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.

EMERGENCY APPLICATION FOR TEMPORARY INJUNCTION PENDING APPEAL

ERIC C. RASSBACH
Counsel of Record
DANIEL H. BLOMBERG
DIANA M. VERM
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. N.W., Suite 700
Washington, D.C. 20036
(202) 955-0095
erassbach@becketlaw.org

DECEMBER 15, 2017

Counsel for Applicants

RULE 29.6 DISCLOSURE

Harvest Family Church is a non-profit corporation that has no parent entities and does not issue stock.

Hi-Way Tabernacle is a non-profit corporation that has no parent entities and does not issue stock.

Rockport First Assembly of God is a non-profit corporation that has no parent entities and does not issue stock.

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to this Court's Rule 22 and the All Writs Act, 28 U.S.C. 1651, Applicants Harvest Family Church, Hi-Way Tabernacle, and Rockport First Assembly of God ("Churches") respectfully apply for a temporary injunction pending appeal prohibiting Respondents Federal Emergency Management Agency and Administrator William P. Long ("FEMA") from enforcing their policy barring Applicants from obtaining FEMA disaster relief grants solely because they are houses of worship. Applicants request an injunction lasting only as long as the pendency of the current Fifth Circuit appeal and any subsequent appeal to this Court.

* * *

This application can be summed up in two pictures.

1. The first picture is a screenshot taken earlier today from a FEMA website showing the current status of Applicant Harvest Family Church's application for a FEMA disaster relief grant:

Description	Step	Status	Age (Days)	Step (Days)	Last Action
Harvest Family Church (203-UF8PT-00) for 4332DR-TX (4332DR)		Pending (Held)	84	84	Workflow placed on hold. Reason: Holding Houses of Worship per HQ

As the screenshot shows, Harvest Family Church's grant application is "on hold" because FEMA is "Holding Houses of Worship per HQ" and that Harvest Family Church's application has been pending for 84 days. FEMA is refusing to process all disaster grant applications for churches, synagogues, and mosques that are "established or primarily used for * * * religious * * * activities," *i.e.*, solely because

they are houses of worship.[1] And while FEMA has managed to not only process, but to finally review and approve over $500 million in grants to other applicants, see https://www.fema.gov/disaster/4332, the Churches have been waiting on the sidelines for months because FEMA refuses to consider their applications. That differential and worse treatment of churches directly contravenes the First Amendment as interpreted by the Court six months ago in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (June 26, 2017), which held that "[t]he express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." 137 S. Ct. at 2022.

Despite this clear instruction, the district court below decided that *Trinity Lutheran* did not apply here because "*Trinity Lutheran* involved the funding of a playground, not a religious activity." App. 6. That conclusion is a gross distortion of *Trinity Lutheran* and the law of the First Amendment. In fact it is indisputably clear that FEMA's conduct violates the Constitution because FEMA is categorically "Holding [all] Houses of Worship per HQ," rather than evaluating each grant application on a case-by-case basis.

Indeed, the constitutional violation is so indisputably clear that FEMA has never disputed it. FEMA has knowingly conceded that its policy violates the First

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[1] Two synagogues in Florida damaged by Hurricane Irma have also sued FEMA over its exclusion of houses of worship. See *Chabad of Key West, Inc.* v. *FEMA*, No. 17-cv-10092 (S.D. Fla.). One of the synagogues, Chabad of the Space Coast, was previously denied relief grants by FEMA in 2012, and was damaged again by Irma.

Amendment. That concession alone disposes of this application, since the loss of First Amendment freedoms constitutes irreparable injury. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Administrative agencies cannot (and should not be permitted to) disfavor First Amendment rights in the name of administrative preference. Particularly where, as here, the policy is embodied in neither a statute nor a regulation, but mere guidance. The First Amendment trumps FEMA's concededly unconstitutional exclusion policy. In fact, Circuit Justices have frequently granted emergency stays when sensitive First Amendment rights were threatened. And this case is even clearer than those cases, because here the unconstitutionality is conceded.

2. The second picture that tells the story is one of the devastation wrought by Hurricane Harvey on the sanctuary of Applicant Rockport First Assembly of God:

App. 122.

Rockport is where Harvey made landfall, and as the picture demonstrates, First Assembly's sanctuary had to be demolished after having its roof ripped off. These are critical and exigent circumstances in two separate ways.

First, the Churches cannot wait at least two more months to start the FEMA grant process. Hurricane Harvey made landfall on August 25, almost four months ago. Their buildings are literally rotting in place while their FEMA grant applications linger in bureaucratic limbo. FEMA has been saying that it is reconsidering its policy since late September. But the Churches are on hold while, as noted above, FEMA has received, processed, and finally approved other applications for over $500 million in PA grants. Indeed, since late September, FEMA has offered expedited grants that could be processed and distributed within 10 days. But not to churches.

Each Church has suffered. For example, because of the danger to its members and to the general public, First Assembly has already had to demolish its sanctuary. It also had its application for a Small Business Administration loan turned down just yesterday, so a FEMA grant is now its only hope of obtaining any federal assistance at all as it seeks to rebuild. And but for FEMA's policy First Assembly *would have already received* an expedited FEMA grant to cover emergency repair costs.

For its part, Hi-Way Tabernacle's sanctuary has been rendered structurally unsound by flooding. As a result, it has been forced to use a small all-purpose room for worship. But how long it will have to wait to demolish its sanctuary and start anew is completely unknown, because FEMA refuses to process its grant application, and FEMA says it penalizes applicants that demolish structures without first

obtaining its signoff as part of the grantmaking process. Hi-Way Tabernacle thus faces a Catch-22: If it demolishes now, it will be penalized by FEMA and will likely receive no grant money, but if it waits for FEMA to process churches' applications, its building will continue to rot, and as FEMA made clear in its briefing below, it will penalize Hi-Way if it delays demolition for too long. App. 27. Either way Hi-Way Tabernacle's members' ability to worship will be burdened because they will have no worship sanctuary for an indefinite period of time.

The second aspect of the critical and exigent circumstances that the Churches face is bald-faced discrimination. The loss of First Amendment freedoms for even a short time constitutes irreparable injury. See *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Here, the Churches are being subjected to a facially discriminatory rule: unlike other private nonprofits, FEMA refuses to process their applications. They can knock, but they can't come in. That would constitute discrimination if done with respect to almost any protected characteristic, but ought to be especially problematic when houses of worship, which enjoy the "special solicitude" of the First Amendment, are the targets. *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012).

