apply for Public Assistance ("PA") grants, I assisted the Churches in trying to determine the proper way to apply.

4. The Churches were very busy with recovery and relief efforts, and had limited ability to access the internet, their own internal files (some of which had been damaged by the storm or moved during recovery efforts), or make phone calls.

5. FEMA's PA grant application instructions for disaster victims did not clearly identify where to submit applications.

6. For instance, I repeatedly visited the FEMA PA grant FAQ webpage over a period of several weeks, and clicked on the link to the question "How do I apply for Public Assistance?" See How do I apply for Public Assistance?" <https://www.fema.gov/public-assistance-frequently-asked-questions##grant>. Every time I have clicked on that link, I was led to a web page with an error message stating "404 Page Not Found. Oops. This isn't good, you're getting an error message." The last time I visited the webpage was October 11, 2017, and it still led to the same error message.

7. Accordingly, the Churches mailed the proper forms to the Washington, DC, headquarters for FEMA's Public Assistance program.

8. Out of an abundance of caution to ensure that the Churches had correctly submitted their applications, I continued to research whether there were other ways to submit them.

9. I saw a letter from Texas Governor Greg Abbott stating that FEMA "Public Assistance (PA)" grants were available to nonprofit organizations and that "any questions" about the grants could be directed to each "county's district coordinator with the Texas Division of Emergency Management." See Gov. Greg Abbott, *Disaster*

Relief Letter at 2 (August 31, 2017), [https://gov.texas.gov/uploads/files/press/Letter to County Judges.pdf](https://gov.texas.gov/uploads/files/press/Letter_to_County_Judges.pdf).

10. The letter linked to a map of the county district coordinators and gave their office and cell phone numbers as the means of contacting them. *See* District Coordinators Map, <http://www.dps.texas.gov/dem/FieldResponse/DistCoordMap.pdf>.

11. Accordingly, I called Ronald Walker, the Texas Division of Emergency Management (“TDEM”) District Coordinator for Liberty County, where Hi-Way Tabernacle is located. TDEM is a Division of the Texas Department of Public Safety.

12. The call was on September 12, 2017, at 12:59 PM EST. I explained that I was assisting Hi-Way Tabernacle and was trying to find out how it, as a private non-profit in his district, could apply for a PA Program grant. I explained that Hi-Way was a church and had been severely damaged by Hurricane Harvey. Walker said he would need to check with TDEM and asked to call me back.

13. Walker called back at 1:12 PM EST on the same day. I took contemporaneous notes of our conversation. He said that since Hi-Way Tabernacle “is a church, you’re not entitled to PA.” When I asked him to explain, he was apologetic, but said that, “If it’s a church, you’re eligible for SBA, not for PA.” He said I could speak to “Natasha” at a particular phone number, and she could further explain why churches aren’t eligible for PA grants.

14. By looking online at TDEM’s website, I learned that “Natasha” was Natasha Valentine of TDEM’s Regional Disaster Finance Unit.

15. I called Valentine two or three times over the next few days. On September 15 at 11:47 AM EST, Valentine called me back. We spoke for approximately 12 minutes. I took contemporaneous notes as we talked.

16. I explained that I was calling on behalf of Hi-Way Tabernacle to help the church find out how to apply for a PA grant as a private nonprofit. I informed her that Walker stated that Hi-Way was ineligible for a PA grant because it was a church, and that he had referred me to her to get more information.

17. She asked me whether Hi-Way had been damaged by Hurricane Harvey. I said that it had. I explained that it was seeking funding for severe flooding damage to its sanctuary, and that it was using its church gym for disaster relief services.

18. Valentine confirmed that Walker correctly stated that Hi-Way was ineligible for PA funding for the flooding damage to its sanctuary. She said, “You, as a faith-based organization, are not eligible to apply for a PA assistance grant.”

19. Valentine volunteered that Hi-Way could potentially seek reimbursement from Liberty County for disaster relief services, but that funding for repair to the church’s sanctuary would have to come from insurance or an SBA loan.

20. Valentine cautioned that if the church did not already have an agreement with the county to receive reimbursement for the services it was already offering, the county might not be receptive to receiving a bill from the church.

21. I asked her to confirm that Hi-Way would not be eligible for a PA grant because it was a church established for a religious purpose. *Id.* Valentine responded, “Right, absolutely not eligible.”

22. I asked if the same rule would apply to Harvest Family Church, which was also established as a church and was in Harris County, a county immediately adjacent to Liberty County. Valentine said that Harvest Family Church would also be ineligible for the same reason.

23. Valentine apologized and said that she “didn’t make the rules,” and that she had also received calls from several other churches on this issue and had told them that they would also be ineligible for PA grants for the same reason.

24. Both Walker and Valentine were friendly and professional during our calls.

25. Exhibit 1 attached to this declaration is a true and correct copy of emails from FEMA’s counsel to counsel for the Churches.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2017.

/s/ Daniel Blomberg

Daniel Blomberg

Exhibit 1

From: Eric Rassbach
Sent: Friday, September 29, 2017 4:42 PM
To: Wolfson Young, Danielle (CIV) <Danielle.Young2@usdoj.gov>
Cc: Daniel Blomberg <dblomberg@becketlaw.org>; Diana Verm <dverm@becketlaw.org>; Farby, Lesley (CIV) <Lesley.Farby@usdoj.gov>; Mark Rienzi <mrienzi@becketlaw.org>; D'Ottavio, Kari E. (CIV) <Kari.E.D'Ottavio@usdoj.gov>
Subject: Re: Harvest Family Church v. FEMA, No. 17-cv-2662 - request for consent to stay motion

Danielle,

I take it that you all will not approve Category B funding during the 60 day period. We oppose the motion.

Best,

Eric

From: Wolfson Young, Danielle (CIV) <Danielle.Young2@usdoj.gov>
Sent: Friday, September 29, 2017 3:29 PM
To: Eric Rassbach
Cc: Daniel Blomberg; Diana Verm; Farby, Lesley (CIV); Mark Rienzi; D'Ottavio, Kari E. (CIV)
Subject: RE: Harvest Family Church v. FEMA, No. 17-cv-2662 - request for consent to stay motion

Eric,

Here are the responses to your two queries:

1. For Category A debris removal assistance, FEMA would be unable to determine the eligibility of your clients during the 60 day period. For Category B emergency protective measures, eligible applicants include the State and applicable local government. If your clients enter into an agreement with the state or local government in which the local government agrees to apply to FEMA for the costs, then FEMA would reimburse the local government and the local government could reimburse your clients.
2. FEMA will assign a representative or point of contact for your clients to work with. FEMA, working with the State, can help applicants complete draft project worksheets during the 60 days. However, these project worksheets will only document scopes of work. They cannot establish cost estimates until after the applicants have applied to SBA and been determined eligible or ineligible for a loan.

Danielle

From: Eric Rassbach [<mailto:erassbach@becketlaw.org>]
Sent: Friday, September 29, 2017 2:09 PM
To: Wolfson Young, Danielle (CIV) <dyoung@CIV.USDOJ.GOV>
Cc: Daniel Blomberg <dblomberg@becketlaw.org>; Diana Verm <dverm@becketlaw.org>; Farby, Lesley (CIV) <LFarby@civ.usdoj.gov>; Mark Rienzi <mrizeni@becketlaw.org>; D'Ottavio, Kari E. (CIV) <kdottav@CIV.USDOJ.GOV>
Subject: Re: Harvest Family Church v. FEMA, No. 17-cv-2662 - request for consent to stay motion

Danielle --

Thanks. Totally appreciate the need to observe Yom Kippur, though I think this is really a problem DOJ created by waiting until very late (midday yesterday) to propose the stay motion. Given that there are other attorneys at DOJ who won't be observing Yom Kippur, DOJ should be able to accommodate your personal religious observance (as the law requires) while still continuing the government's business.

Regarding how our clients' applications for PA grants would be processed during the proposed stay:

* I see you say FEMA would not *deny* my clients' PA grant applications during the stay. Would FEMA be able to *approve* my clients' pending RPAs during the proposed 60-day stay, so that they would be eligible to receive Category A and B Public Assistance grants during the 60 days? I am just trying to figure out what would happen as a practical matter on that front.

* Also, my clients have some pressing decisions to make, including those related to facility demolition. These decisions will inform a lot of their future plans, including how to handle demolition and how and where to rebuild. At least one of my clients is currently prevented from holding religious services. Would FEMA agree to assign a PA representative to my clients to manage the processing of their projects during the next 60 days?

Thanks,

Eric

From: Wolfson Young, Danielle (CIV) <Danielle.Young2@usdoj.gov>
Sent: Friday, September 29, 2017 12:52 PM
To: Eric Rassbach
Cc: Daniel Blomberg; Diana Verm; Farby, Lesley (CIV); Mark Rienzi; D'Ottavio, Kari E. (CIV)

Subject: RE: Harvest Family Church v. FEMA, No. 17-cv-2662 - request for consent to stay motion

Hi Eric,

We need to file today in order to give the Court adequate time to review the motion. Could you please let me know by 3 PM what your clients' position is on the stay? My apologies for the early timeframe, but I have to leave early in observance of Yom Kippur today. Thank you in advance for understanding.

Sincerely,

Danielle

Danielle Wolfson Young

Trial Attorney | U.S. Department of Justice

Civil Division | Federal Programs Branch

Direct Dial: (202) 616-2035

Danielle.Young2@usdoj.gov

From: Wolfson Young, Danielle (CIV)

Sent: Friday, September 29, 2017 10:11 AM

To: 'Eric Rassbach' <erassbach@becketlaw.org>

Cc: Daniel Blomberg <dblomberg@becketlaw.org>; Diana Verm <dverm@becketlaw.org>; Farby, Lesley (CIV) <LFarby@civ.usdoj.gov>; Mark Rienzi <mrizenzi@becketlaw.org>; D'Ottavio, Kari E. (CIV) <kdottav@civ.usdoj.gov>

Subject: RE: Harvest Family Church v. FEMA, No. 17-cv-2662 - request for consent to stay motion

Dear Eric,

Thank you for getting back to us. FEMA will not deny any houses of worship funding during the reconsideration period, but FEMA may process their applications during this time period.

Thank you,

Danielle

Danielle Wolfson Young

Trial Attorney | U.S. Department of Justice

Civil Division | Federal Programs Branch

Direct Dial: (202) 616-2035

Danielle.Young2@usdoj.gov

From: Eric Rassbach [<mailto:erassbach@becketlaw.org>]
Sent: Friday, September 29, 2017 9:12 AM
To: D'Ottavio, Kari E. (CIV) <kdottav@CIV.USDOJ.GOV>
Cc: Daniel Blomberg <dblomberg@becketlaw.org>; Diana Verm <dverm@becketlaw.org>; Farby, Lesley (CIV) <LFarby@civ.usdoj.gov>; Wolfson Young, Danielle (CIV) <dyoung@CIV.USDOJ.GOV>; Mark Rienzi <mrizeni@becketlaw.org>
Subject: Re: Harvest Family Church v. FEMA, No. 17-cv-2662 - request for consent to stay motion

Kari,

Thanks for your email. To clarify, when you state that you would not "adjudicate" our clients' applications for PA grants, do you mean you would not process them at all? Or do you mean something else?

Thanks,

Eric

From: D'Ottavio, Kari E. (CIV) <Kari.E.D'Ottavio@usdoj.gov>
Sent: Thursday, September 28, 2017 11:47 AM
To: Eric Rassbach
Cc: Daniel Blomberg; Diana Verm; Farby, Lesley (CIV); Wolfson Young, Danielle (CIV)
Subject: Harvest Family Church v. FEMA, No. 17-cv-2662 - request for consent to stay motion

Dear Eric,

We plan to move for a 60-day stay of the case so that FEMA can determine whether to make any changes to its current policy. FEMA would not adjudicate pending applications from houses of worship under the current policy during the reconsideration period, so there would be no prejudice to your clients. Would you consent to our stay motion? Please let me know your position ASAP as we are hoping to get the stay motion on file today.

