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

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

Plaintiffs,

v.

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

Defendants.

Civil No. 17-cv-2662

Hon. Gray H. Miller

PLAINTIFFS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND RULING ON OUTSTANDING MOTION FOR PRELIMINARY INJUNCTION

SUMMARY OF ARGUMENT AND NATURE AND STAGE OF THE PROCEEDING

Judge Ellison set today, December 1, as a deadline for the government Defendants to change their position or he would rule on the pending emergency motion for preliminary injunction. Judge Ellison unexpectedly recused in this case yesterday evening, and the case was reassigned today. By means of this motion, Plaintiffs seek immediate relief for the Plaintiff Churches that were devastated by Hurricane Harvey. In Plaintiffs' view, an injunction ought to have issued in September. In the meantime, they have suffered irreparable harm, which Defendants do not contest. That irreparable harm is ongoing and can be remedied only by immediate relief from this Court, by means of either the temporary restraining order requested here or the pending motion for preliminary injunction that is ripe for ruling.

* * *

Plaintiffs are three churches who were severely damaged by Hurricane Harvey and who, but for their status as houses of worship, would have been allowed equal access to federal disaster relief *months ago*. But because they are houses of worship, all three are *right now* being denied equal access to the relief. That discrimination blatantly violates the Free Exercise Clause of the First Amendment, irreparably harming both these Churches and also the other Texas synagogues and houses of worship trying to recover from Harvey. It also creates immediate practical harm because the Churches suffered millions of dollars in damage that left their facilities unsafe and in need of emergency repairs. But despite these emergency needs, the Churches are not only being denied equal access to *apply* for FEMA relief, but have already been formally *denied* expedited emergency FEMA relief that would otherwise have been distributed to them mid-October.

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

motion on September 12. FEMA has never contested the merits of the Churches' claims, instead arguing only that the Churches lacked standing and their claims lacked ripeness. After a hearing on November 7, Judge Ellison said he was unpersuaded by FEMA's justiciability arguments and ruled that unless FEMA adopted a new position by December 1—today—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." Dkt. 45 at 6.

Today is December 1, and FEMA's position remains unchanged. And FEMA's position has only become weaker since the November 7 hearing. As the Churches explained in their Nov. 22, 2017 status report, Dkt. 55, the White House recently gave full support to a statutory change to FEMA's policy, which FEMA quickly followed with a statement that it was considering making a regulatory change to its own policy, albeit *in the future*—at the earliest, perhaps by the end of December. These admissions eliminate any basis FEMA could have to a preliminary injunction granting *now* to restore the Churches to equal status with other disaster-ravaged nonprofits.

Since suffering along with many other Texans through one of the costliest natural disasters in national history, the Churches have suffered unjustifiable and unjustified religious discrimination at the hands of their own government for almost 3 months. The Court indicated one month ago that it would rule by December 1. The Churches should not have to continue to wait.

FEMA opposes both this motion and the preliminary injunction motion. The Department of Justice has not stated whether it can make an attorney available on Monday for a telephonic hearing, but can be available on Tuesday. The Churches seek a hearing on Monday, December 4.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Plaintiffs seek an emergency temporary restraining order and preliminary injunctive relief.

The standard for obtaining a temporary restraining order is the same as that for a preliminary injunction. A plaintiff must establish: "(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." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Mora v. Koy*, 2012 WL 12894812, at *1 (S.D. Tex. Nov. 30, 2012).

STATEMENT OF FACTS SUPPORTING TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF

I. FEMA's house of worship exclusion policy

FEMA is authorized by 42 U.S.C. § 5121 *et seq*. to provide funds under its Public Assistance ("PA") Program to assist communities recovering from major disasters. *See* FEMA Public Assistance Program and Policy Guide at 1-2, http://bit.ly/2hteb2R ("FEMA Policy Guide"). Certain nonprofits are permitted to apply for these funds, including "museums, zoos, [and] community centers." 44 C.F.R. § 206.221(e)(7). Activities that make a facility eligible for relief grants include "[e]ducational enrichment activities" such as "stamp and coin collecting"; and "[s]ocial activities" such as "community board meetings, neighborhood barbeques, [and] various social functions of community groups." FEMA Policy Guide at 14.

