

**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 Renewed
Emergency Motion for
Preliminary Injunction**

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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 in 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 that houses of worship would also get federal government disaster-relief help on an equal basis with other private nonprofit organizations. Yet FEMA policy explicitly denies equal access to disaster relief grants for houses of worship solely because of their religious status and activities. Indeed, FEMA excludes houses of worship from disaster relief grants solely because they are “established” for “religious purposes” or because a house of worship engages in religious activities more than 50% of the time. If FEMA applies its longstanding and uniformly enforced policy

to victims of Hurricane Harvey, 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, government may not discriminate against a church, a synagogue, or a mosque because of its *status* as a house of worship. Nor may the government discriminate against religious exercise by excluding houses of worship because of their religious activities, allowing their participation only if they forgo religious activities.

Plaintiffs—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. This is particularly important now, since the Churches have filed their applications with FEMA and need relief to ensure the applications are accepted and evaluated without religious discrimination.

Moreover, the Churches seek emergency relief because their houses of worship are heavily damaged right now and they need to make time-sensitive decisions right now about whether and how to demolish and rebuild—which is why FEMA policy emphasizes that effective disaster relief requires coordination with FEMA as soon as possible after a disaster. Also, FEMA relief grants for emergency protective measures

are scheduled for a ten-percent cut 30 days after the President's Texas disaster declaration. Thus, the Churches seek relief by September 30, 2017 or earlier.¹

STATEMENT OF FACTS SUPPORTING INJUNCTIVE RELIEF

IV.I. FEMA's house of worship exclusion policy

A. 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 Policy Guide"). The program provides emergency assistance to save lives and protect property, and helps 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

¹ Plaintiffs' counsel conferred with counsel for Defendants. Defendants oppose the motion. A Certificate of Conference is appended to the accompanying motion.

operates a facility can apply for PA Program grants if it provides an “eligible service.” *Id.* at 12-13, 17 (citing 44 C.F.R. § 206.221(f)).

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

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

FEMA Policy Guide at 14. But FEMA policy states that “facilities established *or* primarily used” for religious activities are simply “not eligible.” *Id.* at 12 (emphasis added). If a building is established for religious purposes, or used more than 50% of the time for “religious activities, such as worship, proselytizing, religious instruction,” it is not eligible for PA grants. *Id.* at 15-17. Houses of worship are thus effectively excluded from access to disaster relief grants.

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

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 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.

In another example, a Unitarian Universalist church in New Orleans was left under eight feet of water for several weeks after Hurricane Katrina. But while the

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.

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

church's building was used for a variety of "community center types of activities," FEMA found it ineligible because it believed that the building was "established for religious purposes." *See* Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015) https://www.fema.gov/appeal/288379?appeal_page=analysis. FEMA focused on the church's articles of incorporation and bylaws to determine that it was "established" for religious purposes and thus the kind of facility FEMA could not give grants to—"regardless of the other secular activities held at the facility." *Id.* (emphasis supplied). The church was damaged by Hurricane Katrina in 2005; FEMA finally denied aid in 2015. *Id.* 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

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>

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

(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 Nonprofit Fairness Act of 2013*, H.R. 592, 113th Cong. (2013). The bill enjoyed broad bi-partisan support, but later died in a Senate committee.

C. The Churches

Harvest Family Church is located in Cypress, Texas, a Houston suburb within Harris County. 2d 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. 2d Stoker Decl. ¶ 2. The Tabernacle has been operating for over 15 years and meets in both its sanctuary and its gym so that it can hold up to 350 people. *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. 2d Frazier Decl. ¶ 2. In the last several years, First Assembly has grown from about 25 members to about 125 members today. *Id.* at ¶3.

D. Hurricane Harvey

On August 25, 2017, Hurricane Harvey made landfall near Rockport, Texas, as a Category 4 hurricane. Over 100,000 homes were damaged or destroyed by Harvey. Thousands of people were rescued by water and tens of thousands had to find refuge in emergency shelters. Media reports put the current death toll at over 40 victims. Current estimates are that Harvey is the most costly natural disaster in U.S. history.