Sincerely,
Kari

Kari E. D'Ottavio
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
Direct Dial: (202) 305-0568
kari.e.dottavio@usdoj.gov

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662
Jury Demanded

THIRD DECLARATION OF PASTOR BRUCE FRAZIER

1. My name is Pastor Bruce Frazier. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are within my personal knowledge.

2. I am the pastor of Rockport First Assembly of God ("First Assembly").

3. On September 26, two weeks after First Assembly's Public Assistance ("PA") grant application was sent to FEMA, I received an email from Aeris Williams, a Senior Reconciliation Accountant for Finance and Grant Management at the Texas Division of Emergency Management ("TDEM"). Exhibit 1 contains a true and correct

copy of the September 26 email I received from Aeris Williams, Senior Reconciliation Accountant, Finance and Grant Management, TDEM.

4. The email purported to follow up on a September 22 email that Williams said that he had previously sent to me. The September 22 email was attached to the September 26 email, and is included in Exhibit 1.

5. After receiving the September 26 email, I searched my email inbox and did not see any previous emails to me from Williams.

6. In the combined emails, TDEM offered to provide “expedited funding for Category A and B” PA grant funds to First Assembly. TDEM explained that the “Public Assistance program is allowing for one-time, quick turn-around funding for Debris Removal (Category A) and Emergency Protective Measures (Category B) via an Expedited Project Worksheet process.”

7. If First Assembly elected to participate in the program, TDEM said the funds could be “available to you within ten days.”

8. TDEM requested that I let TDEM know “as soon as possible” if the church was “interested or want[s] to decline” the funding.

9. TDEM also requested that First Assembly apply for the expedited funding program by emailing two attached forms to TDEM.Applicants@dps.texas.gov.

10. TDEM instructed me to contact TDEM’s Ann Lister with any questions.

11. I took several hours away from working on repairs to the church in order to investigate the expedited PA Grant offer and to fill out and submit TDEM’s requested forms.

12. The process was complicated by continued poor internet access and cell phone coverage in Rockport, as well as the severe damage to First Assembly's offices.

13. On Saturday, September 30, I submitted the required expedited PA grant forms to TDEM via email. Exhibit 2 contains a true and correct copy of the September 30 email I sent from First Assembly to TDEM.

14. I had to make a special trip to get to a location with internet access in order to email out the forms.

15. On October 3, TDEM sent a responsive email to me from the TDEM.Applicants@dps.texas.gov address. Exhibit 3 contains a true and correct copy of the October 3 email I received from TDEM.

16. TDEM denied First Assembly's application for an expedited PA grant.

17. TDEM's response highlighted in yellow the language from my email applying for the funds which stated that First Assembly "was not eligible because it was established for a religious purpose."

18. I did not highlight that language in yellow in my email to TDEM, as can be seen by comparing Exhibit 3 (TDEM's email, with highlighting) with Exhibit 2 (First Assembly's original email, without the highlighting).

19. TDEM's email did not provide any other reason for denying my application for expedited Category A and Category B PA grants.

20. In its email TDEM said that instead of a PA grant, First Assembly must look to "insurance and [the] Small Business Administration" to cover the cost of the damage to its facilities from Hurricane Harvey.

21. TDEM copied Ann Lister, the designated TDEM point of contact for First Assembly, on the grant denial email.

22. TDEM also copied Michelle Taylor, a TDEM official who handles PA grant administration.

23. Michelle Taylor has also since contacted me about First Assembly's primary PA grant application.

24. While TDEM's initial responses to First Assembly's PA grant application asked for some additional information, TDEM has since confirmed that it received all requested documents from First Assembly. Exhibit 4 contains a true and correct copy of the confirmation email that I received from TDEM.

25. Further, none of TDEM's responses to First Assembly's PA grant application stated that the application was incomplete because we had not yet submitted evidence that First Assembly applied for a Small Business Administration loan.

26. Nonetheless, I have submitted an SBA loan application on behalf of First Assembly. When I completed the online application on October 11, I received an SBA loan application number and was informed that my application had been successfully submitted.

27. First Assembly has been severely damaged by Hurricane Harvey.

28. On average, I have been working on emergency repairs and recovery efforts at the church 10 hours a day, 6 days a week since the hurricane.

29. I believe that it is unfair and discriminatory for First Assembly to be denied expedited PA grant funding under FEMA's discriminatory PA grant policy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2017.

/s/ Bruce Frazier

Bruce Frazier

Exhibit 1

From: Williams, Aeris <Aeris.Williams@dps.texas.gov>
Sent: Mon, Sep 25, 2017 1:27 pm
Subject: Expedited Funding for Cat A and B

Good Afternoon,

I am following up to an email you should have received regarding expedited funding for Category A and B. If you are interested or want to decline, can you please let me know as soon as possible.

Please see the attached email if you have not already.

If you have any questions please feel free to contact me.

Respectfully,

Aeris Williams

Senior Reconciliation Accountant, Finance and Grant Management

Texas Division of Emergency Management

Texas Homeland Security

Texas Department of Public Safety

O: 512.424.7848

F: 512.424.2444

Aeris.williams@dps.texas.gov

www.txdps.state.tx.us/dem

Attached Message

From	Williams, Aeris < Aeris.Williams@dps.texas.gov >
To	Williams, Aeris < Aeris.Williams@dps.texas.gov >
Subject	FW: Expedited Funding
Date	Fri, 22 Sep 2017 19:35:26 +0000

The Public Assistance program is allowing for one-time, quick turn-around funding for Debris Removal (Category A) and Emergency Protective Measures (Category B) via an Expedited Project Worksheet process. With this process, FEMA can quickly write a PW based on estimates and other minimal information. These PWs are obligated at roughly 40% of the estimated cost. We expect that funds that are obligated through this process would be available to you within ten days.

Should you desire to participate in this process, please complete the appropriate form(s) and return them with the additional documentation requested on the form(s) to:

TDEM.Applicants@dps.texas.gov

Please be aware that if TXDOT will be handling your debris removal, TXDOT will bear the bulk of the costs; therefore, an Expedited PW is not needed. Additionally, as this is an important matter, you may receive multiple contacts from us, so we ask for your patience.

Should you have any questions, please reach out to your Point of Contact shown below:

Region 1
Mollie Rivas
512-284-0088

Region 2
Sherri Copeland
737-703-8199

Region 3
Judy Lucio
512-538-5382

Region 6
Ann Lister
512-994-8541

Consult the attached map if you are unsure of the regional designation for your jurisdiction.

Sandra Fulenwider
Deputy Assistant Director
Recovery, Mitigation, and Standards
Texas Division of Emergency Management
Texas Homeland Security
Texas Department of Public Safety
O: 512-424-2102
M: 512-694-3383
Sandra.Fulenwider@dps.texas.gov
www.txdps.state.tx.us/dem

Exhibit 2

From: bbrucelf@aol.com

Date: September 30, 2017 at 4:06:19 PM CDT

To: Aeris.Williams@dps.texas.gov

Subject: Re: Expedited Funding for Cat A and B

Dear Aeris,

Thank you very much for reaching out to me. I did not receive the email that was attached to your message. And I was a little confused about your message, since even though I applied for a PA grant for my church, I had heard that my church would not be eligible because it was established for a religious purpose. In any event, my church received severe damage and we definitely need some help. I've filled out the forms you sent me. I haven't received any official guidance on how to fill them out, and some of the terms weren't clear to me, so I just did the best I could. And we're still picking up the pieces around here, so I may not have captured the full extent of the damage in my estimates. Also, while we have a lot of debris to get removed, my current understanding is that the City is likely picking that up without any cost to the church. I've spent a lot of time compiling the debris and getting it into a manageable location on the church's property, but I'm not yet sure if I'm going to have to incur additional costs to get it disposed of.

If you need anything else from me, please just let me know.

Thank you very much for your help.

Sincerely,
Pastor Bruce Frazier,
First Assembly of God of Rockport

-----Original Message-----

From: Williams, Aeris <Aeris.Williams@dps.texas.gov>

Sent: Mon, Sep 25, 2017 1:27 pm

Subject: Expedited Funding for Cat A and B

Good Afternoon,

I am following up to an email you should have received regarding expedited funding for Category A and B. If you are interested or want to decline, can you please let me know as soon as possible.

Please see the attached email if you have not already.

If you have any questions please feel free to contact me.

Respectfully,

Aeris Williams

Senior Reconciliation Accountant, Finance and Grant Management

Texas Division of Emergency Management
Texas Homeland Security
Texas Department of Public Safety
O: 512.424.7848
F: 512.424.2444
Aeris.williams@dps.texas.gov
www.txdps.state.tx.us/dem

Attached Message

From	Williams, Aeris < Aeris.Williams@dps.texas.gov >
To	Williams, Aeris < Aeris.Williams@dps.texas.gov >
Subject	FW: Expedited Funding
Date	Fri, 22 Sep 2017 19:35:26 +0000

The Public Assistance program is allowing for one-time, quick turn-around funding for Debris Removal (Category A) and Emergency Protective Measures (Category B) via an Expedited Project Worksheet process. With this process, FEMA can quickly write a PW based on estimates and other minimal information. These PWs are obligated at roughly 40% of the estimated cost. We expect that funds that are obligated through this process would be available to you within ten days.

Should you desire to participate in this process, please complete the appropriate form(s) and return them with the additional documentation requested on the form(s) to:

TDEM.Applicants@dps.texas.gov

Please be aware that if TXDOT will be handling your debris removal, TXDOT will bear the bulk of the costs; therefore, an Expedited PW is not needed. Additionally, as this is an important matter, you may receive multiple contacts from us, so we ask for your patience.

Should you have any questions, please reach out to your Point of Contact shown below:

Region 1
Mollie Rivas
512-284-0088

Region 2
Sherri Copeland
737-703-8199

Region 3
Judy Lucio
512-538-5382

Region 6
Ann Lister
512-994-8541

Consult the attached map if you are unsure of the regional designation for your jurisdiction.

Sandra Fulenwider

Deputy Assistant Director

Recovery, Mitigation, and Standards

Texas Division of Emergency Management

Texas Homeland Security

Texas Department of Public Safety

O: 512-424-2102

M: 512-694-3383

Sandra.Fulenwider@dps.texas.gov

www.txdps.state.tx.us/dem

Exhibit 3

From: TDEM.Applicants <TDEM.Applicants@dps.texas.gov>
Date: October 3, 2017 at 11:32:00 AM CDT
To: "bbrucelf@aol.com" <bbrucelf@aol.com>
Cc: "Taylor, Michelle D" <Michelle.Taylor@dps.texas.gov>, "Lister, Ann" <Ann.Lister@dps.texas.gov>
Subject: Re: Expedited Funding for Cat A and B

Sir—Your first source of reimbursement is insurance and Small Business Administration (SBA).

From: bbrucelf@aol.com [<mailto:bbrucelf@aol.com>]
Sent: Saturday, September 30, 2017 4:06 PM
To: Williams, Aeris
Subject: [EXTERNAL] Re: Expedited Funding for Cat A and B

Dear Aeris,

Thank you very much for reaching out to me. I did not receive the email that was attached to your message. And I was a little confused about your message, since even though I applied for a PA grant for my church, I had heard that my church would not be eligible because it was established for a religious purpose. In any event, my church received severe damage and we definitely need some help. I've filled out the forms you sent me. I haven't received any official guidance on how to fill them out, and some of the terms weren't clear to me, so I just did the best I could. And we're still picking up the pieces around here, so I may not have captured the full extent of the damage in my estimates. Also, while we have a lot of debris to get removed, my current understanding is that the City is likely picking that up without any cost to the church. I've spent a lot of time compiling the debris and getting it into a manageable location on the church's property, but I'm not yet sure if I'm going to have to incur additional costs to get it disposed of.

If you need anything else from me, please just let me know.

Thank you very much for your help.

Sincerely,
Pastor Bruce Frazier,
First Assembly of God of Rockport

-----Original Message-----
From: Williams, Aeris <Aeris.Williams@dps.texas.gov>
Sent: Mon, Sep 25, 2017 1:27 pm
Subject: Expedited Funding for Cat A and B

Good Afternoon,

I am following up to an email you should have received regarding expedited funding for Category A and B. If you are interested or want to decline, can you please let me know as soon as possible.