Finally, absent an injunction pending appeal, the Court's jurisdiction will be impeded because the Churches will have nothing left to save by the time this litigation might appear again before the Court on writ of certiorari or otherwise. Indeed, sovereign immunity means that the Churches will never be able to seek damages from FEMA—once the opportunity to participate in FEMA's grant program

is gone, it will be gone forever. See 42 U.S.C. 5148 (FEMA immune from liability for "failure to exercise or perform a discretionary function or duty"); *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991) (applying "discretionary function" standard). Indeed, this is why courts regularly uphold injunctions against discriminatory grant criteria; the harm is not just lost money, but lost opportunity. See *Ne. Florida Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville, Fla.*, 508 U.S. 656, 668 (1993). That urgency is doubly pressing because FEMA's funding may run out if further appropriations are not made to the Disaster Relief Fund. The absence of any ability on the part of the Churches to obtain retrospective relief from FEMA therefore means that issuing a limited, temporary injunction here is both necessary and appropriate in aid of the Court's jurisdiction.

Like many Texans, the Churches are still hurting from Harvey. Unlike many Texans, the Churches are currently barred from the FEMA disaster relief grant process. They may apply, but will then be put on indefinite, months-long hold "per HQ" because they are houses of worship. They need relief from this Court.

JURISDICTION

The Churches filed their original complaint on September 4, 2017, challenging FEMA's policy under the Free Exercise Clause of the First Amendment. Dist Ct. Dkt. 1. The district court had jurisdiction over the Churches' lawsuit under 28 U.S.C. 1331 and 1361 and had authority to issue an injunction under 28 U.S.C. 2201 and 2202.

On September 6, the Churches filed an emergency motion for a preliminary injunction and then, after an emergency hearing on September 8 and at Judge Ellison's request, filed a first amended complaint and a renewed emergency motion

on September 12. App. 36, 58. On November 9, Judge Ellison issued an order finding that FEMA had declined to defend the merits of its policy, and that unless FEMA adopted a new position by December 1, he would rule on the Churches' motion. App. 179. On November 30, Judge Ellison unexpectedly recused. On December 1, the case was reassigned to Judge Gray Miller. That same day, the Churches filed an emergency motion for a temporary restraining order asking the district court to provide an immediate ruling as promised by Judge Ellison.

On December 7, Judge Miller denied the temporary restraining order and the preliminary injunction. App. 1. That same day, Applicants filed an emergency appeal to the Fifth Circuit, App. 10, and sought an injunction pending appeal from the district court and from a motions panel of the Fifth Circuit. The district court denied the injunction on December 8. App. 13. The motion panel denied the Churches' motion on December 11. App. 34.

The Court has jurisdiction over this Application under 28 U.S.C. 1254(1) and has authority to grant the requested relief under the All Writs Act, 28 U.S.C. 1651.

STATEMENT

A. FEMA's policy

The Robert T. Stafford Disaster Relief and Emergency Assistance Act authorizes the President to provide Federal assistance when the magnitude of an incident or threatened incident exceeds the affected State, Territorial, Indian Tribal, and local governments' capabilities to respond or recover. See 42 U.S.C. 5121 *et seq*. FEMA's largest grant program under the Stafford Act is its Public Assistance (PA) Program, which provides funds to assist communities recovering from major disasters or

emergencies declared by the President. *See* FEMA Public Assistance Program and Policy Guide at 1-2, http://bit.ly/2hteb2R ("FEMA Policy Guide"). The program provides emergency assistance to save lives and protect property, and helps restore community infrastructure harmed by a federally declared disaster.

Because it is a disaster-relief program, effective implementation requires urgency. FEMA emphasizes "the necessity to collaborate with Applicants early in the PA Program implementation process," and requires that applications be collected "as soon as possible" after a disaster declaration, and normally no later than 30 days. *Id.* at 131. Where there is "an immediate need," FEMA also provides "expedited funding" under the PA program to support emergency repairs that protect public health and safety, and prevent additional damage to already-harmed property. *Id.* at 135.

Certain private nonprofit organizations (FEMA calls them "PNPs") are eligible for PA Program grants if they are located in a place that has been declared a federal disaster area, and if they apply for the grants within 30 days of the declaration. *Id.* at 2, 131. A nonprofit recognized as an I.R.C. 501(c) entity and which owns or operates a facility can apply for PA Program grants if it provides an "eligible service." *Id.* at 12-13, 17 (citing 44 C.F.R. 206.221(f)).

As relevant here, "eligible service" includes "non-critical, but essential governmental service" provided by a facility that is open to the general public at little or no fee. *Id.* at 12. Such non-critical services include "museums, zoos, community centers, libraries, homeless shelters, [and] senior citizen centers." 44 C.F.R. 206.221(e)(7). Activities that make a facility eligible for relief grants 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.

But FEMA policy states that "facilities established *or* primarily used" for "religious" activities are simply "not eligible." *Id*. at 12 (emphasis added). If a building is established for religious purposes, or used more than 50% of the time for "religious activities, such as worship, proselytizing, religious instruction," it is not eligible for PA grants. *Id.* at 15-17. Houses of worship are thus effectively excluded from access to disaster relief grants.

This has been FEMA's policy and practice since at least 1998. See FEMA Publication 9521.1(VII)(C)(1) (eff. 2008-2015) ("churches, synagogues, temples, mosques, and other centers of religious worship" are generally ineligible because their facilities are established or primarily used for religious purposes); see also FEMA Publication 9521.1(7)(c)(7) (eff. 1998-2008) ("A facility used for a variety of community activities but primarily established or used as a religious institution or place of worship would be ineligible"; this includes "churches, synagogues, temples, mosques, and other centers of religious worship").[2] While religious bodies may obtain

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[2] Both archived versions of FEMA Publication 9521.1 are available here: http://bit.ly/2yEblew.

grants for what FEMA deems "nonreligious" buildings, houses of worship themselves are categorically ineligible because of their religious purpose. See, *e.g.*, FEMA Release No. 1763-141 (Aug. 8, 2008) https://www.fema.gov/news-release/2008/08/08/variety-government-assistance-available-churches (advisory that "federal grants cannot cover * * * worship sanctuaries").

