

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

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

Plaintiffs,

v.

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

Defendants.

Civil No. 17-cv-2662

**Plaintiffs' Memorandum in
Support of Emergency Motion
for Preliminary Injunction**

INTRODUCTION AND SUMMARY OF ARGUMENT

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

To its credit, the federal government has stepped to help the people of Texas, who are already very busy helping one another with the recovery process. One of the leading resources for disaster relief has been houses of worship. Plaintiff Hi-Way Tabernacle is itself currently in use as a shelter for dozens of evacuees, a warehouse for disaster relief supplies, a distribution center for thousands of emergency meals, and a base to provide medical services. FEMA has accordingly

and rightly recognized that houses of worship have an essential role as places of refuge during the storm, and as nerve centers of recovery afterwards.

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

The Constitution does not allow this exclusionary policy. Under the Free Exercise Clause of the First Amendment—particularly as interpreted by the Supreme Court decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017)—government may not discriminate against a church, or a synagogue, or a mosque simply because of its *status* as a house of worship.

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

Moreover, the Churches seek emergency relief, both because of the time-sensitive nature of their injury and because if the Churches do not apply for FEMA disaster-relief aid within 30 days of President Trump's disaster declaration, FEMA policy makes them ineligible to receive it. Thus, the Churches need relief before September 26, 2017 in order to make a timely application for FEMA aid.¹

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

STATEMENT OF FACTS SUPPORTING INJUNCTIVE RELIEF

I. FEMA's house of worship exclusion policy

A. The policy

The Robert T. Stafford Disaster Relief and Emergency Assistance Act authorizes the President to provide Federal assistance when the magnitude of an incident or threatened incident exceeds the affected State, Territorial, Indian Tribal, and local government capabilities to respond or recover. 42 U.S.C. § 5121 *et seq.* FEMA's largest grant program under the Stafford Act is its Public Assistance (PA) Program, which provides funds to assist communities recovering from major disasters or emergencies declared by the President. *See* FEMA Public Assistance Program and Policy Guide at 1-2, [https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf) ("FEMA

¹ Pursuant to Local Civil Rule 7.1D, Plaintiffs' counsel conferred with counsel for Defendants. Defendants state that "While we cannot say for certain until we see your motion, it is likely we will oppose."

Policy Guide”). The program provides emergency assistance to save lives and protect property, and helps permanently restore community infrastructure harmed by a federally declared disaster.

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

As relevant here, “eligible service” includes “non-critical, but essential governmental service” provided by a facility that is open to the general public at little or no fee. *Id.* at 12. Such non-critical services include “museums, zoos, community centers, libraries, homeless shelters, [and] senior citizen centers.” 44 C.F.R. § 206.22(e)(7). The types of activities that FEMA specifies as making a facility eligible for disaster relief grants include:

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

FEMA Policy Guide at 14.

But FEMA policy states that “facilities established or primarily used” for religious activities are simply “not eligible.” *Id.* at 12. If a building is established 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.

B. History of FEMA’s policy enforcement

FEMA policy guidance since at least 1998 has unwaveringly stated that “churches, synagogues, temples, mosques, and other centers of religious worship” are generally ineligible simply because their facilities are primarily used for religious purposes. *See* FEMA Publication 9521.1(VII)(C)(1) (eff. 2008-2015); *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 *see also* FEMA Release No. 1763-141 (Aug. 8, 2008) <https://www.fema.gov/news-release/2008/08/08/variety-government-assistance-available-churches> (FEMA advisory stating that “federal grants cannot cover . . . worship sanctuaries”). FEMA has also informed the public following major disasters that houses of worship are ineligible. Recent high-profile examples include the aftermath of Hurricane Katrina and Superstorm Sandy.³

² Both archived versions of FEMA Publication 9521.1 are available here: [https://www.fema.gov/media-library-data/1490624155120-46037af75303c02d78dc11d9b3a54041/FEMA Public Assistance 9500 Series Policies 1998-2015.pdf](https://www.fema.gov/media-library-data/1490624155120-46037af75303c02d78dc11d9b3a54041/FEMA%20Public%20Assistance%209500%20Series%20Policies%201998-2015.pdf).