Please see the attached email if you have not already.

If you have any questions please feel free to contact me.

Respectfully,

Aeris Williams

Senior Reconciliation Accountant, Finance and Grant Management

Texas Division of Emergency Management

Texas Homeland Security

Texas Department of Public Safety

O: 512.424.7848

F: 512.424.2444

Aeris.williams@dps.texas.gov

www.txdps.state.tx.us/dem

Attached Message

From Williams, Aeris <Aeris.Williams@dps.texas.gov>
To Williams, Aeris <Aeris.Williams@dps.texas.gov>
Subject FW: Expedited Funding
Date Fri, 22 Sep 2017 19:35:26 +0000

The Public Assistance program is allowing for one-time, quick turn-around funding for Debris Removal (Category A) and Emergency Protective Measures (Category B) via an Expedited Project Worksheet process. With this process, FEMA can quickly write a PW based on estimates and other minimal information. These PWs are obligated at roughly 40% of the estimated cost. We expect that funds that are obligated through this process would be available to you within ten days.

Should you desire to participate in this process, please complete the appropriate form(s) and return them with the additional documentation requested on the form(s) to:

TDEM.Applicants@dps.texas.gov

Please be aware that if TXDOT will be handling your debris removal, TXDOT will bear the bulk of the costs; therefore, an Expedited PW is not needed. Additionally, as this is an important matter, you may receive multiple contacts from us, so we ask for your patience.

Should you have any questions, please reach out to your Point of Contact shown below:

Region 1

Mollie Rivas

512-284-0088

Region 2

Sherri Copeland

737-703-8199

Region 3

Judy Lucio

512-538-5382

Region 6
Ann Lister
512-994-8541

Consult the attached map if you are unsure of the regional designation for your jurisdiction.

Sandra Fulenwider
Deputy Assistant Director
Recovery, Mitigation, and Standards
Texas Division of Emergency Management
Texas Homeland Security
Texas Department of Public Safety
O: 512-424-2102
M: 512-694-3383
Sandra.Fulenwider@dps.texas.gov
www.txdps.state.tx.us/dem

Exhibit 4

From: Taylor, Michelle D <Michelle.Taylor@dps.texas.gov>
To: bbrucelf <bbrucelf@aol.com>
Sent: Tue, Oct 10, 2017 11:23 am
Subject: RE: DR 4332 | <Rockport First Assembly of God> | Additional Documentation Request

Greetings,

We have received all requested documents. We will contact you if we need any additional information.

Thank you,

Michelle Taylor, M.S.

Texas Division of Emergency Management
Texas Homeland Security
Texas Department of Public Safety
O: 512-424-5294

Michelle.Taylor@dps.texas.gov
www.txdps.state.tx.us/dem



From: bbrucelf@aol.com [<mailto:bbrucelf@aol.com>]
Sent: Tuesday, October 10, 2017 5:28 AM
To: Taylor, Michelle D
Subject: Re: DR 4332 | <Rockport First Assembly of God> | Additional Documentation Request

CAUTION: This email was received from an EXTERNAL source, use caution when clicking links or opening attachments.
If you believe this to be a malicious and/or phishing email, please send this email as an attachment to SPAM@dps.texas.gov.

Ms. Taylor—Thank you for addressing the DUNS issue. I appreciate your help. Can you please explain the request for an IRS letter? I hadn't received a request from TDEM about that before. My understanding is that it was sufficient to submit documentation from the State showing that First Assembly is a Texas nonprofit corporation, which I provided in my original application to FEMA and which is also reflected in our articles of incorporation. To try to speed things along, I've re-attached both documents, along with

other documents showing that First Assembly is registered as a Texas nonprofit. Please let me know if you will need anything further. Thanks again for your help. -Pastor Frazier

-----Original Message-----

From: Taylor, Michelle D <Michelle.Taylor@dps.texas.gov>

To: bbrucelf <bbrucelf@aol.com>

Sent: Mon, Oct 9, 2017 11:38 am

Subject: RE: DR 4332 | <Rockport First Assembly of God> | Additional Documentation Request
Good morning,

Thank you for the documentation. I have inquired about the duns# and I will let you know as soon as I find out. In the meantime, please provide a 'Letter of Account Status from the Department of the Treasury Internal Revenue Service'.

Thank you,

Michelle Taylor, M.S.

Texas Division of Emergency Management

Texas Homeland Security

Texas Department of Public Safety

O: 512-424-5294

Michelle.Taylor@dps.texas.gov

www.txdps.state.tx.us/dem



From: bbrucelf@aol.com [<mailto:bbrucelf@aol.com>]

Sent: Saturday, October 07, 2017 7:45 AM

To: Taylor, Michelle D

Subject: Re: DR 4332 | <Rockport First Assembly of God> | Additional Documentation Request

CAUTION: This email was received from an EXTERNAL source, use caution when clicking links or opening attachments.
If you believe this to be a malicious and/or phishing email, please send this email as an attachment to SPAM@dps.texas.gov.

Dear Ms. Taylor—The requested documents are attached. I'm a little confused about the DUNS number requirement. I know that other applicants have applied for PA grants and had DUNS numbers assigned to them. Is there a reason First Assembly is being treated differently? I ask in

part because the DUNS website below stated that it might take up to 30 days to get the number assigned. First Assembly's church facilities are in bad shape, and waiting another 30 days just to get our PA grant request processed would really be hard on our church. Thanks for your help.
-Pastor Frazier

-----Original Message-----

From: Taylor, Michelle D <Michelle.Taylor@dps.texas.gov>

To: BBRUCELF <BBRUCELF@AOL.COM>

Sent: Thu, Oct 5, 2017 10:53 am

Subject: DR 4332 | <Rockport First Assembly of God> | Additional Documentation Request

Greetings,

My name is Michelle Taylor and I am with the Texas Division of Emergency Management (TDEM). In reviewing your Request for Public Assistance (RPA) and submitted documents for the Hurricane Harvey DR-(4332), the following information is needed to process your application:

- A revised Request for Public Assistance (RPA) Form (attached)
- By-laws
- Articles of Incorporation

Thank you for the RPA. Please resubmit with a DUNS#. If you do not know your DUNS#, here's a link to where you can go to verify the Duns number: <http://www.dnb.com/duns-number/lookup.html#> and here's the link where you can go to apply for a Duns number if needed: <http://www.dnb.com/get-a-duns-number.html>. I've attached a blank form and the form you sent.

Please complete and return the attached documents and requested documentation via email as soon as possible. We will continue processing your application once all requested information is received.

Thank you,

Michelle

Michelle Taylor, M.S.

Texas Division of Emergency Management

Texas Homeland Security

Texas Department of Public Safety

O: 512-424-5294

Michelle.Taylor@dps.texas.gov

www.txdps.state.tx.us/dem



**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662
Jury Demanded

THIRD DECLARATION OF PASTOR PAUL CAPEHART

1. My name is Paul Capehart. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are within my personal knowledge.

2. I am the pastor of Harvest Family Church.

3. In Exhibit 1, I have attached true and correct copies of emails I have received from the Texas Division of Emergency Management (“TDEM”) regarding Harvest Family’s Public Assistance (“PA”) grant application.

4. While TDEM’s initial responses to Harvest Family’s PA grant application asked for some additional information, TDEM has since confirmed that it received all requested documents from Harvest Family.

5. Further, none of TDEM's responses to Harvest Family's PA grant application stated that the application was incomplete because we had not yet submitted evidence that Harvest Family applied for a Small Business Administration loan.

6. I understand that some PA grant applicants are already receiving funds, and that expedited PA grant funding has been offered to some applicants. My church has not received an offer for expedited PA grants.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 12, 2017.

/s/ Paul Capehart
Paul Capehart

Exhibit 1

From: "Taylor, Michelle D" <Michelle.Taylor@dps.texas.gov>
Date: October 10, 2017 at 8:03:17 AM CDT
To: Paul Gmail <paulcapehart@gmail.com>
Subject: RE: DR 4332 | <Harvest Family Church> | Additional Documentation Request
Good morning,

We have received all requested documents. We will contact you if we need any additional information.

Michelle Taylor, M.S.
Texas Division of Emergency Management
Texas Homeland Security
Texas Department of Public Safety
O: 512-424-5294

Michelle.Taylor@dps.texas.gov
www.txdps.state.tx.us/dem



From: Paul Gmail [<mailto:paulcapehart@gmail.com>]
Sent: Monday, October 09, 2017 1:51 PM
To: Taylor, Michelle D
Subject: DR 4332 | <Harvest Family Church> | Additional Documentation Request

Hi Michelle,

Thanks for your email. I've attached the requested documents. On the articles of incorporation, I've included the amendments reflecting the Church's official name changes. Also, as noted in the application materials, Harvest Family is a church and was established and is primarily used for religious purposes. So it's our understanding that the church's facilities are ineligible for PA grants, but we are applying because we need the help.

If you have any questions, please let me know.

Thanks,

Pastor Paul Capehart

From: "Taylor, Michelle D" <Michelle.Taylor@dps.texas.gov>

Date: September 27, 2017 at 11:47:18 AM CDT

To: "paulcapehart@gmail.com" <paulcapehart@gmail.com>

Subject: DR 4332 | <Harvest Family Church> | Additional Documentation Request

Greetings,

My name is Michelle Taylor and I am with the Texas Division of Emergency Management (TDEM). In reviewing your Request for Public Assistance (RPA) for the Hurricane Harvey DR-(4332), the following information is needed to process your application:

- Request for Public Assistance (RPA) Form (attached) – Please fill out the alternate contact info on the RPA form. I attached the partially filled out form, for your convenience, and I attached a blank RPA form.
- Letter of Account Status from the Department of the Treasury Internal Revenue Service
- Designation of Applicant's Agent (DAA) (attached)
- Direct Deposit Authorization (DDA) (attached)
- By-laws
- Articles of Incorporation
- Proof of Ownership or Lease

Please complete and return the attached documents via email as soon as possible. We will continue processing your application once all requested information is received.

Thank you,

Michelle

Michelle Taylor, M.S.

Texas Division of Emergency Management

Texas Homeland Security

Texas Department of Public Safety

O: 512-424-5294

Michelle.Taylor@dps.texas.gov

www.txdps.state.tx.us/dem





**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662
Jury Demanded

THIRD DECLARATION OF PASTOR BRUCE STOKER

1. My name is Bruce Stoker. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are within my personal knowledge.

2. I am the pastor of Hi-Way Tabernacle.

3. In Exhibit 1, I have attached true and correct copies of the emails I have received from the Texas Division of Emergency Management (“TDEM”) regarding Hi-Way’s Public Assistance (“PA”) grant application.

4. TDEM’s responses to Hi-Way’s PA grant application have asked for some additional information.

5. But at no time have I received any TDEM responses to Hi-Way's PA grant application stating that the application is incomplete because we have not yet submitted evidence that Hi-Way applied for a Small Business Administration loan.

6. Nonetheless, I have submitted an SBA loan application on behalf of Hi-Way Tabernacle. When I completed the online application on October 12, 2017, I received an SBA loan application number and was informed that my application had been successfully completed.

7. I understand that some PA grant applicants are already receiving funds, and that expedited PA grant funding has been offered to some applicants. My church has not received an offer for expedited PA grants.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 12, 2017.

/s/ Bruce Stoker

Bruce Stoker

Exhibit 1

From: "Taylor, Michelle D" <Michelle.Taylor@dps.texas.gov>

Date: September 27, 2017 at 12:41:35 PM CDT

To: "cwstoker@hotmail.com" <cwstoker@hotmail.com>

Subject: DR 4332 | <Hi-Way Tabernacle Assembly of God> | Additional Documentation Request

Greetings,

My name is Michelle Taylor and I am with the Texas Division of Emergency Management (TDEM). In reviewing your Request for Public Assistance (RPA) for the Hurricane Harvey DR-(4332), the following information is needed to process your application:

- Request for Public Assistance (RPA) Form (attached) – Please fill out the alternate contact info on the RPA form. I attached the partially filled out form, for your convenience, and I attached a blank RPA form.
- Designation of Applicant's Agent (DAA) (attached)*
- Direct Deposit Authorization (DDA) (attached)*
- By-laws*
- Articles of Incorporation*
- Proof of Ownership or Lease*

Please complete and return the attached documents via email as soon as possible. We will continue processing your application once all requested information is received.

