

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

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

Plaintiffs,

v.

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

Defendants.

Case No.: 4:17-cv-2662

DEFENDANTS' OPPOSITION
TO PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION

Defendants Federal Emergency Management Agency, and William B. Long, in his official capacity as Administrator of the Federal Emergency Management Agency, hereby oppose Plaintiffs' renewed motion for a preliminary injunction. A memorandum of points and authorities is attached.

Dated: October 3, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY
INJUNCTION

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- FEMA. *Public Assistance Program and Policy Guide 2017*,
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INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Congress sought to “provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from . . . disasters.” 42 U.S.C. § 5121(b). The Public Assistance Program authorized by the Stafford Act provides federal assistance to State, Territorial, Indian Tribal, and local governments to enable communities to respond to and recover from major disasters or emergencies declared by the President. The Stafford Act also authorizes federal assistance to certain private nonprofit facilities including “nonprofit educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities,” and other private nonprofit facilities that “provide[] essential services of a governmental nature to the general public.” *Id.* § 5122(11).

In effectuating this Congressional directive, FEMA must assess whether private nonprofit organizations meet the statutory criteria for eligibility for public assistance. For private nonprofits that provide both eligible services and ineligible services, FEMA assesses the “primary use” of the facility to determine eligibility; if more than 50 percent of the facility is providing eligible services, then the facility may be eligible for a public assistance grant.¹

In addition to receiving public assistance grants, private nonprofit organizations that provide emergency services in the wake of a disaster on behalf of State or local government, including sheltering survivors, may obtain reimbursement for the costs of such services through

¹ On September 29, 2017, Defendants moved for a 60-day stay of proceedings, noting that Defendants are considering making changes to FEMA’s Public Assistance Grant Program. Defs.’ Mot. Stay Pending Recons. FEMA Policies at 1, ECF No. 24 at 1. While the current policy is under review, FEMA will not deny applications from houses of worship solely on the basis of the religious nature of their activities. *Id.*

the State or local government. Indeed, if the emergency sheltering services are provided pursuant to an agreement with the State or local government, reimbursement may be obtained without regard to the “primary use test” generally applied to such private nonprofit facilities. These nonprofit organizations—including houses of worship—often play a crucial role assisting local authorities in the immediate aftermath of a disaster.

Plaintiffs, three Texas churches who allegedly suffered damage as a result of Hurricane Harvey, contend that FEMA’s approach to determining eligibility for public assistance grants discriminates against churches by excluding them solely because of their identity as religious organizations. Plaintiffs seek a preliminary injunction enjoining FEMA from enforcing its Public Assistance policies and requiring FEMA to treat Plaintiffs on the same terms as nonreligious nonprofits. But FEMA already treats religious and nonreligious organizations alike. The agency does not categorically exclude churches or other faith-based organizations from public assistance just as it does not categorically award grants to secular nonprofit organizations. Rather, consistent with the criteria prescribed by the Stafford Act, FEMA determines eligibility by assessing the services provided by a given private nonprofit, in particular, whether they are “essential services of a governmental nature.” Applying these statutory criteria, FEMA has provided assistance to hundreds of religious organizations, including churches and other houses of worship that provide such services.

The Court should deny Plaintiffs’ motion because Plaintiffs fail to satisfy any of the requirements for the extraordinary remedy of a preliminary injunction. Not only can Plaintiffs not demonstrate irreparable harm, they lack standing and their claim is not ripe for review because FEMA has not yet acted on their (still incomplete) applications for public assistance. The Court therefore need not even address their likelihood of success on their Free Exercise claim, but even

if it did these same justiciability problems would be fatal. Finally, because adherence to the governing statute is in the public interest, the balance of harms weighs in favor of denying Plaintiffs' requested injunction.

BACKGROUND

I. The Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 83 Stat. 143 (1974), as amended ("Stafford Act"), 42 U.S.C. § 5121 *et seq.*, provides the statutory authority for the federal disaster response activities of the Federal Emergency Management Agency ("FEMA"). In passing the Stafford Act, Congress explained that: "[i]t is the intent of the Congress, by this chapter, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from . . . disasters." *Id.* § 5121(b).

Titles I, III, and IV of the Stafford Act authorize FEMA's administration of the Public Assistance ("PA") Program, which provides federal assistance to State, Territorial, Indian Tribal, and local governments, and certain private nonprofit ("PNP") organizations, so that communities can respond to and recover from major disasters or emergencies declared by the President. FEMA Public Assistance Program and Policy Guide 2017 (hereinafter, "Policy Guide") at 7, [https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf). Through the PA Program, FEMA provides grants for debris removal, emergency protective measures, and the restoration of disaster-damaged, publicly-owned facilities and the facilities of certain PNPs. *See* 42 U.S.C. § 5170b ("Essential assistance"); *id.* § 5172 ("Repair, restoration, and replacement of damaged facilities"); *id.* § 5173 ("Debris removal"); *see also* 44 C.F.R. § 206.2(20) (defining "Public Assistance"). Any financial

assistance that FEMA provides under the PA Program, however, must be supplemental only; the duplication of benefits is strictly prohibited. *See* 42 U.S.C. § 5155(a) (FEMA “shall assure that that no such person, business concern, or other entity will receive [financial] assistance with respect to any part of such loss as to which he has received financial assistance under any other program or from insurance or any other source.”).