FEMA has also repeatedly informed the public following major disasters that houses of worship are ineligible. Recent high-profile examples include the aftermath of Hurricane Katrina and Superstorm Sandy.[3]

The Stafford Act by no means requires FEMA's religious disqualification of otherwise eligible nonprofit groups. See 42 U.S.C. 5122(11) (defining eligible nonprofits without reference to religion). But the Act does forbid "discrimination on the grounds of * * * religion" in "the processing of applications." 42 U.S.C. 5151(a).

B. History of FEMA's policy enforcement

FEMA has repeatedly ruled against houses of worship who appealed Requests for Public Assistance that were denied based on the applicants' religious status. The common thread in all of the denials 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 (ruling against church).

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[3] *See* Alan Cooperman, *Parochial Schools to Get U.S. Funds for Rebuilding*, Washington Post (Oct. 19, 2015) (quoting FEMA stating that churches, mosques, and synagogues were not eligible for FEMA aid after Hurricane Katrina); Sharon Otterman, *For Congregational Leaders, Hurricane is Taking a Toll*, N.Y. Times (Nov. 12, 2012) (same, Superstorm Sandy).

For instance, one of the synagogues currently suing FEMA for its discriminatory policy was previously denied aid in 2012 because too many of its "activities appeared to be geared to the development of the Jewish faith" and to be "based on or teach Torah values." See Final Decision, Chabad of the Space Coast (June 27, 2012), https://www.fema.gov/appeal/219590?appeal_page=letter. In another example, a Unitarian Universalist church in New Orleans was left under eight feet of water for several weeks after Hurricane Katrina. But while the church's building was used for a variety of "community center types of activities," FEMA found it ineligible because it believed that the building was "established for religious purposes." See Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015) https://www.fema.gov/appeal/288379?appeal_page=analysis. FEMA focused on the church's articles of incorporation and bylaws to determine that it was "established" for religious purposes and thus the kind of facility FEMA could not give grants to. FEMA emphasized that being established for a religious purpose rendered the church ineligible *"regardless* of the other secular activities held at the facility." *Id.* (emphasis supplied). The church was damaged by Hurricane Katrina in 2005; FEMA finally denied aid in 2015. *Id.*[4]

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[4] See also Final Decision, Philadelphia Ministries https://www.fema.gov/appeal/286079 (Apr. 7, 2015) (denying aid to church because "main feature" of facility was "church sanctuary" and "facility was established as a church," even though third of facility was "dedicated for homeless shelter services"); Final Decision, Mount Nebo Bible Baptist Church (Mar. 13, 2014), https://www.fema.gov/appeal/283775?appeal_page=analysis (denying grant because,

By contrast, other nonprofit entities have been able to receive FEMA grants even when they are not generally open to the public. See Final Decision, Gulf Marine Institute of Technology (Jan. 6, 2011), https://www.fema.gov/appeal/219468 (approving grant for cephalopod research center, which had not previously been open to the public); see also Final Decision, Montgomery Botanical Center (April 2, 2001), https://www.fema.gov/appeal/218795 (approving grant for fence and shade house at center; public was permitted to access the center "by appointment").

C. The Churches

Harvest Family Church is located in Cypress, Texas, a Houston suburb within Harris County. App. 64 ¶ 2. It is a young church, started in 2011, and has about 200 members from a variety of backgrounds. App. 65 ¶ 6.

Hi-Way Tabernacle is located in Cleveland, Texas, a town within Liberty County. App. 89 ¶ 2. The Tabernacle has been operating for over 15 years and meets in both its sanctuary and its gym so that it can hold up to 350 people. App. 90 ¶ 4. In addition to its other services to the community, the Tabernacle provides significant disaster relief assistance. For instance, it has been a FEMA staging center for Hurricanes Rita, Ike, and now Harvey. *Id.* ¶ 7. In that role, it has hosted dozens of 18-wheeler trucks loaded with MREs, and has distributed those resources—along with many

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though church provided "literacy programs, clothing distribution, food and nutrition programs, teen retreats, health and wellness programs, and operat[ed] as a wellness center," church could not prove that over 50% of its activities were non-religious); *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").

others—to the community. *Id.* ¶ 8. During Hurricane Ike, federal military-grade emergency vehicles known as HMMWVs were parked in the Tabernacle's parking lot and permanently damaged the pavement. *Id.* ¶ 9.

Rockport First Assembly of God is located in Rockport, Texas, a part of Aransas County. App. 109 ¶ 5. In the last several years, First Assembly has grown from about 25 members to about 125 members today. App. 108 ¶ 3.

D. Hurricane Harvey

On August 25, 2017, Hurricane Harvey made landfall near Rockport, Texas, as a Category 4 hurricane and later struck the Houston metropolitan area with the greatest floods in its recorded history. Over 100,000 homes were damaged or destroyed by Harvey. Thousands of people were rescued by water and tens of thousands had to find refuge in emergency shelters. Media reports put the current death toll at over 70 victims. Current estimates are that Harvey is the most costly natural disaster in U.S. history.

On August 25, 2017, the President declared that Hurricane Harvey had caused a major disaster in Texas. *See* FEMA Release No. HQ017-060 (Aug. 25, 2017), https://www.fema.gov/news-release/2017/08/25/president-donald-j-trump-approves-major-disaster-declaration-texas. Two days later, the President amended the notice to include the counties in which the Churches are located: Aransas, Harris, and Liberty Counties. FEMA Amendment No. 1, (Aug. 27, 2017), https://www.fema.gov/disaster/notices/amendment-no-1-4. This amendment made funding in those counties "for debris removal and emergency protective measures" under the PA program.

First Assembly was the first of the Churches to be hit by Hurricane Harvey. It sustained severe damage. The steeple was blown off. See App. 109 ¶ 9, App. 120 (depicting image). The church roof was destroyed. App. 109 ¶ 8, 118. The sanctuary's internal ceiling, lighting, and insulation were damaged, and the sanctuary's sound system may also be a total loss. App. 109 ¶ 10. A bathroom ceiling in the church building caved in. *Ibid.* Outside the main facility, several trees were blown over, the parsonage's roof suffered damage, and the church van was totaled. App. 110 ¶ 13-15, App. 124. Altogether, about 5,500 square feet of the church's facility are irreparable and in need of immediate demolition. App. 110 ¶ 12.

