No. 17-20768

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees.

On Appeal from the United States District Court for the Southern District of Texas (Hon. Gray Miller, D.J.)

BRIEF OF PLAINTIFFS-APPELLANTS HARVEST FAMILY CHURCH, HI-WAY TABERNACLE, AND ROCKPORT FIRST ASSEMBLY OF GOD

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RULE 28.2.1 CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.2.1, I hereby certify as follows:

(1) This case is *Harvest Family Church, et al., v. Federal Emergency Management Agency, et al.,* No. 17-20768 (5th Cir.).

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: January 3, 2018

STATEMENT REGARDING ORAL ARGUMENT

Appellants Harvest Family Church, Hi-Way Tabernacle, and Rockport First Assembly of God believe oral argument will be helpful because this appeal presents important questions arising under the Free Exercise Clause. Oral argument has been scheduled by this Court for the morning of February 7, 2018.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and § 1361, as this action against Defendants-Appellees ("FEMA") arises under the Constitution and laws of the United States. The district court had jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

The district court denied a preliminary injunction to the Appellant Churches on December 7, 2017. R.E.17. That same day, Appellant Churches filed a notice of appeal. R.E.14.

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

PRELIMINARY STATEMENT

This appeal was already going to reach the Court in an extraordinary procedural posture. But on the day before this brief was to be filed, the posture became even more extraordinary, when FEMA announced that it would be adopting new policy guidance that no longer excludes the Churches and other houses of worship from FEMA's Public Assistance grant program. FEMA has stated that the new guidance will be published in the Federal Register on January 4, the day after this brief is to be filed.

As of the date of this filing, Plaintiff Churches do not know whether this announced-but-not-published change will translate into immediate relief for them. In particular, they do not know whether or when FEMA will begin processing their grant applications, which are still marked as "on hold," *see, e.g.*, Fig. 1 below, or whether they will be given an opportunity to re-apply for FEMA's expedited Public Assistance grants that they were denied in September and October.

Description	Step	Status	Age (Days)	Step (Days)	Last Action
Harvest Family Church (203-UF8PT-00) for 4332DR-TX (4332DR)		Pending (Held)	103	103	Workflow placed on hold. Reason: Holding Houses of Worship per HQ

Fig. 1 (Jan. 2, 2018 screenshot of Harvest Family's grant application on the fema.gov website).

Counsel for FEMA have not yet clarified whether they will soon adopt those measures, although the Plaintiff Churches are hopeful that they will have more information by the time their reply brief is due on January 22.

It also remains to be seen whether FEMA will seek to meet its burden to show that it is "absolutely clear" that FEMA cannot "revert to its policy of excluding religious organizations," whether by simply "reinstating [its]

policy in the future" or as a result of lawsuits hostile to the new policy. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (internal citations omitted); *see also* Josh Gerstein, *FEMA broadens churches' access to disaster funds*, Politico (Jan. 3, 2018), https://www.politico.com/story/2018/01/03/churches-disaster-funds-fema-religion-establishment-321202 ("several groups" may seek to continue "the legal saga" over FEMA policy because they believe that "paying taxpayer funds to rebuild churches is unconstitutional").

In the interim, however, the Churches welcome FEMA's recognition that the Free Exercise Clause, as interpreted by the Supreme Court in *Trinity Lutheran*, forbids FEMA's former policy. That policy denied the Churches equal access to a disaster relief grant program that—but for their religious character—they would have been eligible for.

For the informed observer, FEMA's change in position is not entirely surprising, as FEMA's church exclusion policy was an obvious violation of the principles of non-discrimination described in *Trinity Lutheran* and *Church of the Lukumi*, and FEMA had not even attempted to defend it on the merits. It was thus particularly wrong for the district court to rule for FEMA's exclusion policy on the merits because FEMA had waived any

such defense and a mere amicus brief could not concoct governmental interests on behalf of an unwilling government.

Likewise, FEMA's policy has unmistakably inflicted irreparable injury on the Churches. First, having their grant applications sent to the back of the line solely because they were churches is unconstitutional discrimination that is *per se* irreparable injury. But second, the church exclusion policy also put the Churches into an administrative Catch-22: they must wait for mandatory FEMA demolition and repair approvals to avoid jeopardizing any FEMA grants, but if they *do* wait for FEMA's approvals (which would first require FEMA to take their grant applications off "hold" status), then FEMA will not cover any new damages to their facilities caused by FEMA's delay. And while the Churches are stuck in limbo waiting for FEMA to act on their applications, they are unable to use their sanctuaries for worship.

The Churches need help as soon as possible, but until the just-announced policy is translated into action concerning their grant applications, they remain subject to FEMA's discriminatory rule and stuck in bureaucratic limbo. Given the urgent need both to respect sensitive First Amendment rights and to quickly resume reconstruction,

if FEMA does not begin to provide relief under the just-announced policy, this Court should reverse the district court's denial of a preliminary injunction and either (a) immediately enter an injunction in favor of the Churches or (b) remand with instructions to immediately enter an injunction.

STATEMENT OF THE ISSUES

1. Did the district court err by considering and relying on assertions of government interests waived by the government defendants and raised solely by an amicus?

2. Do the Churches have a likelihood of showing that FEMA's policy of excluding churches from emergency disaster relief grants violates the Free Exercise Clause under *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)?

3. Have the Churches sufficiently shown the remaining preliminary injunction factors?

STATEMENT OF THE CASE

A. FEMA's policy excluding houses of worship

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 2.0 (April 2017) at 1-2, http://bit.ly/2hteb2R ("FEMA Policy Guide 2.0"). 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," which requires that grant applications be collected "as soon as possible" after a

disaster declaration, and normally no later than 30 days. *Id.* at 131. Moreover, 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 federally-declared disaster area, and if they apply for the grants within 30 days of the declaration. *Id.* at 2, 131. A nonprofit recognized as a 501(c) entity under the Internal Revenue Code that 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[s]" includes "non-critical, but essential governmental service[s]" provided by a facility that is open to the general public at little or no fee. *Id.* at 12. Examples of facilities that provide 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 2.0 at 14.

But current FEMA policy states that "facilities established *or* primarily used" for "religious" activities are simply "not eligible." *Id.* at 12 (emphasis added).[1] 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

[1] On the afternoon of January 2, the day before this filing was due, FEMA announced a new policy, anticipated to be published in the Federal Register on January 4, the day after this filing is due. *See* Federal Register, *Revisions to the Public Assistance Program and Policy Guide*, https://www.federalregister.gov/documents/2018/01/04/2018-00044/revisions-to-the-public-assistance-program-and-policy-guide. The new policy promises to "make houses of worship owned or operated by PNP organizations eligible applicants for . . . financial assistance." *See* FEMA Press Release, https://www.fema.gov/news-release/2018/01/02/fema-expands-public-assistance-eligibility-include-houses-worship. At the time of this filing, the policy has not yet been applied to the Churches.

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 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").

