No. 17-20768

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees.

On Appeal from the United States District Court for the Southern District of Texas (Hon. Gray Miller, D.J.)

EMERGENCY MOTION OF HARVEST FAMILY CHURCH, HI-WAY TABERNACLE, AND ROCKPORT FIRST ASSEMBLY OF GOD FOR FED. R. APP. P. 8 INJUNCTION PENDING APPEAL AND TO EXPEDITE APPEAL

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RULE 28.2.1 CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.2.1, I hereby certify as follows:

(1) This case is *Harvest Family Church, et al., v. Federal Emergency Management Agency, et al.,* No. 17-20768 (5th Cir.).

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: December 7, 2017

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EMERGENCY MOTION FOR ENTRY OF AN INJUNCTION PENDING APPEAL UNDER FED. R. APP. P. 8 AND TO EXPEDITE APPEAL

Appellant Churches respectfully move this Court for an emergency Fed. R. App. P. 8 injunction pending resolution of their appeal from the district court's denial earlier today (Dec. 7) of a temporary restraining order and preliminary injunction. Absent an injunction ordering Defendants ("FEMA") to allow them to apply for Public Assistance grants on an equal basis with all other nonprofits, Appellants will remain in limbo regarding their ability to proceed with demolition and reconstruction of their damaged houses of worship.

Accordingly, Appellants request that this Court enter an order by **Monday, December 11,** enjoining FEMA during the pendency of this appeal from any application or enforcement of:

- the religion-specific eligibility policies on pages 12 and 15 of FEMA's Public Assistance Program and Policy Guide (including that "[f]acilities established or primarily used for . . . religious . . . activities are not eligible" for relief grants, and listing "[r]eligious activities, such as worship, proselytizing, religious instruction, or fundraising activities," "[r]eligious education," and "[r]eligious services" as ineligible); and

- any other policy or regulation that prohibits houses of worship from being considered for grants under 42 U.S.C. § 5122 because of their religious status or the religious use of their facilities.

In addition to their request for an injunction pending appeal, Appellant Churches also respectfully request that the Court set this appeal for expedited briefing, argument, and disposition. Appellants consulted with counsel for FEMA and FEMA opposes this motion.

INTRODUCTION

Hurricane Harvey made landfall on August 25. Appellant Churches were, like many other Texans, devastated by Harvey. However, they quickly found out that unlike most other Texans and many other private non-profit entities, they were ineligible for disaster relief grants because FEMA has a policy of categorically denying FEMA Public Assistance grants for houses of worship, solely because they are established as houses of *worship*.

Appellants filed their lawsuit on September 4 and have been consistently seeking emergency relief in the district court since that time. The district court did not allow emergency briefing or disposition. The first judge assigned to the case indicated that he

believed that FEMA had conceded the merits of the case and thus he would make a decision on the Churches' request for an injunction on December 1. But then he unexpectedly recused on the evening of November 30. The case was reassigned on December 1 and the new district court judge *found* that FEMA had conceded the merits, but still denied interim injunctive relief this morning. It thus took over three months for the district court to reach a decision on interim injunctive relief.

During those three months, the Churches have suffered ongoing and irreparable harm due to Defendants' church exclusion policy. Rockport First Assembly of God has already been formally denied expedited PA grants once, and then had to demolish its sanctuary—which had its roof ripped off by Harvey—thus permanently limiting its ability to seek a FEMA grant covering that demolition.

For its part, Hi-Way Tabernacle is currently unable to proceed with demolishing and rebuilding its sanctuary because if it does so now it will permanently jeopardize its ability to obtain FEMA disaster grants. That is because FEMA says grant applicants must seek FEMA signoff before demolition or reconstruction begins. Yet

because FEMA excludes houses of worship from its Public Assistance grant program, FEMA will not allow Appellants to obtain signoff, or to access the grant application process at all. Without interim injunctive relief, the Churches will therefore permanently lose opportunities to obtain grant assistance on the same basis as every other entity. That is textbook irreparable injury, and the district court found as much in its ruling.