Although the PA Program is intended primarily to assist state and local governments’ disaster recovery efforts, the Stafford Act also allows for assistance to PNPs that meet its statutory definition. The Act defines “private nonprofit facility” as follows:

(A) In general.—

The term “private nonprofit facility” means private nonprofit educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled) and facilities on Indian reservations, as defined by the President.

(B) Additional facilities.—

In addition to the facilities described in subparagraph (A), the term “private nonprofit facility” includes any private nonprofit facility that provides essential services of a governmental nature to the general public (including museums, zoos, performing arts facilities, community arts centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops, broadcasting facilities, and facilities that provide health and safety services of a governmental nature), as defined by the President.

Id. § 5122(11).

II. Public Assistance Program Administration and Procedures

A. Emergency Work and Permanent Work

Through the PA Program, FEMA provides grant funding for two types of work: emergency work and permanent work. *See* Policy Guide at 20. Emergency work is defined as “work which must be done immediately to save lives and to protect improved property and public health and safety, or to avert or lessen the threat of a major disaster.” 44 C.F.R. § 206.201(b). FEMA separates emergency work into two categories: (A) debris removal, and (B) emergency protective

measures. Policy Guide at 20; Ex. A, Declaration of Howard Stronach (hereinafter “Stronach Decl.”) at ¶ 14. Debris removal activities, such as the clearance, removal, and disposal of hazardous tree limbs or wreckage, are eligible for PA grants only if determined to be in the public interest. *See* 42 U.S.C. § 5173(a); 44 C.F.R. § 206.224(a); Policy Guide at 45. Emergency protective measures include (1) emergency services, such as flood fighting, evacuation and sheltering, firefighting, and security and law enforcement, and (2) temporary emergency repairs or maintenance to prevent further damage to an eligible facility and its contents, such as sandbagging to reduce flooding or covering a damaged roof with a tarp to prevent the infiltration of rainwater. *See* 42 U.S.C. § 5170b; 44 C.F.R. § 206.225; Policy Guide at 44, 59–60.

Permanent work is defined as “restorative work that must be performed through repairs or replacement, to restore an eligible facility on the basis of its predisaster design and current applicable standard.” 44 C.F.R. § 206.201(i). FEMA divides permanent work in five categories: restoration of (C) roads/bridges; (D) water control facilities; (E) buildings/equipment; (F) utilities; and (G) parks, recreational, and other facilities. Policy Guide at 20; Stronach Decl. at ¶ 14. Public Assistance grants for both emergency and permanent work are available only if the work is required as the result of the declared incident; is located within the designated area of the declared incident (with the exception of evacuation and sheltering activities); and is the legal responsibility of the applicant requesting assistance. 44 C.F.R. § 206.223(a); Policy Guide at 20.

B. Application Process

All applicants requesting PA grants for either emergency or permanent work must follow the application process set forth in 44 C.F.R. § 206.202. Under the PA Program, the State or Tribe is the grant recipient that is responsible for submitting applications on behalf of applicants (i.e., State, Territorial, Tribal, and local government entities and private nonprofits), and

processing sub-grants to applicants. *Id.* § 202.202(a). To request PA funding, an applicant must submit a Request for Public Assistance (“RPA”) to the recipient, who will send the RPA to FEMA’s Regional Administrator. *Id.* § 202.202(c); *see* Policy Guide at 131. In the RPA, the applicant should provide general information about its organization, including physical location and point of contact. *Id.* at 132. For PNP applicants, the RPA must also include a PNP Facility Questionnaire, proof of non-profit status, proof of ownership or proof of legal responsibility to repair the incident-related damage, and a list of services provided in the facility, when and to whom. *See id.* State and Tribal recipients must send RPAs to FEMA within 30 days after designation of the area where the damage occurred, unless FEMA extends that deadline. 44 C.F.R. § 206.202(c), (f)(2).