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

Under FEMA's current policy, houses of worship seeking FEMA relief are instead told to apply for Small Business Administration ("SBA") loans. *Id.*

FEMA even created a training exercise to manage opposition to its policy. The exercise was set in the "State of Columbia" in 1998, where "All Saints Church" suffered "substantial damage" from "Hurricane Nancy" and was denied reconstruction aid by FEMA "because churches are not eligible," and so was redirected to apply for SBA aid. *See* FEMA Emergency Management Inst., *Public Assistance Issues Activity Instructions*, https://training.fema.gov/emiweb/downloads/pahoac.doc.

FEMA has also repeatedly informed the public following major disasters that houses of worship are barred from the PA grant program. Recent high-profile examples include exclusion notices issued during the aftermaths of Hurricane Katrina and Superstorm Sandy.[3]

[3] *See* Alan Cooperman, *Parochial Schools to Get U.S. Funds for Rebuilding*, Washington Post (Oct. 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801622.html ("Churches, mosques and synagogues are not eligible" for FEMA aid after Hurricane Katrina); Sharon Otterman, *For Congregation Leaders, Hurricane is Taking a Toll*, N.Y. Times (Nov. 12, 2012), http://www.nytimes.com/2012/11/13/nyregion/regional-places-of-worship-seek-to-rebuild.html (same, Superstorm Sandy).

The text of the Stafford Act does not require 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 denied Requests for Public Assistance that were filed by houses of worship. The thread common to 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).

For instance, a Florida synagogue currently suing FEMA over this issue in parallel litigation 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; *see also Chabad of Key West, Inc. v. FEMA*, No. 17-cv-10092 (S.D. Fla. filed Dec. 4, 2017) (current lawsuit).

In another example, a Unitarian Universalist church in New Orleans was left under "eight (8) feet of water for several weeks" after Hurricane Katrina. *See* Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015), https://www.fema.gov/appeal/288379?appeal_page=analysis. 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." *Id.* The church was damaged by Hurricane Katrina in 2005; FEMA denied aid in 2015. *Id.*[4]

FEMA rendered a similar decision against a small African-American church destroyed by Katrina when floodwaters rose so high that boats were tied to its steeple. *See* Samuel G. Freeman, *In New Orleans, Black Churches Face a Long, Slow Return,* N.Y. Times (Aug. 27, 2010), http://www.nytimes.com/2010/08/28/us/28religion.html. In that case, FEMA denied Mount Nebo Bible Baptist a PA grant even though the church provided "literacy programs, clothing distribution, food and nutrition programs, teen retreats, health and wellness programs, and

[4] *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").

operat[ed] . . . a homeless shelter" because of its "purpose 'to be religious . . . [and] to promote the teachings of the Gospel of Jesus Christ[.]'" Final Decision, Mount Nebo Bible Baptist Church (Mar. 13, 2014), https://www.fema.gov/appeal/283775?appeal_page=analysis. FEMA rendered its decision in March 2014, almost nine years after the church flooded in August 2005.

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 (Apr. 2, 2001), https://www.fema.gov/appeal/218795 (approving grant to center which public was permitted to access "by appointment").

C. The Churches

Harvest Family Church is located in Cypress, Texas, a Houston suburb within Harris County. ROA 17-20768.67 ¶ 2. It is a young church, started in 2011, and has about 200 members. ROA 17-20768.68 ¶ 6.

Hi-Way Tabernacle is located in Cleveland, Texas, a town in Liberty County. ROA 17-20768.90 ¶ 2. The Tabernacle has been operating for over 15 years and—before the hurricane—met in both its sanctuary and its gym so that it could hold up to 350 people. ROA 17-20768.91 ¶ 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 following Hurricanes Rita, Ike, and now Harvey. *Id.* ¶ 7. In that role, it has provided shelter, clothing, supplies, medical care, and food—including hosting and distributing the contents of dozens of 18-wheeler trucks loaded with MREs to the community. *Id.* ¶ 8.

Rockport First Assembly of God is located in Rockport, Texas, a part of Aransas County. ROA 17-20768.106 ¶ 5; 17-20768.109 ¶ 25. In the last several years, First Assembly has grown from about 25 members to about 125 members today. ROA 17-20768.105 ¶ 3.

D. Hurricane Harvey

On August 25, 2017, Hurricane Harvey made landfall near Rockport as a Category 4 hurricane. It later struck the Houston metropolitan area with the worst 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. Reports put the death toll at over 75 in Texas alone. *See* Cindy George, *Storm deaths: Harvey claims lives of more than 75 in Texas*, Houston Chronicle (Oct. 9, 2017), http://www.chron.com/news/houston-weather/hurricaneharvey/article/Harvey-Aftermath-Houston-police-officer-dies-19-12159139.php. Current estimates are that Harvey is the costliest 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 available in those counties "for debris removal and emergency protective measures" under the PA program. *Id.*

First Assembly was the first of the Churches to be hit by Hurricane Harvey. It sustained severe damage. The steeple was blown off. *See* ROA

17-20768.106 ¶ 9; ROA 17-20768.116 (depicting image to left). The church roof was destroyed. ROA 17-20768.106 ¶ 8; ROA 17-20768.114. The sanctuary's internal ceiling, lighting, and insulation were damaged, and the sanctuary's sound system may also be a total loss. ROA 17-20768.106 ¶ 10. A bathroom ceiling in the church building caved in. *Id.* Outside the main facility, several trees were blown over, the parsonage's roof suffered damage, and the church van was totaled. ROA 17-20768.107 ¶ 11-15; ROA 17-20768.118. Altogether, over 5,500 square feet of the church's facility are unrepairable and must be demolished. ROA 17-20768.206 ¶ 12.

Harvest Family was also extensively damaged, suffering flooding throughout its buildings. At the flood's peak, the area and roads around the church were completely impassable, with between 2 to 3 feet of water surrounding the church itself. ROA 17-20768.163 ¶¶ 14-15; ROA 17-20768.172 (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 20 inches in some locations, coating the inside of the church with mud and silt. ROA 17-20768.163-64 ¶¶ 16, 20; ROA 17-20768.177-81. A large tree next to the church was felled by the flood, and other trees on the property may also be damaged and in need of removal. ROA 17-20768.163-64 ¶¶ 17, 24. Carpets, flooring, drywall, insulation, doors, furniture, and a variety of other materials were destroyed by the flood. ROA 17-20768.164 ¶ 20.

The Tabernacle also experienced extensive flooding, with at least three feet of standing water in the sanctuary and significant damage throughout the building. ROA 17-20768.188 ¶¶ 20, 22; ROA 17-20768.197 (depicting image to right). Water compromised the sanctuary's foundation, which will require the sanctuary to be demolished. ROA 17-20768.189 ¶ 24. Church members quickly rallied, drained and dried the gym, and immediately began taking in evacuees. ROA 17-20768.187 ¶¶ 11-12. As of September 12, the church was sheltering about 70 evacuees, including about a dozen families, and providing three meals a day. ROA 17-20768.187-88 ¶¶ 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. ROA 17-20768.187 ¶ 15. FEMA also used the Tabernacle, including as a location for FEMA employees to accept and process aid applications. ROA 17-20768.187 ¶ 14. Because its sanctuary is unusable and its gym is in use, the Tabernacle has had to cancel a number of religious services. ROA 17-

20768.193 ¶ 48. Although the Tabernacle has resumed some worship services by moving relief supplies temporarily out of a smaller multi-purpose room off the gym every Sunday, the services are expected to continue being drastically curtailed until a new sanctuary is built. All the while, the Tabernacle continues to welcome families who need shelter in the space it has available.