That ongoing injury is flatly unconstitutional. The purely legal question before the Court, and the one on which the lower court's decision hinged, is whether FEMA violates the Free Exercise Clause—as interpreted by the Supreme Court earlier this year in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017)—when it categorically excludes houses of worship from a safety-oriented public grant program solely because of their religious identity. Direct discrimination against religious organizations also runs afoul of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), because it is neither neutral nor generally applicable. Given this open discrimination against churches, it is perhaps unsurprising that FEMA has yet to

defend this exclusion policy on the merits, thereby conceding the point.

Given the obvious injury and the purely legal question of whether FEMA's policy violates the First Amendment, the Court should enter the targeted injunction requested and set the appeal for expedited briefing and argument. There is no reason to keep telling these Churches there is no room at the inn.

FACTUAL BACKGROUND

Appellants are three churches that were severely damaged by Hurricane Harvey and that, but for their status as houses of worship, would have been allowed equal access to federal disaster relief months ago.

A. FEMA's policy excluding houses of worship

FEMA is authorized by 42 U.S.C. § 5121 *et seq*. to provide funds under its Public Assistance ("PA") Program to help communities recovering from major disasters. *See* FEMA Public Assistance Program and Policy Guide at 1-2, http://bit.ly/2hteb2R ("FEMA Policy Guide"). Certain nonprofits are permitted to apply for these funds, including "museums, zoos, [and] community centers." 44

C.F.R. § 206.221(e)(7). Services that make a facility eligible for grants include "[e]ducational enrichment activities" such as "stamp and coin collecting," and "[s]ocial activities" such as "community board meetings, neighborhood barbeques, [and] various social functions of community groups." FEMA Policy Guide at 14.

But FEMA policy—which is classified as "guidance," not regulation or statute—categorically excludes houses of worship from applying for these funds, even though they could be otherwise eligible. FEMA's policy states that "facilities established *or* primarily used" for religious activities are "not eligible." *Id.* at 12 (emphasis added). If a building is established for religious purposes, or, if it has multiple uses, "if FEMA determines that 50 percent or more of physical space is dedicated to ineligible services, the entire facility is ineligible." *Id.* at 17. Ineligible services include "religious activities, such as worship, proselytizing, religious instruction." *Id.* at 16. Houses of worship are thus effectively excluded from access to disaster relief grants.

FEMA has unwaveringly interpreted its policy to categorically exclude churches from receiving PA grants to repair their houses of

worship. *See*, *e.g.*, FEMA Publication 9521.1(7)(c)(7) (eff. 1998-2008) ("A facility used for a variety of community activities but primarily established or used as a religious institution or place of worship would be ineligible"; this includes "churches, synagogues, temples, mosques, and other centers of religious worship"); *see also* FEMA Release No. 1763-141 (Aug. 8, 2008) (stating that "federal grants cannot cover . . . worship sanctuaries"); *see also* Dkt. 12-5 at 6-7 (listing denials of houses of worship).

By contrast, other nonprofit entities have been able to receive FEMA grants even when they are not generally open to the public. *See, e.g.*, 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).

B. FEMA's discrimination against the Churches

Each of the Churches is a small congregation with primary meeting spaces that were severely damaged by Hurricane Harvey. The Churches are located in counties that were declared federal disaster areas. Dkt. 12-2 ¶ 2; Dkt. 12-3 ¶ 2; Dkt. 12-4 ¶ 2. One of

the Churches served as a FEMA staging center, and to this day is providing housing, clothing, medical care, and thousands of meals to evacuees. Dkt. 12-3 ¶¶ 7-16. All three Churches need immediate emergency repairs to protect the safety of their congregations and to prevent further damage to their buildings. Dkt. 12-2 ¶¶ 21-25, 43-44; Dkt. 12-3 ¶¶ 23-27; Dkt. 12-4 ¶¶ 19-21. Pictures of the devastation to the churches can be found in the record. Dkt. 12-2, Exhibits 1-2; Dkt. 12-3, Exhibits 1-2; Dkt. 12-4, Exhibits 1-5. But for their religious status and religious use of their facilities, the Churches would be eligible nonprofits. Dkt. 12-2 ¶¶ 31, 39; Dkt. 12-3 ¶¶ 34, 43; Dkt. 12-4 ¶¶ 27, 34.