³ *See* Alan Cooperman, *Parochial Schools to Get U.S. Funds for Rebuilding*, Washington Post (Oct. 19, 2015) <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801622.html> (quoting FEMA stating that churches, mosques, and synagogues were not eligible for FEMA aid after Hurricane Katrina); *see* Sharon Otterman, *For Congregational Leaders, Hurricane is Taking a*

FEMA has also repeatedly ruled against houses of worship who appealed Requests for Public Assistance that were denied based on the applicants' religious status. For instance, a Jewish synagogue was denied aid 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. The synagogue initially submitted its request in January 2009, received the initial denial over two months later in March 2009, and then lost on its initial appeal at the end of October 2009. *Id.* The state of Florida filed a second appeal on behalf of the synagogue, which was denied over a year later. *Id.*

In another example, a Unitarian Universalist church was left under eight feet of water for several weeks after Hurricane Katrina. But while the church's building was used for a variety of "community center types of activities," FEMA found it ineligible because it believed that the building was "established for religious purposes." See Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015) https://www.fema.gov/appeal/288379?appeal_page=analysis. FEMA disregarded the church's "claimed secular events"—such as potluck dinners, dance programs, and a camera club—because it perceived them as secondary to "the church's religious operations." *Id.* The church was initially damaged by Hurricane Katrina in 2005; it received the final denial of aid from FEMA in 2015. *Id.*

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).

Throughout all of the denials, the common thread was 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).⁴ The entire process from application to denial on appeal took at least a year for all of the applicants, and most took over a year.

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

In 2013, the House of Representatives voted overwhelmingly—354 to 72—to end FEMA’s policy and allow houses of worship to apply for disaster relief on equal terms with other similarly situated nonprofits. *See Federal Disaster Assistance*

⁴ *See also* Final Decision, Philadelphia Ministries <https://www.fema.gov/appeal/286079> (Apr. 7, 2015) (denying aid to church because the “main feature” of the facility was a “church sanctuary” and “the facility was established as a church,” despite the fact that about a third of the facility was “dedicated for homeless shelter services”); *see also* Final Decision, Mount Nebo Bible Baptist Church (Mar. 13, 2014), https://www.fema.gov/appeal/283775?appeal_page=analysis (denying grant because, though church provided “literacy programs, clothing distribution, food and nutrition programs, teen retreats, health and wellness programs, and operat[ed] as a wellness center,” church could not prove that over 50% of its activities were non-religious); *accord* Final Decision, Victory Temple Worship Center (July 8, 2003), <https://www.fema.gov/appeal/218874> (ruling against church after Hurricane Isidore because its facilities were “not primarily used for eligible secular services”).

Nonprofit Fairness Act of 2013, H.R. 592, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/house-bill/592>. The bill enjoyed broad bi-partisan support, but later died in a Senate committee.

II. The Churches

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

Hi-Way Tabernacle is located in Cleveland, Texas, a town within Liberty County. Stoker Decl. ¶ 2. The Tabernacle has been operating for over 15 years and meets in a converted gym that can hold up to 350 people. *Id.* at ¶ 5. In addition to its other services to the community, the Tabernacle provides significant disaster relief assistance. For instance, it has been a FEMA staging center for Hurricanes Rita, Ike, and now Harvey. *Id.* at ¶ 7. In that role, it has hosted dozens of 18-wheeler trucks loaded with MREs, and has distributed those resources—along with many others—to the community. *Id.* at ¶ 8. During Hurricane Ike, federal military-grade emergency vehicles known as HMMWVs were parked in the Tabernacle's parking lot and permanently damaged the pavement. *Id.* at ¶ 9.

Rockport First Assembly of God is located in Rockport, Texas, a part of Aransas County. Frazier Decl. ¶ 2. In the last several years, First Assembly has grown from about 25 members to about 125 members today. *Id.* at ¶ 3.