But FEMA policy categorically excludes houses of worship from applying for these funds, even though they could be otherwise eligible. FEMA's 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.

FEMA has unwaveringly interpreted its policy to categorically exclude churches from

receiving PA grants to repair their houses of worship. *See, e.g.*, 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"); *see also* FEMA Release No. 1763-141 (Aug. 8, 2008) (stating that "federal grants cannot cover . . . worship sanctuaries").

FEMA has likewise unwaveringly enforced its policy as a categorical ban on PA grants for repairing otherwise-eligible houses of worship: "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); *accord* Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015) https://www.fema.gov/appeal/288379?appeal_page=analysis (church facility "established" for religious purposes could not receive FEMA grants *"regardless* of the other secular activities held at the facility." (emphasis supplied)); *see also* Dkt. 12-5 at 5-7 (more denials).

II. FEMA's discrimination against the Churches

Each of the Churches are small congregations that were severely damaged by Hurricane Harvey and are in counties that were declared federal disaster areas. Dkt. 12-2, 2d Capehardt Decl. ¶ 2; Dkt. 12-3, 2d Stoker Decl. ¶ 2; Dkt. 12-4, 2d Frazier Decl. ¶ 2. One of the Churches served as a FEMA staging center, and to this day is providing housing, clothing, medical care, and thousands of meals to evacuees. Dkt. 12-3, 2d Stoker Decl. ¶¶ 7-16. 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. Dkt. 12-2, 2d Capehart Decl. ¶¶ 21-25, 43-44; Dkt. 12-3, 2d Stoker Decl. ¶¶ 23-27; Dkt. 12-4, 2d Frazier Decl. ¶¶ 19-21. But for their religious status and religious use of their facilities, the Churches would be eligible nonprofits. Dkt. 12-2, 2d Capehart

Decl. ¶¶ 31, 39; Dkt. 12-3, 2d Stoker Decl. ¶¶ 34, 43; Dkt. 12-4, 2d Frazier Decl. ¶¶ 27, 34.

The Churches submitted applications for disaster relief aid to FEMA (to include SBA loan applications, which is a prerequisite to receiving non-emergency PA grants) and have received confirmation from officials that no further materials were necessary. *See, e.g.*, Dkt. 34-2, 3d Frazier Decl. Ex. 4; Dkt. 34-3, 3d Capehart Decl. Ex. 1; Dkt. 34-4, 3d Stoker Decl. ¶ 6. The Churches have since been denied PA grant funding, told that they are not eligible, and—solely because they are houses of worship—had their applications placed on a "hold" by FEMA while it processes applications for other nonprofits:

- On September 15, 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. Dkt. 34-1, Blomberg Decl. ¶ 21.

- On October 3, the government denied expedited PA grant funding to First Assembly that could have been available within ten days. Dkt. 34-2, 3d Frazier Decl. ¶ 16. The only stated basis for the denial was that First Assembly "was established for a religious purpose." *Id.* ¶ 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." Dkt. 41 at 2.

- 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." Dkt. 43. Harvest Family Church's application is still "on hold" as of today. FEMA has not allowed the other two Churches to obtain access to the online portal showing the status of their applications, but it appears that they are also on hold. The other two Churches' applications were, in all relevant respects, identical to Harvest Family's.

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

But while the Churches and other houses of worship are categorically on hold and being denied PA grant funding, FEMA has disbursed over $497 million in PA grants. *See* https://www.fema.gov/disaster/4332?utm_source=hp_promo&utm_medium=web&utm_campaign=disaster. Thus, FEMA's current policy places houses of worship in an untenable position, where they must delay performing 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 pot of money to other PA grant applicants.