Harvest Family was also extensively damaged, suffering flooding throughout its buildings. At the flooding's peak, the area and roads around the church were completely flooded and impassable, with between 2 to 3 feet of water surrounding the church itself. App. 67 ¶¶ 14-15, App. 75 (depicting image to right). 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 twenty inches in some locations, coating the inside of the church with mud and silt. App. 67-68 ¶¶ 16, 20, App. 81-85. A large tree next to the church was felled by the flooding, and other trees on the property may also be damaged and in need of removal. App. 67-68 ¶¶ 17, 24. Carpets, flooring, drywall, insulation, doors, furniture, and a variety of other materials were destroyed by the flooding. App. 68 ¶ 20.

The Tabernacle also experienced extensive flooding, with at least three feet of standing water in the sanctuary and significant damage throughout the building. App. 92 ¶ 20, App. 101 (depicting image). Flooding compromised the sanctuary's foundation, which will require the sanctuary to be demolished. App. 93. Church members quickly rallied, drained and dried the gym, and immediately began taking in evacuees. App. 91 ¶¶ 11-12. As of September 10, the church was sheltering about 70 people, including about a dozen families, and providing them three meals a day. App. 91-92 ¶¶ 12, 16. The Tabernacle's gym has been transformed into a warehouse for the surrounding area, storing and distributing food, water, hygiene products, and clothing. App. 91 ¶ 15. FEMA is also using the Tabernacle, including as a location for FEMA employees to accept and process aid applications. App. 91 ¶ 14. Because its sanctuary is unusable and its gym is in use, the Tabernacle has had to cancel a number of religious services.

App. 97 ¶ 48. Although the Tabernacle has resumed some worship services, they are expected to continue being drastically curtailed until a new sanctuary is built.

Notably, the Tabernacle is not alone among houses of worship providing emergency relief services. As they have in other recent disasters, houses of worship and religious organizations are playing a key role in emergency relief and recovery efforts. See, *e.g.*, *Shelters and donation drop offs around Houston area*, KTRK-TV Houston, (Sept. 1, 2017), http://abc13.com/weather/list-of-shelters-around-houston-area/2341032/ (listing numerous Houston-area houses of worship serving as emergency shelters). Indeed, FEMA's deputy administrator conceded that the "real first responders" are immediate neighbors and then it is "the local church, the local synagogue, the local faith based community, [and] the local mosque" that are "going to help people out." See https://www.fema.gov/media-library-data/1386343317410-9c998ad2f85ba25a3f93ca5fbce8df65/ThinkTank_July2013.txt. But while FEMA admits that "[c]hurches * * * serve an essential role in disaster recovery," when churches themselves need help, the "best option" available to them is trying to take out a loan through the Small Business Administration. See SBA May Help Churches, Nonprofits, Associations (July 8, 2011), https://www.fema.gov/news-release/2011/07/08/sba-may-help-churches-nonprofits-associations.

All three Churches need immediate emergency repairs and debris removal to protect the safety of their congregations and to prevent further damage to their buildings. App. 68 ¶¶ 21-25, 43-44; App. 92-93 ¶¶ 23-27; App. 111 ¶¶ 19-21. First Assembly and the Tabernacle must also make immediate decisions concerning major

demolition and repair. App. 115 ¶ 39; App. 97 ¶¶ 47-48. The Churches estimate that these repairs will cost tens of thousands of dollars for each church, and perhaps significantly more. App. 68-69 ¶¶ 26-27; App. 93 ¶¶ 28-29; App. 111 ¶¶ 22-23.

But for their religious status and religious activities, all three of the Churches' buildings would be eligible for FEMA disaster relief grants. App. 69 ¶ 31, App. 72 ¶ 39; App. 94-95 ¶ 34, App. 97 ¶ 43; App. 112 ¶ 27, App. 114 ¶ 34. 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 Texas counties—Harris, Liberty, and Aransas—that have been declared by the President to be a disaster area eligible for federal funds. All three open their buildings to the general public and provide services that, but for their religious character and purpose, are considered eligible important community services by FEMA. But because all three Churches were established for religious purposes, and because all three primarily use their buildings for religious purposes, none is eligible to apply for the same kind of relief offered to similarly situated nonprofits. App. 65 ¶¶ 7-8, App. 71-2 ¶¶ 36, 45, App. 87; App. 90 ¶ 6; App. 95 ¶ 39, App. 98 ¶ 50, App. 106; App. 109 ¶ 4, App. 113 ¶ 32, App. 115 ¶ 41, App. 128.

FEMA works with the Texas Division of Emergency Management ("TDEM") to administer the PA grant program in Texas. TDEM is charged by FEMA to make the "initial eligibility determination" on PA grants, and it "administers the grant for FEMA and distributes funding to the applicant." Dist. Ct. Dkt. 30 at 15. The Churches submitted applications for disaster relief aid to both FEMA and TDEM, and have received confirmation from TDEM officials that no further materials were necessary.

See, *e.g.*, App. 156; App. 163; App. 167 ¶ 6. Since applying, the Churches have been denied PA grants, told that they are not eligible, and—solely because they are houses of worship—had their applications placed on "hold" by FEMA while it processes applications for other nonprofits:

- On September 15, TDEM officials administering the PA grants stated that Hi-Way Tabernacle and Harvest Family Church were "absolutely not eligible" for PA grant funds under FEMA's policy. App. 132.

- On October 3, TDEM denied expedited PA grant funding to First Assembly that could have been available within ten days. App. 141 ¶ 16. The only stated basis for the denial was that First Assembly "was established for a religious purpose." App. 141 ¶ 17.

- On October 27, FEMA admitted to the Court that it would put "on hold" "all applications from houses of worship deemed ineligible for PA funding." Dist. Ct. Dkt. 41 at 2; see also App. 4.

- On November 6, Harvest Family Church confirmed its application had been "placed on hold" by FEMA because FEMA headquarters had issued an order "Holding Houses of Worship." App. 173 ¶¶ 5-7. Harvest Family Church's application is still "on hold" as of today.

FEMA policy makes PA grant funding contingent upon FEMA's pre-clearance of certain types of projects. For instance, FEMA must review even emergency demolition to ensure compliance with environmental and historical preservation laws. FEMA Policy Guide at 75. Two of the Churches' buildings were damaged so badly that they required demolition. App. 93 ¶ 24; App. 111 ¶ 19. Hi-Way Tabernacle is attempting to wait for the required FEMA approval before it demolishes its sanctuary, and will do so promptly once FEMA offers its approval. First Assembly, on the other hand, was unable to wait for FEMA approval due to the urgent need to start demolition.