With assistance from the recipient, FEMA reviews the RPA to determine whether the applicant is eligible for PA funding. *See* 44 C.F.R. § 206.207(b)(1)(iii)(C). If FEMA approves the RPA, it will work with the applicant to prepare a Project Worksheet for each project for which the applicant seeks assistance. *Id.* § 206.202(d). The Project Worksheet must identify the eligible scope of work and include actual or estimated costs for the eligible work. *Id.*; *see also* Policy Guide at 134–42 (“Project Formulation”). The applicant must maintain all documentation supporting the project costs. *Id.* at 141. In accordance with the strict prohibition on duplicating disaster relief benefits, *see* 42 U.S.C. § 5155(a), applicants must also provide documentation of insurance coverage, if applicable. *See* 44 C.F.R. § 206.250. “Actual and anticipated insurance recoveries shall be deducted from otherwise eligible costs.” *Id.* at § 205.250(c).

Before FEMA obligates any funds to the recipient, the recipient must complete and send to FEMA an Application for Federal Assistance and an Assurances for Construction Programs. 44 C.F.R. § 206.202(e)(1). Once those forms are received, FEMA will obligate funds to the

recipient based on the approved Project Worksheets. *Id.* The recipient will then approve sub-grants to applicants based on the Project Worksheets approved for each applicant. *Id.*

In practice, the PA grant process can be lengthy, especially in large-scale disasters resulting in a high volume of applicants. Stronach Decl. at ¶ 19. It is not atypical under normal circumstances for it to take several years for funds to be obligated. *Id.* Accordingly, applicants should not wait for a determination from FEMA that it has approved their RPA, and applicants certainly should not wait for an obligation of funds, to complete necessary emergency work or repairs; indeed, during the reconciliation process, FEMA ensures that it only provides reimbursement for actually-expended and documented costs. FEMA will not provide PA grants for the repair of damage caused by deterioration, deferred maintenance, the applicant's failure to take measures to protect a facility from further damage, or negligence. *See* 44 C.F.R. § 206.223(e); Policy Guide at 20–21.

III. PNP Eligibility for the Public Assistance Program

Because the PA Program is a discretionary grant program, FEMA must decide whether to approve or deny each Request for Public Assistance, consistent with the terms of the Stafford Act. Typically, FEMA determines PA funding eligibility in four successive steps: (1) applicant eligibility, (2) facility eligibility, (3) work eligibility, and (4) cost eligibility. *See* Policy Guide at 10. For PNP applicants, FEMA determines whether the applicant is eligible by simultaneously determining whether it owns or operates an eligible facility. *See id.* at 11.

A. PNP Facility Eligibility

To satisfy the initial determination of facility eligibility, PNP applicants must meet two criteria. First, the PNP applicant must show that it meets the regulatory definition of “private nonprofit organization” by providing either (1) a current ruling letter from the U.S. Internal

Revenue Service granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code of 1954; or (2) documentation from the State substantiating that it is a non-revenue producing, nonprofit entity organized or doing business under State law. *See* 44 C.F.R. § 206.221(f); Policy Guide at 11–12. Second, the PNP applicant must show that it owns or operates a facility that either (1) provides a critical service, or (2) provides a non-critical, but essential governmental service and is open to the general public for little or no fee. *See* 42 U.S.C. § 5122(11); 44 C.F.R. § 206.221(e); Policy Guide at 12.

Both the Stafford Act and the regulations implementing the PA Program guide FEMA’s interpretation of what constitutes a nonprofit facility that provides critical services or non-critical, but essential governmental services. *See* 42 U.S.C. § 5122(11) (defining “private nonprofit facility”); *id.* § 5172(a)(3)(B) (defining “critical services”); 44 C.F.R. § 206.221(e) (defining “private nonprofit facility”). The term “critical services” includes “power, water (including water provided by an irrigation organization or facility), sewer, wastewater treatment, communications (including broadcast and telecommunications), education, and emergency medical care.” 42 U.S.C. § 5172(a)(3)(B); *see also* Policy Guide at 13 (Table 1 – PNP Eligible Critical Services). Non-critical, but essential governmental services include, *inter alia*, community arts centers, libraries, homeless shelters, museums, custodial care, child care, food assistance, alcohol and drug treatment, and certain educational enrichment activities. *See* 42 U.S.C. § 5122(11)(B); 44 C.F.R. § 206.221(e)(7); Policy Guide at 14 (Table 2 – PNP Eligible Non-Critical, Essential Governmental-Type Services). Thus, a nonprofit facility that offers such services and is open to the general public, such as a community center, homeless shelter, library, or museum, may be considered an eligible PNP facility under the PA Program. *See* 42 U.S.C. § 5122(11)(B). This includes such facilities operated by religious organizations. In fact, FEMA has awarded public

assistance to many religiously affiliated organizations, including houses of worship. *See* Stronach Decl. Ex. 1 (listing FEMA public assistance grants to religiously affiliated organizations from 2012–2017).