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 stated that, after immediate neighbors, the "real first responders" are "the local church, the local synagogue, the local faith based community, [and] the local mosque." *See* FEMA, Think Tank (July 2013), http://bit.ly/2CHNNJm. But while FEMA admits that "[c]hurches . . . serve an essential role in disaster recovery," when churches themselves need help, FEMA has

stated that the "best option" available is seeking a loan from the Small Business Administration. *See* FEMA, *SBA May Help Churches, Nonprofits, Associations* (July 8, 2011), http://bit.ly/2liDl2K.

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. ROA 17-20768.164 ¶¶ 21-25, ROA 17-20768.168 ¶¶ 43-44; ROA 17-20768.188-189 ¶¶ 23-27; ROA 17-20768.207 ¶¶ 19-21. First Assembly and the Tabernacle must also make immediate decisions concerning major demolition and repair. ROA 17-20768.211 ¶ 39; ROA 17-20768.193 ¶¶ 47-48. The Churches estimate that these repairs will cost tens of thousands of dollars for each church, and perhaps significantly more. ROA 17-20768.164-65 ¶¶ 26-27; ROA 17-20768.189 ¶¶ 28-29; ROA 17-20768.207 ¶¶ 22-23.

But for their religious status and religious activities, all three of the Churches' buildings would be eligible for FEMA disaster relief grants. ROA 17-20768.165 ¶ 31; ROA 17-20768.168 ¶ 39; ROA 17-20768.190-91 ¶ 34; ROA 17-20768.193 ¶ 43; ROA 17-20768.208 ¶ 27; ROA 17-20768.210 ¶ 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 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. ROA 17-20768.161 ¶¶ 7-8; ROA 17-20768.167-68 ¶¶ 36, 45; ROA 17-20768.183; ROA 17-20768.186 ¶ 6; ROA 17-20768.191 ¶ 39; ROA 17-20768.194 ¶ 50; ROA 17-20768.202; ROA 17-20768.205 ¶ 4; ROA 17-20768.209 ¶ 32; ROA 17-20768.211 ¶ 41; ROA 17-20768.224.

E. Enforcement of FEMA's policy against the Churches

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." ROA 17-20768.359. The Churches submitted applications for disaster relief aid to both FEMA and TDEM, and have

received confirmation from TDEM officials that they have submitted all requested materials. *See, e.g.*, R.E.52, 58, 61 ¶¶ 5-6.

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. R.E.35 ¶¶ 18, 21.
- On October 3, TDEM denied expedited PA grant funding to First Assembly that could have been available within ten days. R.E.39 ¶¶ 15-16. The only stated basis for the denial was that First Assembly "was established for a religious purpose." *Id.* ¶ 17.
- On October 17, FEMA admitted to the Court that it would put "on hold" all "applications from houses of worship [deemed] ineligible" for PA funding." ROA 17-20768.531-32 ¶ 6; *see also* ROA 17-20768.783-84.
- On November 6, Harvest Family Church confirmed that, as of October 13, its application had been "placed on hold" by FEMA because FEMA headquarters had issued an order "Holding Houses of Worship." R.E.65 ¶¶ 5-7.

Harvest Family Church's application was still "on hold" as of the day before this filing, as reflected on FEMA's online grant application portal:

Description	Step	Status	Age (Days)	Step (Days)	Last Action
Harvest Family Church (203-UF8PT-00) for 4332DR-TX (4332DR)		Pending (Held)	103	103	Workflow placed on hold. Reason: Holding Houses of Worship per HQ

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 2.0 at 75. Two of the Churches had buildings which were damaged so badly that they required demolition. ROA 17-20768.189 ¶ 24; ROA 17-20768.207 ¶ 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 issues approval. But First Assembly was unable to wait for FEMA approval, and started demolishing significant portions of its facilities in September. ROA 17-20768.206-7 ¶¶ 12, 19.

Similarly, before construction to restore their facilities, the Churches must allow FEMA to ensure compliance with environmental and historical preservation laws. FEMA Policy Guide 2.0 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 states that it is initiating steps to change the policy. ROA 17-20768.574 ¶ 2. Until yesterday, FEMA had not provided any information as to the content of that change, whether it would solve the policy's constitutional problems, and when it would be implemented. And as of the date of this filing, FEMA's discriminatory policy has prevented the Churches' applications from being processed for over three months, and the injuries from that delay are still harming the Churches. ROA 17-20768.580.

While the Churches and other houses of worship are on hold, FEMA has disbursed over $500 million in PA grants to other applicants. *See* FEMA, Texas Hurricane Harvey (DR-4332), 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. ROA 17-20768.456 ¶¶ 6-7. 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.

F. 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*. ROA 17-20768.14. The Churches acted after they realized that FEMA would continue excluding houses of worship despite the Supreme 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. ROA 17-20768.129; ROA 17-20768.151. Judge Ellison refused the Churches' request for emergency consideration of their preliminary injunction motion ROA 17-20768.259.

FEMA moved for a stay while it considered a potential rule change, and then filed an opposition to the motion for a preliminary injunction. ROA 17-20768.270 (stay); ROA 17-20768.338 (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," ROA 17-20768.874, and confirmed that:

- FEMA's "current policy for houses of worship" was to put their applications "on hold," *id.* at 874-75;
- during the "hold," FEMA refused to start "paying monies to people in the positions of the plaintiffs" even if they were otherwise eligible, *id.* at 876;
- the Churches' applications were "complete" and that nothing was "deficient about the applications besides the fact they come from houses of worship," *id.* at 885-86; and
- FEMA refused to give a "definitive end date" to its policy reconsideration, *id.* at 875.

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." *Id.* at 883-884. 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.

Id. at 911. Two days later, Judge Ellison issued an order denying the stay. R.E.26. 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." R.E.31. 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." *Id.* In his November 9 order, Judge Ellison also invited amici to file briefs supporting FEMA's policy. *Id.*

On November 30, hours after amici Americans United for Separation of Church and State and others moved for leave to file an amicus brief, ROA 17-20768.585, Judge Ellison unexpectedly recused himself. ROA 17-20768.734. The case was reassigned to Judge Gray Miller on December 1. ROA 17-20768.735. Since almost three months had passed since the filing of the lawsuit and the emergency motion for preliminary injunction, 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. ROA 17-20768.736.

On December 7, Judge Miller denied the temporary restraining order and the preliminary injunction. R.E.17. Judge Miller first rejected FEMA's justiciability arguments, ruling that under the "plain language" of FEMA's policy, FEMA will "[u]ndoubtedly . . . deny funding" to the Churches and further delay would be "futile." R.E.21. He further found that FEMA had failed to meet Judge Ellison's deadline, "thus conced[ing] Plaintiffs' likelihood of success on the merits." R.E.22 n.1. But he went on to find *sua sponte*, *id.*, 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." R.E.22, 24. These conclusions were derived from the amicus brief submitted by Americans United on November 30 that had not yet been accepted for filing at the time Judge Miller issued his order. R.E.25 (simultaneously accepting the amicus brief and denying the preliminary injunction). The Churches were afforded no opportunity to respond to the arguments in the amicus brief.