III. Hurricane Harvey

On August 25, 2017, Hurricane Harvey made landfall near Rockport, Texas, as a Category 4 hurricane. It was the strongest hurricane to make landfall in the United

States for more than a decade. Hurricane Harvey's rain and storm surge dumped trillions of gallons of water on Texas and caused unprecedented flooding. The total rainfall from Harvey was over 27 trillion gallons of rain, which is reportedly enough to fill the Houston Astrodome over 85,000 times.

Over 100,000 homes were damaged or destroyed by Hurricane Harvey. Thousands of people were rescued by boats, helicopters, canoes, buses, dump trucks, and even jet skis. Tens of thousands were forced to leave their homes and find refuge in emergency shelters. Media reports put the current death toll at over 40 victims. Current estimates are also that Hurricane Harvey is the most costly natural disaster in U.S. history—causing as much damage as Hurricane Katrina and Superstorm Sandy combined. And it is not over—Hurricane Harvey's flooding lasted for days, and more flooding is still expected due to continued intermittent rain, saturated ground, river flows, and nearby reservoirs at or near peak capacity.

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 of a major disaster declaration to include the counties in which the Churches are located: Aransas, Harris, and Liberty Counties. Funding was made available in those counties “for Individual Assistance and assistance for debris removal and emergency protective measures” under the PA program. FEMA Amendment No. 1, (Aug. 27, 2017), <https://www.fema.gov/disaster/notices/amendment-no-1-4>.

First Assembly was the first of the Churches to be hit by Hurricane Harvey. It



sustained severe damage. The steeple was blown off. *See* Frazier Decl. ¶ 9, Ex. 2 (depicting image to left). The shingles of the church were destroyed. *Id.* at ¶ 8, Ex. 1. All of the sanctuary's internal ceiling, lighting, and insulation were destroyed, and the sanctuary's sound system may also be a total loss. *Id.* at ¶ 10. A bathroom

ceiling in the church building caved in. *Id.* Several trees were blown over. *Id.* at ¶ 13. The church parsonage's roof suffered significant damage. *Id.* at ¶ 11. The church van was damaged, with all of the windows blown out. *Id.* at ¶ 12, Ex. 3. Over a week after landfall, Rockport's electricity and cell service remain unreliable. *Id.* at ¶ 19.

Harvest Family was also extensively damaged, suffering flooding throughout its buildings. At the flooding's peak, the area and roads around the church were completely flooded and impassable, with between 2 to 3 feet of water surrounding the church itself. Capehart Decl. ¶¶ 14-15, Ex. 1 (depicting image to right). Judging by the water marks and debris lines, the



interior of Harvest Family's buildings experienced at least 1 foot of flooding throughout, with up to 20 inches in some locations, coating the inside of the church with mud and silt. *Id.* at ¶ 16, Ex. 2. A large tree next to the church was felled by the flooding, and other trees on the property may also be damaged and in need of removal. *Id.* at ¶ 17, 24. Carpets, flooring, drywall, insulation, doors, furniture, and a variety of other materials were destroyed by the flooding. *Id.* at 20.

Tabernacle also experienced extensive flooding, with at least 3 feet of standing



water in the sanctuary and significant damage throughout the building. Stoker Decl. ¶ 18, Ex. 1 (depicting image to left). The church quickly rallied, drained and dried the sanctuary as

best as possible, and immediately began taking in evacuees. *Id.* at ¶ 11-12. As of September 4, the church was sheltering 60 people, and more were expected. *Id.* The Tabernacle's gym has been transformed into a warehouse for the county, storing and distributing food, water, hygiene products, and clothing. *Id.* at ¶ 14. And FEMA is also using the Tabernacle, with federal-government vehicles currently vehicles parked on the Tabernacle's property. *Id.* at ¶ 15.