For example, FEMA explains that community centers that offer educational enrichment activities for at-home pursuits, such as gardening or personal financial and tax planning, may be considered an eligible PNP facility. Policy Guide at 14. Likewise, “[c]ommunity centers operated by a religious institution that provides secular activities, such as fundraising, . . . that help the community at large” may also be considered an eligible PNP facility. *Id.* Conversely, facilities that offer “religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large” may not be considered an eligible PNP facility. *Id.* at 15 (Table 3 – PNP Ineligible Services). Moreover, facilities that offer athletic or vocational training, or political or religious education, may not be considered an eligible PNP facility. *Id.* Indeed, the regulations implementing the PA Program explain that eligible private nonprofit educational facilities do not include “buildings, structures and related items used primarily for religious purposes or instruction.” 44 C.F.R. § 206.221(e)(1); *see also* 6 C.F.R. § 19.3(e) (“All organizations that participate in DHS social service programs, including religious organizations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of DHS-supported activities, including those prohibiting the use of direct financial assistance from DHS to engage in explicitly religious activities.”).

i. Mixed-Use Facilities

Recognizing that some PNP facilities may provide both eligible and ineligible services, FEMA looks to the “primary use” of the facility to determine whether the PNP facility is eligible

for PA grants. Policy Guide at 17. “Primary use” is the use for which more than 50 percent of the physical space in the facility is dedicated. *Id.* If more than 50 percent of the physical space in the facility is dedicated to providing eligible services—i.e., the facility meets the “primary-use test”—then the facility may be eligible for PA grants, and FEMA will prorate funding based on the percentage of physical space dedicated to the eligible services. *Id.* For example, if a church operates a soup kitchen that is open to the general public, and the physical space used for this service (kitchen, seating area, etc.) comprises 60 percent of the entire facility, then the church may be eligible for PA funding for the entire facility because more than 50 percent of the facility is dedicated to a providing a non-critical, but essential governmental service and is open to the general public. However, the church would only receive up to 60 percent of the funds requested, as FEMA would prorate funding based on the percentage of physical space of the entire facility is dedicated to operating the soup kitchen.

By contrast, if 50 percent or more of the physical space is dedicated to ineligible services, the entire facility is ineligible. *Id.* For example, facilities primarily used for “political, athletic, religious, recreational, vocational, or academic training, conferences, or similar activities” are not eligible for PA grants. *Id.* at 12. To make this determination, FEMA may review additional items such as pre-disaster charters and bylaws and evidence of longstanding, routine use of the facility (e.g., a calendar of activities) in order to determine the primary use of the facility. *Id.*

In cases where the same physical space of a PNP facility is used for both eligible and ineligible services, the “primary use” is the use for which more than 50 percent of the operating time is dedicated to eligible services in that shared physical space. *Id.* at 17. For example, if a synagogue uses its facilities to operate a day care open to the general public Monday through Friday, and on the weekends uses that same physical space for worship services, then the

synagogue may be eligible for PA funding because more than 50 percent of the operating time of the shared physical space is dedicated to a non-critical, but essential governmental service and is open to the general public.²

B. PNPs that Provide Emergency Services at the Request of a Government Entity

In some circumstances, a PNP may be reimbursed for costs associated with providing emergency services after a declared disaster, even though its facility may not otherwise be eligible for PA grants. *See* Stronach Decl. at ¶ 50. Because emergency services, such as firefighting and security and law enforcement, typically are the legal responsibility of the State, Territorial, Tribal, or local government, PNPs generally are not legally responsible for providing such services. *See id.* Accordingly, FEMA generally does not provide PA grants to PNPs for the costs associated with providing those services. *See* 44 C.F.R. § 206.223(a)(3) (“To be eligible for financial assistance, an item of work must . . . be the legal responsibility of an eligible applicant.”). However, when a PNP provides emergency services at the request of the legally responsible government entity, FEMA may provide PA funding to the government entity as the eligible applicant, after which the government entity may reimburse the PNP. *See* Stronach Decl. at ¶ 50; Policy Guide at 61. In such circumstances, PNP facility eligibility is irrelevant because it is the government entity, not the PNP, that applies for PA funding. *See* Policy Guide at 61. Moreover, the PA grant is not meant to address damage to a facility, but to reimburse an entity for the costs of providing an emergency service. *Id.* at 61–62, 69–71.

² For additional examples of PNP facility eligibility determinations, see FEMA’s Policy Guide at 171–74 (Appendix B: Private Nonprofit Facility Eligibility Examples), in particular “School Operated by a Religious Institution,” “University Offering Secular and Religious Education,” and “Community Center Operated by a Religious Charity.”