The Churches filed an emergency appeal of the denial of a preliminary injunction to this Court on December 7, R.E.14, and also sought an injunction pending appeal from both the district court, ROA 17-20768.793, and from a motions panel of this Court, ROA 17-20768.804. The district court denied the injunction on December 8. ROA 17-20768.799. 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. FEMA Opp'n 25. In a short *per curiam* order, the motions panel denied the Churches' motion on December 11, but granted an expedited appeal. Order on Mot. 34.

On December 15, the Churches applied to Justice Alito as Circuit Justice for the Fifth Circuit for an emergency injunction pending appeal to be issued under the All Writs Act, 28 U.S.C. § 1651(a). *See Harvest Family Church v. FEMA*, No. 17A649 (S. Ct. Dec. 15, 2017). On December 21, Justice Alito requested that FEMA respond to the application by January 10, 2018. At the time of this writing, that application is still pending.

Yesterday, on January 2, 2018, at 4:45 PM EST, FEMA announced a new policy guide that would allow houses of worship to be eligible for PA grants. That policy guide is anticipated to be published in the Federal Register on January 4.

SUMMARY OF THE ARGUMENT

The Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) reaffirmed the longstanding principle that the government may not discriminate against churches because of their status as churches. It also held that one forbidden form of this impermissible discrimination is excluding churches from generally available public benefits programs "solely because of [their] religious character." *Id.* at 2024. But that has hitherto been exactly FEMA's policy. FEMA's exclusion of churches simply because they were "established" for religious purposes violates the Free Exercise Clause under *Trinity Lutheran*.

FEMA's current 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 current 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.

The Churches thus have a substantial likelihood of success on their Free Exercise claim. FEMA has never argued otherwise, and has thereby waived its defense on this claim.

The Churches likewise fulfill the other criteria for a preliminary injunction because FEMA's discrimination irreparably injuries them in a way that severely harms the Churches, the public interest, and the First Amendment without any countervailing value to FEMA. And FEMA has likewise failed to substantively dispute these criteria and thus waived them.

The district court ruled otherwise only by impermissibly relying on arguments raised solely in an amicus brief that was filed after the close of briefing, and which attempted to assert governmental Establishment Clause interests on behalf of FEMA. But amici cannot raise issues waived by parties, nor can private parties concoct governmental interests.

This Court should therefore reverse the district court's decision below and, subject to any further changes to FEMA's position, either

immediately issue an injunction, or alternatively, remand with instructions to enter the requested preliminary injunction immediately.

STANDARD OF REVIEW

The Court should apply *de novo* review here because the appeal turns entirely on questions of law and the relevant facts are not in dispute. Generally the denial of a preliminary injunction is reviewed under an abuse of discretion standard. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). But where a decision is either "grounded in erroneous legal principles" or concerns whether First Amendment rights have been violated, it is reviewed *de novo*. *Id.*; *see also Nat'l Football Players Ass'n v. Nat'l Football League*, 874 F.3d 222, 225 (5th Cir. 2017) ("*de novo* review is appropriate where 'a district court's ruling rests solely on a premise as to the applicable rule of law' and the applicable facts are established").

Here, the district court held that "the question before the court—whether the denial of funds to Plaintiffs violates their constitutional rights—is purely legal." ROA 17-20768.784. FEMA likewise agrees that the "dispositive" merits issue on appeal is the "pure legal question" of whether FEMA's policy "violates [the Churches'] Free Exercise rights

under the First Amendment." Dkt. 87 at 2. Accordingly, this Court's review is *de novo*.

Moreover, to the extent that any facts were determined by the district court, this Court must also review them *de novo* since "First Amendment issues" are implicated. *See Marceaux v. Lafayette City-Parish Consol. Gov't*, 731 F.3d 488, 491-92 (5th Cir. 2013) ("in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record'") (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984)). That rule necessarily applies to Free Exercise Claims arising under the First Amendment. *See*, *e.g.*, *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (McConnell, J.) ("Freedom of religion, no less than freedom of speech, is a promise of the First Amendment") (internal quotation and citation omitted) (collecting cases).

ARGUMENT

A preliminary injunction should issue if the movant establishes

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum, 566 F.3d at 445. Here, all four elements favor the issuance of an injunction. However, the Court must first address a waiver issue.

I. The district court erred by reaching and relying exclusively on a defense that FEMA expressly waived.

A. FEMA waived argument on the likelihood of success.

In both the district court and in this Court, FEMA has refused to offer any argument against the Churches' likelihood of success on the merits of their Free Exercise Clause claim. That sort of knowing waiver is often dispositive. *See, e.g.*, *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) ("arguments must be briefed to be preserved."); *accord DeSmit v. Dallas Fort Worth Int'l Airport Bd.*, 470 F. App'x 277, 278 (5th Cir. 2012) ("The failure to brief is fatal to any claim."); *see also Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002) (failure to brief an issue in district court "constitutes a waiver on appeal").

Rather than engage on the merits, FEMA made a strategic choice to rely instead on justiciability arguments, denying that the Churches had suffered harm from being put "on hold." ROA 17-20768.884; 17-20768.899 (FEMA counsel stating that FEMA "is not taking a position on the merits"). FEMA also explicitly declined to assert any sort of Establishment Clause interest. *Id.* at 899. Judge Ellison recognized

FEMA's refusal to "defend[] the merits of what the government is doing," ROA 17-20768.911 and R.E.31, and warned FEMA that unless it met a December 1 deadline to change its position, it would be deemed to have "concede[d], at the very least, Plaintiffs' likelihood of success on the merits of this case" for purposes of the preliminary injunction motion. R.E.31.

Like Judge Ellison, Judge Miller rejected FEMA's justiciability arguments, holding that FEMA's refusal to dispute the merits had "conceded Plaintiffs' likelihood of success on the merits." R.E.22 n.1. But the district court then took a wrong turn, holding that it was "still obligated" to evaluate amicus brief arguments that had been waived by the government. *Id.* That conclusion was error.

B. No "exceptional circumstances" justified the district court's decision to rule on an Establishment Clause defense raised solely by an amicus brief.

As a general matter, courts need not answer non-jurisdictional Establishment Clause questions not raised by the parties to the litigation. For instance, in *Trinity Lutheran*, several amici—including some who filed below—argued that allowing equal access to the grant program would offend the Establishment Clause. *See*, *e.g.*, Brief of ACLU

at 3, *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) (No. 15-577) ("the Establishment Clause squarely prohibits the direct payment of taxpayer funds to churches"). Yet the Supreme Court did not address that argument, as the "parties agree[d] that the Establishment Clause" was not at issue. 137 S. Ct. at 2019.

In fact, "[a]bsent exceptional circumstances, an issue waived by appellant cannot be raised by amicus curiae." *Squyres v. Heico Companies, L.L.C.*, 782 F.3d 224, 233 n.5 (5th Cir. 2015) (quoting *Christopher M. ex rel. Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991)).[5] Thus, Americans United should not have been allowed to make up an argument for FEMA, absent exceptional circumstances. But the district court made no attempt to look for exceptional circumstances.