Thank you,

Michelle

Michelle Taylor, M.S.

Texas Division of Emergency Management
Texas Homeland Security
Texas Department of Public Safety
O: 512-424-5294

Michelle.Taylor@dps.texas.gov
www.txdps.state.tx.us/dem





**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Civil No. 4:17-cv-2662
Jury Demanded

FOURTH DECLARATION OF PASTOR PAUL CAPEHART

1. My name is Paul Capehart. I am over the age of 21 and am capable of making this unsworn declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are within my personal knowledge.

2. I am the pastor of Harvest Family Church.

3. On September 19, 2017, one week after Harvest Family's PA grant application was submitted on September 12, I received an email from the FEMA PA grant support team informing me that FEMA had set up a PA grant portal for Harvest Family. The email instructed me to log into the portal.

4. Since that time, I have been able to observe FEMA's actions on Harvest Family's PA application.

5. From September 19 to October 13, FEMA took 27 actions on Harvest Family's file, largely uploading documents that I sent to Michelle Taylor at the Texas Division of Emergency Management.

6. But on October 13, Harvest Family's organization profile was updated to reflect that it is a "House of Worship (Religious Institution)." Since that time, no further action has been taken on Harvest Family's application. I last checked the portal today, November 6.

7. The portal states that the reason for the processing stoppage is that "Workflow placed on hold. Reason: Holding Houses of Worship per HQ."

8. The portal also has a section for "tasks" that Harvest Family needs to perform. There are no incomplete tasks listed. I never saw that the portal previously indicated that Harvest Family needed to file an SBA loan application in order to complete a required "task" on our PA grant application.

9. Nevertheless, I submitted an SBA loan application on behalf of Harvest Family Church on November 1, 2017. When I completed the online application, I received an SBA loan application number and received confirmation that my application had been received.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 6, 2017.

/s/ Paul Capehart

Paul Capehart

ENTERED

November 10, 2017

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION****HARVEST FAMILY CHURCH, *et al*,****Plaintiffs,****VS.****FEDERAL EMERGENCY****MANAGEMENT AGENCY, *et al*,****Defendants.**§
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§**CIVIL ACTION NO. 4:17-CV-2662****MEMORANDUM AND ORDER**

Plaintiffs in this case ask the Court to hold unconstitutional the policy of the Federal Emergency Management Agency (“FEMA”) not to provide assistance to most houses of worship. The request comes at a time when FEMA confronts the aftermath of emergencies from California to Puerto Rico and many points in between, and is aimed at a policy that is fraught with Establishment Clause and Free Exercise issues.

The Court acknowledges its heavy sense of humility in undertaking the task before it. Particularly so in that it is asked to grant preliminary relief before plenary consideration. It also acknowledges the handicap imposed by FEMA’s unwillingness either to defend the current policy or to articulate a new one.

I. FACTUAL BACKGROUND

This is a First Amendment case. Plaintiffs are three churches, all of which provided emergency relief services during and after Hurricane Harvey, and all of which also suffered significant damage in the storm. Defendants are FEMA and its Administrator, which are responsible for coordinating the federal government’s response to any natural disaster. Plaintiffs are suing FEMA because they contend that the agency’s grant policy violates the Free Exercise

Clause. Pending before the Court are two motions: Plaintiffs' Renewed Motion for Preliminary Injunction (Doc. No. 12) and Defendants' Motion to Stay (Doc. No. 24).

On August 25, Hurricane Harvey made landfall in Texas and the federal government began to respond. That response was governed in large part by the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), which authorizes the President to provide federal assistance when the magnitude of a natural disaster exceeds the affected state or local government's ability to respond. Many of FEMA's regulations implementing the Stafford Act fall under the Public Assistance Program ("PA Program"). The PA Program specifically allows for "private nonprofit facilities" ("PNPs") to receive disaster relief grants—as long as those facilities satisfy certain eligibility criteria.

In order to be an eligible facility, a PNP must own or operate a facility that either (1) "provides a critical service, which is defined as education, utility, emergency, or medical" or (2) "provides a non-critical, but essential governmental service AND is open to the general public." FED. EMERGENCY MGMT. AGENCY, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE 12 (2017), [https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf) ("Policy Guide"). Plaintiffs here argue that they fall under category (2) because they provide "non-critical, but essential governmental service[s]" and are "open to the general public." Their openness to the general public is not in dispute. Instead, the nature of the "non-critical, but essential governmental service[s]" that they would need to provide in order to be eligible for PA Program funding is the crux of this case.

In order to satisfy the "non-critical, but essential governmental service" requirement, a facility must provide a service that is "eligible." The list of "eligible" non-critical, essential

governmental services includes “hobby or at-home pursuits, such as car care, ceramics, [or] gardening,” “child care,” “rehabilitation programs,” and “homeless shelters.” The list of “ineligible” services includes “[r]eligious activities, such as worship, proselytizing, [or] religious instruction” Policy Guide at 15. The “eligible”/“ineligible” distinction creates complications because PNPs frequently provide multiple services to their communities. In such cases, FEMA reviews the facilities’ “[tax] documentation,” “pre-disaster charter, bylaws, and amendments,” and “evidence of longstanding, routine (day-to-day) use” in order to determine what the “primary use” of the facility is. Policy Guide at 12. As FEMA explains:

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

Policy Guide at 17. Under the “primary use” test, a house of worship that dedicates more than 50 percent of its space to religious activities is ineligible to receive any funds. In this case, Plaintiffs identify as houses of worship dedicating nearly all of their space to religious activities. They argue that the “primary use” test violates their rights under the Free Exercise Clause of the First Amendment.

II. PRELIMINARY INJUNCTION

“A preliminary injunction is an ‘extraordinary remedy’ that should not be granted unless its proponent clearly shows: (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest.” *Google, Inc. v. Hood*,

822 F.3d 212, 220 (5th Cir. 2016).

a. Substantial likelihood of success on the merits

Plaintiffs rely on *Trinity Lutheran Church of Columbia, Inc. v. Comer*, which held that a public benefits program with an express policy of rejecting grant applications from any applicant owned or controlled by a religious entity violates the Free Exercise Clause by denying that entity an otherwise available public benefit on account of its religious status. 137 S. Ct. 2012, 2022 (2017). Plaintiffs insist that they claim no “entitlement to a subsidy,” but rather “a right to participate in a government benefit program without having to disavow [a] religious character.” *Id.* at 2022. Plaintiffs also maintain that there is no substantive distinction between the program at issue in *Trinity Lutheran*, which categorically excluded any applicant owned or controlled by a religious entity, and the PA Program, which effectively excludes any applicant owned or controlled by an entity dedicating at least 50 percent of its facility to ineligible religious activity, because both exemplify the kind of status-based discrimination that the Court found unconstitutional in *Trinity Lutheran*.

b. Substantial threat of irreparable injury

Plaintiffs argue that, as a matter of law, “the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.” *Gordon v. City of Houston*, 79 F. Supp. 3d 676, 694 (S.D. Tex. 2015) (quoting *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 539 (5th Cir. 2013) and citing *Elrod v. Burns*, 427 U.S. 347 (1976)). At oral argument, they characterized this injury as a “dignitary harm.” Plaintiffs have also drawn the Court’s attention to various provisions in the PA Program requiring potential applicants to refrain from making construction decisions until FEMA completes an environmental and historic preservation assessment, which allegedly

threaten the churches' ability to act speedily in repairing their facilities. Policy Guide at 87.

c. Threatened injury outweighs threatened harm to enjoined party

Plaintiffs argue that, absent an injunction, they face the grievous harm of religious-status discrimination that is, quoting *Trinity Lutheran*, “odious to our Constitution,” *Trinity Lutheran*, 137 S. Ct. at 2025. They emphasize that churches are being left “in the lurch” as they try to recover from the disaster. Plaintiffs also highlight that houses of worship are among the first responders in times of disaster and that religious orientation does not impede an organization's ability to provide effective recovery assistance to the general public.

d. Will not disserve public interest

Plaintiffs note the strong public interest in the free exercise of religion and that promoting disaster relief is always in the public interest, even when the entities doing so are houses of worship.

III. STAY REQUEST

FEMA's Motion to Stay explains that the agency is currently reconsidering its eligibility policy. During the period of reconsideration, FEMA has directed its regional administrators to implement the following practice:

Where an eligibility review determines a PNP HOW [private nonprofit house of worship] is an eligible applicant for Public Assistance because it operates an eligible facility, FEMA should fully process this application through the standard workflow process for PNPs. Where an eligibility review determines a PNP HOW is not an eligible applicant for Public Assistance because it does not operate an eligible facility, FEMA should place the workflow process on hold until further notice from the Office of Chief Counsel (OCC).

(Doc. No. 40 at 2-3.) (internal citations omitted). Defendants cite no case law in support of their position that the mere consideration of a policy change is sufficient to justify a stay. They simply argue that a stay would not prejudice Plaintiffs because FEMA will not

deny pending applications from houses of worship during the reconsideration period.

FEMA has declined to defend the merits of its policy. FEMA has also declined to engage in a substantive analysis of the four-part criteria that govern the issuance of a preliminary injunction.

The agency has asked the Court to stay the case until November 29. This request is **DENIED**. The Court is willing, however, to delay its ruling on the Motion for Preliminary Injunction until December 1. As distinguished from a stay, the parties may continue to file pleadings and briefs within this period.

The Court has received instructive briefing from amici in support of Plaintiffs' Motion, for which it expresses gratitude. Nevertheless, as the Fifth Circuit has recognized, "Without opponents, the adversary system cannot function." *United States v. Chagra*, 701 F.2d 354, 361 (5th Cir. 1983). The Court would therefore welcome amici with differing views.

If, by December 1, FEMA's position remains unchanged, the Court will assume that FEMA concedes, at the very least, Plaintiffs' likelihood of success on the merits of this case and that the injury being suffered by Plaintiffs is irreparable. The Court will then issue its ruling on Plaintiffs' request for preliminary relief.

IV. CONCLUSION

For the aforementioned reasons, Defendants' Motion to Say is **DENIED**. The Court issues no ruling at this time on Plaintiffs' Renewed Motion for Preliminary Injunction.

IT IS SO ORDERED.

SIGNED at Houston, Texas on the 9th of November, 2017.

A handwritten signature in black ink, appearing to read "Keith P. Ellison", written over a horizontal line.

HON. KEITH P. ELLISON

UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARVEST FAMILY CHURCH,
HI-WAY TABERNACLE, and
ROCKPORT FIRST ASSEMBLY OF
GOD,

Plaintiffs,

v.

FEDERAL EMERGENCY
MANAGEMENT AGENCY, WILLIAM
B. LONG, Administrator of the Federal
Emergency Management Agency,

Defendants.

Case No.: 4:17-cv-2662

DEFENDANTS' STATUS UPDATE

In response to the Court's November 9, 2017 Memorandum and Order, ECF No. 45, Defendants hereby submit the following status update on the progress of the Federal Emergency Management Agency's (FEMA's) reconsideration process.

1. On September 29, 2017, Defendants informed this Court that FEMA was reconsidering the policy challenged in this lawsuit. *See* ECF No. 24. FEMA has subsequently developed changes to this policy. *See* Ex. 1, Turi Decl. at ¶ 4.

2. As of November 21, 2017, FEMA submitted a revised policy to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. *See* Ex. 1, Turi Decl. at ¶ 5 and Attachment 1 (screenshot of submission); *see also Pending EO 12866 Regulatory Review for Public Assistance Program and Policy Guide*, <https://www.reginfo.gov/public/do/eoDetails?rrid=127742>.