For example, a PNP that provides emergency sheltering of disaster survivors may be reimbursed for costs associated with that emergency service if it was done at the request of the State. In such a situation, the State would submit the Request for Public Assistance, receive the PA grant from FEMA, and then reimburse the PNP. *Id.* at 61; *See Stronach Decl.* at ¶ 50. FEMA recognizes that sheltering occurs in facilities “with large open spaces, such as schools, churches, community centers, armories, or other similar facilities.” Policy Guide at 67. Even if those facilities may not otherwise be eligible for PA grants for other types of emergency protective measures, such as emergency repairs or debris removal, or for permanent work, they still may be eligible for reimbursement from the State for providing sheltering services pursuant to an agreement with the State (even one executed after-the-fact). *See id.* at 61; *Stronach Decl.* at ¶ 50; *Faith-based, Voluntary and Nonprofit Organizations May Be Eligible for FEMA Disaster Grants*, FEMA (September 28, 2017), <https://www.fema.gov/news-release/2017/09/28/faith-based-voluntary-and-nonprofit-organizations-may-be-eligible-fema>.

C. Small Business Administration Loan and Insurance Requirements

Private nonprofits that do not provide critical services and are seeking PA funding for permanent work must satisfy an additional statutory criterion in order to be considered eligible: they must apply for a disaster loan from the U.S. Small Business Administration (“SBA”) within the applicable deadlines. *See* 42 U.S.C. § 5172(a)(3)(A) (“Conditions for Assistance to Private Nonprofit Facilities”); 44 C.F.R. § 206.226(c). Following a major disaster declaration, the SBA can provide loans to individuals and businesses for facility restoration. *See* 15 U.S.C. § 636; *see also U.S. SBA Fact Sheet—Disaster Loans, Hurricane Harvey*, SBA, (Aug. 28, 2017), https://smallbusiness.house.gov/uploadedfiles/attachment_1.pdf (explaining that the SBA may provide “business physical disaster loans” to “repair or replace disaster-damaged property owned

by the business” and that “[p]rivate, non-profit organizations such as charities, churches, private universities, etc.” are eligible for such loans).

FEMA provides PA grants only to non-critical PNPs for eligible permanent work costs that an SBA disaster loan will not cover. *See* 42 U.S.C. § 5172(a)(3)(A)(ii); 44 C.F.R. § 206.226(c)(2); Policy Guide at 18. For example, if a non-critical PNP applies to FEMA for permanent work assistance, but its SBA loan application was approved and the SBA loan fully covers the permanent work costs, then FEMA will not provide assistance for permanent work. *See* 42 U.S.C. § 5172(a)(3)(A)(ii)(II)(bb); *see also id.* § 5155(a) (prohibition on duplication of benefits). Likewise, if a non-critical PNP applies to FEMA for permanent work assistance, but has failed to apply to the SBA for a disaster loan at all, FEMA will not provide assistance for permanent work. *See id.* § 5172(a)(3)(A)(ii)(I); *see also* Policy Guide at 18 (Figure 8 – SBA Loan Outcomes).

Similarly, all PNPs applying for both emergency and permanent work must provide proof of insurance. *See* 44 C.F.R. § 206.250. If a private nonprofit receives full or partial insurance coverage for their otherwise eligible loss, their eligible funding from FEMA will be reduced or debilitated by the amount of the benefits received through insurance. *See* Policy Guide at 40. This is because FEMA only provides benefits under the PA program that are not otherwise available through other sources, including insurance, in order to avoid the duplication of benefits as required by statute. *See* 42 U.S.C. § 5155(a); Policy Guide at 40.

IV. Hurricane Harvey

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

of Applicants. *See supra* Part II.B. The President initially authorized the State to provide Individual Assistance and assistance for emergency work under the PA Program, and later amended the Disaster Declaration to include authorization for permanent work as well. Stronach Decl. at ¶ 58. On September 1, 2017, FEMA extended the RPA deadline to 90 days from the Disaster Declaration. Stronach Decl. at ¶ 59. Thus, the RPA deadline is now November 22, 2017. *Id.*

Under the Stafford Act, generally, the cost-sharing arrangements for both emergency work and permanent work is 75 percent Federal and 25 percent State. 42 U.S.C. § 5170b(b); § 5172(b); § 5173(d). However, on September 2, 2017, the President amended the Disaster Declaration to authorize a 90 percent Federal cost share for debris removal; and a 100 percent Federal cost share for emergency protective measures performed within 30 days from the Disaster Declaration, after which the Federal cost share would be reduced to 90 percent. *See* FEMA Fact Sheet, Cost Share Adjustment for Public Assistance – Hurricane Harvey in Texas, *available at* https://www.fema.gov/media-library-data/1506702623604-b9738beff09d4126ba0cac2b77944ae2/FEMA_Cost_Share_Adjustment_Fact_Sheet_508_FINAL.pdf (explaining the cost-share adjustments); Stronach Decl. at ¶ 60 (the same). In other words, FEMA will reimburse qualifying applicants up to 100 percent for emergency protective measures performed between August 25, 2017 and September 24, 2017. *Id.* For emergency protective measures performed after September 24, 2017, FEMA will reimburse qualifying applicants up to 90 percent. *Id.*