Nor could it have found them if it had tried. The amicus brief was submitted well after the parties' preliminary injunction briefing had closed. The district court relied on the brief before accepting it for filing,

[5] The "exceptional circumstances" standard is shared by many other Courts of Appeals. *See, e.g.*, *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017), *cert. denied* No. 17-370 (U.S. Dec. 11, 2017); *Sequoyah Cty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1194 n.1 (10th Cir. 1999).

so the Churches never had a meaningful opportunity to respond. R.E.25. That unusual posture provides ample reason for *not* finding any "exceptional circumstances."

More importantly, amici cannot make such arguments on their own. While an amicus may inform the Court of justiciability defects even if the parties do not, *private* parties certainly cannot invent *governmental* interests where the government has not asserted them. *See, e.g.*, *Met. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 169 (D.D.C. 1976) ("private party lacks standing to assert the government's interests" if government does not assert them). Nor can private parties meet the government's evidentiary burden on its strict scrutiny affirmative defense. For this reason, courts have refused to consider "government 'interests'" raised by amici, instead ruling that the government "must justify its regulations in terms of its own problems." *Preferred Commc'ns, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406 n.9 (9th Cir. 1985). Allowing private amici to manufacture interests for silent governmental parties would turn civil rights litigation into a free-for-all.

And that is just what happened. The amici offered, and the district court effectively accepted, a grab bag of disparate sources to conjure up a

"historic and substantial governmental interest" that justifies refusing emergency disaster relief to the Churches. ROA 17-20768.610. But none of those sources have anything to do with FEMA, or with this case. Indeed, the amici provided zero record evidence that FEMA shares their reasons for opposing disaster relief to houses of worship. *Preferred Commc'ns*, 754 F.2d at 1406 n.9 (rejecting amici's argument where "nothing in the record suggests that [FEMA] has a substantial interest in any of the concerns raised by amici").

And for good reason: FEMA could not have raised these interests as compelling because the federal government, including FEMA, provides many *other* grants to houses of worship. *See* Section II(C), *infra*. Moreover, amici's arguments run contrary to over a decade of controlling advice from the Department of Justice's Office of Legal Counsel, which is binding on FEMA. *See* Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, 26 Op. O.L.C. 114, 124 (2002) ("a FEMA disaster assistance grant is analogous to the sort of aid . . . approved by the [Supreme] Court" for provision to houses of worship).

In sum, the district court erred by relying on arguments that the government waived and on alleged government interests raised only by private amici.

II. The Churches have a substantial likelihood of success on the merits of their Free Exercise Clause claim.

FEMA's steadfast refusal to offer any counter to the Churches' likelihood of success on the merits obviously increases that likelihood. But the Churches have made a more than sufficient showing that FEMA's policy violates both *Trinity Lutheran* and *Lukumi*, even without FEMA's concessions.

A. *Trinity Lutheran* prohibits FEMA's policy against providing disaster relief grants to groups that are "established" for religious purposes.

1. FEMA cannot categorically exclude churches.

FEMA's church exclusion policy violates *Trinity Lutheran*'s rule that churches cannot be excluded from government grant programs solely because of their religious character. 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 Missouri excluded churches from the program. *Id.* Even though Trinity Lutheran would

have otherwise received funding, its application was rejected solely because it was a church. *Id.* at 2018. The Supreme 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," that "triggers the most exacting scrutiny." *Id.*[6]

The same is true here. But for the exclusion policy, the Churches would be eligible for FEMA disaster relief aid. ROA 17-20768.165-166, 17-20768.168 ¶¶ 31, 39; ROA 17-20768.190, 17-20768.193 ¶¶ 34, 43; ROA 17-20768.208, 17-20768.210 ¶¶ 27, 34. The Churches meet all of FEMA's non-religiously discriminatory criteria: the IRS has granted them tax exemptions; they provide services to the public similar to those provided by a community center or museum; they are open to the general public without fees; and they each have facilities that have been damaged

[6] To be sure, "a law targeting religious beliefs as such is never permissible" and thus must be rejected regardless of government interest. *Trinity Lutheran*, 137 S. Ct. at 2024 n.4. The Churches address strict scrutiny because the district court did, and because, as in *Trinity Lutheran*, FEMA's policy "cannot survive strict scrutiny in any event." *Id.*

and are in need of "emergency protective measures." ROA 17-20768.165-166¶ 31; ROA 17-20768.190 ¶ 34; ROA 17-20768.208 ¶ 27.

The only reason the Churches are not eligible is FEMA's policy of disqualifying facilities that are "established or primarily used" for "religious" activities." FEMA Policy Guide 2.0 at 12, http://bit.ly/2hteb2R. 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*. *Cf. 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 with facilities that amount to little more than their house of worship, 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*.

***2. The district court misapplied* Trinity Lutheran.**

The district court's contrary ruling first erred by finding that the holding of *Trinity Lutheran* was confined to playgrounds that are used for nonreligious purposes. R.E.22. Its sole support for that remarkable conclusion is a single *dictum*—a footnote joined by only four Justices that restates the facts of the case. 137 S. Ct. at 2024 n.3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do no address religious uses of funding or other forms of discrimination."). But footnote 3 is simply not part of the Supreme Court's holding, and the holding itself did not confine its reasoning to playgrounds. Rather, the Court clearly explained that its ruling was built upon 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.

The district court also wrongly concluded that *Trinity Lutheran*'s ruling turned on whether the playground grant went to a non-religious purpose. First, the district court got the law wrong: far from blessing discrimination on the basis of religious motivation, *Trinity Lutheran* explained that the Free Exercise Clause *forbids* discriminating against a private party's "conduct because it is religiously motivated." 137 S. Ct. at 2021.

The district court also got *Trinity Lutheran*'s facts wrong. The church in *Trinity Lutheran* sought the grant in order to advance its preschool "educational program . . . to allow a child to grow spiritually." *Id.* at 2018. As the district court in that case found, "religious instruction is a central element of the preschool . . . , and there is nothing in the Complaint to suggest that this instruction does not extend to the playground." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1150 (W.D. Mo. 2013). 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) (quoting policy).

The district court also misapplied *Trinity Lutheran* to the facts here, holding that FEMA's policy against grants for "facilities established" for "religious activities, such as worship," FEMA Policy Guide 2.0 at 12, 15, somehow does not discriminate on the basis of religious character or status. R.E.23. But a house of worship without worship is just a house. And a policy that discriminates against religious worship therefore "categorically disqualif [ies]" 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.").

Moreover, whereas here the facility in question is a mixed-use facility, FEMA does not merely look to the use of the facility. It has explained that its analysis of the "established" prong "should be determined by reviewing *the organization's* (pre-disaster) charter, bylaws, and amendments" and its "articles of incorporation," among other documents. *See* Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015) (emphasis supplied), http://bit.ly/2DWmtqi; *see also* FEMA Policy Guide 2.0 at 132.