The Churches submitted applications for disaster relief aid to FEMA (including Small Business Administration loan applications, which is a prerequisite for receiving non-emergency PA grants) and have received confirmation from officials that no further materials were necessary. *See, e.g.*, Dkt. 34-2, Exhibit 4; Dkt. 34-3, Exhibit 1; Dkt. 34-4 ¶ 6. The Churches have since been denied PA grant funding, told that they are not eligible, and—solely because they

are houses of worship—had their applications placed on "hold" by FEMA while it processes applications for other nonprofits:

- On September 15, officials administering the PA grants stated that Hi-Way Tabernacle and Harvest Family Church were "absolutely not eligible" for PA grant funds under FEMA's policy. Dkt. 34-1 ¶ 21.

- On October 3, the government denied expedited PA grant funding to First Assembly that could have been available within ten days. Dkt. 34-2 ¶ 16. The only stated basis for the denial was that First Assembly "was established for a religious purpose." *Id.* ¶ 17.

- On October 27, FEMA admitted to the Court that it would put "on hold" "all applications from houses of worship deemed ineligible for PA funding." Dkt. 41 at 2.

- On November 6, Harvest Family Church confirmed its application had been "placed on hold" by FEMA because FEMA headquarters had issued an order "Holding Houses of Worship." Dkt. 43. Harvest Family Church's application is still "on hold" as of today.

FEMA policy makes PA grant funding contingent upon FEMA's pre-clearance of certain types of projects. For instance, FEMA must review even emergency demolition to ensure compliance with environmental and historical preservation laws. FEMA Policy Guide at 75. Two of the Churches' buildings were damaged so badly that they required demolition. Dkt. 12-3 ¶ 24; Dkt. 12-4 ¶ 19. Hi-Way Tabernacle is attempting to wait for the required FEMA

approval before it demolishes its sanctuary, and will do so promptly once FEMA offers its approval. First Assembly, on the other hand, was unable to wait for FEMA approval due to the urgent need to start demolition.

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

FEMA and the White House now admit that they are taking steps to change the policy. Dkt. 54 ¶ 2. FEMA is vague, however, as to the content of that change, whether it will solve the policy's constitutional problems, and when it will be implemented. *See* Dkt. 54-1 ¶ 5 (FEMA "expects" it may make a decision "by the end of December"). In the meantime, FEMA's discriminatory policy remains in place and has prevented the Churches' applications from being processed.

While the Churches and other houses of worship are on hold, FEMA has disbursed over $500 million in PA grants to other applicants. *See* https://www.fema.gov/disaster/4332?utm_source=hp_promo&utm_medium=web&utm_campaign=disaster. Thus, FEMA's current policy places houses of worship in an untenable position. They must delay necessary repairs in order to preserve a chance at obtaining funding, even while FEMA policy categorically bans them from accessing that funding and actively distributes a dwindling amount of relief funds to other PA grant applicants.

PROCEDURAL HISTORY

The Churches brought this lawsuit in the Southern District of Texas on September 4, 2017. The case was initially assigned to Judge Keith Ellison. On September 6, the Churches filed an emergency motion for a preliminary injunction and then, after an emergency hearing on September 8 and at Judge Ellison's request, filed a renewed emergency motion on September 12. Judge Ellison denied the Churches' request to expedite briefing. FEMA opposed the motion for a preliminary injunction and moved for a stay of proceedings while it considered a potential rule change.