ARGUMENT

I. The Court should grant a temporary restraining order and a preliminary injunction.

The Churches request the entry of a temporary restraining order and a preliminary injunction to last during the pendency of the litigation in this Court and until the resolution of any subsequent appeal. The Churches easily meet all four preliminary injunction factors, all of which FEMA has now formally or effectively conceded. As Judge Ellison found on November 10, "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." Dkt. 45 at 6. Moreover, by failing to change its position by the December 1 deadline, FEMA must be deemed to have "concede[d], at the very least, [that] Plaintiffs' likelihood of success on the merits of this case and that the injury being suffered by Plaintiffs is irreparable." *Id.*

A. The Churches have a substantial likelihood of success on the merits.

The Churches argued, and incorporate that argument here by reference, that FEMA's policy violates the Free Exercise Clause because it discriminates against them based on their religious status and their religious use of their facilities. Dkt. 12-5 at 13-25 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (forbidding religious status-based

discrimination) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (forbidding religious conduct-based discrimination)); Dkt. 34 at 9-10 (same).

FEMA has conceded the merits of that argument in three ways. *First*, it failed to argue the merits in either its briefing or, despite repeated invitation by Judge Ellison, at oral argument. *See* Dkt. 45 at 6 ("FEMA has declined to defend the merits of its policy"); *Dortch v. Mem'l Hermann Healthcare Sys.-Sw.*, 525 F. Supp. 2d 849, 876 n.69 (S.D. Tex. 2007) ("failure to brief an argument in the district court waives that argument"). *Second*, FEMA failed to meet Judge Ellison's deadline for changing its position, and thus "concedes, at the very least, Plaintiffs' likelihood of success on the merits of this case[.]" Dkt. 45 at 6. *Third*, FEMA (and the White House) now admit that they are taking steps to change FEMA's discriminatory policy. Dkt. 55. While those steps are uncertain and insufficient because they do not relieve the injury FEMA is causing *now*, they nonetheless still effectively undermine any merits-based defense.

FEMA's sole argument on likelihood of success was that justiciability issues—namely, lack of concrete injury—prevented an injunction. But, as the Supreme Court affirmed yet again in *Trinity Lutheran*, the "injury in fact" 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 (quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract")); *see also* Dkt. 38 at 4-6.

And FEMA is simply wrong that the Churches haven't also been injured at a practical level by its policy. Most obviously, *First Assembly has already been denied expedited PA grants under FEMA's policy*. Dkt. 38 at 2-3. But for FEMA's policy, First Assembly would have received expedited Emergency Work PA grants over a month ago. Moreover, the other Churches have

already been informed by officials administering the PA grants that they are "absolutely not eligible," and FEMA has provided no reason to think that this assessment is either incorrect or has been reversed. *Id.* In fact, FEMA *is actively enforcing its policy against all three Churches by putting them "on hold" simply because they are houses of worship*. *Id.* at 3; *see also* Dkt. 43).

And this is a very clear instance of where delaying justice denies justice, since being frozen outside the system means the Churches face several disadvantages that are harming them right now. For instance, the Churches are prevented from being able to get required FEMA pre-approvals in order to perform emergency demolition and construction. *See* FEMA Policy Guide at 75, 87 (noting that the review must occur "before the Applicant begins work" and that failure to do so "will jeopardize PA funding"). Also, one type of PA grant that the Churches seek is for Emergency Work, which is work that "must be done immediately to . . . protect property and public health and safety," which includes "temporary emergency repairs or maintenance to prevent further damage to an eligible facility and its contents." *See* FEMA Opp., Dkt. 30 at 11-12 (quoting 44 C.F.R. § 206.201(b)). Getting such work done promptly is crucial to getting it done at all. FEMA Policy Guide at 131 (noting the "necessity" to get the PA grant process moving "early in the PA Program implementation process" and "as soon as possible").

B. The Churches will be irreparably injured if an injunction does not issue.

FEMA has conceded this prong. *See* Dkt. 45 at 6. Moreover, it is settled law that a threatened violation of Plaintiffs' rights under the First Amendment results in irreparable injury. ""[T]he loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Gordon v. City of Houston*, 79 F. Supp. 3d 676, 694 (S.D. Tex. 2015) (quoting *Texans for Free Enter*., 732 F.3d 535, 539 (5th Cir. 2013) and *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). 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." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (3d ed. 2013) (footnotes omitted); *accord* Dkt. 38 at 4-6.