FEMA applied this analysis in assessing whether to award PA grants to a Unitarian Universalist church destroyed by Katrina, reviewing the church's "articles of incorporation, bylaws, charter, [and] IRS tax exemption letter" to "assess whether the [church's] facility was eligible." *Id.* FEMA determined that those documents stated that the church "was organized for purposes of . . . 'practicing the principles of the Unitarian Universalist faith," "refer[red] to the facility as a religious institution," and identify the church's facility as a "Church" in federal, state, and insurance filings. *Id.* "Based on the purposes set forth" in those documents, FEMA determined that the church was ineligible because *the church itself* "was established for religious purposes." *Id.*

FEMA conducted the same analysis, and reached the same result, for several other church applicants. For instance, it determined that a Baptist church was ineligible to receive a grant because "the Applicant's purpose" is "to be religious . . . [and] promote the teachings of the Gospel of Jesus Christ." Final Decision, Mount Nebo Bible Baptist Church (Mar. 13, 2014), https://www.fema.gov/appeal/283775?appeal_page=analysis. Similarly, FEMA denied eligibility for Philadelphia Ministries' church facility because "Philadelphia Ministries was incorporated as a religious

institution" and its facility was therefore "established primarily as a church." Final Decision, Philadelphia Ministries (Apr. 7, 2015), https://www.fema.gov/appeal/286079?appeal_page=analysis. Indeed, after they applied for PA grants, the Churches were required to turn in copies of their articles of incorporation, bylaws, and tax status. R.E.54, 59, 63.

Moreover, under FEMA's standard, no amount of "secular" good deeds can remove the taint of religiosity: where a church is "established" for religious purposes, it is ineligible "regardless of 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: "a church does not meet FEMA's definition of an eligible . . . facility." *See* Final Decision, Middleburgh Reformed Church (Nov. 12, 2013), https://www.fema.gov/appeal/ 283579.

The Churches here have suffered that kind of categorical denial in several ways. TDEM 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." ROA 17-20768.457 ¶ 17. They also stated that Hi-Way Tabernacle and Harvest Family were "absolutely not eligible" for PA grants because they were churches. ROA 17-20768.447, 17-20768.448 ¶¶ 13, 21. And FEMA is "Holding Houses of Worship per HQ," R.E.65 ¶ 7, leaving in limbo all "applications from houses of worship deemed ineligible for PA funding." ROA 17-20768.536. The Churches' applications are stuck in that limbo right now.

Accordingly, FEMA's policy impermissibly discriminates based on the religious character of the Churches and cannot be upheld under *Trinity Lutheran*.

B. *Lukumi* separately prohibits FEMA's policy against providing disaster relief grants for facilities that are "primarily used" for religious activities.

In *Lukumi*, the Supreme Court held that the Free Exercise Clause "protect[s] religious observers against unequal treatment." 508 U.S. at 542. 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 among other things they exempted "[m]any types of" nonreligious animal slaughter while, in practice, targeting "conduct motivated by religious belief." *Id.* at 536-38, 543. This kind of unequal treatment of religiously motivated actions was impermissible because it "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Id.* at 537. As then-Judge Alito later explained, *Lukumi* forbids such governmental "value judgment" against religion. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

Here, FEMA's policy facially discriminates against religiously motivated activities. It bans funding for facilities "primarily used" for "religious activities," "religious education," "religious services," and "religious instruction." FEMA Policy Guide 2.0 at 12, 15. 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, the *only thing* that FEMA's "primary use" test regulates is religious motivation. And when a policy "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). 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." R.E.24. 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 "criminaliz[ation]." 137 S. Ct. at 2022 (internal quotation marks omitted). Nor was *Trinity Lutheran* announcing a novel proposition of law: "As the Court put it more than 50 years ago, '[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'" *Id.* (quoting *Sherbert v. Verner,* 374 U.S. 398, 404 (1963)).

Second, the district court held that *Lukumi* did not apply because religion was not the *only* category of conduct targeted for disfavor.

R.E.24-25. 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). For instance, *Fraternal Order of Police* found that *Lukumi* required strict scrutiny where just one secular exception was made to a policy burdening religious exercise. 170 F.3d at 366; *accord Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004) (same). And here, as noted above, FEMA's policy is riddled with exceptions, from stamp clubs and community centers to art classes and cephalopod research. FEMA Policy Guide 2.0 at 14 (listing eligible activities such as "art classes," "car care, ceramics, gardening, . . . sewing, stamp and coin collecting," and "social activities" such as "community board meetings" and "neighborhood barbeques"). Thus, FEMA's policy also flunks *Lukumi*.

C. FEMA's policy fails strict scrutiny.

Because FEMA's policy discriminates on the basis of both religious status and religious conduct, FEMA must offer an affirmative defense showing its policy can pass strict scrutiny. *Trinity Lutheran*, 137 S. Ct.

at 2019. But FEMA never tried to do so below and thus waived the defense. *Yohey*, 985 F.2d at 225 ("arguments must be briefed to be preserved").

As explained above, that waiver means FEMA's policy fails strict scrutiny and violates the First Amendment for purposes of this appeal. This Court need go no further. Nonetheless, because the district court *sua sponte* raised an antiestablishment interest justifying FEMA's policy, the Churches address it here.

FEMA has no compelling interest in banning houses of worship from the PA Program. *Trinity Lutheran* explicitly rejected the argument that excluding a religious institution from a neutral grant program just for "being a church" can be justified by an "antiestablishment interest." 137 S. Ct. at 2023, 2024. When religious groups are excluded from a neutral program based only on their religiosity, a government interest in "nothing more than [a] policy preference for skating as far as possible from religious establishment concerns . . . cannot qualify as compelling." *Id.* at 2024. Any antiestablishment interests go "too far" if they are "pursued . . . to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character." *Id.* Thus, such

interests can be relevant "only *after* determining" that a given program does not "'require [recipients] to choose between their religious beliefs and receiving a government benefit.'" *Id.* at 2023 (quoting *Locke v. Davey*, 540 U.S. 712, 720-21 (2004) (emphasis supplied)).

Further, FEMA can have no such antiestablishment interest in denying churches disaster aid since it regularly encourages houses of worship to seek *other* forms of government subsidy to rebuild their facilities: for example, 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) (stating that SBA loans "can cover . . . items that federal grants cannot cover, such as worship sanctuaries").[7] The federal government cannot have "an interest of the highest order" in denying PA grants with one hand while granting SBA loans with the other.

Moreover, FEMA itself provides grants to houses of worship via its Nonprofit Security Grants Program ("NSGP"). *See* Department of Homeland Security Appropriations Act, Pub. L. No. 115-31 (2017). The

[7] The SBA has informed one of the Churches—First Assembly—that it will not receive an SBA loan because it does not have funds sufficient to cover the difference between the loan and the cost of rebuilding. A PA grant is thus First Assembly's only option.

program provides $25 million a year in grants for physical security enhancements to the facilities of nonprofit organizations that face high risk of terrorist attack. *See* FY 2017 NSGP Fact Sheet, http://bit.ly/2BL88fC. Houses of worship are eligible for the grants, and religious organizations have reportedly received most of them. *See* Tobin Grant, *Why Jewish organizations received $110 million from Homeland Security*, Religion News Service, May 29, 2015, http://bit.ly/2CFRZZW. Recipients include synagogues, mosques, churches, and Sikh temples. *See, e.g.*, N.J. Office of Homeland Security & Preparedness, *Homeland Security Grants to Nonprofits to Improve Security* (July 30, 2014), http://nj.gov/oag/newsreleases14/pr20140730a.html (listing 2014 New Jersey recipients); Florida Div. of Emergency Mgmt., *Non-Profit Security Grant*, https://www.floridadisaster.org/ Preparedness/domesticsecurity/ (last updated Nov. 20, 2017) (listing 2017 Florida recipients).