After another hearing on November 7, Judge Ellison denied FEMA's motion to stay the case and ruled that unless FEMA adopted a new position by December 1, FEMA would be deemed to have "concede[d], at the very least, Plaintiffs' likelihood of success on the merits of this case and that the injury being suffered by Plaintiffs is irreparable." Dkt. 45 at 6.

On November 30, Judge Ellison unexpectedly issued a recusal order, and on December 1, the case was reassigned to Judge Gray Miller. On the same day, the Churches filed an emergency motion for a temporary restraining order asking the district court to provide an immediate ruling as promised by Judge Ellison. Today, December 7, Judge Miller issued an order denying the temporary restraining order and the preliminary injunction. Plaintiffs filed a notice of appeal, and now file this motion for emergency injunctive relief and for an expedited appeal.

ARGUMENT

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 is excluding churches from generally available public benefits programs "solely because of [their] religious character." *Id.* at 2024. That is exactly FEMA's policy here. FEMA's exclusion of churches simply because they were "established" for religious purposes violates the Free Exercise Clause under *Trinity Lutheran*.

FEMA's policy also violates the Free Exercise Clause under *Lukumi* because it favors certain non-religious activities (*e.g.*, stamp collecting and cephalopod research) over religiously motivated activities. 508 U.S. 520. Under FEMA's policy, should the Churches give up the religious motivation for their activities, they would qualify for aid, but if they continue functioning as houses of worship, they are ineligible. That is impermissible.

The Churches thus have a substantial likelihood of success on their Free Exercise claim. They likewise fulfill the other criteria for an injunction pending appeal since FEMA's discrimination irreparably injuries them in a way that severely harms the Churches and the public interest without any countervailing value

to FEMA. This Court should accordingly grant an injunction pending appeal.

I. The Churches are substantially likely to succeed on the merits of their claims.

As Judge Ellison indicated and Judge Miller found, FEMA has already conceded that the Churches are substantially likely to succeed on the merits. Dist. Ct. Op. at 6 n.1. Even if it had not, though, the Churches make a sufficient showing to warrant injunctive relief pending appeal.

A. *Trinity Lutheran* forbids FEMA's policy against providing disaster relief funds to facilities that are "established" for religious purposes.

The district court's ruling distinguishing *Trinity Lutheran* erred in two primary ways. First, it restricted *Trinity Lutheran*'s applicability to "the funding of a playground, not a religious activity." Op. at 6. Second, it ruled that FEMA's policy does not, like the policy in *Trinity Lutheran*, discriminate based upon the religious character of recipients.

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 from the program. *Id.* Even though Trinity Lutheran would have otherwise received funding, its application was rejected solely because it is a church. *Id.* at 2018. The Supreme Court held that Missouri's policy "expressly discriminate[d] 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. But for the exclusion policy, the Churches would be eligible for FEMA emergency aid. Dkt. 12-2 ¶¶ 31, 39; Dkt. 12-3 ¶¶ 34, 43; Dkt. 12-4 ¶¶ 27, 34. The IRS has granted them tax exemptions; they provide services to the public similar to a community center or museum; they are open to the general public without fees; and they each have facilities that have been damaged and are in need of "emergency protective measures." Dkt. 12-2 ¶ 31; Dkt. 12-3 ¶ 34; Dkt. 12-4 ¶ 27.

The only reason the Churches are not eligible is FEMA's policy that disqualifies facilities that are "established or primarily used"

for "religious" activities. FEMA Policy Guide at 12, http://bit.ly/2hteb2R. Houses of worship are, by their nature, established and primarily used for religious activities, a reality that they cannot change without changing their identity as houses of *worship*. *See*, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2029 (Sotomayor, J., dissenting) ("A house of worship exists to foster and further religious exercise"). Thus, especially for small congregations with facilities that amount to little more than their house of worship, FEMA's rule is clear: "no churches need apply." *Trinity Lutheran*, 137 S. Ct. at 2024.