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Plaintiffs Harvest Family Church, Hi-Way Tabernacle, and Rockport First Assembly of God (“Plaintiffs”) filed the instant suit on September 4, 2017. Compl., ECF No. 1. On September 6, 2017, Plaintiffs filed a preliminary injunction motion asking the Court to enjoin FEMA from

applying certain aspects of its policy on PA Program eligibility, as laid out in the Policy Guide. Pls.’ First Em. Mot. for Prel. Inj., ECF No. 3. Plaintiffs requested relief by September 24, 2017 “[d]ue to the impending deadline for applying for FEMA disaster relief grants.” *Id.* at 2. As of September 1, 2017, however, the application deadline had been extended to November 22, 2017. Stronach Decl. at ¶ 59.

On September 8, 2017, the Court held a telephonic status conference in which it indicated there was no live case or controversy because Plaintiffs had not submitted applications for public assistance to FEMA. *See* Status Conf. Tr. at 7:24–8:4, 8:13-16, Sept. 8, 2017; Min. Order, Sept. 8, 2017. On September 12, 2017, Plaintiffs filed an amended complaint and a renewed preliminary injunction motion, explaining that they had submitted applications to FEMA that same day. Pls.’ Ren. Em. Mot. for Prelim. Inj. at 2, ECF No. 12. Plaintiffs’ applications are currently pending a determination by FEMA. Stronach Decl. at ¶ 61.³ Although Plaintiffs submitted their RPAs directly to FEMA, FEMA only accepts RPAs through the Recipient, the State of Texas in this instance, because the State administers the grant for FEMA and distributes funding to the applicant. *Id.* Accordingly, FEMA rerouted the applications to Texas for an initial eligibility determination, while also beginning its own processing as well. *Id.* At this time, FEMA is missing information it needs to complete processing of Plaintiffs’ applications. *Id.* at ¶ 62–63. For example, FEMA has not received any proof that Plaintiffs applied for an SBA loan. *Id.* at ¶ 63.

³ Notably, Plaintiffs have only applied for emergency work grants, but much of the work they appear to be asking for in their Complaint and Motion appears to be permanent work for facility repair. *See* Stronach Decl. at ¶ 61; Pls.’ Ren. Em. Mot. for Prelim. Inj. Ex. A at Ex. 3, Ex. B at Ex. 3, Ex. C. at Ex. 6. One church, Hi-Way Tabernacle, does appear to be seeking emergency work for sheltering services, but Plaintiffs do not allege that Texas or a local government entity has sought funding from FEMA for sheltering services provided by Hi-Way Tabernacle pursuant to an agreement. *See* Stronach Decl. at ¶ 62; Pls.’ Ren. Em. Mot. for Prelim. Inj. Ex. A at Ex. 3, Ex. B at Ex. 3, Ex. C. at Ex. 6.

Further, FEMA is unaware if the State or any local governmental entity intends to request sheltering services via an agreement with any of the Plaintiffs. *Id.* at ¶ 62.

In their renewed preliminary injunction motion, Plaintiffs request relief by September 30, 2017 “[d]ue to the time-sensitive nature of the demolition, repairs, and rehabilitation efforts, along with the upcoming reduction in FEMA cost-shares for Public Assistance grants for emergency protective measures.” Pls.’ Ren. Em. Mot. for Prelim. Inj. at 2. On September 13, 2017, the Court held another telephonic status conference, after which it entered a briefing schedule directing Defendants to file a response by October 3, 2017, and Plaintiffs to file a reply by October 13, 2017. Order, ECF No. 14.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The only issue in this case is whether Plaintiffs have met their burden of showing a need for a preliminary injunction. They have not done so here. “A preliminary injunction is an extraordinary remedy that should not be granted unless” the plaintiff shows “a substantial threat” of irreparable injury, “a substantial likelihood” of success on the merits, that the “threatened injury” to the plaintiff “outweighs the threatened harm” to the defendant, and that “granting the preliminary injunction will not disserve the public interest.” *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) (citation omitted). Relief “should only be granted when the movant has clearly carried the burden of persuasion” on all four requirements. *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009). “The Fifth Circuit frequently cautions that . . . ‘the decision to grant a preliminary injunction is to be treated as the exception rather than the rule.’” *Matrix Partners VIII v. Nat. Res. Recovery, Inc.*, No. 1:08-cv-547, 2009 WL 175132, at *6 (E.D. Tex. Jan. 23, 2009) (alteration omitted) (quoting *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 180 (5th Cir. 1996)). If the plaintiff fails to carry its burden on a single requirement, the court need not address

the remaining requirements in order to deny the preliminary injunction. *See, e.g., Lake Charles Diesel, Inc., v. Gen. Motors Corp.*, 328 F.3d 192, 203 (5th Cir. 2003) (recognizing that if the plaintiff fails to meet their burden on a single requirement, then the court “need not address the three remaining prongs of the test for granting preliminary injunctions.”); *see also Anderson*, 556 F.3d at 360 (recognizing that the plaintiff must carry its burden on each factor for a preliminary injunction to issue).

