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' Reply in Support of Renewed Emergency Motion for Preliminary Injunction

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Churches need relief from this Court right away. Rockport First Assembly of God still has a hole where its roof used to be. Hi-Way Tabernacle is still cancelling religious services because its sanctuary was destroyed. And Harvest Family Church is in the long slog of dealing with severe flood damage. In their opening memorandum, the Churches explained that FEMA's discriminatory and unconstitutional policy of excluding houses of worship from its Public Assistance (PA) grants program causes them ongoing harm, and that the Churches meet the preliminary injunction factors.

FEMA's response is an odd combination of a half-hearted standing argument and irrelevant factual filler. FEMA concedes the likelihood of success on the merits, concedes that Free Exercise violations constitute irreparable injury, and makes a cursory argument on the remaining preliminary injunction factors. FEMA relies almost entirely on an argument that the Churches' applications for Public Assistance (PA) grants have not yet been officially denied, and that as a result the Churches have suffered no injury and thus lack standing. But while FEMA was telling that story to the Court, First Assembly was being denied PA grant funds ***solely and expressly because of FEMA's exclusion policy***. And the other two Churches have now been told by government officials administering the PA grants that they are ineligible for PA grants ***solely because they are churches***. These new facts alone belie FEMA's "no injury" argument.

In its response, FEMA also attempts to muddy the waters by presenting a grab bag declaration describing all of the other organizations it has helped using PA grants and the houses of worship it has reimbursed for services rendered. But it presents no evidence that it has *ever* given a PA grant to a house of worship to repair its devastated sanctuary, which is what its written policies prohibit and what *this* lawsuit is about. What FEMA has done to other kinds of organizations and in its reimbursement programs is irrelevant and a red herring.

Ultimately, all of FEMA's standing arguments are misplaced, since they focus on potential future funding. But the question here is whether FEMA can continue to maintain an "odious" anti-religious criterion as a required element of eligibility. In *Trinity Lutheran*, the Supreme Court did not order that Missouri begin funding the church; it ordered Missouri to end its policy of religious discrimination and start treating churches equally. That is all the Churches seek here.

NEW FACTS SUPPORTING INJUNCTIVE RELIEF

There are several factual updates relevant to this Court's consideration:

- On October 3, the government denied expedited PA grant funding to First Assembly that could have been available within ten days. 3d Frazier Decl. ¶ 16. The only stated basis for the denial was that First Assembly "was established for a religious purpose." *Id.* ¶ 17.
- On September 29, FEMA's counsel informed the Churches' counsel that it would not grant any PA funds to otherwise eligible church applicants during its proposed 60-day stay. Blomberg Decl. Ex. 1. And FEMA moved the deadline to apply from November 22 (*see* Opp. at 14) to October 31. *See* http://bit.ly/2z3knlT.
- On September 15, government officials charged with administering the PA grant program stated that Hi-Way Tabernacle and Harvest Family Church were "absolutely not eligible" for PA grant funds under FEMA's policy. Blomberg Decl. ¶ 21.
- FEMA has reviewed, approved, and transferred over $300 million for other PA grants. *See* Financial Assistance tab, https://www.fema.gov/disaster/4332.
- All three churches have submitted complete PA applications, and the government specifically confirmed that First Assembly and Harvest Family provided all requested documentation. 3d Frazier Decl. Ex. 4; 3d Capehart Decl. Ex. 1.
- First Assembly and Hi-Way Tabernacle have applied for SBA loans. 3d Frazier Decl. ¶ 26; 3d Stoker Decl. ¶ 6.

ARGUMENT

I. The Churches have standing and their claims are ripe.

FEMA's policy towards the Churches causes them current, ongoing, and imminent future harm. FEMA hangs its opposition to the Churches' motion almost entirely on the argument that harm has not occurred and will not occur. Because the Churches can show that argument to be false, the Churches are entitled to a preliminary injunction. Article III requires that in order for a claim to be justiciable, the Churches must suffer an injury that is "actual or imminent." *Susan B.*

Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014). The Churches have suffered injury in two primary ways. First, one church (First Assembly) has been formally denied access to expedited PA grants because it was established as a church, and the other two Churches were informed by TDEM that they are ineligible for the same reason. Second, FEMA's policy facially applies to prevent the Churches from obtaining PA grant relief because of their religious status, and FEMA has not expressly disavowed enforcement of its policy—if anything, it has promised to continue enforcing it by categorically refusing to award PA grants to the Churches within the next 60 days, all while hundreds of millions in grants are awarded to other recipients.

A. The Churches have standing because one Church has already been denied PA grant funds, and the other two have been informed that they are ineligible for PA grants.