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

First Assembly was the first of the Churches to be hit by Hurricane Harvey. It sustained severe damage. The steeple was blown off. *See* 2d Frazier Decl. ¶ 9, Ex. 2 (depicting image at top of next page). The church roof was destroyed. *Id.* at ¶ 8, Ex.



1. The sanctuary's internal ceiling, lighting, and insulation were damaged, 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.* Outside the main facility, several trees were blown over, the parsonage's roof suffered damage, and the church van was totaled. *Id.* at ¶ 13-

15, Ex. 4. Altogether, about 5,500 square feet of the church's facility are irreparable and in need of immediate demolition. *Id.* at ¶ 12.

Harvest Family was also extensively damaged, suffering flooding throughout its buildings. At the flooding's peak, the area and roads around the church were completely flooded and impassable, with between 2 to 3 feet of water surrounding the church itself. 2d 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, 20 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.



water in the sanctuary and significant damage throughout the building. 2d Stoker Decl. ¶ 20, Ex. 1 (depicting image to left). Flash flooding compromised the

sanctuary's foundation, which will require the sanctuary to be demolished. *Id.* at 24. The church quickly rallied, drained and dried the gym, and immediately began taking in evacuees. *Id.* at ¶ 11-12. As of September 10, the church was sheltering about 70 people, including about a dozen families, and providing them three meals a day. *Id.* at 12, 16. 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. FEMA is also using the Tabernacle, including as a location for FEMA employees to accept and process aid applications. *Id.* at ¶ 15. Because its sanctuary is unusable and its gym is in use, Tabernacle has had to cancel some religious services. *Id.* at 48.

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). Indeed, FEMA's deputy administrator conceded that the "real first responders" are immediate neighbors and then it is "the local church, the local synagogue, the local faith based community, [and] the local mosque" that are "going to help people out." *See* https://www.fema.gov/media-library-data/1386343317410-9c998ad2f85ba25a3f93ca5fbce8df65/ThinkTank_July2013.txt. But while FEMA admits that "[c]hurches . . . serve an essential role in disaster recovery," when churches themselves need help, the "best option" available to them is trying to take out a loan through the Small Business 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. 2d Capehart Decl. ¶¶ 21-25, 43-44; 2d Stoker Decl. ¶¶ 23-27; 2d Frazier Decl. ¶¶ 19-21. First Assembly and the Tabernacle must also make immediate decisions concerning major demolition and repair. 2d Frazier Decl. ¶ 39; 2d Stoker Decl. ¶¶ 47-48. The Churches estimate that these repairs will cost tens of thousands of dollars for each church, and perhaps significantly more. 2d Capehart Decl. ¶¶ 26-27; 2d Stoker Decl. ¶¶ 28-29; 2d Frazier Decl. ¶¶ 22-23.

But for their religious status and religious activities, all three of the Churches' buildings would be eligible for FEMA disaster relief grants. 2d Capehart Decl. ¶¶ 31, 39; 2d Stoker Decl. ¶¶ 34, 43; 2d Frazier Decl. ¶¶ 27, 34. All three Churches own their damaged buildings and are non-profits that have received I.R.C. § 501(c)(3) recognition from the IRS. All three are in counties—Harris, Liberty, and Aransas—that have been declared by the President to be a disaster area eligible for federal funds. All three open their buildings to the general public and provide services that, but for their religious character and purpose, are considered eligible important community services by FEMA. But because all three Churches were established for religious purposes, and because all three primarily use their buildings for religious purposes, none is eligible to apply for the same kind of relief offered to similarly situated nonprofits. 2d Capehart Decl. ¶¶ 7-8, 36, 45 Ex. 3; 2d Stoker Decl. ¶¶ 6, 39, 50 Ex. 3; 2d Frazier Decl. ¶¶ 4, 32, 41 Ex. 6.