3. Separately, Congress has introduced legislation “that would make houses of worship eligible for disaster relief funding (provided they meet the other relevant criteria for private non-profit facilities).” *See* Office of Management and Budget, *Letter regarding additional funding and reforms to address impacts of recent natural disasters*, at 3 (Nov. 17, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/Letters/fy_2018_hurricanes_supp_111717.pdf (“OMB Letter”). As Plaintiffs have already pointed out, the Administration has indicated its support for this legislation as part of its fiscal year 2018 emergency funding request to address ongoing recovery efforts. *See* Plaintiffs’ Notice of Case Developments, ECF No. 47; OMB Letter at 1 (requesting that “the amounts proposed be provided and designated as emergency requirements pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA)”). Because any legislative changes would impact whatever final policy FEMA implements, FEMA will need to ensure that its proposed new policy is in conformance with its statutory obligations.

4. In sum then, Defendants’ position has changed in two important ways since the Court’s November 9, 2017 Memorandum and Order: (1) FEMA has affirmatively decided to change the challenged policy and has submitted a revised version to OIRA for review and publication; and (2) the Administration supports legislation in Congress that would also change the challenged policy. Given these significant developments, Defendants propose providing the Court with an additional status update by December 21, 2017. Because these legislative and policy processes may ultimately moot Plaintiffs’ claims, Defendants respectfully request that the Court delay ruling on Plaintiff’s preliminary injunction motion pending Defendants’ next status update.

DATED: November 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Kari E. D'Ottavio

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 HARVEST FAMILY CHURCH, et al* Civil No. H-17-2662
5 *
6 VERSUS * Houston, Texas
7 * November 7, 2017
8 FEDERAL EMERGENCY MANAGEMENT* 3:30 p.m.
9 AGENCY, et al*
10

11 MOTION HEARING
12 BEFORE THE HONORABLE KEITH P. ELLISON
13 UNITED STATES DISTRICT JUDGE
14
15

16 For the Plaintiffs:

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18 Mr. Eric C. Rassbach
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computer aided transcription.

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1 THE COURT: Good afternoon and welcome. Thank you
2 for being available on short notice.

3 Harvest Family Church versus FEMA. We will
4 take appearances of counsel beginning with plaintiffs, please

5 MR. RASSBACH: Eric Rassbach for plaintiffs.

6 THE COURT: Thank you.

7 MR. HU: Daniel Hu for FEMA, along with my
8 colleague --

9 THE COURT: Is there somebody on the phone, I think?

10 MS. D'OTTAVIO: Yes. This is Kari D'Ottavio for the
11 Department of Justice, and we would like to thank the Court
12 for allowing us to participate telephonically.

13 THE COURT: Okay. We are taking plaintiffs'
14 appearance now.

15 Not at all. You are always welcome to
16 participate by phone in a non-evidentiary hearing.

17 Give me your appearance one more time, though.

18 MS. D'OTTAVIO: Sure. This is Kari D'Ottavio for
19 the Department of Justice for defendants.

20 THE COURT: Okay.

21 Mr. Hu.

22 MR. HU: Yes, also for FEMA.

23 THE COURT: Anybody else?

24 MS. VERM: Diana Verm for the plaintiff.

25 MR. BLOMBERG: Daniel Blomberg for the plaintiffs.

1 THE COURT: Have you discussed among yourselves how
2 you wish to proceed today?

3 MR. RASSBACH: We have not. But we thought it might
4 make sense, since it's our motion on the preliminary
5 injunction motion, to go ahead and present on that.

6 Mr. Hu seems to be nodding his head.

7 THE COURT: That's fine.

8 I have some preliminary questions, though.

9 The briefing, for which I thank you, spent a
10 lot of time on issues that I know are important but seem to
11 me a little bit secondary or tertiary to the ultimate
12 dispute.

13 I am less interested in whether plaintiffs were
14 communicating with a Texas agency on behalf of FEMA or FEMA
15 directly. I am less interested in whether the timing of the
16 applications that have been tendered, and I'm less interested
17 in the particulars of the harm to the structures. All that
18 is important, but I am not sure it's important to what we are
19 doing today.

20 I would like to get a clear statement from FEMA
21 as to what its current policy is. We've heard it may be
22 changing, change is perhaps under review.

23 What is the current policy for houses of
24 worship?

25 MS. D'OTTAVIO: Your Honor, this is Kari D'Ottavio

1 for defendant.

2 The policies that plaintiff challenge in this
3 lawsuit are currently on hold. They're not being
4 implemented, they're not being enforced. And so what FEMA is
5 currently doing is undertaking a comprehensive review of
6 those policies, which is why we think that ultimately this
7 litigation should be stayed while FEMA undertakes that
8 reconsideration.

9 THE COURT: Well, I have never stayed a case because
10 a policy is under consideration. That's not strong enough, I
11 don't think.

12 Do you have an end date? Do you know when we
13 will have a definitive verdict from FEMA?

14 MS. D'OTTAVIO: Your Honor, we do not have a
15 definitive end date at this time. FEMA has ever intent to
16 move as expeditiously as possible through this process, but
17 we just can't guarantee that this process, which has lots of
18 moving parts, will be completed by a date certain.

19 We can certainly provide a report updating the
20 Court on the proceedings, but at this point we can't
21 guarantee a date by which the process will be completed.

22 THE COURT: Well, what are you advising those in the
23 position of plaintiffs, I mean, other than "let's stay it"?
24 Are you advising them that in the interim monies will be
25 provided or in the interim the old policy prevails, or what

1 do you counsel plaintiffs?

2 MS. D'OTTAVIO: Well, plaintiffs have already
3 applied. And to the extent that they would be ineligible
4 under the current policy, they certainly would not be denied.
5 Their applications would be put on hold while the agency
6 reconsiders the policies that they challenge in this lawsuit.
7 So the ultimate outcome of the reconsideration process may
8 moot plaintiffs' claims to begin with. So there is nothing
9 that they need to do.

10 What they're asking for, what they essentially
11 asked for in their preliminary injunction motion was for the
12 Court to enjoin the policies; and that's essential what the
13 agency is doing voluntarily. They're not implementing those
14 policies albeit on a temporary basis right now.

15 THE COURT: But neither are they paying monies to
16 people in the position of plaintiffs, right?

17 MS. D'OTTAVIO: No. However, even if the agency
18 didn't endeavor to put those challenged policies on hold for
19 now, there is no guarantee that the plaintiffs here or any
20 applicant would receive money or even a final determination
21 by the agency within any certain period of time.

22 THE COURT: That's for reasons independent of the
23 religious issue, right?

24 MS. D'OTTAVIO: Correct.

25 THE COURT: Does the plaintiff wish to say anything

1 in response to any of that? Anybody who speaks I think needs
2 to speak from this microphone here. It is the only one that
3 carries on the phone.

4 MR. BLOMBERG: Thank you, Your Honor. Daniel
5 Blomberg for the plaintiffs.

6 Your Honor, the policy is being enforced
7 against our clients right now because, as you asked, they're
8 not being paid, they're not receiving the same consideration
9 that a non-religious community center would be receiving in
10 the same situation. In fact, the First Assembly of God has
11 already been denied the funding under FEMA's policy.

12 They were offered an expedited PA grant by
13 Texas officials, and they were denied the ability to receive
14 that funding on October 3rd. They could have received that
15 funding within 10 days of the time that they applied for it
16 if they had been approved. And they were denied solely
17 because they were established as a church.

18 Now, that expedited funding, while it was
19 specifically denied to First Assembly Church of God, is also
20 eligible to other private nonprofits as reflected in page 135
21 of the FEMA policy guide. And so, in fact, the churches are
22 eligible to receive expedited relief right now but for this
23 discriminatory policy which FEMA is enforcing right now,
24 because if they weren't enforcing it, the churches would be
25 able to access the funding on an equal basis.

1 THE COURT: She makes a legitimate point that there
2 are other issues in terms of qualifying for funding. If they
3 weren't enforcing it, you would have at least one hurdle out
4 of the way, right?

5 MR. BLOMBERG: You would have that hurdle out of the
6 way; but, Your Honor, that's the only hurdle that FEMA has
7 identified, and it is the sole hurdle that was identified in
8 denying the funding to First Assembly of God on October 3rd.
9 So they would have already had the money by now if it hadn't
10 been for that hurdle.

11 And the other churches would be eligible under
12 the policy guide under expedited versions of the PA grant for
13 Categories A and B, which are the emergency work categories
14 which are before this Court on the preliminary injunction.

15 So what FEMA just represented to this Court is
16 not accurate. The money could actually be in the church's
17 pocket right now, and they could be using it to make the
18 decisions they need to right now.

19 And the other effect, Your Honor, of being put
20 on hold, they're not even being put to the back of the line
21 like other profit, nonprofits and other facilities. I mean,
22 over \$400 million has already gone out the door into Texas
23 private nonprofits who are receiving this funding. Our
24 clients haven't been able to access any of that, so that
25 belies FEMA's assertion to this Court that they just couldn't

1 get the money at this stage.

2 And by being put on hold, the churches are also
3 being put in a position where they're unable to take steps
4 they need to take in order to make decisions that are before
5 them right now.

6 So, for instance, emergency demolition
7 decisions, which are on page 75 of the PA grant policy, says
8 FEMA has to analyze a particular construction decision, a
9 demolition decision, and on page 87, a construction decision
10 ahead of time, right?

11 So the churches have to decide and make those
12 decisions right now about facilities they have to tear down
13 so they can preserve and protect both their property and the
14 parishioners who are attending the services there.

15 And because FEMA has put them on hold and is
16 not allowing them to participate in the process, regardless
17 of where the funding actually flows, but because they're not
18 actually being allowed to participate in the profits at this
19 point, they're prevented from getting to the stage where they
20 can be told by FEMA, well, you need to do step X, Y and Z in
21 order to be sure that you can receive this funding in the
22 future.

23 And FEMA is very specific about this on page 87
24 of the policy that if you do not allow FEMA the opportunity
25 to inspect your facilities ahead of time and sign off on your

1 plans, then you "jeopardize" -- and that's the word they
2 use -- you "jeopardize" your PA grant funding in the future.

3 And the churches are having to make these
4 decisions right now. One church has already had to tear down
5 some of its facility because of the safety issues they
6 presented. Another church is waiting to tear down its
7 facility because they're waiting on FEMA to make this
8 determination.

9 And so, because of FEMA'S policy of placing the
10 churches, because they are churches and solely because they
11 are churches, as evidenced in the filing yesterday and also
12 in FEMA's filing in the previous weeks, because they're
13 engaging in religious status discrimination and putting these
14 churches on hold and not allowing them to go through the
15 application process, it's forcing the churches to take steps
16 right now which will jeopardize their ability to access the
17 funding in the future. So those are some of the practical
18 consequences of FEMA'S position right now.

19 The primary practical consequence and the one
20 this Court has alluded to before, is the threshold issue
21 that's presented in this case, which is, this policy is on
22 the books, it's being enforced against our clients right now,
23 and there is nothing that's taking it off the books.

24 FEMA is not saying that they will grant the
25 funding for our client if they were otherwise qualified.

1 They're saying -- and it's already been enforced in their
2 policy -- they will not grant the funding to our clients if
3 they are otherwise qualified.

4 And so our clients are really in the worst
5 possible position because they can't get the funding because
6 FEMA has, on the basis of their religious status, put them on
7 hold; and they also can't get a denial so they can come to
8 this Court and get the policy fixed. They're stuck in limbo.
9 And being stuck in limbo, they're being forced to make policy
10 choices or building choices right now for their facilities
11 right now which will jeopardize their ability to access the
12 funding later.

13 THE COURT: Thank you.

14 MS. D'OTTAVIO: Your Honor, may I?

15 THE COURT: Yes. Go ahead.

16 MS. D'OTTAVIO: Okay. Just a few points first.

17 First, as we made clear in our sur-reply, FEMA
18 has not made an official eligibility determination on
19 plaintiffs' application and really cannot speak to what Texas
20 has relayed to the plaintiffs here.

21 Also, we tried to reiterate many times that the
22 public assistance program is a discretionary grant program
23 that provides grants in the form of reimbursement, and it's
24 just simply not designed for applicants to wait for a funding
25 decision from FEMA before performing necessary repairs.

1 So for plaintiffs to say they really need
2 FEMA's input to decide what to do, I mean, we had explained
3 that that is just not how the program is designed to work.

4 THE COURT: Well, the quote he read about you may
5 jeopardize funding if you proceed without FEMA approval,
6 that's what, taken out of context?

