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January 8, 2018

Lyle W. Cayce, Clerk of Court
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: *Harvest Family Church, et al. v. Federal Emergency Management Agency, et al.*, No. 17-20768

Dear Mr. Cayce,

Pursuant to the Court's order of January 3, 2018 in the above-captioned appeal, Plaintiffs-Appellants ("the Churches") submit this letter brief.

Background. Since the Churches filed their opening brief on January 3, two important developments have occurred.

First, Defendants-Appellees ("FEMA") published a revised policy guide on January 4. *See* Revisions to the Public Assistance Program and Policy Guide, 83 Fed. Reg. 472 (Jan. 4, 2018). The new guide revised FEMA's Public Assistance ("PA") grant policy to comport with *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), and ensure that "houses of worship will not be singled out for disfavored treatment" among "PA nonprofit applicants." 83 Fed. Reg. at 473. The revision recognized that, under *Trinity Lutheran*, "the Free Exercise Clause of the First Amendment" does not permit the government to deny "an otherwise available public benefit" to a church "solely because it [is] a church." *See* FEMA Public Assistance Program and Policy Guide at vii, Version 3 (January 2018), http://bit.ly/2mfcndH. FEMA's new policy guide accordingly does not "exclude houses of worship from eligibility for FEMA aid on the basis of the religious character or primarily religious use of the facility." *Id.*

Specifically, the new guide deleted the previous policy guide's language that targeted religion for disfavor. *Id.* at vii-viii (deleting "religious" from the sentence "Facilities established or primarily used for . . . religious . . . activities are not eligible"; deleting language excluding "religious education, "religious services," and "religious activities" as ineligible services). The new policy guide instead recognizes as eligible services "[a]ctivities of community centers or houses of worship open to the general public, without regard to their secular or religious nature." FEMA Policy Guide (V. 3) at vii, 14.

FEMA published these policy changes on January 4 in response to Justice Alito's request that FEMA respond by January 10 to the Churches' application for an emergency injunction pending appeal. *Harvest Family Church v. Federal Emergency Management Agency*, No. 17A649 (S. Ct. Dec.

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21, 2017). FEMA's policy changes also mirror the injunction requested by the Churches both below and on appeal. *See* Mot. for Inj. Pend. App. at 1 (Dec. 7, 2017); *see also* ROA 17-20768.151-52.

Second, pursuant to its new policy change, FEMA officials removed the hold that it had placed on the Churches' applications and have begun processing the applications. On January 5, FEMA's Office of the Chief Counsel confirmed to counsel for the Churches that FEMA had completed the eligibility review of the Churches' applications, and that it had determined that all three Churches are eligible applicants for PA grants.

Given FEMA's changed policy, its immediate processing of their applicants, and its determination that they are eligible applicants under the new policy, the Churches have withdrawn their application to Justice Alito for an emergency injunction pending appeal. *See Harvest Family Church v. Federal Emergency Management Agency*, No. 17A649 (application withdrawn Jan. 4, 2018).

Analysis. By taking actions with respect to the Churches' grant applications that mirror the preliminary injunctive relief the Churches requested below, the government has removed the reasons for this appeal, and it may therefore be dismissed. However, this Court must still address an important question: vacatur.

Should the Court dismiss this appeal as moot, it should also vacate the district court's ruling below. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below").

The Supreme Court has held that "'a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance,' . . . 'ought not in fairness be forced to acquiesce in' that ruling." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994)). Thus, courts have granted vacatur as an "equitable remedy" in such cases. *Id.* at 712. The Fifth Circuit has indicated that the primary consideration in granting vacatur is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Staley v. Harris Cty.*, 485 F.3d 305, 310 (2007) (quoting *U.S. Bancorp*, 513 U.S. at 24). Indeed, "vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *Id.* at 310 (internal quotation marks omitted). This principle applies even when the entire case is not moot. *See Camreta*, 563 U.S. at 714 (vacating only the "part of the 9th Circuit opinion" that addressed the

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mootness issue); *see also Yates v. Collier*, 677 F. App'x 915, 918 (5th Cir. 2017) (vacating preliminary injunction order).

Here, the Churches sought review of an adverse ruling on a motion for a preliminary injunction. FEMA, though it prevailed below, acted unilaterally in changing its policy during the pendency of the appeal. The Churches were not consulted regarding the content or the timing of the new policy, and their ability to obtain a ruling from this Court has thus been "frustrated by the vagaries of circumstance." *Camreta*, 563 U.S. at 712. The most sensible result is thus to vacate the lower court decision.

This result is also required for another reason. The Supreme Court has recognized that the very "point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication." *Camreta*, 563 U.S. at 713 (quoting *Munsingwear*, 340 U.S. at 40-41). In particular, a "legally consequential decision" such as "a constitutional ruling" is "rightly 'strip[ped] . . . of its binding effect" when a case becomes moot on appeal, which "clears the path for future relitigation." *Id.* Because of FEMA's unilateral policy change, this Court will not be able to review the district court's ruling on an important constitutional issue. And this is a legal issue that may well be subject to future relitigation, *see* Br. at 3 (noting news report of threatened litigation), which could obviously harm the Churches' interests as they act in reliance on FEMA's new rule.

This case presents a particularly strong candidate for vacatur because the district court's ruling is impermissibly based on arguments that neither party presented nor had the opportunity to respond to. *See* Br. at 28 (district court granted leave to file amicus brief in same order denying preliminary injunction). Moreover, the district court's decision relies on putative government interests that were not raised by FEMA below, and which have been repudiated by FEMA's new rule. Finally, to our knowledge, the decision below is the first and only one in the country to rule on this issue. To leave the lower court decision in place without a chance for review would leave a thumb on the scales in any future litigation of this and similar issues, and would thwart the purpose of appellate review.

Trinity Lutheran did not allow FEMA's previous policy. FEMA has now acted to remove the constitutional violation of excluding these plaintiffs and has started to process their applications. Therefore the appeal may be dismissed and the district court's ruling vacated under *Munsingwear*.

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Respectfully submitted,

/s/ Eric C. Rassbach

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