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Plaintiffs filed an original complaint in this matter on September 4, 2017. Dkt. 1. On September 6, Plaintiffs filed an emergency motion for a preliminary injunction. Dkt. 3. On September 8, the Court held a status conference to discuss and stayed its consideration of the preliminary injunction motion. On September 12, and further to the discussion during the status conference, Plaintiffs submitted applications for disaster relief aid to FEMA. 2d Capehart Decl. ¶ 45; 2d Stoker Decl. ¶ 50; 2d Frazier Decl. ¶ 41. Plaintiffs now renew their motion seeking a preliminary injunction on an emergency basis. Given the necessity of making decisions in the near term regarding

demolition, repair, and rehabilitation, along with the upcoming reduction of some FEMA grants, Plaintiffs seek a ruling from the Court by September 30 or earlier.

STATEMENT OF THE ISSUES AND APPLICABLE STANDARDS OF REVIEW

Plaintiffs seek a preliminary injunction on an emergency basis, with a ruling by September 30 or earlier. 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).

ARGUMENT

I. The 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 (“established” for “religious purposes”) violates the Free Exercise Clause under *Trinity Lutheran*. FEMA’s policy also violates the Free Exercise Clause because it favors certain non-religious activities (e.g., stamp collecting and cephalopod research) over religious activities. Under FEMA’s policy, should the Churches give up their religious activities they would qualify for aid, but if they continue as houses of worship. That violates the Free Exercise Clause under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Churches thus have a substantial likelihood of success on their Free Exercise claim.

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

In *Trinity Lutheran*, Missouri offered reimbursement grants to public and private schools, nonprofit daycares, and other nonprofit entities that resurfaced their playgrounds using recycled shredded tires. 137 S. Ct. at 2017. But it excluded churches and other religious organizations from the program. *Id.* Even though Trinity Lutheran 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 and activities. *Id.* at 2017. But

for the exclusion policy, the Churches would be eligible for FEMA emergency aid. 2d Capehart Decl. ¶¶ 31, 39; 2d Stoker Decl. ¶¶ 34, 43; 2d Frazier Decl. ¶¶ 27, 34. 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.” 2d Capehart Decl. ¶ 31; 2d Stoker Decl. ¶ 34; 2d Frazier Decl. ¶ 27.

The only reason they are not eligible is FEMA’s policy that disqualifies facilities that were established for religious purposes or dedicate at least 50 percent of their space to religious activities. FEMA Policy Guide at 12, 15. Houses of worship are, by their nature, established and primarily used for religious activities, a function they cannot change without changing their identity as houses of *worship*. The Churches engage in precisely the kinds of activities that would qualify them for FEMA aid, if the Churches were not religious. 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 14.⁵ If the

⁵ The process of determining whether a church, synagogue, or mosque was established for religious purposes is also troubling. FEMA’s current policy of

Churches were established to do all these activities without religion, they would be eligible. But because the Churches were established for religious purposes and cannot in good faith strip out the religious elements from their actions, 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. Their religious character and activity are “penalize[d]” because the PA program denies them “an equal share of the rights, benefits, and privileges enjoyed by other citizens.” *Id.* at 2020 (quotation omitted). That religious disqualification cannot stand under *Trinity Lutheran*.

It also cannot stand under *Lukumi*. In *Lukumi*, the Supreme Court struck down three ordinances banning animal sacrifice, unanimously concluding that the ordinances fell “well below the minimum standard necessary to protect First Amendment rights.” 508 U.S. at 543. The ordinances were not “neutral” or “generally applicable” because *inter alia* they burdened “Santeria adherents but almost no others” and they exempted “[m]any types of animal deaths or kills” that undermined the government’s interests “in a similar or greater degree than Santeria sacrifice does.” *Id.* at 536-38, 543. As then-Judge Alito put it in a Third Circuit appeal, that is because favoring non-religiously-motivated activities over religiously-motivated activities constitutes a forbidden governmental “value judgment.” *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

inquiring deeply into articles and bylaws is a classic example of governmental “trolling through a person’s or institution’s religious beliefs” that the First Amendment frowns upon. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

In *Fraternal Order*, the Third Circuit considered a free-exercise challenge to a police department's grooming policy. The policy provided beard exemptions for beards grown for medical reasons, but not for beards grown for Muslim religious reasons. The Third Circuit held that the policy was not generally applicable, because the exemption for medical reasons involved "a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome [the government's] general interest in uniformity but that religious motivations are not." *Id.* at 366. And "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Id.*; see also *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (wildlife permitting fee was not generally applicable where it exempted zoos and circuses, but not Native Americans). That it cannot do.