Notably, 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); *see also* President Donald J. Trump, *A Proclamation: National Day of Prayer for the Victims of Hurricane Harvey* (Sept. 1, 2017) (“Houses of worship have organized efforts to clean up communities and repair damaged homes.”). Indeed, in 2013, FEMA’s deputy administrator conceded that the “real first responders” are immediate neighbors and then it is “the local church, the local synagogue, the local faith based community, [and] the local mosque” that are “going to help people out.” *See* https://www.fema.gov/media-library-data/1386343317410-9c998ad2f85ba25a3f93ca5fbce8df65/ThinkTank_July2013.txt. But while FEMA admits that “[c]hurches . . . serve an essential role in disaster recovery,” when churches themselves need help, the “best option” available to them is trying to take out a loan through the Small Business Association. *See* *SBA May Help Churches, Nonprofits, Associations* (July 8, 2011), <https://www.fema.gov/news-release/2011/07/08/sba-may-help-churches-nonprofits-associations>.

All three Churches need immediate emergency repairs and debris removal to protect the safety of their congregations and to prevent further damage to their buildings. Capehart Decl. ¶¶ 21-25; Stoker Decl. ¶¶ 20-24; Frazier Decl. ¶¶ 17-19.

The Churches estimate that these repairs will cost tens of thousands of dollars for each church, and perhaps significantly more. Capehart Decl. ¶¶ 26-27; Stoker Decl. ¶¶ 25-26; Frazier Decl. ¶¶ 20-21.

But for their religious usage, all three of the Churches' buildings would be eligible for FEMA disaster relief grants. Capehart Decl. ¶¶ 30-31; Stoker Decl. ¶¶ 29-30; Frazier Decl. ¶¶ 24-25. All three Churches own their damaged buildings and are non-profits that have received I.R.C. § 501(c)(3) recognition from the IRS. All three are in counties—Harris, Liberty, and Aransas—that have been declared by the President to be a disaster area eligible for federal funds. All three open their buildings to the general public and provide services that, but for their religious character and purpose, are considered eligible important community services by FEMA. But because all three Churches primarily use their buildings for religious purposes, none of them are eligible to apply for the same kind of relief offered to similarly situated nonprofits.

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Plaintiffs filed an original complaint in this matter on September 4, 2017. Dkt. 1. Plaintiffs now file a motion for a preliminary injunction. Plaintiffs seek relief on an emergency basis, with a ruling by September 24, 2017 in order to meet the September 26 application deadline, but are not seeking a temporary restraining order at this time.

STATEMENT OF THE ISSUES AND APPLICABLE STANDARDS OF REVIEW

Plaintiffs seek a preliminary injunction on an emergency basis, with a ruling by September 24, 2017.

To obtain 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); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008).

ARGUMENT

I. This Court should grant a preliminary injunction.

Plaintiffs request the entry of a preliminary injunction to last during the pendency of litigation in this Court and until the resolution of any subsequent appeal. For the reasons stated below, Plaintiffs easily meet all four preliminary injunction factors.

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

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. It also held that one forbidden form of discrimination includes excluding churches from generally available public benefits programs “solely on account of religious identity.” *Id.* at 2019. That is

exactly FEMA’s policy here. FEMA’s exclusion of churches simply because of their religious nature violates the Free Exercise Clause under *Trinity Lutheran*. The Churches thus have a substantial likelihood of success on the merits of their Free Exercise claim.

1. FEMA’s exclusion policy impermissibly discriminates against the Churches.

In *Trinity Lutheran*, Missouri’s Department of Natural Resources offered reimbursement grants to public and private schools, nonprofit daycares, and other nonprofit entities that resurfaced their playgrounds using recycled shredded tires. *Id.* at 2017. But Missouri excluded churches and other religious organizations from the program. *Id.* Even though Trinity Lutheran Learning Center ranked fifth out of 44 applicants and would have otherwise received funding, its application was rejected solely because it is a church. *Id.* at 2018.