FEMA's policy accordingly "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*.

The district court's contrary ruling first erred by finding that the holding of *Trinity Lutheran* was confined to playgrounds that are

used for nonreligious purposes. Op. at 6. Its sole support for that remarkable conclusion is *dicta*—a footnote that was joined by only four justices, and which merely restates the facts of the case. But the footnote is simply not part of the Supreme Court's holding, and the holding itself did not confine its reasoning to playgrounds. Rather, the Court clearly explained that its ruling was built upon a string of "prior decisions," all of which had nothing to do with playgrounds and which together "make one thing clear": that a policy which "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" runs afoul of the Free Exercise Clause. *Id.* at 2021.

Moreover, the district court is simply wrong that *Trinity Lutheran*'s ruling turned on whether the playground grant went to a non-religious purpose. To the contrary, *Trinity Lutheran* explains that the Free Exercise Clause *forbids* discriminating against a private party's "conduct because it is religiously motivated." 137 S. Ct. at 2021. In addition, the church in *Trinity Lutheran* was clear that it sought the grant to advance its "educational program to

allow a child to grow spiritually." *Id.* at 2017. Thus, the church's "playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission." 137 S. Ct. at 2029 (Sotomayor, J. dissenting). Indeed, it was partly for this reason that Missouri denied the church funding, since the program would give grants to religious organizations only if their "'mission and activities are secular (separate from religion, not spiritual) in nature' and the funds 'will be used for secular (separate from religion, not spiritual) purposes.'" 137 S. Ct. at 2038 (Sotomayor, J., dissenting).

Second, the district court was wrong that FEMA's policy does not discriminate on the basis of religious character or status. A house of worship without worship is just a house. And a policy that discriminates against religious worship therefore "categorically disqualifies" houses of worship. *Trinity Lutheran*, 137 S. Ct. at 2017; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

FEMA has repeatedly stated that its policy has categorical implications for houses of worship: "a church does not meet FEMA's

definition of an eligible [private nonprofit] facility." *See* Final Decision, Middleburgh Reformed Church (Nov. 12, 2013) https://www.fema.gov/appeal/283579. Indeed, where a church is "established" for religious purposes, it is ineligible "*regardless of the other secular activities held at the facility*." Final Decision, Community Church Unitarian Universalist (Dec. 31, 2015) https://www.fema.gov/appeal/288379?appeal_page=analysis. Thus, under the "established-for" prong of FEMA's policy, churches are categorically ineligible.

That is true of the Churches here. Texas officials charged with administering FEMA's PA program denied expedited PA grant funding to First Assembly because First Assembly "was established for a religious purpose." Dkt. 34-2 ¶ 17. They also stated that Hi-Way Tabernacle and Harvest Family were "absolutely not eligible" for PA grants because they were churches. Dkt. 34-1 ¶¶ 13, 21. FEMA directly admitted that it put "on hold" "all applications from houses of worship deemed ineligible for PA funding," Dkt. 41 at 2, and has done so to the Churches' applications.

Accordingly, FEMA's policy impermissibly discriminates based on the religious character of the Churches.

B. *Lukumi* forbids FEMA's policy against providing disaster relief funds to facilities that are "primarily used" for religious activities.

In *Lukumi*, the Supreme Court held that the Free Exercise Clause "protect[s] religious observers against unequal treatment." 508 U.S. at 533. The Court applied this principle to strike 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 exempted "[m]any types of" nonreligious animal slaughter while, in practice, targeting only "conduct motivated by religious beliefs." *Id.* at 536-38, 543. As then-Judge Alito later explained, this favoring of non-religiously-motivated activities over religiously-motivated activities constituted a forbidden governmental "value judgment." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

The district court declined to follow *Lukumi* on two grounds. First, it held that *Lukumi* and the Free Exercise rule it articulates apply only to "criminal or civil sanctions." Op. at 8. But *Trinity Lutheran* directly addressed and rejected that position: "the Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions" or "criminalizat[ion]." 137 S. Ct. at 2022 (internal quotation marks omitted); *accord Merced v. Kasson*, 577 F.3d 578, 591 (5th Cir. 2009) (striking down policy that "force[d] the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit and, on the other hand, following his religious beliefs").