7 MS. D'OTTAVIO: That is only for, I believe for
8 emergency work. And much of the work that plaintiffs seems
9 to be asking for in their pleadings would fall under the
10 category of permanent work with the exception of the
11 emergency sheltering service that one of the plaintiff
12 churches has provided.

13 And we have explained that to the extent that
14 Texas has filed an application on that church's behalf, that
15 church can be reimbursed for those services regardless of
16 whether they are otherwise eligible or ineligible under the
17 current policy.

18 But an important note is that to the extent any
19 house of worship applicants are applying and they're
20 currently -- and they're eligible under the current policy,
21 their application will continue on a normal course.

22 To the extent that house of worship applicant
23 applies and there is a question as to their eligibility,
24 they're not being denied anything, they're being put on hold
25 while FEMA reconsiders the policy; and the outcome of that

1 reconsideration process may ultimately mean that those
2 applications will be approved, but FEMA just does not know at
3 this time as it's actively reconsidering those policies.

4 THE COURT: I take your point. I take your point.
5 It's under reconsideration. But I think you will understand
6 that's not a lot of comfort to the churches.

7 MS. D'OTTAVIO: I understand that. And we totally
8 understand the need for FEMA to move expeditiously through
9 this process, and FEMA certainly has endeavored to do so.

10 But the Stafford Act nor the regulations did
11 not provide any time frame by which FEMA has to make a
12 decision on any application. So even if there were no
13 reconsideration of the policy in place, even if we are going
14 along the normal course, there would still be no time frame
15 by which an agency is required to act.

16 THE COURT: No, no, no.

17 MS. D'OTTAVIO: There is no legitimate expectation
18 of a decision.

19 THE COURT: I understand there is no time frame for
20 the government to reconsider a policy, but there is some time
21 frame that comes with a lawsuit, and plaintiffs are asking
22 for a preliminary injunction right now, so the timing becomes
23 critical, if not for FEMA's reconsideration, for plaintiffs
24 in this case.

25 I just don't know that I can delay a ruling on

1 a preliminary injunction pending the possibility of a change
2 in policy at some date not yet determined, and I think you
3 can understand that.

4 MS. D'OTTAVIO: The government completely
5 understands that.

6 And what we would say is that what plaintiff
7 had essentially asked this Court to do is enjoin FEMA from
8 applying existing policies, and FEMA has voluntarily
9 endeavored to do just that. They put these policies on hold,
10 and FEMA is reconsidering policies during this period, just
11 as it would have to do if the policies were enjoined.

12 So the challenged policies are being
13 implemented, and the agency, regardless of whether the
14 preliminary injunction is granted or not, the agency is going
15 to go through some sort of reconsideration process as to what
16 the new policy tenet should be.

17 So plaintiffs aren't suffering any harm because
18 what they're essentially getting -- they're essentially
19 getting the relief that they seek. They are in the same boat
20 they would be if their PI, if their preliminary injunction
21 was granted because FEMA has stopped enforcing or
22 implementing that policy and it's actively reconsidering it
23 to see if it should be replaced or not, which is exactly what
24 FEMA will be doing if the Court were to enjoin it from
25 applying those policies.

1 THE COURT: No. If the Court were to enjoin it,
2 presumably FEMA would pay some money. That's a huge
3 difference.

4 MS. D'OTTAVIO: Your Honor, I would disagree with
5 that assessment because just because plaintiffs -- enjoining
6 the current policy wouldn't automatically make the plaintiff
7 churches eligible. The policy would still have to be
8 replaced and some sort of evaluation process would need to be
9 undertaken.

10 THE COURT: Tell me what else is deficient about the
11 applications besides the fact they come from houses of
12 worship.

13 MS. D'OTTAVIO: Well, they're no -- well, right now
14 the applications are currently complete, but there is also a
15 traceability or adjustability problem here because plaintiffs
16 could be denied FEMA funding for reasons other than because
17 they are ineligible under the current policy.

18 THE COURT: That's what I am asking. What are other
19 reasons they might be deemed ineligible?

20 MS. D'OTTAVIO: Sure. So, for example, if insurance
21 or an FDA loan covers the full cost of their repairs, FEMA
22 would not provide more funding on top of what insurance or
23 FDA would cover. So they could be denied funding for reasons
24 that have nothing to do with their application as churches,
25 or rather the services that they provide.

1 So plaintiffs cannot demonstrate that being
2 denied funding is even traceable to the challenged policy
3 such that a court order enjoining that policy will address
4 their injury because there is other reasons unrelated to what
5 they're saying that they would be denied.

6 THE COURT: But at least we'd get to those other
7 reasons. At least we could debate those ultimately and
8 robustly and figure out whether these are reasons that are
9 fatal to the application or require only a modification of
10 the application.

11 MS. D'OTTAVIO: Right. That's right. But FEMA
12 would still have to undertake a comprehensive evaluation of
13 that, and that will take time.

14 THE COURT: Okay. All right.

15 Mr. Blomberg.

16 MR. BLOMBERG: Yes, Your Honor. Just a few points.

17 First -- and we're happy to hear FEMA say that
18 they were wanting to put us in the same boat as if a
19 preliminary injunction was granted and they voluntarily
20 agreed to do just that.

21 THE COURT: Not too fast.

22 MR. BLOMBERG: Sorry, Your Honor. I was exiting.

23 We are happy to hear them say that they want to
24 put us in the same position, the church in the same position
25 as if a preliminary injunction was granted, and they have

1 voluntarily agreed to do just that.

2 So to on our mind that means FEMA can have no
3 objection to the motion before this Court for a preliminary
4 injunction if they are agreeing to suspend their policy and
5 allow the churches to be treated fairly.

6 Now, we think their description of the
7 situation is inaccurate on a number of levels.

8 First, yes, Your Honor is right, the funding
9 would flow because First Assembly wouldn't have been denied
10 on October 3rd solely on the basis of their religious
11 identity, and other churches would also have been eligible to
12 apply.

13 But, Your Honor, the other piece of this is
14 that FEMA is just incorrect as a matter of law that the only
15 interest that the churches have here is in obtaining the
16 funding. The churches have been very clear their primary
17 interest is actually in ending the odious, quoting Trinity
18 Lutheran, "the odious badge of discrimination that has been
19 placed on them" that is official religious discrimination in
20 FEMA's policy that's being enforced against them right now
21 and against other churches.

22 And Trinity Lutheran said specifically that the
23 policy that was struck down expressly discriminates against
24 otherwise eligible recipients by disqualifying them from a
25 public benefit because of their religious character, and that

1 both Trinity Lutheran and the cases that came before it made
2 one thing clear, that such a policy imposes a penalty on the
3 free exercise of religion.

4 And both the Fifth Circuit and the Supreme
5 Court have been very clear that "when the government erects a
6 barrier" -- and I'm quoting now from Northeast Florida
7 chapter of Associated General Contractors, 508 U.S. 656 --
8 "when the government erects a barrier that makes it more
9 difficult for the members of one group" --

10 THE COURT: No, no. Start the quote over again.
11 Slowly.

12 MR. BLOMBERG: Certainly.

13 "When the government erects a barrier that
14 makes it more difficult for members of one group to obtain a
15 benefit than it is for the members of another group," the
16 relevant injury is -- and here's the quote -- "the denial of
17 the equal treatment resulting from the imposition of the
18 barrier and not the ultimate inability to obtain the
19 benefit."

20 So, in the Moore versus U.S. Department of
21 Agriculture case, the Fifth Circuit said that the
22 discriminatory eligibility criteria itself was a cognizable
23 harm in and of itself that provides grounds for standing.
24 That's 993 F2d at 1224.

25 The Court specifically said that there is no

1 requirement that an applicant would have to go -- and I
2 quote -- "grovel before an agency and fill out an application
3 and go through the application process when the face of the
4 eligibility criteria itself applies to the applicant."

5 And that's been applied both in the context of
6 a funding criteria, it's been implied in the situation where
7 an employer has a discriminatory sign saying, you know,
8 "whites only" on the hiring office door.

9 It's been applied in the context of religious
10 discrimination where the District of D.C. issued an order
11 enjoining three days of discriminatory testing that would
12 have discriminated against a Sikh service member, S-i-k-h
13 service member, not an ill one, but a member of the Sikh
14 religious.

15 And here FEMA is asking for 20 times that much
16 in its 60-day stay. And as they have represented here,
17 that's a very open-ended stay, and they have no date certain
18 they can give to this Court before they would remove it.

19 A couple quick points, too, Your Honor on the
20 policy guide language. So FEMA policy guide page 75 calls
21 for a FEMA review, and that concerns emergency demolition, so
22 this is under Category B, what we are talking about here.

23 FEMA counsel suggested that it was only
24 concerning emergency work and that we were actually applying
25 for permanent work and so it wasn't an issue; but in fact,

1 another provision on page 87 concerning permanent work
2 construction says that, again, you have to get FEMA's
3 pre-approval, and failure to get FEMA's pre-approval
4 jeopardizes, and I quote, "jeopardizes the grants."

5 If this Court would like, I can read the quote.

6 THE COURT: Why are the parties disagreeing about
7 this? It either says that or it doesn't. Where is the
8 ambiguity?

9 MR. BLOMBERG: Your Honor, I don't think there is
10 any ambiguity. I think it's very clear that FEMA has a
11 process, and that process requires you to apply for a grant;
12 and once you get in the process, in fact, on page 132 FEMA
13 assigns you a personal representative once they have approved
14 your request for public assistance. And that person walks
15 you through this process. FEMA refuses to give that personal
16 representative to the churches because that step comes after
17 they make an eligibility determination.

18 And here, contrary to what FEMA's counsel just
19 suggested, they have in fact made eligibility determination
20 at least as it regards Harvest Family Church, because they
21 have put Harvest Family Church on hold. They're not just
22 wondering about what they're going to do with them. Their
23 application status, which hasn't been touched since October
24 13th, specifically says that it's on hold because it is a
25 house of worship. And FEMA's filings with this Court

1 specifically say they only put houses of worship on hold if
2 they are otherwise ineligible.

3 So they have made a determination regarding
4 Harvest Family Church. They put Harvest Family Church on
5 hold, they put the other churches before this Court on hold;
6 and because of that those churches are being forced to make
7 decisions right now regarding their rebuilding efforts as
8 they're trying to recover from one of the worst natural
9 disasters this country has ever seen. And they can't get the
10 kind of assistance that other non-profits can get solely
11 because they're religious and because FEMA's policy, both on
12 its pages and the way it's applying it in this litigation,
13 discriminate against the churches on the basis of their
14 religious status.

15 THE COURT: Trinity Lutheran was worried about a
16 church being ineligible because any part of what it did was
17 religious. Here FEMA seems to have adopted a 50.1 percent
18 test. Does that change the analysis?

19 MR. BLOMBERG: No, Your Honor, it doesn't, because
20 what Trinity Lutheran was talking about is the discrimination
21 on the basis of religious character. And here it's very
22 clear that FEMA's policy, the relevant language at page 12 of
23 their policy guide, says that facilities that are established
24 or primarily used for religious activities are ineligible.
25 And so that goes to the religious character of the

1 institution.

2 So FEMA is saying, if you have this certain
3 kind of religious character, you can't access the kind of
4 funding that we offer to entities of a different type of
5 character, a non-religious or secular character. And so we
6 don't think that changes the analysis here.

7 And importantly, FEMA hasn't contested that in
8 their filing they did. They waived the issue by not
9 contesting plaintiffs' affirmative case, both as it relates
10 to the issue of Trinity Lutheran's analysis and the Church of
11 Lukimi analysis and as it relates to strict scrutiny. FEMA
12 did not respond to any of that and has waived the issue at
13 this point.

14 So as to the affirmative case on the merits,
15 FEMA has no response. Their only response is on the question
16 of injury. And here there is no question there is injury
17 because, one, we have the official policy which is
18 discriminating on its face against the churches.

19 Two, the churches have actually been denied the
20 funding as of October 3rd. First Assembly was denied funding
21 on October 3rd.

22 Three, the churches have been excluded from the
23 process and they're not being able to participate in the
24 process because they have been put on hold, unlike other
25 types of entities that are going through the process right

1 now and are not on hold.