But this case is even easier than *Lukumi* or *Blackhawk* because the differential treatment of churches is open and notorious. 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 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 even 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.

Finally, FEMA’s argument that houses of worship have the freedom to apply for grants and see what happens is also unavailing. The freedom to apply is not much of a freedom if FEMA has a written, long-standing, and uniformly enforced policy of categorically turning away houses of worship because they are established for religious purposes or conduct religious activities most of the time. Even where a policy is not facially discriminatory—not the case here—“*Lukumi* requires courts to look beyond a regulation’s text The effect of the law in its real operation is ‘strong evidence of its object.’” *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 878 (S.D. Tex. 2009), *aff’d*, 611 F.3d 248 (5th Cir. 2010) (quoting *Lukumi*, 508 U.S. at 536). Here, the “real operation” of FEMA’s policy, both in writing and in uniform practice, is to categorically exclude houses of worship. And churches destroyed by Hurricane Katrina had to wait up to ten years to find out that their “freedom to apply” had been entirely illusory.⁶ In these circumstances, assurances of counsel that FEMA doesn’t really mean it cannot possibly suffice—unless they are made binding by this Court in an order.

2. FEMA has no compelling interest in discriminating against the Churches.

FEMA has no compelling interest in banning houses of worship—that is active 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

⁶ Cf. Franz Kafka, *Vor dem Gesetz*, *Sämtliche Erzählungen* 131-32 (Fischer 1970).

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); *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.

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. 793, 829-30 (2000) (plurality op.). Protecting people from fires, or from crimes, or from collapsing buildings, or from dangerous debris, or from dangerous playgrounds, is within the

legitimate power of government, even if the people to be protected are religious or engaged in religious activities.

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. *Lukumi*, 508 U.S. at 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. Presaging *Trinity Lutheran*, the OLC recognized that FEMA’s current policy could well violate the Free Exercise Clause, noting that “excluding religious organizations from disaster assistance made available to similarly situated secular institutions would violate the Free Exercise 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, 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 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 worse.

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 the Churches’ “religious character,” *Trinity Lutheran*, 137 S. Ct. at 2021, to deny access to FEMA aid during the pendency of this case.

What's more, FEMA itself has never taken the position that a religion bears any sort of negative relationship to the ability to provide disaster relief. To the contrary, FEMA has emphasized that churches are "essential" to disaster recovery efforts and that houses of worship are among the first responders in times of disaster. *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>. Thus allowing houses of worship to apply for grants will merely assist entities that FEMA has long seen as on the front lines of disaster relief.

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) ("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 has no 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. Protecting public safety is always in the public interest, even when members of the public are religious or engaged in religious activities.

II. The Court should issue an injunction by September 30 or earlier.

Plaintiffs respectfully request a ruling on the motion by September 30 or earlier. As set out above, the Churches have to make crucial decisions in the very near future that cannot be taken back. Moreover, FEMA cost-sharing for PA grants covering emergency protective measures will be reduced from 100% to 90% after *30 days* from the President's initial disaster declaration. *See* Amendment No. 4 to Notice of a Major Disaster Declaration, Internal Agency Docket No. FEMA-4332-DR, <https://www.fema.gov/disaster/notices/amendment-no-4>. And FEMA could run out of funding before the Churches even get in line. *See, e.g.,* Ashley Killough, *FEMA could run out of cash this weekend*, CNN (Sept. 7, 2017).

By contrast, there will be no prejudice to Defendants by putting this litigation on an accelerated timeline. Instead of having to apply their current special rule for churches, synagogues, and mosques, Defendants can treat them like any other nonprofit organization. Eliminating *sui generis* rules saves governmental time and effort. In addition, FEMA has multiple attorneys working on this case, and has previously briefed many of the defenses it will presumably raise here.

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,

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Dated: September 12, 2017

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CERTIFICATE OF SERVICE

I certify that on September 12, 2017, the foregoing document was served on counsel for all parties by means of the Court's ECF system.

/s/ Eric C. Rassbach
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