Second, the district court held that *Lukumi* did not apply because religion was not the *only* category of conduct targeted for disfavor. Op. at 9. But that is not the standard. Nor could it be, since it would incentivize legislators and bureaucrats to burden a few sacrificial secular categories to bless religious discrimination. To the contrary, when a policy allows for "at least some" exceptions, it becomes suspect. *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990). And, as directly applicable here, when the law in question

"discriminate[s] on its face" and "regulates . . . conduct *because it is undertaken for religious reasons*," it must face strict scrutiny. *Lukumi*, 508 U.S. at 532-33 (emphasis supplied). And that of course is what FEMA's policy does. FEMA Policy Guide at 12, 15 (banning funding for facilities used for "religious activities," "religious education," "religious services," and "religious" instruction"). If the Churches abandoned their religious motivations:

- their prohibited "worship" services would be eligible "social activities to pursue items of mutual interest";
- the impermissible "religious instruction" in 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. Thus, FEMA's policy also flunks *Lukumi*.

C. FEMA's policy fails strict scrutiny.

Because FEMA's policy discriminates on the basis of both religious status and religious conduct, it must—at least—pass "the strictest scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2019. That it cannot do, in part because FEMA never tried to do so below and

thus waived the defense. *See Dortch v. Mem'l Hermann Healthcare Sys.-Sw.*, 525 F. Supp. 2d 849, 876 n.69 (S.D. Tex. 2007) ("failure to brief an argument in the district court waives that argument").

Moreover, courts need not try to unilaterally answer constitutional questions not raised by the parties. *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2019 (noting, without more, that the "parties agree that the Establishment Clause" was not at issue). That's particularly true here, where striking down FEMA's general discriminatory policy would still have left FEMA leeway to raise specific Establishment Clause issues beyond the simple bricks-and-mortar matters at issue in this appeal.

Nonetheless, because the district court *sua sponte* raised an antiestablishment interest, the Churches address it here.

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 excluding 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.*

Thus, *Trinity Lutheran* explained that such interests can be relevant "only *after* determining" that a given program does not "'require [recipients] to choose between their religious beliefs and receiving a government benefit.'" *Id.* at 2023 (quoting *Locke v. Davey*, 540 U.S. 712, 720-21 (2004) (emphasis supplied)). In *Locke*, for instance, the Court could consider the State's antiestablishment interests only after it showed that its program "went 'a long way toward including religion in its benefits,'" including by allowing usage at "pervasively religious schools." *Id.* (quoting *Locke*, 540 U.S. at 724). But here, FEMA specifically *excludes* religion from its PA program, and religious recipients are only eligible if they can show that, far from "pervasively," they are not even *predominantly*

religious in their usage of a given facility. FEMA Policy Guide at 12, 15.

Further, FEMA can have no such antiestablishment interest since it regularly encourages houses of worship to seek *other* forms of government subsidy to rebuild their facilities: the Small Business Administration's disaster loan program. 13 C.F.R. § 123.200 (2002); *see also* FEMA Release No. 1763-141 (Aug. 8, 2008) (stating that SBA loans "can cover . . . items that federal grants cannot cover, such as worship sanctuaries").[1] The government cannot have "an interest of the highest order" in denying PA grants with one hand while granting SBA loans with the other.

Moreover, accepting the district court's rule would "place a host of other programs at risk" that help restore the "physical buildings" of houses of worship. *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 299 (6th Cir. 2009) (citing examples "such as Ebenezer Baptist Church in Atlanta or the Old North Church in

[1] The SBA has informed at least one of the Churches—First Assembly—that it will not receive an SBA loan because it does not have funds sufficient to cover the difference between the loan and the cost of rebuilding. A PA grant is First Assembly's only option.