ARGUMENT

I. Plaintiffs have not suffered any injury—let alone an irreparable one—and for the same reasons they lack standing and their case is not ripe for judicial decision.

The Supreme Court has made clear that a preliminary injunction cannot be entered based on a mere “possibility” of irreparable harm; rather, a plaintiff must “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The threat of irreparable injury must be “real,” “substantial,” and “immediate.” *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983).

Plaintiffs’ alleged injuries do not meet these criteria. As Plaintiffs themselves admit, their claims have not even been processed yet as they only recently submitted their initial applications. Pls.’ Ren. Em. Mot. for Prelim. Inj. at 1–2. Any alleged injury is therefore speculative. Plaintiffs’ requests for reimbursement are currently in the queue awaiting review. *See Stronach Decl.* at ¶ 61. As noted above and in Defendants’ stay motion, FEMA will not deny applications from houses of worship under the current policy while it undertakes a review of its current policy. *See ECF No. 24.* Thus, Plaintiffs have not suffered any injury, nor are they subject to any threat of imminent irreparable harm because their requests for reimbursement have not been processed or denied.

For these same reasons, Plaintiffs lack standing and this case is not ripe for judicial review. Ripeness and standing are closely related, and a plaintiff who does not allege a present injury

generally cannot meet either requirement. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (recognizing that in some cases, “standing and ripeness boil down to the same question”); *see also Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) (explaining that “the doctrines of ripeness and standing often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury” (citation omitted)).

Plaintiffs do not have a present concrete injury. Indeed, they may never suffer any injury as the primary-use test may never be applied to them as they may receive reimbursement or be denied for unrelated reasons. For example, Plaintiffs have not even alleged, let alone proven, that any sheltering services they provided were pursuant to an authorized agreement with the responsible governmental entity, who has submitted a request on their behalf. *See* Pls.’ Ren. Em. Mot. for Prelim. Inj. Ex. A at Ex. 3, Ex. B at Ex. 3, Ex. C. at Ex. 6; Stronach Decl. at ¶ 62. And to the extent Plaintiffs are seeking emergency work reimbursement for sheltering services, the primary-use test, which addresses only *facility* eligibility (rather than *work* eligibility), does not apply at all. *See* Policy Guide at 61–62; Stronach Decl. at ¶ 50. Further, Plaintiffs’ applications also do not indicate that they applied for SBA loans,⁴ which is a statutory requirement for private nonprofits to receive funding. *See* 42 U.S.C. § 5172(a)(3)(A). Because Plaintiffs’ applications lack proof that they have applied for an SBA loan, their applications are incomplete and must be denied under the plain terms of the statute. *See id.* Accordingly, Plaintiffs cannot demonstrate that their alleged injury—the denial of funding—is the traceable to the primary-use test, or that their injury would be redressed by an order enjoining the use of that test. *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102–104 (1998). Accordingly, Plaintiffs lack standing

⁴ *See* Pls.’ Ren. Em. Mot. for Prelim. Inj. Ex. A at Ex. 3, Ex. B at Ex. 3, Ex. C. at Ex. 6; Decl. at ¶ 63.

and, at a minimum, this case is not ripe for adjudication because the alleged injury “may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted); *Lopez*, 617 F.3d at 342. *A fortiori*, Plaintiffs cannot meet their burden to show immediate irreparable harm.

Despite the speculative nature of the alleged harm, Plaintiffs insist that their harm is irreparable because (1) they have alleged a First Amendment violation and (2) they need to know *now* if they may be eligible in order to make reconstruction plans, especially because of the reduced federal government share of funding after September 24, 2017. *See* Pls.’ Mem. Supp. Ren Em. Mot. for Prelim. Inj. at 22–23, 25. But these arguments do not establish irreparable harm.

Although it is true that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion), “[a] preliminary injunction is not appropriate . . . unless the party seeking it can demonstrate that First Amendment interests are either threatened or in fact being impaired *at the time relief is sought*.” *Google Inc. v. Hood*, 822 F.3d 212, 227–28 (5th Cir. 2016) (emphasis added) (citation omitted). “Thus, invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury.” *Id.* at 228. In *Google*, for example, the court reversed a grant of a preliminary injunction where it was not yet clear whether Google, the plaintiff, would someday be subject to an enforcement action that violated its First Amendment rights—as the investigation was in its early stages and the Attorney General needed more information before determining whether such an action would ever occur. *See id.* at 226–29. Here, as in *Google*, Plaintiffs have not alleged sufficient facts to show a “non-speculative irreparable injury” because the alleged injury to their First Amendment rights *may never occur*.