Similarly, before construction to restore their facilities, the Churches must allow FEMA to ensure compliance with environmental and historical preservation laws. FEMA Policy Guide at 87 (noting that review must occur "before the Applicant begins work" and that failure to ensure FEMA's pre-project review "will jeopardize PA funding").

FEMA now claims that it is initiating steps to change the policy. App. 181 ¶ 2. FEMA is vague, however, as to the content of that change, whether it will solve the policy's constitutional problems, and when it will be implemented. See Dist. Ct. Dkt. 54-1 ¶ 5 (FEMA "expects" it may make a decision "by the end of December"); App. 182 ¶ 3 (noting that FEMA will wait on Congress before making "final" policy changes). In the meantime, FEMA's discriminatory policy remains in place and has prevented the Churches' applications from being processed for almost three months.

While the Churches and other houses of worship are on hold, FEMA has disbursed over $500 million in PA grants to other applicants. See https://www.fema.gov/disaster/4332?utm. Since late September, FEMA has offered expedited grants to other PA applicants that can be disbursed in ten days. App. 140 ¶ 7. Thus, FEMA's current policy places houses of worship in an untenable position. They must delay necessary repairs in order to preserve a chance at obtaining funding, even while FEMA policy categorically bans them from accessing that funding and actively distributes a dwindling amount of relief funds to other PA grant applicants.

PROCEDURAL HISTORY

The Churches filed their complaint on September 4, 2017, challenging FEMA's policy under *Trinity Lutheran* and *Church of the Lukumi Babalu Aye*. Dist. Ct. Dkt.

1. The Churches acted after they found out that FEMA would continue excluding houses of worship from the PA grant program despite the Court's decision in *Trinity Lutheran*.

The case was initially assigned to Judge Keith Ellison. At his request, the Churches filed an amended complaint and renewed emergency motion on September 12. App. 36, 58. FEMA moved for a stay while it considered a potential rule change, and then filed an opposition to the motion for a preliminary injunction. Dist. Ct. Dkts. 24 (stay), 30 (opposition). Both filings took the position that the Churches did not have standing and their claims were not ripe because FEMA was reconsidering its policy and had not yet denied grants to the Churches.

Judge Ellison held a hearing on the pending motions on November 7. He asked for a "clear statement from FEMA as to what its current policy is," App. 188, and confirmed that:

- FEMA's "current policy for houses of worship" was to put their applications "on hold," App. 188-89;
- during the "hold," FEMA refused to start "paying monies to people in the positions of the plaintiffs" even if they were otherwise eligible, App. 190;
- the Churches' applications were "complete" and that nothing was "deficient about the applications besides the fact they come from houses of worship," App. 199-200; and
- FEMA refused to give a "definitive end date" to its policy reconsideration, App. 189.

Judge Ellison noted that this position did not provide "a lot of comfort to the churches," and rejected the government's argument that the court should "delay a ruling on a preliminary injunction pending the possibility of a change in policy at some date not yet determined." App. 197-98. He then turned from FEMA's

justiciability arguments to the merits and stated that FEMA was essentially conceding the merits:

> You are not defending the merits of what the government is doing, you're not offering examples of irreparable harm, you're not offering examples of why it's not irreparable harm, you are not offering examples of how the government's, how the public interest is being disserved.

App. 225. Two days later, Judge Ellison issued an order formally denying the stay. He also found that "FEMA has declined to defend the merits of its policy" and "has also declined to engage in a substantive analysis of the four-part criteria that govern the issuance of a preliminary injunction." App. 179. He ruled that unless FEMA adopted a new position by December 1, FEMA would be deemed to have "concede[d], at the very least, Plaintiffs' likelihood of success on the merits of this case and that the injury being suffered by Plaintiffs is irreparable." App. 179.

After Judge Ellison unexpectedly recused himself on November 30 and the case was reassigned to Judge Gray Miller, the Churches immediately filed an emergency motion for a temporary restraining order and preliminary injunction, asking the district court to provide a ruling as close to the promised December 1 deadline as possible.

On December 7, Judge Miller denied the temporary restraining order and the preliminary injunction. Judge Miller first rejected FEMA's justiciability arguments and found that FEMA had failed to meet Judge Ellison's deadline, "thus conced[ing] Plaintiffs' likelihood of success on the merits." App. 6 n.1. But he went on to find *sua sponte*, App. 6 n.1, that the Churches were unlikely to succeed (1) because *Trinity Lutheran* was restricted to nonreligious contexts such as playgrounds, and

(2) because the Free Exercise Clause's ban on discrimination against religious conduct applied only to "criminal or civil sanctions." App. 6, 8. These conclusions were derived from an amicus brief filed by Americans United for Separation of Church and State that had been filed on November 30 and had not yet been accepted for filing when Judge Miller issued his order. The Churches were afforded no opportunity to respond to the arguments.

Applicants filed an emergency appeal to the Fifth Circuit on December 7, App. 10, and also sought an injunction pending appeal from both the district court and from a motions panel of the Fifth Circuit. The district court denied the injunction on December 8. App. 13. In its opposition to the Fifth Circuit motion for an injunction pending appeal, FEMA abandoned its justiciability arguments and instead argued solely that the Churches had not shown irreparable injury. App. 25. In a two-sentence per curiam order, the motions panel denied the Churches' motion on December 11, but granted an expedited appeal. App. 34. This application follows.

ARGUMENT

The All Writs Act, 28 U.S.C. 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers); *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); and 28 U.S.C. 1651(a)) (alterations in original). This

extraordinary relief is warranted in cases involving irreparable harm to First Amendment freedoms. See *CBS, Inc.* v. *Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (staying injunction where "indefinite delay" of broadcast protected by First Amendment caused "irreparable harm"); see also *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established likely violation of Voting Rights Act); *Am. Trucking Ass'ns* v. *Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (granting injunction); *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (same).