The Supreme Court held that the Department’s policy “expressly discriminates against otherwise eligible recipients . . . because of their religious character.” *Id.* at 2021. Such discrimination impermissibly “imposes a penalty on the free exercise of religion,” which requires invalidating the policy or, at the very least, “triggers the most exacting scrutiny.” *Id.*

The same is true here. FEMA has “categorically disqualif[ied]” the Churches from its PA Program on the basis of their religious status. *Id.* at 2017. But for the exclusion policy, the Churches would be eligible for FEMA emergency aid. Capehart Decl. ¶ 31; Stoker Decl. ¶ 30; Frazier Decl. ¶ 25. They have letter rulings from the IRS granting them tax exemptions; they provide services to the public similar to a

community center, library, shelter or museum; they are open to the general public without fees; and they each have facilities providing these critical services, which have been damaged and are in need of “emergency protective measures.” Capehart Decl. ¶ 31; Stoker Decl. ¶ 30; Frazier Decl. ¶ 25.

The only reason they are not eligible is FEMA’s policy that disqualifies facilities that dedicated at least 50 percent of their space to religious activities. FEMA Guide at 15. Houses of worship are, by their nature, established and primarily used for religious activities, a function they cannot change without changing their identity. The Churches engage in precisely the kinds of activities that would qualify them for FEMA aid, if the Churches were not religious. For example, if the Churches abandoned their religion, their prohibited “worship” services would instead be eligible “social activities to pursue items of mutual interest”; the impermissible “religious instruction” in Sunday 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. But because the Churches cannot carry out any of their services without the religious elements, the rule becomes clear: “no churches need apply.” *Trinity Lutheran*, 137 S. Ct. at 2024.

FEMA’s policy “puts [the Churches] to a choice”: “participate in an otherwise available benefit program or remain a religious institution.” *Id.* at 2021-22. Churches’ religious activity is “penalize[d]” because the PA program “den[ies] any

person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” *Id.* at 2020 (quoting *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 449 (1988)).

The Supreme Court has held that “law[s] targeting religious belief as such is never permissible.” *Trinity Lutheran*, 137 S. Ct. at 2024 n.4 (quotation and citation omitted). Any attempt to “punish the expression of religious doctrines” or “impose special disabilities on the basis of religious views” is categorically forbidden. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (citations omitted). That is FEMA’s policy here, and for that reason, this Court need not reach strict scrutiny. *See, e.g., Torcaso v. Watkins*, 367 U.S. 488 (1961) (requiring belief in God for holding public office violated free exercise without strict scrutiny); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (“The freedom to hold religious beliefs and opinions is absolute.”). Even so, FEMA’s policy fails strict scrutiny here.

2. FEMA has no compelling interest in discriminating against houses of worship.

FEMA has no compelling interest in banning churches, synagogues, and mosques from the PA Program. *Trinity Lutheran* explicitly rejected the argument that a religious institution from a neutral grant program just for “being a church” is 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.*.

Moreover, any antiestablishment interest in FEMA’s exclusion policy is nil here, because the only grants the Churches currently seek access to are grants for Emergency Work. According to FEMA, these grants are used for immediate needs to “[s]ave lives; [p]rotect public health and safety; [p]rotect improved property; or [e]liminate or lessen an immediate threat of additional damage.” FEMA Policy Guide at 43-44 (footnotes omitted). Even during the height of the Supreme Court’s “no-aid” jurisprudence in the 1970s, the inclusion of churches in an emergency aid program would not have violated the Establishment Clause. In those cases, the Court acknowledged that public services “such as police and fire protection, sewage disposal, highways, and sidewalks,” if “provided in common to all citizens,” can be “marked off from the religious function” and “fairly [] viewed as reflections of a neutral posture toward religious institutions.” *Comm. For Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 781-82 (1973) (quotations and citations omitted); *see also Am. Atheists, Inc. v. City Of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 292 (6th Cir. 2009) (“If a city may save the exterior of a church from a fire, it is hard to understand why it cannot help that same church with peeling paint or tuckpointing—at least when it provides the same benefit to all downtown buildings on the same terms.”).