Like their constitutional argument, Plaintiffs’ argument that they need to know their eligibility status now does not change the speculative nature of their injury or create any urgency.

See Pls.’ Mem. Supp. Ren Em. Mot. for Prelim. Inj. at 23, 25. As a reimbursement program, the PA Program is not designed for applicants to wait for a funding decision before performing repairs. In fact, applicants who wait to make repairs are ineligible to receive reimbursement for any additional expenses incurred as a result of the delay (such as mold). 44 C.F.R. § 206.223(e); Policy Guide at 20–21, 84. Nor does the reduction in the federal share after September 24, 2017, create any urgency either. *See* FEMA, Dep’t of Homeland Security, Amendment No. 4 to Notice of a Major Disaster Declaration, Internal Agency Docket No. FEMA-4332-DR, (Sept. 2, 2017) <https://www.fema.gov/disaster/notices/amendment-no-4>. The determining factor for what reimbursement scheme applies is based on *when the work is performed*. *See* FEMA Fact Sheet, Cost Share Adjustment for Public Assistance – Hurricane Harvey in Texas, FEMA (Sept. 3, 2017), https://www.fema.gov/media-library-data/1506702623604-b9738beff09d4126ba0cac2b77944ae2/FEMA_Cost_Share_Adjustment_Fact_Sheet_508_FINAL.pdf (explaining the cost-share adjustments); Stronach Decl. at ¶ 60. It does not affect when someone needs to apply or when FEMA must act on the application. *See* Stronach Decl. at ¶ 60. Put simply, the only threatened harm from delay would be “further damage to their buildings” and increased costs caused by Plaintiffs’ own delay. Pls.’ Mem. Supp. Ren Em. Mot. for Prelim. Inj. at 23. But such costs, even if attributable to Defendants, would not create an irreparable injury. “[F]ederal courts have long recognized that . . . an injury is ‘irreparable’ only if it cannot be undone through monetary remedies.” *See, e.g., Enter. Int’l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) (citation and internal quotations omitted). Because Plaintiffs’ only harm from delay would be increased monetary costs, they have not met their burden of showing irreparable harm.

In sum, Plaintiffs' claims have not been denied, nor is there any imminent threat of denial while FEMA's current policy is under review. Because Plaintiffs have not suffered any injury, and are not under any threat of imminent injury, Plaintiffs cannot establish standing, their claims are not ripe, and there is no irreparable harm.

II. Plaintiffs Are Unlikely to Succeed on Their Claim Due to Jurisdictional Defects.

Because Plaintiffs are unable to demonstrate irreparable injury, they have failed to meet their burden of persuasion and the Court need not address the remaining requirements for a preliminary injunction. *See, e.g., Lake Charles Diesel*, 328 F.3d at 203 (recognizing that if the plaintiff fails to meet their burden on a single requirement, then the court "need not address the three remaining prongs of the test for granting preliminary injunctions."); *see also Anderson*, 556 F.3d at 360 (recognizing that the plaintiff must carry its burden on each factor for a preliminary injunction to issue). Indeed, the standing and ripeness issues detailed above provide an adequate basis for the Court to dismiss the lawsuit for lack of subject matter jurisdiction⁵ and make Plaintiffs unlikely to succeed on their claim. *See infra* Section I.

III. The Balance of Equities and the Public Interest Favor Denying Preliminary Injunctive Relief.

Although the Court also need not reach this requirement, it would provide further grounds for denying Plaintiffs' motions because these factors tip in Defendants' favor. Plaintiffs have failed to demonstrate that any alleged irreparable injuries outweigh the harm that the preliminary injunction would cause Defendants, and that granting the injunction would be in keeping with the public interest. *See Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986); *Southdown, Inc. v. Moore McCormack Res., Inc.*, 686 F. Supp. 595, 596 (S.D. Tex. 1988).

⁵ Although Defendants are seeking a stay to permit FEMA to reconsider the challenged policy, Defendants reserve the right to file a motion to dismiss for lack of subject matter jurisdiction in due course.

Plaintiffs have not made any showing of injury here, let alone injury that is substantial, imminent, and irreparable. Against this non-existent showing of harm weighs the significant public interest in FEMA's adherence to the Stafford Act, which "is designed to bring an orderly and systematic means of federal natural disaster assistance for *state and local governments* in carrying out their responsibilities to aid citizens." Stronach Decl. at ¶ 4 (citing 42 U.S.C. § 5121) (emphasis added).

CONCLUSION

Because Plaintiffs' applications have not yet been completed or processed, they have not suffered any harm—let alone irreparable harm. They thus lack standing and their claims are not ripe for adjudication. Each of these reasons is alone sufficient for the court to deny Plaintiffs' request for a preliminary injunction.

DATED: October 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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