I. The Churches face critical and exigent circumstances.

The Churches face critical and exigent circumstances because they are currently unable to worship freely, and have exhausted available resources outside of FEMA's PA grants. All three Churches are in need of immediate emergency repair grants, and all three are stuck in limbo while FEMA refuses to treat them like other nonprofit PA applicants. This is ongoing irreparable First Amendment harm. See *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The district court also recognized the irreparable harm, giving FEMA until December 1 to change its position or concede likelihood of success on the merits and irreparable harm. App. 179. At the Fifth Circuit, FEMA argued that because the Churches have not been denied grants as of yet, they are not suffering irreparable harm. App. 25.

But putting the Churches' applications "on hold" does not *prevent* harm, it *causes* irreparable harm. "When the government erects a barrier that makes it *more difficult* for members of one group to obtain a benefit than it is for members of another group,"

the relevant irreparable injury "is the denial of equal treatment resulting from the imposition of the barrier[,] * * * not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993) (emphasis supplied). The First Amendment confers "a federal constitutional right to be *considered* for public [grants] without the burden of invidiously discriminatory" qualifications. *Id.* Thus, the Churches need relief, and need it urgently.

A member of this Court has granted emergency relief under the All Writs Act to prevent "indefinite delay" of the exercise of First Amendment rights, because it would "cause irreparable harm * * * that is intolerable under the First Amendment." *CBS, Inc.*, 510 U.S. at 1318 (Blackmun, J., in chambers) (exposé video of meatpacking plant). And several members of this Court have also repeatedly granted stays under 28 U.S.C. 2101(f) to protect sensitive First Amendment rights. While those rulings were under a lower standard of review, they were also in much closer cases: even in the face of compelling countervailing interests, such as the right to a fair trial, Circuit Justices have refused to allow even "short-lived" infringements on the First Amendment because they cause "irreparable injury to First Amendment interests as long as [they] remain[ ] in effect." *Capital Cities Media, Inc.* v. *Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J., in chambers); see also *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1308 (1974) (Powell, J., in chambers) (criminal trial; rejected delay "of uncertain duration"); *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1327, 1330 (1975) (Blackmun, J., in chambers) ("First Amendment interests" require relief

when "irreparable injury is threatened"); see also *Smith* v. *Ritchey*, 89 S. Ct. 54, 54 (1968) (Douglas, J., in chambers) (granting relief because "a serious First Amendment question is involved"). Here, FEMA has *no* countervailing interest, but is just as uncertain about the length of its delay. App. 182 (stating any new policy will have to wait for Congress to act). Accordingly, the irreparable injury caused by the conceded violation of the Churches' First Amendment rights counsels heavily in favor of temporary relief.

Moreover, without equal treatment now, the Churches' chances for a PA grant will be permanently jeopardized. For instance, FEMA's Policy Guide states that "FEMA *must* review the applicant's demolition process for compliance" with applicable law "[f]or demolition to be eligible." FEMA Policy Guide at 75 (emphasis supplied). Two of the Churches' buildings were damaged so badly that they required demolition. App. 93 ¶ 24; App. 111 ¶ 19. Hi-Way Tabernacle is attempting to wait for the required FEMA approval before it demolishes its sanctuary, and will do so promptly once FEMA offers its approval. First Assembly, on the other hand, was unable to wait for FEMA approval due to the urgent need to start demolition.

By contrast, secular nonprofits that are not "on hold" are assigned FEMA employees who help guide them through the legal thicket of compliance requirements. FEMA Policy Guide at 133. But FEMA's discriminatory policy means that the Churches permanently jeopardize their applications in ways that other nonprofits need not. Indeed, FEMA rejected a devastated church's PA application in 2014 in part because the church "demolished the facility before FEMA could conduct

an onsite, visual inspection" of the facility. See Final Decision, Mount Nebo Bible Baptist Church (Mar. 13, 2014), https://www.fema.gov/appeal/283775?appeal_page=analysis (noting that it was immaterial that the demolition was "mandated by the local or state government" for "safety concerns").

The Churches have already had this discriminatory policy enforced against them, and are still at the back of the line to receive application assistance and funding until FEMA decides what to do with them. In the meantime, their worship spaces continue to be completely unusable. This Court can prevent that injury from continuing, but a denial of the Churches' motion will leave the Churches in limbo for an indeterminate period of time, causing even more harm to their rebuilding efforts and their First Amendment rights.[5]

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[5] The Churches are also not the only houses of worship currently suffering from FEMA's denials and delay. As this Court explained in the employment context, discriminatory eligibility criteria cause harm beyond the immediate parties to an action: "If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs." *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 365-66 (1977). Thus, even "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as he who goes through the motions of submitting an application." *Id.* Many houses of worship have suffered severe damage from Hurricanes Harvey and Irma. See Amicus Br. of Jews for Religious Liberty, Dist. Ct. Dkt. 29 at 3-5; see also n.1, *supra* (synagogues in Florida). And many houses of worship in Texas are watching this case closely to see whether it is worth their effort to apply for a PA grant. See, *e.g.*, Amicus Br. of Jews for Religious Liberty at 8-9; Amicus Br. of Archdiocese of Galveston-Houston, Dist. Ct. Dkt. 37 at 5-6. But many more will never try.

II. The Churches have an indisputably clear right to relief.

FEMA's policy indisputably violates the Free Exercise Clause in two separate ways. First, by banning equal access to churches that are "established" for religious activities, it discriminates on the basis of religious status in violation of *Trinity Lutheran*. Second, by banning equal access to churches that are "primarily used" for religious activities, it discriminates against religious conduct in violation of *Lukumi*. These violations are apparent both on the face of FEMA's policy and in its actual operation.

And that they are indisputably clear is further evinced by the fact that they are just that: undisputed. FEMA has expressly and consistently refused to make any defense of its policy on the merits, and that alone is sufficient in the context of sensitive First Amendment rights to justify granting temporary injunctive relief. Courts need not try to unilaterally answer constitutional questions not raised by the parties. See, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2019 (noting, without more, that the "parties agree that the Establishment Clause" was not at issue). That is particularly true here, where granting temporary relief against FEMA's general discriminatory policy will still leave FEMA leeway to raise case-by-case Establishment Clause issues beyond the simple question of law at issue in this application. Thus, the Court may grant narrow, temporary relief to the Churches without going any further.