The Government rests much of its opposition on the premise that the Churches' injuries are "speculative" because their applications for funding have not yet been denied. Dkt. 30 (Opp.) at 17. As explained below, that is not the law. But even if it were, it would still be wrong on the facts. The government *has* denied PA grant funding to First Assembly under FEMA's discriminatory policy, and the government *has* informed Hi-Way and Harvest Family that they are ineligible for PA grants under that same policy. Those facts necessitate an injunction now.

First Assembly received an offer from TDEM over two weeks ago for expedited PA grant funding for Category A and B emergency work, with the funding to be disbursed within 10 days. But after it submitted all the information requested, First Assembly's PA grant application was denied and First Assembly was directed instead to the separate SBA loan program. The only reason identified for the denial was that First Assembly "would not be eligible because it was established for a religious purpose." 3d Frazier Decl. Ex. 3. Thus, but for FEMA's discriminatory policy, First Assembly would likely have *already been awarded PA grant funds* by now.

Moreover, this denial also tracked FEMA's litigation posture. Notwithstanding its (now broken) promise that the Churches would not be "denied" PA funds during the next 60 days, FEMA has now confirmed that it will not *grant* any PA funds to the Churches during that time. Blomberg Decl. Ex. 1. Far from being "speculative," Opp. at 17, FEMA's policy and posture led to the direct rejection of First Assembly's access to much-needed PA funds.

Similarly, the Texas government agency charged by FEMA with administering the PA grant program in Texas has also repeatedly and explicitly told counsel for the Churches that Harvest Family Church and Hi-Way Tabernacle are "absolutely not eligible" for any PA grants, including the Category A and B grants at issue here. Blomberg Decl. ¶ 21. Again, the sole basis for this eligibility determination was FEMA's discriminatory policy against PA funding for repairing church facilities established or primarily used for religious purposes. *Id.*

This is more than enough of an injury to move forward with the Churches' motion for preliminary injunction. First Assembly was offered an opportunity to receive funds right away, but was denied them. That is an actual, particularized injury, and it establishes standing. "When the suit is one challenging the legality of government action," and "the plaintiff is himself an object of the action," then "there is ordinarily little question" that the plaintiff has standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992). First Assembly thus has standing.

Thus, this Court need not consider whether the other Churches have standing, because once "at least one plaintiff has standing, the court need not consider whether the remaining plaintiffs have standing." *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014). But the repeated ineligibility determinations by TDEM would be enough to establish standing to challenge the discriminatory FEMA policy that TDEM relies on and is bound by. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (multiple land use application rejections established standing).

FEMA tries to dodge this conclusion by focusing on irrelevant issues. First, it argues that the Churches aren't suffering discrimination because they can get reimbursement for certain disaster relief services. That is a red herring. The Churches are not challenging FEMA's policy on *reimbursement*, they are challenging FEMA's *PA grant* policy.

Second, FEMA says that the Churches have not yet applied for SBA loans. Even if that mattered, First Assembly and Hi-Way have applied for an SBA loan. 3d Frazier Decl. ¶ 26; 3d Stoker Decl. ¶ 6. But whether the Churches have applied is irrelevant to the issues before this Court, since, as FEMA admits, applying for SBA loans is a predicate only to receiving *Permanent Work* PA grants, and the Churches are applying for *Emergency Work* PA grants. *See* Stronach Decl. ¶ 14; 3d Frazier Decl. ¶ 6. Emergency relief grants do not require the Churches to apply for SBA loans. Stronach Decl. ¶ 53; FEMA Policy Guide at 18 (figure 8). And even for Permanent Work, the statute does not say that, without "proof" of applying for an SBA loan, PA grant "*applications* are incomplete and must be denied." Opp. 18 (emphasis supplied). At most, the statute says that an SBA application is necessary *to ultimately receive PA funding*. *See* 42 U.S.C. § 5172(a)(3)(a). But that doesn't mean that an SBA funding application is a predicate to the sole issue in this case: a PA grant *eligibility determination*.

B. The Churches have standing because FEMA's discriminatory policy applies to the Churches and FEMA has not disavowed enforcing it.

In addition to the injuries they are already suffering, the Churches face the imminent injury of future denials from FEMA and the continuing delay of their applications. FEMA responds that it has not processed the Churches' applications fully. *See* Opp. at 17. But this argument is irrelevant. In analogous situations, courts do not require plaintiffs to wait for final resolution of an application for a government benefit when the government is applying clear rules and the parties have already suffered an injury. For example, in *Palazzolo*, the Supreme Court considered a petitioner whose

land use applications had been twice denied by the local government. The Court held that his claims were ripe, because of the "unequivocal nature of the . . . regulations at issue" and the prior "application of the regulations" made it clear that any further petitions were futile. 533 U.S. at 619. Here, it would be futile to force the Churches to wait for a denial that is *expressly required* by the text of FEMA's own policy. *See, e.g., LeClerc v. Webb*, 419 F.3d 405, 413-14 (5th Cir. 2005) (where government issued "flat prohibition," further waiting is "futile" and there is no "utility of further factual development"). FEMA has "unequivocal[ly]" told the Churches that their kind of religious organization is "ineligible." *Palazzolo*, 533 U.S. at 619; FEMA Policy Guide at 12, 15.