2 And four, because we are running the risk of
3 the funding running out at some point. And so there is not
4 an infinite sum of funding that we have here to get from, and
5 that's why officials that are administering this fund have
6 said, you know, the early bird gets the worm, and over \$400
7 million has gone out to other eligible PA grant recipients
8 while the churches have been forced to sit on the sidelines
9 by FEMA's discriminatory policy.

10 THE COURT: To obtain an injunction plaintiffs have
11 to show irreparable injury, correct?

12 MR. BLOMBERG: Yes, Your Honor.

13 THE COURT: Normally irreparable injury is not
14 something that can be fixed with money. Aren't we talking
15 about something that can be fixed with money?

16 MR. BLOMBERG: No, Your Honor, no, Your Honor; and
17 there is two reasons, at least two reasons why this can't be
18 fixed with money.

19 First is the dignitary harm that's being
20 suffered by the odious discrimination that's going on by
21 FEMA. And that's why several cases have granted injunctions
22 in similar types of situations, including in the Northeast
23 Florida Chapter Association of General Contractors where
24 again you had a discriminatory eligibility criteria for
25 government funding, and the district court there issued both

1 a TRO and then followed that up with a preliminary injunction
2 and the Supreme Court upheld that against a justiciability
3 challenge on appeal. So there is that aspect of it, which is
4 not compensable by funding.

5 And courts have found that that harm to First
6 Amendment rights, which again, FEMA doesn't contest here,
7 they just say that we aren't actually being harmed; but they
8 don't contest the argument that this discriminates on its
9 face against our clients, against the churches, and that most
10 courts find that is sufficient injury to find irreparable
11 harm without going any further under the Elrod v. Burns
12 analysis.

13 And the other piece of this, Your Honor, is the
14 lost opportunity cost, right. So, First Assembly several
15 weeks ago had the opportunity to receive this funding. First
16 Assembly, if it had received the funding several weeks ago,
17 could have gone through the processes that FEMA allows and
18 would have enhanced their ability to ensure they'd receive
19 future funding for other types of issues.

20 But now that because of what FEMA has done and
21 because they put them on hold and because they actually
22 denied them funding in these other instances, the First
23 Assembly has denied, denied their ability, or that FEMA has
24 denied their ability to access the funding because of lost
25 opportunity costs.

1 And the courts have been really clear on that.
2 In Janvey v. Alguire, which is 647 F.3d 585, that's a Fifth
3 Circuit 2011 decision, said where you have these kind of lost
4 opportunity costs that come up, you can't compensate,
5 recompense them just by an award of funding.

6 THE COURT: Isn't it a more significant loss than
7 that? Isn't it the loss of the opportunity for a spiritual
8 life during a critical time?

9 MR. BLOMBERG: Your Honor, that's absolutely
10 correct. And, in fact, that's one of the things that's
11 happened to High-Way Tabernacle, as evidenced in the record
12 before this Court. They've actually had to cancel religious
13 services because their sanctuary was destroyed by the
14 flooding. And their church gym, which is their only other
15 facility, was filled with FEMA agents who were using it to
16 help the other members of the community, which the church is
17 happy to do that, they volunteered to do that; but the issue
18 is they lost the opportunity for them to hold religious
19 worship services.

20 THE COURT: Okay. Thank you.

21 Anything from the government?

22 MS. D'OTTAVIO: Yeah. I'd like to respond to a few
23 points.

24 First, FEMA has not denied plaintiffs anything.

25 Second, the government is absolutely not

1 conceding that a preliminary injunction is warranted here.
2 We strongly believe there is no irreparable harm.

3 What we are simply saying is that, practically
4 speaking, if this Court were to grant their preliminary
5 injunction, we would be in the same posture we're in now.
6 Enjoining the policies wouldn't mean money would be in
7 plaintiffs' hands right away. FEMA would still have to need
8 to come up with a new policy to implement the Stafford Act.

9 So, plaintiffs' arguments are all assuming that
10 if this policy weren't in place or if it were different that
11 money would be in their hands right now, and that's just
12 simply an assumption that is not accurate based on how
13 this --

14 THE COURT: Let me stop you on the issue of
15 irreparable harm.

16 Haven't the members of these churches been
17 suffering irreparable harm in not being able to worship?

18 MS. D'OTTAVIO: I would say that they're not being
19 irreparably harmed because it's not -- they're not being
20 denied anything from FEMA.

21 THE COURT: They're being denied their spiritual
22 home.

23 MS. D'OTTAVIO: But that's not, respectfully, that's
24 not FEMA's, you know, that's not their responsibility. It's
25 a discretionary grant program, so it's not, you know, FEMA

1 doesn't provide guarantees that it will give any applicant
2 money, certainly not by any date certain. So the worshipers
3 in these institutions are not necessarily entitled to any
4 sort of funding from FEMA.

5 THE COURT: Okay. Anything else? Anything else?

6 MS. D'OTTAVIO: That's it for now, Your Honor.

7 Thank you.

8 THE COURT: I think, it looks to me like plaintiffs
9 might have proposed to put on some witnesses. No?

10 MR. BLOMBERG: No, Your Honor.

11 THE COURT: I don't think this is a question to
12 which we need evidentiary input.

13 MS. D'OTTAVIO: Your Honor, if I may say this while
14 I can.

15 THE COURT: Yes.

16 MS. D'OTTAVIO: FEMA has every intent to move as
17 expeditiously as possible through this process; and while I
18 can't speak to the specifics of the government's internal
19 deliberations, I can certainly represent that there is a
20 reconsideration process actively taking place. The agency is
21 making a good faith effort to reevaluate its current policy
22 as expeditiously as possible.

23 We completely understand the need to move
24 expeditiously through this process, and FEMA has endeavored
25 to do so; but the Stafford Act does not require any time

1 frame by which FEMA has to make a decision on any
2 application. So there is no legitimate expectation of a
3 decision by any time. And we would urge the Court to grant
4 the stay pending this reconsideration process.

5 And if plaintiff wants to renew their
6 preliminary injunction later after the outcome of that
7 process, obviously they are entitled to do so; but we think
8 that granting the stay and not ruling on this preliminary
9 injunction would be the most judiciously efficient course
10 this Court could take because the outcome of the
11 reconsideration process may ultimately moot plaintiffs'
12 claim.

13 THE COURT: I'm unlikely to grant a motion, grant a
14 stay. I think a stay is not proper when I don't have any
15 representation that a policy is going to change on a date
16 certain.

17 On the other hand, I do see the hazards that
18 would be caused by entering a preliminary injunction. I am
19 just one district judge in one part of the country, and the
20 consequences of enjoining FEMA on an issue this broad would
21 have ramifications system wide, including in areas that are
22 still dealing with damage that may even be greater than that
23 suffered by the Houston area.

24 I am mindful of that. I am mindful that
25 unelected judges should be careful about policy. But I don't

1 think a stay is proper.

2 I am going to take a moment to confer with my
3 colleagues. No one need rise.

4

5 (Recess taken)

6

7 THE COURT: Let's go back on the record.

8 Are you still with us in Washington?

9 MS. D'OTTAVIO: Yes, Your Honor.

10 THE COURT: Okay.

11 Do I understand the government agrees that
12 Trinity Lutheran controls in this case?

13 MS. D'OTTAVIO: Your Honor, we believe it's
14 premature to discuss the merits of plaintiffs' free exercise
15 challenge since the policy that they're currently challenging
16 is under active reconsideration. So the government is not
17 taking a position on the merits at this time.

18 THE COURT: Is there an establishment clause issue?

19 MS. D'OTTAVIO: We are not taking a position on the
20 merits at this time.

21 THE COURT: Let me ask plaintiff this. Trinity
22 Lutheran Church wants funds for a playground. It was set
23 aside, the monies that different organizations could use for
24 a playground. Is it different if the funds in question are
25 going to the creation of a sanctuary for worship services?

1 MR. BLOMBERG: Your Honor, we don't believe so
2 because in this instance it's a generally available program.
3 And so just like a community center would receive funding for
4 its brick and mortar repairs, the church would receive
5 funding for its brick and mortar repairs if it qualified in
6 the same eligibility criteria, and so --

7 THE COURT: But in the old cases it dealt with aid
8 to parochial education. There were distinctions made for
9 funding that did not involve excessive entanglement. They
10 provide, the government could provide textbooks but not
11 prayer books, textbooks but not payment of a minister or
12 rabbi's salary. Right?

13 MR. BLOMBERG: That's correct, Your Honor.

14 THE COURT: Is that distinction dead?

15 MR. BLOMBERG: I think the distinction is narrowing
16 significantly, but it's not relevant to the disposition of
17 this case, Your Honor, because even under the older decisions
18 in Tilton and Nyquist and cases like that, the Court
19 recognized that houses of worship had equal access to types
20 of generally available community services, particularly ones
21 that related to fundamental safety issues.

22 And so, in the Nyquist case, for instance, the
23 court acknowledged that public services such as police and
24 fire protection, sewage disposal, highways and sidewalks, if
25 provided in common to all citizens, were marked off from the

1 religious function; and so, there was no requirement under
2 the establishment clause that a synagogue be allowed to burn
3 down while a community center be protected from a fire.

4 And the American atheist case decided in the
5 Sixth Circuit by Judge Sutton specifically addressed this and
6 talked about how FEMA disaster aid relief was analogous to
7 those type of police and fire protections.

8 And, in fact, an OLC memo, Office of Legal
9 Counsel memo from 2002 which recognized and granted funding
10 to a Seattle Hebrew school specifically made that observation
11 as well. It said, a FEMA disaster assistance grant is
12 analogous to the sort of aid that qualifies as general
13 government services approved by the Supreme Court for
14 provision to houses of worship.

15 And so in a later OLC opinion in 2003, the
16 following year, the office approved a grant of funding on
17 repairs for the Old North Church, which was both a historical
18 landmark and the location of an active Episcopal
19 congregation.

20 So, Your Honor, we think that that distinction
21 doesn't carry the day here, it doesn't create establishment
22 clause problems here. And if anything, the distinction
23 between Trinity Lutheran in this case suggests that the free
24 exercise interests are much higher because in Trinity
25 Lutheran it was odious to discriminate against a school

1 simply in terms of playgrounds; but here we are talking about
2 fundamental issues of health and safety and recovery from one
3 of the worst natural disasters our country has ever seen.

4 And so, allowing that kind of odious discrimination to be
5 imported into the disaster relief context would raise very --

6 THE COURT: It's not an establishment clause issue?

7 MR. BLOMBERG: No, Your Honor, it is not.

8 THE COURT: Why is there not?

9 MR. BLOMBERG: Because, Your Honor, this type of
10 general provision of government services in the disaster
11 relief context, which would be provided on the same kind of
12 basis as other eligible institutions, does not raise
13 establishment clause concerns.

14 THE COURT: Your argument would mean that all
15 churches would be eligible, right?

16 MR. BLOMBERG: On an equal basis to other types of
17 eligible nonprofits.

18 THE COURT: That would include churches like
19 Westborough which treats the Ministry of Hate; it would
20 include churches like that?

21 MR. BLOMBERG: Any church that was open to the
22 public in the same way that a community center that preached
23 a message of hate was open to the public would be eligible
24 under FEMA's policy, yes, Your Honor.

25 THE COURT: Let's assume for the moment that there

1 is a likelihood of success on the merits and assume further
2 that there is irreparable harm being done because they're
3 being denied their right to worship. Let's talk about the
4 public interest and the harm to the other side. The other
5 side is FEMA, but the other side is really all taxpayers, all
6 citizens.

7 How can I make sure that a preliminary
8 injunction entered in this case wouldn't cause more harm in
9 the general public than it would do good in this specific
10 instance?

11 MR. BLOMBERG: Your Honor, I think there's a couple
12 pieces to that. One, the specific injunction that's being
13 requested by the churches here only concerns Categories A and
14 B of the Disaster PA program. And so we are only talking
15 about by definition services -- this is under the policy
16 guide at pages 43 through 44 -- that concern immediate,
17 serious emergency problems, and I quote, "that are important
18 to 'save lives, protect public health and safety, protect
19 improved property or eliminate and were less in an immediate
20 threat of additional damage.'"