Boston."); *see also* 27 Op. Off. Legal Counsel 91, 96-97 (2003) (upholding grants to the Old North Church of Paul Revere's ride). Such a rule would likewise threaten the Church Arson Prevention Act of 1996 and the SBA loan program, both of which provide government-subsidized low-interest reconstruction loans for houses of worship. *See* Pub. L. No. 104-55, 110 Stat. 1392 (1996); 13 C.F.R. § 123.200 (2002).

* * * * *

FEMA's policy is an even clearer violation of the Constitution than the policy at issue in *Trinity Lutheran*. To be sure, both cases feature religious discrimination that is "odious to our Constitution." *Id.* at 2025. But here, there is no government defendant raising antiestablishment interests, and FEMA has never justified the church exclusion policy on antiestablishment grounds. The grants at issue are not to *improve* a church's property, but rather merely to help *restore* it from disaster. And while the grants in *Trinity Lutheran* avoided "a few extra scraped knees," 137 S. Ct. at 2024-25, here the funds concern emergency matters of health and safety

for the general public, and rebuilding facilities which are "essential" to restoring devastated communities. FEMA Policy Guide at 16.

II. The other preliminary injunction factors are satisfied.

Irreparable injury. FEMA has conceded this prong. *See* Dkt. 45 at 6; *see also* Op. at 6 n.1. Moreover, it is settled law that FEMA's violation of the Churches' First Amendment rights results in irreparable injury. ""[T]he loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). 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).

Here, the harm also shows up at a very practical level. All three Churches need immediate emergency repairs to protect the safety of their congregations and the general public, and to prevent further damage to their buildings. And all three are stuck in limbo

while FEMA refuses to treat them like other nonprofit PA applicants.

Balance of harms. FEMA failed to substantively brief this prong and thus waived it. Even absent waiver, though, FEMA's religious discrimination is odious to our constitution and causing irreparable harm to the Churches. To overbalance these severe harms, FEMA must make a "powerful" showing. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 297 (5th Cir. 2012). It cannot do so. Granting the injunction will merely prevent FEMA from relying on the Churches' "religious character," *Trinity Lutheran*, 137 S. Ct. at 2021, to deny these three specific Churches equal access to FEMA aid during the pendency of this appeal. And nothing in the Stafford Act requires FEMA's religious disqualifier in the first place. *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." 42 U.S.C. § 5151(a). So an injunction will only help FEMA to follow the law.

Public interest. FEMA failed to substantively brief this prong and thus waived it. Even if it had not, "[i]njunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life*, 697 F.3d at 298. And where a law violates the First Amendment, "the public interest [is] not disserved by an injunction preventing its implementation." *Id.* at 298.

CONCLUSION

The Churches respectfully request that this Court grant their motions for an injunction pending appeal and for an expedited appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2017, this motion was (1) served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov, upon all registered CM/ECF users; and (2) transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Kaspersky Endpoint Security and is free of viruses.

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

Attorney for Appellants

FED. R. APP. P. 8(A) CERTIFICATE

In accordance with Fed. R. App. P. 8(a), the Churches have also moved for an injunction pending appeal before the district court. The district court has not yet had an opportunity to rule on that motion. Given the time constraints at issue and the ongoing violation of the First Amendment, the Churches believe a ruling on that motion is "impracticable." *See* Fed. R. App. P. 8(a); *see also Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (not requiring the filing of a motion for injunction in the district court due to the "immediacy of the problem and the district court's legal error concerning the First Amendment").

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

Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 5,193 words. This motion complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Century Schoolbook 14 pt.) using Microsoft Word 2013.

/s/ Eric C. Rassbach
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Attorney for Appellants

Dated: December 7, 2017