FEMA's "history" of past application of the policy buttresses the conclusion that it will enforce its policy the same way against the Churches. *Susan B. Anthony List*, 134 S. Ct. at 2345; *see also Roark & Hardee*, 522 F.3d at 543 (bar owners charged with one portion of an ordinance had standing to challenge another portion of the ordinance). Over decades, FEMA has repeatedly ruled that "a church does not meet FEMA's definition of an eligible . . . facility." Dkt. 12-5 (Mem.) 4-7. Given FEMA's past denials, its current denials of the Churches, and its explicit policy, the Churches need not wait years to start seeking relief from the federal courts.

C. The Churches have standing because FEMA's discriminatory treatment of them and other houses of worship constitutes an ongoing injury.

An additional independent basis for standing is that FEMA's policy discriminates against the Churches, indisputably applies to the Churches, and has not been disavowed by FEMA.

FEMA's discriminatory policy is clear: "Facilities established or primarily used for . . . religious . . . activities are not eligible." FEMA Policy Guide at 12. The facts before this Court are that each of the Churches and their damaged facilities were established and are primarily used for religious purposes. 2d Capehart Decl. ¶¶ 36-39; 2d Stoker Decl. ¶¶ 39-43; 2d Frazier Decl. ¶¶ 32-34. FEMA's policy has been repeatedly applied to discriminate against other houses of worship

like the Churches. Mem. at 4-6. Accordingly, FEMA's policy applies to exclude the Churches. That constitutes an injury sufficient to confer standing. *See Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 543-44 (5th Cir. 2008); *ACLU v. Alvarez*, 679 F.3d 583, 592-93 (7th Cir. 2012).

FEMA acknowledges that any "loss of First Amendment freedoms" is an injury. Opp. at 19 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 296 (5th Cir. 2012) (interference with "ability to freely exercise . . . religion" constituted irreparable injury). Indeed, its discriminatory policy toward the Churches is a First Amendment harm *on its face*. *Cf. Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016) ("being subjected to discrimination is by itself an irreparable harm").

FEMA could mitigate this injury if it promised to "refrain from enforcing" the policy against the Churches. *Roark & Hardee*, 522 F.3d at 543-44; *see also Alvarez*, 679 F.3d at 592-93 (where government policy "plainly" interferes with plaintiff's First Amendment interests, the burden is on the *government* to show that is has not "foresworn the possibility" of applying the policy to the party). But FEMA has done the opposite: it has openly acknowledged the policy, that it discriminates based on religion, and that it will continue enforcing the policy. Opp. at 9 (quoting FEMA Policy Guide at 12, 15). Indeed, FEMA's policy is being enforced to exclude both the Churches and other houses of worship. 3d Frazier Decl. ¶ 16; Blomberg Decl. ¶ 23 (other houses of worship also being told they are ineligible); *see also* Amicus Br. of Jews for Religious Liberty, Dkt. 25-2 at 8-9; Amicus Br. of Archdiocese of Galveston-Houston, Dkt. 28-1 at 5-6.[1]

[1] FEMA's motion for a 60-day stay does not suggest otherwise. It states only that "there is a possibility" that FEMA will fix its policy. Dkt. 24 at 1. The Churches intend to file an opposition to the stay motion by the motion docket date of October 20 if the Court has not ruled on the preliminary injunction by then. However, the Churches believe the correct course of action given the urgent nature of the Churches' need for relief is for the Court to grant the preliminary injunction and then deny the stay motion as moot. If the Churches cannot obtain relief from this Court within a short period of time, they will be forced to seek emergency relief from the Fifth Circuit.

Worse, far from agreeing to remove their discriminatory eligibility criteria, FEMA confirmed that it will keep enforcing the criteria by refusing to *grant* any PA funds to otherwise eligible churches. Blomberg Decl. Ex. 1. By contrast, FEMA has already approved and released over $380 million in PA grants to others. *See* Financial Assistance Tab, https://www.fema.gov/disaster/4332.