A. FEMA's policy violates *Trinity Lutheran*.

1. ***Express discrimination.*** This Court held in *Trinity Lutheran* that a policy that "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character * * * imposes a

penalty on the free exercise of religion that triggers the most exacting scrutiny." 137 S. Ct. 2012, 2021. FEMA's policy, which it has declined to defend on the merits, does exactly that. That policy cannot stand up to the scrutiny required by the First Amendment because FEMA has declined to defend its policy, conceding the Churches' likelihood of success on the merits and irreparable harm in the district court. App 6, 179, 225.

The district court's ruling distinguishing *Trinity Lutheran* erred by restricting *Trinity Lutheran*'s applicability to "the funding of a playground, not a religious activity," App. 6, and by ruling that FEMA's policy does not, like the policy in *Trinity Lutheran*, discriminate based upon the religious character of recipients. But this mischaracterizes both the holding of *Trinity Lutheran* and FEMA's policy.

In *Trinity Lutheran*, Missouri offered reimbursement grants to public and private schools, nonprofit daycares, and other nonprofit entities that resurfaced their playgrounds using recycled shredded tires. 137 S. Ct. at 2017. But it excluded churches from the program. *Id.* Even though Trinity Lutheran would have otherwise received funding, its application was rejected because it was a church. *Id.* at 2018. This Court held that Missouri's policy "expressly discriminate[d] against otherwise eligible recipients * * * because of their religious character." *Id.* at 2021. Such discrimination impermissibly "imposes a penalty on the free exercise of religion," which requires invalidating the policy or, at the very least, "triggers the most exacting scrutiny." *Id.*

The same is true here. But for the exclusion policy, the Churches would be eligible for FEMA emergency aid. App. 69 ¶ 31, App. 72 ¶ 39; App. 94 ¶ 34, App. 97 ¶ 43; App. 112 ¶ 27, App. 114 ¶ 34. The IRS has granted them tax exemptions; they provide services to the public similar to a community center or museum; they are open to the general public without fees; and they each have facilities that have been damaged and are in need of "emergency protective measures." App. 69 ¶ 31; App. 94 ¶ 34; App. 112 ¶ 27.

The only reason the Churches are not eligible is FEMA's policy that disqualifies facilities that are "established or primarily used" for "religious" activities. FEMA Policy Guide at 12. Houses of worship are, by their nature, established and primarily used for religious activities, a reality that they cannot change without changing their identity as houses of *worship*. See, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2029 (Sotomayor, J., dissenting) ("A house of worship exists to foster and further religious exercise"). Thus, especially for small congregations like the Churches, that own facilities amounting to little more than their sanctuaries, FEMA's rule is clear: "no churches need apply." *Trinity Lutheran*, 137 S. Ct. at 2024.

FEMA's policy accordingly "puts [the Churches] to a choice": "participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021-22. Their religious character and activity are "penalize[d]" because the PA program denies them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 2020 (quotation omitted). That religious disqualification cannot stand under *Trinity Lutheran*.

The district court's contrary ruling limiting *Trinity Lutheran*'s holding to playgrounds ignored the fact that the Court's reasoning was built on a string of "prior decisions," all of which had nothing to do with playgrounds and which together "make one thing clear": that a policy which "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" runs afoul of the Free Exercise Clause. *Id.* at 2021.

Moreover, the district court is simply wrong that *Trinity Lutheran*'s ruling turned on whether the playground grant went to a non-religious purpose. To the contrary, *Trinity Lutheran* explains that the Free Exercise Clause *forbids* discriminating against a private party's "conduct because it is religiously motivated." 137 S. Ct. at 2021. In addition, the church in *Trinity Lutheran* was clear that it sought the grant to advance its "educational program to allow a child to grow spiritually." *Id.* at 2017. Thus, the church's "playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission." 137 S. Ct. at 2029 (Sotomayor, J. dissenting). Indeed, it was partly for this reason that Missouri denied the church funding, since the program would give grants to religious organizations only if their "'mission and activities are secular (separate from religion, not spiritual) in nature' and the funds 'will be used for secular (separate from religion, not spiritual) purposes.'" 137 S. Ct. at 2038 (Sotomayor, J., dissenting).

Finally, the district court was wrong that FEMA's policy does not discriminate on the basis of religious character or status. A house of worship without worship is just a house. And a policy that discriminates against religious worship therefore

"categorically disqualifies" houses of worship. *Trinity Lutheran*, 137 S. Ct. at 2017; see also *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

FEMA has repeatedly stated that its policy has categorical implications for houses of worship: "a church does not meet FEMA's definition of an eligible [private nonprofit] facility." See Final Decision, Middleburgh Reformed Church (Nov. 12, 2013) https://www.fema.gov/appeal/283579. Indeed, where a church is "established" for religious purposes, it is ineligible "*regardless of the other secular activities held at the facility*." Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015) https://www.fema.gov/appeal/288379?appeal_page=analysis. Thus, under the "established-for" prong of FEMA's policy, churches are categorically ineligible.

That is true of the Churches here. Texas officials charged with administering FEMA's PA program denied expedited PA grant funding to First Assembly because First Assembly "was established for a religious purpose." App. 41 ¶ 17. They also stated that Hi-Way Tabernacle and Harvest Family were "absolutely not eligible" for PA grants because they were churches. App. 131 ¶ 13, App. 132 ¶ 21. FEMA admitted that it put "on hold" "all applications from houses of worship deemed ineligible for PA funding." Dist. Ct. Dkt. 41 at 2. And that is what FEMA has done to the Churches' applications. App. 173 ¶¶ 5-7.

2. ***Strict scrutiny.*** Since FEMA's exclusion policy "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" it must pass "the most exacting scrutiny."

Trinity Lutheran, 137 S. Ct. at 2021. It is indisputably clear that it cannot, and FEMA does not dispute it.

Indeed, FEMA regularly *encourages* houses of worship to use other government subsidies to rebuild their facilities, *e.g.*, the Small Business Administration's disaster loan program. 13 C.F.R. 123.200 (2002); see also FEMA Release No. 1763-141 (Aug. 8, 2008) (SBA loans "can cover * * * items that federal grants cannot cover, such as worship sanctuaries").[6] The government cannot have "an interest of the highest order" in denying PA grants with one hand while granting SBA loans with the other. See also Pub. L. No. 104-55, 110 Stat. 1392 (1996) (Church Arson Prevention Act).

Moreover, both federal and state governments are involved in "a host of other programs" that help restore the "physical buildings" of houses of worship. *Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 299 (6th Cir. 2009) (citing examples "such as Ebenezer Baptist Church in Atlanta or the Old North Church in Boston."); see also 27 Op. Off. Legal Counsel 91, 96-97 (2003) (upholding grants to Old North Church).