For example, the Department of Justice’s Office of Legal Counsel approved a National Park Service grant to restore Boston’s Old North Church—a church which

is currently used by an active Episcopal congregation and was famously used to warn Paul Revere of British military plans. *See* 27 Op. Off. Legal Counsel 91, 96-97 (2003), https://www.justice.gov/sites/default/files/olc/opinions/2003/04/31/op-olc-v027-p0091_0.pdf. Similar grants have been provided for Atlanta’s Ebenezer Baptist Church, where Martin Luther King, Jr., preached, the historic Franciscan missions in California, and Touro Synagogue in Rhode Island. *See* Kim Severson, *At Ebenezer Baptist Church, A Glorious Rebirth*, N.Y. Times, Apr. 21, 2011, <http://www.nytimes.com/2011/04/22/us/22church.html?mcubz=3>; National Trust for Historic Preservation, Touro Synagogue, <https://savingplaces.org/places/touro-synagogue#.Wa8rj8h9670>; National Trust for Historic Preservation, Mission San Juan Capistrano, https://savingplaces.org/places/mission-san-juan-capistrano#.Wa8t_8h9670.

Providing relief to the churches that FEMA is already using to deliver emergency services to the public affected by Hurricane Harvey is indisputably a public work, not an establishment of a church. *A fortiori*, as *Trinity Lutheran* confirmed, including churches in FEMA grants is not a problem under the Court’s modern Establishment Clause jurisprudence. The program is available with “neutral, secular criteria that neither favor nor disfavor religion.” *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (internal quotation marks omitted). Thus, it would create no “incentive to undertake religious indoctrination” and certainly no indoctrination that could be “attributed to the State.” *Id.* at 230-31; *see also Mitchell v. Helms*, 530 U.S. 792, 829-30 (1999) (plurality op.).

FEMA itself does not see aid to churches as a violation of the Establishment Clause, and has left “appreciable damage to that supposedly vital interest unprohibited,” belying any idea that it has an “interest of the highest order” in denying emergency relief to churches. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation and citation omitted). In 2002, for example, after Seattle Hebrew Academy was damaged by a major earthquake, FEMA awarded a disaster relief grant for repair. Before it did so, FEMA asked the Department of Justice’s Office of Legal Counsel whether that was constitutionally permissible. 26 Op. Off. Legal Counsel 114 (2002), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/26/op-olc-v026-p0114.pdf>. OLC’s detailed response concluded that “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. *Id.* at 124. Indeed the OLC recognized that FEMA’s current policy could well violate the Free Exercise Clause, even before *Trinity Lutheran*, noting that “excluding religious organizations from disaster assistance made available to similarly situated secular institutions would violate the Free Exercise Clause and the Free Speech Clause.” *Id.* at 132.

This was not the first time FEMA provided grants to religious organizations. In 1999, for example, it offered a grant to a church damaged in the Oklahoma City Federal Building bombing. See Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J.L. Ethics & Pub. Pol’y 341, 354 (1999).

These examples make FEMA's exclusion of churches in the aftermath of Hurricane Harvey inexplicable. FEMA has no discernible interest in excluding churches, and to exclude them would be impermissible discrimination that violates the Free Exercise Clause under *Trinity Lutheran*. There is no compelling government interest in discriminating. FEMA has offered no reason to think that there is, so there is no need to consider less restrictive means of carrying out FEMA's interests.

B. The Churches face a substantial threat of irreparable injury if the injunction is not issued.

It is settled law that a threatened violation of Plaintiffs' rights under the First Amendment results in irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting *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). That's particularly applicable in the context of religious-status discrimination, because "being subjected to discrimination is by itself an irreparable harm" imposed on religious exercise. *Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016) (citing *Smith v. City of Jackson*, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring))

(“discriminating against” someone is “*inherently harmful* to the targeted individual” (emphasis in original)).