Indeed, there are a "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). For instance, houses of worship nationwide received hundreds of thousands of dollars from the federal government to preserve their sanctuaries

under the National Park Service's Save America's Treasures program. *See id.* at 299 (citing examples "such as Ebenezer Baptist Church in Atlanta or the Old North Church in Boston."); *accord* Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Op. O.L.C. 91, 96-97 (2003); *see also* https://www.nps.gov/preservation-grants/sat/ (describing program); *see*, *e.g.*, 2009 Save America's Treasures Grants, https://www.neh.gov/files/press-release/2009_sat_awards.pdf (listing churches in Minnesota, Alabama, and South Carolina among 2009 recipients).

Similarly, if FEMA were to assert an antiestablishment interest here, it would threaten the Church Arson Prevention Act of 1996, both of which provide government-subsidized low-interest reconstruction loans for houses of worship. *See* Pub. L. No. 104-155, 110 Stat. 1392 (1996); 13 C.F.R. § 123.200 (2002).

In sum, FEMA has not and cannot assert an antiestablishment interest to justify discriminating against the Churches here. As the Department of Justice's Office of Legal Counsel explained in a similar context, "a FEMA disaster assistance grant is analogous to the sort of aid

that qualifies as 'general government services' approved by the [Supreme] Court" for provision to houses of worship. 26 Op. O.L.C. at 124; *accord Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring in the judgment) (government may grant "ordinary police and fire protection" for churches, and there is "no significant difference" between such protection and grant programs "designed to secure . . . health and safety").

* * * * *

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." 137 S. Ct. at 2025. But here, there is no government defendant raising antiestablishment interests, and FEMA has never judicially justified the church exclusion policy on antiestablishment grounds. Moreover, 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," *id.* 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 2.0 at 16.

III. The other preliminary injunction factors are satisfied.

In a First Amendment case where likelihood of success is shown, there is often "no dispute" over "entitlement to relief under the other [preliminary injunction] criteria." *Byrum*, 566 F.3d at 445 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)). And, indeed, the district court found that FEMA's failure to contest the merits was matched by a failure to "engage in a substantive analysis of the four-part criteria that govern the issuance of a preliminary injunction." ROA 17-20768.557; *accord id.* at 911 ("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."). The district court ruled that if FEMA continued to leave its criteria undefended, it would find that FEMA had conceded not only the likelihood of success prong, but also "that the injury being suffered by Plaintiffs is irreparable." R.E.31. And as the district court later correctly found, FEMA did not change its defense. R.E.22 n.1. Accordingly, as with likelihood of success on the merits, the other criteria have been conceded,

and there is no reason this Court should not enter judgment for the Churches.

But, as before, even if FEMA had not conceded, the Churches have made a sufficient showing on the remaining prongs to justify injunctive relief.

A. FEMA's policy is irreparably injuring the Churches.

FEMA's violation of the Churches' First Amendment rights necessarily results in irreparable injury. This Court "has repeatedly held . . . that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (citing *Elrod*, 427 U.S. at 373) (internal quotation marks omitted). Indeed, when a party even "*allege[s]* violations of its First Amendment . . . rights," it has "satisfied the irreparable-harm requirement." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (emphasis supplied). Thus, "[w]hen an alleged deprivation of a constitutional right is involved, such as the right to . . . freedom of religion, most courts hold that no further showing of irreparable injury is necessary." *Id.* (quoting 11A Charles Alan Wright,

Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (3d ed. 2013)). Accordingly, the Churches have shown irreparable injury.

FEMA tried to obfuscate the injury by claiming that it is not enforcing its policy against the Churches and has merely put them "on hold." But putting the Churches' applications on hold does not *prevent* injury, it *causes* injury. "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) (emphases supplied). The First Amendment confers "a federal constitutional right to be *considered* for public [grants] without the burden of invidiously discriminatory" qualifications. *Id.* It is undisputed and indisputable that FEMA's policy *at least* makes it "more difficult" for the Churches to compete for PA grants, and that it does so on the basis of discriminatory qualifications. *Id.*

Thus, the Churches are being injured. Just like the government's policy in *Trinity Lutheran*, FEMA's "policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." 137 S. Ct. at 2021. There as here, the "'injury in fact' is the inability" of each of the Churches "to compete on an equal footing" because of their religious status. *Id.* at 2022 (quoting *City of Jacksonville*, 508 U.S. at 666)).

This Court has repeatedly emphasized that discriminatory eligibility policies create "stigmatization" that "is a cognizable harm in and of itself" sufficient to overcome standing and ripeness arguments. *Moore v. U.S. Dep't of Agric. on Behalf of Farmers Home Admin.*, 993 F.2d 1222, 1224 (5th Cir. 1993) (collecting cases addressing racial discrimination); *accord Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016) ("being subjected to discrimination is by itself an irreparable harm"). And particularly where, as here, the government "fails to defend" its own discriminatory policy, this Court has instructed lower courts to recognize the "pernicious ramifications" of failing to adjudicate undisputed allegations of "overt . . . discrimination." *Moore*, 993 F.2d at 1223-24. Thus, as a result of FEMA's constitutional violation and its continued delay, "[e]ach day that passes"

without the Churches having equal access to PA grants "is a day in which its religious free exercise is curtailed." *Opulent Life*, 697 F.3d at 288.

Further, the Churches have already been concretely injured at a practical level by FEMA's policy: First Assembly was denied expedited PA grant funding solely because it was "established for a religious purpose," and the other Churches were never even offered the chance to apply for expedited funding, presumably because they were deemed "absolutely not eligible" by the officials charged by FEMA to administer the PA grant program in Texas. R.E.35 ¶¶ 18, 21; R.E.39 ¶¶ 16-17.[8] That expedited funding was available within ten days. R.E.38 ¶¶ 6-7. Thus, but for FEMA's policy, the Churches would have received partial disaster relief aid months ago.

And the Churches are continuing to suffer injury because FEMA's decision to put their applications on hold both disadvantages them as compared to other PA grant applicants and permanently jeopardizes

[8] FEMA complained below that these officials worked for TDEM, not FEMA. But TDEM is the agency that FEMA chose to administer its PA grant program, and the officials were merely implementing FEMA's own explicit policy as its agents, including both the discriminatory PA grant policy and the equally discriminatory "on hold" policy. Moreover, FEMA has ratified TDEM's actions by its knowing refusal to reverse them.

their ability to receive FEMA grants. Secular nonprofits that are not "on hold" are can receive approval of their PA applications, which allows them to be assigned a specific "PA representative," a "program expert who serves as the Applicant's customer service agent on PA Program matters and manages FEMA's processing of the Applicant's projects." FEMA Policy Guide 2.0 at 132. These PA representatives also promptly set up an important "Kickoff meeting," which guides applicants through the legal thicket of PA program requirements, identifies damages to the applicants' facilities, and arranges on-site inspections. FEMA Policy Guide 2.0 at 133; FEMA PA Pocket Guide at 3, http://bit.ly/2Dt80l5. Many PA grant applicants are able to move even faster and obtain expedited grants within ten days of applying for them. R.E.38 ¶¶ 6-7; *see also* FEMA Policy Guide 2.0 at 135. And over $500 million in PA grant applications have already been reviewed and approved by FEMA. *See* Texas Hurricane Harvey (DR-4332), https://www.fema.gov/disaster/4332.