FEMA's primary response to the Churches' argument that the discrimination is ongoing is that First Amendment rights do not create standing. Opp. at 19. FEMA cites only *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016) for this proposition. But *Google* did not deal with ongoing discrimination. In *Google*, the plaintiffs were served by the State with a subpoena that was unenforceable until brought to a district court. Google's First Amendment rights were not implicated because enforcement was still a "hypothetical situation[]." *Id.* at 227. Here, the Churches are subject to ongoing facial discrimination, where FEMA's policy applies to the churches now. The Churches have *already* had the policy enforced against them, and are currently at the back of the line to receive funding until FEMA decides what to do with them. This Court can prevent that injury from continuing, but a 60-day delay would prolong and add to that existing injury.

FEMA also briefly notes that it has given grants to some "religiously affiliated" nonprofits. Opp. at 9; Stronach Decl. ¶ 30. But those organizations simply fell outside its discriminatory policy. Providing grants to some religious organizations cannot justify FEMA's admitted policy of disqualifying house of worship PA grant applicants because their facilities are established or primarily used for religious purposes. Thus FEMA's largely illegible list is completely irrelevant. Stronach Decl. Ex. 1. Notably, FEMA fails to provide a list of the houses of worship it has denied under its discriminatory eligibility criteria. Nor would it be able to list how many houses of worship have been deterred from applying in the first place. Blomberg Decl. ¶ 23.

Finally, FEMA offers no independent grounds for its ripeness defense, relying entirely on the arguments it makes for lack of standing. Opp. at 17-18. Since those arguments fail to demonstrate lack of standing for the reasons stated above, they also fail to demonstrate lack of ripeness.

II. The Churches should be granted a preliminary injunction.

A. FEMA concedes substantial likelihood of success on the merits.

FEMA makes no argument that the Churches do not have a substantial likelihood of success on the merits. By failing to brief the issue, FEMA has waived it. *Dortch v. Mem'l Herman Healthcare Sys.-Sw.*, 525 F. Supp. 2d 849, 876 n.69 (S.D. Tex. 2007) ("failure to brief an argument in the district court waives that argument"). In the Churches' opening memorandum, we explained that FEMA's policy, on its face, violates the Free Exercise Clause under *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), because it "puts [the Churches] to a choice": "participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021-22; Mem. at 14-22. We also explained that FEMA's policy violates the Free Exercise Clause under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), because FEMA's policy is not "neutral" or "generally applicable," but "impose[s] special disabilities on the basis of religious views." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (citations omitted); *see* Mem. at 16-18. FEMA made no response to these arguments, thus conceding them.

B. The Churches are suffering ongoing irreparable injury absent an injunction.

We described in our opening memorandum that the Churches are suffering ongoing irreparable harm. *See* Mem. 22-23. And we describe in detail above how the Churches have suffered Article III injuries. *See supra* Section I. In response, FEMA concedes that First Amendment injuries are irreparable. Opp. at 17 (quoting *Elrod*, 427 U.S. at 373). That alone suffices to show irreparable injury. And FEMA's continued enforcement of its policy to deny the Churches PA grants could cause even further irreparable harm if no funds are left by the time FEMA does process them, a

scenario FEMA did not address in its opposition. *See* Mem. at 25. Senior Texas officials have already indicated that current levels of FEMA funding are grossly inadequate. *See* http://bit.ly/2yeBnsI. The State's "hurricane recovery czar" also warned applicants that the "early bird gets the worm." *See* http://bit.ly/2yfk1Mp. FEMA is forcing the Churches to be "late birds." And the Churches are suffering ongoing difficulties now, including missing religious services due to unusable facilities, 2d Stoker Decl. ¶ 48, and being required to divert time from recovery efforts into applying for grants for which they are currently ineligible. 3d Frazier Decl. ¶¶ 11, 28.

C. The remaining preliminary injunction factors favor the Churches.

In our opening memorandum, we showed that an injunction would prevent harm to the Churches, cause no harm to FEMA, and would be in the public interest. Mem. at 23-24. FEMA's response is cursory at best. *See* Opp. at 21-22. The only harm to FEMA or the public interest that FEMA identifies is that an injunction would prevent adherence to the Stafford Act. Opp. 10, 22. Of course, the First Amendment trumps statutes. But there is no conflict here since nothing in the Stafford Act requires FEMA to add a religious disqualifier to the definition of an eligible "private nonprofit facility." *See* 42 U.S.C. § 5122(11) (defining eligible nonprofits without reference to religion). In fact, the Stafford Act requires just the opposite: it forbids "discrimination on the grounds of . . . religion" in "the processing of applications." *Id.* at § 5151(a).

CONCLUSION

The Churches respectfully request that the Court issue a preliminary injunction in the near future relieving them from FEMA's exclusion policy during the pendency of this litigation.

Respectfully submitted,

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Dated: October 12, 2017

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CERTIFICATE OF SERVICE

I certify that on October 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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