Here, the harm shows up on a very practical level. Harvest Family Church and Hi-Way Tabernacle are both missing flooring, internal doors, insulation and portions of their walls as result significant flooding. Rockport First Assembly of God has a severely damaged roof, a bathroom with its ceiling caved in, and a steeple lying on the ground outside. 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. And to make plans about how to deal with these pressing issues, all three Churches need to know whether they remain ineligible to get help from the government.

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

Absent an injunction, the Churches face grievous harm—namely, official governmental religious-status discrimination that is both “odious to our Constitution,” *Trinity Lutheran*, 137 S. Ct. at 2025, and leaves the Churches in the lurch as they try to recover from the most devastating natural disaster in U.S. history. 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, the physical consequences are much more stark. By definition, the grants the Churches seek to access are only available to address serious emergency problems that must be addressed “immediately to: Save Lives; Protect

public health and safety; Protect improved property; or Eliminate or lessen an immediate threat of additional damage.” FEMA Policy Guide at 43-44 (footnotes omitted). Thus, the harms to the Churches are substantial and, as noted above, irreparable.

To overbalance these obvious harms to the Churches, Defendants must make a “powerful” showing. *Opulent Life*, 697 F.3d at 297. They cannot. There is no countervailing harm to Defendants. Granting the injunction will merely prevent them from relying on religious status to deny applicants access to FEMA aid during the pendency of this appeal. FEMA will remain free to otherwise determine the eligibility of applicants and the amount of grants that they can receive.

Indeed, and again by definition, PA Program grant recipients can only be organizations that are providing “essential” services to the general public. FEMA Policy Guide at 12. Accordingly, by removing religion as an eligibility criteria, FEMA will be supporting getting *more* essential services back online for the community. And that is precisely what the PA Program is meant to do. See FEMA Fact Sheet, <https://www.fema.gov/media-library-data/1497559657642-a01f6ee60e25394fa9a25cae2fd289d5/PublicAssistanceFactSheetJune2017.pdf> (the program “assist[s] communities responding to and recovering from major disasters” and “provides emergency assistance to save lives and protect property, and assists with permanently restoring community infrastructure”).

What’s more, FEMA itself has never taken the position that a religion bears any sort of rational relationship to ability to provide disaster relief. To the contrary, and

to its credit, FEMA has repeatedly emphasized that churches are “essential” to disaster recovery efforts and that local houses of worship are among the real first responders in times of disaster. *See, e.g.*, SBA May Help Churches, Nonprofits, Associations (July 8, 2011), <https://www.fema.gov/news-release/2011/07/08/sba-may-help-churches-nonprofits-associations>. Allowing houses of worship to compete for grants, therefore, will merely assist the entities that FEMA has long recognized are already on the front lines of disaster relief.

In short, especially when balanced against the serious irreparable injury being inflicted on the Churches, any harm the Defendants might claim from a preliminary injunction is *de minimis*.

D. An injunction will not disserve the public interest.

Finally, issuing a preliminary injunction will not disserve the public interest. “Injunctions protecting First Amendment freedoms are always in the public interest.” *Opulent Life*, 697 F.3d at 298 (internal edits and quotation marks omitted); *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff’d* 546 U.S. 418 (2006) (“[T]here is a strong public interest in the free exercise of religion.”)). 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 does not have an interest in continuing religious discrimination, but it does have an interest in ending it.

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.

In sum, all four of the preliminary injunction factors weigh heavily in favor of granting a preliminary injunction prohibiting FEMA from treating the Churches differently than other FEMA applicants.

CONCLUSION

Hurricane Harvey ravaged both religious and secular institutions alike. It did not discriminate, and neither should FEMA. The Churches respectfully request that the Court issue a preliminary injunction relieving them from FEMA's exclusion policy during the pendency of this litigation, including any appeals.

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

Dated: September 6, 2017

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2017, the foregoing memorandum was served on the following attorney via email:

Lesley Farby
Assistant Director
United States Department of Justice
Civil Division, Federal Programs Branch
Lesley.Farby@usdoj.gov

/s/ Eric C. Rassbach
Eric C. Rassbach