Here, the harm also shows up at a very practical level. Harvest Family Church and Hi-Way Tabernacle are both missing flooring, doors, insulation and portions of their walls as result significant flooding. Rockport First Assembly of God has a severely damaged roof, ceilings caved in, and a steeple lying on the ground outside. All three Churches need immediate emergency repairs to protect the safety of their congregations and to prevent further damage to their buildings.

C. The injury to the Churches far outweighs any harm to FEMA that might result.

FEMA failed to substantively brief this prong and thus waived it. *See* Dkt. 30 at 21-22. Even absent waiver, though, the Churches meet this factor. In *Trinity Lutheran*, the fact of "odious" religious-status discrimination alone was enough to reject religious discrimination; the Court recognized that the physical "consequence [wa]s, in all likelihood, a few extra scraped knees." *Id.* at 2024-25. But here, where the Churches are trying to recover from the costliest natural disaster in national history and where they seek access to Emergency Work grants that are only awarded to protect public health and safety, the physical consequences are much worse.

To overbalance these obvious harms to the Churches, Defendants must make a "powerful" showing. *Opulent Life*, 697 F.3d at 297. But there is no countervailing harm to FEMA. Nothing in the Stafford Act requires FEMA's religious disqualifier to the definition of an eligible nonprofit. *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." *Id.* at § 5151(a). So an injunction will only assist FEMA in following the law. Moreover, granting the injunction will merely prevent them from relying on the

Churches' "religious character," *Trinity Lutheran*, 137 S. Ct. at 2021, to deny access to FEMA aid during the next two months or so as FEMA and Congress work to permanently fix FEMA's policy.

D. An injunction will not disserve the public interest.

FEMA failed to substantively brief this prong and thus waived it. *See* Dkt. 30 at 21-22. Even if it had not, "[i]njunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life*, 697 F.3d at 298. By the same token, where a law violates the First Amendment, "the public interest [is] not disserved by an injunction preventing its implementation." *Id.* at 298. The public has no interest in continuing religious discrimination, but it does have an interest in ending it.

CONCLUSION

For the foregoing reasons and those stated in the briefing on the Emergency Renewed Motion for Preliminary Injunction, Dkts. 12-5 and 34, the Court should issue a temporary restraining order requiring FEMA to immediately allow the Churches equal access to the PA grant program.

Respectfully submitted,

s/*Eric C. Rassbach*
Eric C. Rassbach (Texas Bar. No. 24013375;
S.D. Texas Bar No. 872454)
Attorney in charge
Diana M. Verm (S.D. Tex. Bar No. VA 71968)
Of Counsel
Daniel Blomberg (S.D. Tex. Bar No. 2375161)
Of Counsel
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. N.W., Suite 700
Washington, DC 20036
Tel.: (202) 955-0095
erassbach@becketlaw.org
dverm@becketlaw.org
dblomberg@becketlaw.org
Counsel for Plaintiffs

Dated: December 1, 2017

CERTIFICATE OF CONFERENCE

I certify that on December 1, 2017, I called and left a voicemail for Kari D'Ottavio, counsel for Defendants, notifying her that the Churches planned to file a motion for a temporary restraining order today, and asking her to identify times when counsel for Defendants could appear in a conference with the Court. I further certify that I then emailed the same message to counsel for the Defendants, including Ms. D'Ottavio, Danielle Young, and Lesley Farby. At 3:04 PM, Ms. D'Ottavio emailed back and stated: "Because we do not know the basis for your motion, nor do we think it is appropriate at this juncture, we are not available for a teleconference with the Court today. Depending on what briefing schedule, if any, the Court orders, we could be available for a teleconference on Tuesday of next week." At the time of filing, counsel for the Defendants were not able to state a position on the motion.

/s/ *Daniel Blomberg*
Daniel Blomberg

CERTIFICATE OF SERVICE

I certify that on December 1, 2017, the foregoing document was served on counsel for all parties by means of the Court's ECF system.

/s/ *Eric C. Rassbach*
Eric C. Rassbach