FEMA thus has *no* interest, much less a compelling one, in categorically banning houses of worship—that is active churches, synagogues, and mosques—from the PA Program. Antiestablishment interests go "too far" if they are "pursued * * * to the

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[6] Yesterday the SBA denied an SBA loan to one of the Churches—First Assembly—because it does not have funds sufficient to cover the difference between the loan and the cost of rebuilding. Therefore a PA grant is now First Assembly's last remaining opportunity to receive any federal assistance.

point of expressly denying a qualified religious entity a public benefit solely because of its religious character." *Trinity Lutheran*, 137 S. Ct.at 2024.

B. FEMA's policy violates *Lukumi*.

FEMA's policy also violates the Free Exercise Clause under *Lukumi* because it favors certain non-religious activities (*e.g.*, stamp collecting and cephalopod research) over religiously motivated activities. 508 U.S. 520. Under FEMA's policy, should the Churches give up the religious motivation for their activities, they would qualify for aid, but if they continue functioning as houses of worship, they are ineligible. That is impermissible.

In *Lukumi*, this Court held that the Free Exercise Clause "protect[s] religious observers against unequal treatment." 508 U.S. at 533. The Court applied this principle to strike down three ordinances banning animal sacrifice, unanimously concluding that the ordinances fell "well below the minimum standard necessary to protect First Amendment rights." 508 U.S. at 543. The ordinances were not "neutral" or "generally applicable" because *inter alia* they exempted "[m]any types of" nonreligious animal slaughter while, in practice, targeting only "conduct motivated by religious beliefs." *Id.* at 536-38, 543. This favoring of non-religiously-motivated activities over religiously-motivated activities constituted a forbidden governmental "value judgment." *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (applying *Lukumi*).

The district court declined to follow *Lukumi* on two grounds. First, it held that *Lukumi* and the Free Exercise rule it articulates apply only to "criminal or civil

sanctions." App. 8. But *Trinity Lutheran* directly addressed and rejected that position: "the Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions" or "criminalizat[ion]." 137 S. Ct. at 2022 (internal quotation marks omitted); accord *Merced* v. *Kasson*, 577 F.3d 578, 591 (5th Cir. 2009) (striking down policy that "force[d] the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit and, on the other hand, following his religious beliefs").

Second, the district court held that *Lukumi* did not apply because religion was not the *only* category of conduct targeted for disfavor. App. 9. But that is not the standard. Nor could it be, since it would incentivize legislators and bureaucrats to burden a few sacrificial secular categories to bless religious discrimination. To the contrary, when a policy allows for "at least some" exceptions, it becomes suspect. *Employment Div.* v. *Smith*, 494 U.S. 872, 884 (1990). And, as directly applicable here, when the law in question "discriminate[s] on its face" and "regulates * * * conduct *because it is undertaken for religious reasons*," it must face strict scrutiny. *Lukumi*, 508 U.S. at 532-33 (emphasis supplied). And that of course is what FEMA's policy does. FEMA Policy Guide at 12, 15 (banning funding for facilities used for "religious activities," "religious education," "religious services," and "religious" instruction"). If the Churches abandoned their religious motivations:

- their prohibited "worship" services would be eligible "social activities to pursue items of mutual interest";
- the impermissible "religious instruction" in Bible classes would be permissible "educational enrichment activities";

- children's church and women's Bible study groups would qualify as a "services or activities intended to serve a specific group of individuals"; and

- meetings between the clergy and other church leaders would be "community board meetings."

FEMA Guide at 14. Thus, FEMA's policy also flunks *Lukumi*.

* * * * *

FEMA's policy is an even clearer violation of the Constitution than the policy at issue in *Trinity Lutheran*. To be sure, both cases feature religious discrimination that is "odious to our Constitution." *Id.* at 2025. But here, there is no government defendant raising antiestablishment interests, and FEMA has never justified the church exclusion policy on antiestablishment grounds. The grants at issue are not to *improve* a church's property, but rather merely to help *restore* it from disaster. And while the grants in *Trinity Lutheran* avoided "a few extra scraped knees," 137 S. Ct. at 2024-25, here the funds concern emergency matters of health and safety for the general public, and rebuilding facilities which are "essential" to restoring devastated communities. FEMA Policy Guide at 16.

III. A temporary injunction is both necessary and appropriate in aid of the Court's jurisdiction.

A temporary injunction here is both necessary and appropriate in aid of the Court's jurisdiction. If this Court does not grant relief now, it will not have an opportunity to correct the irreparable harm the Churches are suffering if and when this case returns to this Court. Once the Churches lose the opportunity to participate in the PA grant program, sovereign immunity dictates that they will not be able to ask for damages. See 42 U.S.C. 5148 (FEMA immune from liability for "failure to

exercise or perform a discretionary function or duty"); *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991) (applying "discretionary function" standard in the context of the Federal Torts Claim Act). If FEMA does not treat the churches equally now, there is an increasing chance they will never have to, as the more time goes on the easier it is for FEMA to deny grants. See FEMA Policy Guide at 75, 87. It is precisely to avoid this kind of inequality of opportunity that courts enjoin discriminatory grant criteria. See *Ne. Florida Chapter*, 508 U.S. at 668 (affirming district court's grant of TRO and preliminary injunction). Moreover, the Disaster Relief Fund is not unending. See https://www.politico.com/story/2017/12/13/hurricane-recovery-disaster-aid-congress-223031 (reporting disputes over inadequate relief funding). The absence of any ability on the part of the Churches to obtain retrospective relief from FEMA therefore means that issuing a limited, temporary injunction here is both necessary and appropriate in aid of the Court's jurisdiction.

CONCLUSION

The Churches respectfully request the issuance of a temporary injunction during the pendency of the appeal before the Fifth Circuit and any subsequent appeal to this Court enjoining FEMA from enforcing its policy excluding houses of worship against the Applicant Churches.

Respectfully submitted.

ERIC C. RASSBACH
Counsel of Record
DANIEL H. BLOMBERG
DIANA M. VERM
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. N.W.,
Suite 700
Washington, D.C. 20036
(202) 955-0095
erassbach@becketlaw.org

DECEMBER 15, 2017

Counsel for Applicants