By stark contrast, the Churches have received neither funding nor even a chance to proceed with the approval process. Because their applications are on hold, the Churches have not been assigned a PA

representative and could not hold a kickoff meeting even if they had been. *See* FEMA PA Pocket Guide at 4 ("Meetings should not be held for any Applicants, including Private Nonprofits, prior to RPA [Request for Public Assistance] approval."); *accord* FEMA Policy Guide 2.0 at 132 (meeting scheduled after approval).

The Churches have also been denied the opportunity to obtain on-site inspections to allow them to obtain required FEMA approvals. For instance, FEMA's Policy Guide 2.0 requires that "FEMA *must* review the applicant's demolition process for compliance" with applicable law "[f]or demolition to be eligible." Policy Guide 2.0 at 75-76 (emphasis supplied). And "before [applicants] begin[ ] work" to reconstruct *after* demolition, they must again allow FEMA to ensure compliance with applicable laws, or else they "will jeopardize PA funding." *Id.* at 87. And even after obtaining FEMA's approval for a specific project, if an applicant determines that changes must be made, it must "allow FEMA time to review [the] changes for eligibility . . . prior to commencement of the work." *Id.* at 137-38. If the applicant "begins work associated with [an unapproved] change before FEMA review and approval, it will jeopardize PA funding." *Id.* at 138. Thus being shut out of the process leaves the

Churches in limbo until FEMA changes its mind or a court tells it to stop discriminating.

Worse yet, while the Churches are stuck waiting, FEMA has also informed them that if they delay in making repairs, FEMA will deem them "ineligible to receive reimbursement for any additional expenses incurred as result of the delay." ROA 17-20768.364 (citing 44 C.F.R. § 206.223(e); FEMA Policy Guide 2.0 at 20–21).

This creates a Catch-22 for the Churches. Hi-Way Tabernacle's situation illustrates how it works. Hi-Way's sanctuary has been rendered structurally unsound by flooding, forcing it to indefinitely use an all-purpose room for worship as it waits for FEMA's guidance and approval for demolishing and rebuilding. 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 FEMA will penalize Hi-Way for any additional damage caused by the delay. And 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.

Unfortunately, First Assembly was unable to wait any longer to demolish its damaged buildings, and was thus forced by FEMA's delay to permanently jeopardize its PA grants. 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"). Thus, the Churches are facing an ongoing disadvantage vis à vis other PA applicants, both in relation to the process and the ultimate decision.

FEMA's admitted discrimination against the Churches because of their religious character is itself irreparable harm and is causing further irreparable harm.

B. The balance of harms weighs in favor of the Churches.

FEMA's religious discrimination is odious to our constitution and causing irreparable harm to the Churches. To overbalance these severe

and irreparable harms, FEMA must make a "powerful" showing. *Opulent Life*, 697 F.3d at 297. It cannot do so, and it has never even tried.

Granting the injunction will merely prevent FEMA from relying on the Churches' "religious character," *Trinity Lutheran*, 137 S. Ct. at 2021, to deny these three specific Churches equal access to FEMA aid during the pendency of this case. And nothing in the Stafford Act requires FEMA's religious disqualifier in the first place. *See* 42 U.S.C. § 5122(11) (defining eligible nonprofits without reference to religion). In fact, the Stafford Act requires just the opposite: it forbids "discrimination on the grounds of . . . religion" in "the processing of applications." 42 U.S.C. § 5151(a). So an injunction will *help* FEMA follow the law.

Indeed, FEMA's exclusion policy is neither a regulation nor a statute. It is a policy document that FEMA regularly updates of its own volition. *See* FEMA Policy Guide 2.0 at viii ("FEMA will make updates to this guide . . . on an annual basis"). Nor is the challenged policy complex. The operative text is about 25 words and fills less than a quarter page of FEMA's 77,000-word, 218-page policy guide. *See* ROA 17-20768.157-58 (proposed order requesting changes to portions of two pages of FEMA Policy Guide 2.0). And allowing the Churches equal access will merely

end FEMA's unnecessary religious disqualification criteria; the Churches will still have to follow all of FEMA's normal PA grant procedures. Removing FEMA's minuscule-yet-unconstitutional carve-out is not a heavy regulatory lift for FEMA and also comports with the Administration's public statements about seeking to lessen the number of federal regulations.

By contrast, FEMA itself has never taken the position that a religion bears any sort of negative relationship to the ability to provide disaster relief. Indeed, FEMA has emphasized that churches are "essential" to disaster recovery efforts and that houses of worship are among the first responders in times of disaster. Thus allowing houses of worship to apply for grants will merely help entities that, in turn, help FEMA accomplish its mission.

C. The public interest would be served by enjoining FEMA's discriminatory policy.

Finally, issuing a preliminary injunction will not disserve the public interest because "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter.*, 732 F.3d at 539. By the same token, where a law violates the First Amendment, "the public interest [is] not disserved by an injunction preventing its

implementation." *Opulent Life*, 697 F.3d at 298 (internal quotation marks omitted). The public has no interest in continuing religious discrimination, but it does have an interest in ending it.

That's particularly true here, where many houses of worship in Texas and Louisiana are watching this case. Even when a house of worship's "desire for a [grant] is not translated into a formal application solely because of [its] unwillingness to engage in a futile gesture, [it] is as much a victim of discrimination as [the church which] goes through the motions of submitting an application." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977). Many houses of worship in Texas and Louisiana have suffered severe damage from Hurricanes Harvey. *See* Amicus Br. of Jews for Religious Liberty, ROA 17-20768.325-327; Amicus Br. of Archdiocese of Galveston-Houston, ROA 17-20768.508-10. Several have been told that they are ineligible just because they are houses of worship. R.E.35 ¶¶ 18, 21; R.E. 36 ¶ 22; R.E.39 ¶¶ 16-17. And many are watching this case closely to see whether it is worth their effort to apply for a PA grant.

Moreover, and by FEMA's own admission, permitting churches to have equal access to disaster relief will only be a practical net benefit to the

public that they serve. Since houses of worship are essential partners in rebuilding, helping them helps the larger community. Protecting public safety is always in the public interest, even when members of the public are religious or engaged in religious activities.

CONCLUSION

The Churches respectfully request that this Court immediately enter an injunction in favor of the Churches or, alternatively, reverse and remand with instructions to enter an immediate injunction prohibiting FEMA from enforcing its church exclusion policy against the Churches.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 3, 2018, this brief was served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov, upon all registered CM/ECF users. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of any paper copies in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Bitdefender Endpoint Security Tools and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2, it contains 12,653 words.

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