21 So here, by protecting a church, for instance,
22 that has a damaged sanctuary like Highways' sanctuary, you
23 are protecting the public, and the public, that is, for
24 instance, accessing the church gym that is immediately
25 adjacent to the sanctuary, right. So the public's interest

1 and the public safety is being upheld in the same way it
2 would for a grant given to any other type of community center
3 that would be applied here.

4 Your Honor, I think the other piece of this,
5 too --

6 THE COURT: If I entered a preliminary injunction it
7 immediately would hold precedent for the entire country,
8 wouldn't it?

9 MR. BLOMBERG: Your Honor, I think it would
10 certainly, it would certainly, you know, the rationale and
11 reasoning of it would have not an affect on other situations,
12 but only your injunction concerns --

13 THE COURT: I know. I know that.

14 But haven't we then established the principle
15 that if you are waiting for FEMA funds, rather than wait your
16 place in line you're better off going to court?

17 MR. BLOMBERG: Not at all, Your Honor, not at all,
18 because all we are talking about here is one page, less than
19 one page of a 218-page manual. This is a very surgical
20 deletion of a discriminatory policy that FEMA makes no effort
21 to defend in front of this Court, Your Honor.

22 So we are not talking about a wholesale change
23 in policy. We're just saying all the criteria remain exactly
24 the same. Just stop discriminating on the basis of religion.

25 So, if High-Way Tabernacle is ineligible for

1 some of the relief that it's requesting, then that would be
2 determined on the same basis that it would be determined for
3 a community center. All this Court would be ruling is that a
4 policy which FEMA has refused to defend on the merits,
5 including in direct questioning just now, can't be enforced
6 to deny the churches equal access simply based on their
7 religious status.

8 I mean, the contrary is to allow FEMA to
9 continue a policy of odious religious discrimination. And,
10 Your Honor, it's not without harm to the public.

11 THE COURT: I understand that. But there's harm
12 either way.

13 Would the government like to speak to this?

14 MS. D'OTTAVIO: Yes, Your Honor.

15 If Your Honor were to enjoin the current
16 policies, FEMA, it would absolutely be in the public interest
17 for FEMA to undertake a comprehensive evaluation and have the
18 opportunity to come up with a policy that adequately and
19 efficiently implements the Stafford Act.

20 What plaintiffs are assuming is that they can
21 just simply delete whatever, you know, a few lines in a
22 policy guide; but FEMA would still have to come up with a new
23 policy that adequately implements the Stafford Act. It's not
24 like they get to still leave a few lines. They would have to
25 replace it with a new policy, and reconsideration of a new

1 policy would certainly take some time, and rushing through
2 that process would not be in anyone's interest, including
3 plaintiff.

4 MR. BLOMBERG: Your Honor, there is nothing, there
5 is nothing in the Stafford Act that requires FEMA's policy
6 discriminates against religious private nonprofits. In fact,
7 the definition in the statute for private nonprofits has zero
8 reference to religion. That's at 42 USC Section 5122(11).

9 And, in fact, the Stafford Act requires just
10 the opposite. It forbids -- and I quote -- "discrimination
11 on the grounds of religion in the processing of
12 applications." Again, that's at 42 USC Section 5151(a).

13 So FEMA's policy, that very small part of their
14 policy guide, is already in derogation of the statute. It's
15 already in derogation of the First Amendment, which again,
16 they make no attempt to argue to the contrary in front of
17 this Court.

18 And, Your Honor, the churches shouldn't be
19 required to spend more and more hours trying to get the
20 treatment that other nonprofits are already getting and other
21 nonprofits have gotten for decades.

22 I mean, this is not the first time this
23 happened. Mt. Newbo Bible Baptist Church, a small
24 African-American church that was buried in 20 feet of water
25 after Katrina, was denied by FEMA because it was a church

1 because they were established for a religious purpose. They
2 looked at their articles of incorporation and said, you were
3 established to spread the gospel of Jesus Christ and so we're
4 not going to help you out.

5 THE COURT: Well, I understand that, and I don't
6 hear the government defending that policy. I am just trying
7 to think through the other aspects of the preliminary
8 injunction test.

9 Anything more for the government?

10 MS. D'OTTAVIO: Your Honor, we'd just like to
11 reiterate the key language in the Stafford Act which requires
12 that or only allows funding under the public assistance
13 program to go to organizations or institutions that provide
14 services of a governmental nature. So any policy that FEMA
15 would implement would have to adhere to that clearly explicit
16 language in the Stafford Act.

17 THE COURT: Okay. So here's a whole nother test;
18 that even if these churches were to do away with the house of
19 worship exception they might fail at the public interest
20 hurdle?

21 MS. D'OTTAVIO: I would absolutely say so, Your
22 Honor, because it's not as enjoining the current policies
23 that automatically mean that, A, the churches would be
24 eligible and funds would be in their hands immediately, and
25 B, that FEMA would just not have any policy to replace. FEMA

1 would have to basically --

2 THE COURT: No. FEMA still has a policy in place.
3 But you are making what I think is a new argument, that there
4 is not only currently a house of worship exclusion, but
5 there's also an exclusion if you're not providing services in
6 the public interest.

7 MS. D'OTTAVIO: Well, the language in the Stafford
8 Act requires that FEMA funding is only eligible, only
9 institutions that provide services, essential services of a
10 governmental nature are eligible.

11 THE COURT: Is this in your briefing anywhere?

12 MS. D'OTTAVIO: Yes. FEMA would have to decide how
13 to apply that language in the Stafford Act, which controls,
14 simply controls the public assistance program, how that would
15 apply to houses of worship.

16 MR. BLOMBERG: Your Honor, if I may. FEMA's policy
17 guide already addresses that on page 14 of the policy guide,
18 which says, this is how community centers can show that they
19 provide critical services of a government nature.

20 And then what FEMA's policy guide does is it
21 does a carve out from that and said, okay, so services,
22 community centers that provide things like neighborhood
23 barbecues -- and I am quoting here -- "provide things like
24 neighborhood barbecues, community board meetings, various
25 social functions of community groups and do things like

1 sewing, stamp collecting and coin collecting," those kinds of
2 services that are provided at a community center, FEMA has
3 already determined at page 14 of the policy guide that those
4 are the kinds of services -- and that's not an exhaustive
5 list, it's just kind of an illustrative list -- those are the
6 kinds of policies or services that qualifies people or
7 entities to meet the Stafford Act definition.

8 And then FEMA says, "but even if you provide
9 those services, if you are established or primarily used for
10 religious purposes, you're out," right.

11 So that's why this is a very surgical
12 injunction that we're asking for here. We're just asking for
13 the carve out to be taken out. The churches are still going
14 to be subject to have to show that they provide services,
15 critical services of a governmental nature in the same way
16 that other types of community centers do.

17 So this isn't going to be opening the flood
18 gates of anything any more than just going to be closing an
19 unconstitutional condition that again FEMA fails to even
20 defend before this Court.

21 THE COURT: I am concerned about that. The
22 government doesn't offer me any basis to believe that its
23 current policy is correct, even that its current policy is
24 constitutional.

25 Do I read the government correctly?

1 MS. D'OTTAVIO: Your Honor, the government believes
2 it's premature to discuss the merits of plaintiffs' claims as
3 to the policies that they challenge because those very
4 policies are currently being reconsidered by the agency.

5 THE COURT: But how do I make a judgment about the
6 likelihood of success if we are not going to talk about the
7 merits?

8 MS. D'OTTAVIO: Well, Your Honor, we don't think
9 that you should. We think that the best course of action
10 would be to allow the agency to fully complete that
11 reconsideration process, stay this litigation in the meantime
12 because plaintiffs' claims may ultimately be mooted by that
13 process, and not rule on the preliminary injunction. And at
14 the end of the process, if plaintiffs are not satisfied or
15 they don't think FEMA's reconsideration process is sufficient
16 or adequate, then they can renew their preliminary injunction
17 motion. But any ruling on that motion we believe at this
18 time would be premature.

19 THE COURT: Is the reconsideration debate happening
20 at FEMA, in HHS, in the oval office, in Congress? Where is
21 this happening?

22 MS. D'OTTAVIO: So the reconsideration process is --
23 well, the policies are being given consideration at high
24 levels of both FEMA and the Department of Justice. So that
25 process is ongoing. It's requiring a lot of communication

1 between agencies; and obviously we can't speak to the
2 specifics of those communications and deliberations, but that
3 process is actively taking place and has been taking place.
4 And for those reasons we don't believe that any -- you know,
5 any ruling that goes to the merits of plaintiffs' challenges
6 to those policies would be absolutely premature at this point
7 because they're actively being reconsidered.

8 THE COURT: And I understand that. But you and I
9 have both seen enough of the government in action to know
10 that reconsideration of a policy can last years. And that is
11 not a cognizable metric for me to being reconsidered.

12 I will say I have enormous personal empathy for
13 your position. I think you were sent to argue this with
14 maybe both hands tied behind your back. You are not
15 defending the merits of what the government is doing, you're
16 not offering examples of irreparable harm, you're not
17 offering examples of why it's not irreparable harm, you are
18 not offering examples of how the government's, how the public
19 interest is being disserved.

20 What am I as a judge to surmise on this,
21 though? Is the government sotto voce asking me to enter an
22 injunction to help give them something to point out when they
23 change their policy?

24 MS. D'OTTAVIO: So, Your Honor, I'd just like to
25 reiterate that the plaintiffs here have not been denied

1 anything, will not be denied anything during this
2 reconsideration process that is actively going on.

3 And I understand Your Honor's concern that
4 reconsideration process can go on and on and on; but I can
5 represent to you wholeheartedly that the government at high
6 levels, at multiple agencies are actively going through a
7 comprehensive evaluation of the very policies challenged in
8 this lawsuit.

9 We have asked for a stay so the agency, to give
10 the agency time to continue that process; and plaintiffs, we
11 take the position, will not be harmed at any time.

12 THE COURT: Anybody else want to --

13 MS. D'OTTAVIO: They have not been denied anything.
14 They haven't been denied anything.

15 THE COURT: Anybody else wish to say anything at
16 all?

17 MR. RASSBACH: Just I think --

18 THE COURT: Identify yourself.

19 MR. RASSBACH: Oh, sorry.

20 THE COURT: Come to the floor and identify yourself
21 for those on the phone.

22 MR. RASSBACH: Eric Rassbach for plaintiffs.

23 I just think FEMA has the prejudice all
24 backwards. We are being prejudiced right now, as we've
25 detailed before this Court. They're not going to be

1 prejudiced at all if they put us through the process, just
2 like any other private nonprofit. And they even have a
3 process for seeking recoupment if they accidentally give out
4 funds the wrong way. Now, we would probably contest that if
5 they --

6 THE COURT: I understand.

7 MR. RASSBACH: -- gave us funds.

8 But the point is, and they'll know exactly how
9 much money they gave us because, you know, they will know
10 exactly.

11 THE COURT: I understand that.

12 MR. RASSBACH: So the prejudice is on -- we're the
13 ones being prejudiced, not FEMA.

14 THE COURT: Okay. The motion for stay is denied.

15 The Court will take under advisement the
16 preliminary injunction.

17 Thank you all very much. You are excused.

18 MR. BLOMBERG: Thank you, Your Honor.

19 MS. D'OTTAVIO: Thank you, Your Honor.

20

21

22 (Conclusion of proceedings)

23

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25

1 CERTIFICATION

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5 I, Fred Warner, Official Court Reporter for the
6 United States District Court for the Southern District of
7 Texas, Houston Division, do hereby certify that the foregoing
8 pages 1 through 43 are a true and correct transcript of the
9 proceedings had in the above-styled and numbered cause before
10 the Honorable KEITH P. ELLISON, United States District Judge,
11 on the 7th day of November, 2017.

12 WITNESS MY OFFICIAL HAND at my office in Houston,
13 Harris County, Texas on this the 12th day of December, A.D.,
14 2017.

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18
19 /s/ Fred Warner
20 Fred Warner, CSR
21 Official Court Reporter
22
23
24
25