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MOOT COURT

NATIONAL CHAMPIONSHIP

2018 Competition Problem

COWBOY CHURCH OF LIMA, Petitioner

v.

**FEDERAL EMERGENCY MANAGEMENT AGENCY,
W. Craig Fugate, Administrator of the
Federal Emergency Management Agency, Respondents**

**IN THE
SUPREME COURT
OF THE UNITED STATES**

No. C17-2893-1

OCTOBER TERM 2017

COWBOY CHURCH OF LIMA, Petitioner

v.

***FEDERAL EMERGENCY MANAGEMENT AGENCY,
W. Craig Fugate, Administrator of the
Federal Emergency Management Agency, Respondents***

ORDER GRANTING WRIT OF CERTIORARI

PER CURIAM:

The petition for a writ of certiorari from the United States Court of Appeals for the Fourteenth Circuit is hereby granted.

IT IS ORDERED that the above-captioned matter be set down for argument in the 2017 term of this Court, said argument to be limited to the following issues:

- I. Can the Federal Emergency Management Agency be subject to lawsuits prior to determining whether or not an entity is eligible to receive relief or is such a lawsuit barred by the doctrine of ripeness?
- II. Does the Establishment Clause of the First Amendment bar the Cowboy Church of Lima from receiving the public benefit of relief under the Federal Emergency Management Agency's Public Assistance Program?

**UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

COWBOY CHURCH OF LIMA

Petitioner

Case No. 17-2893-1

v.

**FEDERAL EMERGENCY
MANAGEMENT AGENCY,
W. Craig Fugate, Administrator
Of the Federal Emergency Management
Agency**

Respondents

Decided October 1, 2017

Before Judges Schuester, Sylvester, and Figgins.

Schuester, Circuit Judge, for the Court.

Petitioner, Cowboy Church of Lima, files this appeal from the granting of Summary Judgment on the issues of ripeness and the ban of churches receiving FEMA relief under the Establishment Clause of the Constitution of the United States of America entered by the United States District Court for the Central District of New Tejas. For the reasons stated below, we affirm.

I. BACKGROUND FACTS

A. Hurricane Rhodes and the Impact on Lima, New Tejas.

On August 13, 2016, Hurricane Rhodes made landfall one hundred miles north of the Township of Lima, located on the western coast of New Tejas. Hurricane Rhodes proceeded to drop over forty-five inches of water within a period of thirty-six hours. The unprecedented

amount of rain fall stressed the Flanagan Dam, which was undergoing repairs, and caused the dam to fail. The failure of the dam allowed flood waters to overflow the banks of the Motta River, causing catastrophic flooding across the region.

On August 15, 2016, the flood waters from the dam failure surged towards the Township of Lima in the County of Nyada, two miles off the eastern banks of the Motta River in New Tejas. The Township of Lima has a population of approximately 4,150 people. At the heart of the township is a food processing and packing plant that supplies prepackaged food to a state wide grocery chain, T-D-M Groceries, Inc. On the outside of the town is a cowboy ministry, the Cowboy Church of Lima.

The Cowboy Church of Lima resides on an 88 acre tract of land that has multiple structures, including a small rodeo arena that seats about 500 people, a chapel with an attached event center that seats 120 people, and assorted storage buildings for the rodeo arena and the chapel. The 88 acre tract is designated as XV – Religious Exempt Property under the New Tejas Property Code, meaning property tax is not collected on any of the property. The chapel was originally built in 1990, the same year in which the Cowboy Church of Lima filed for their 501(C)(3) designation. The Internal Revenue Service granted the Cowboy Church of Lima its tax-exempt status. At all points, the Cowboy Church of Lima has complied with the tax-exempt reporting requirements.

Beginning in 1998, Lima Mayor Rachel Berry asked Chaplain Finn Hudson, the head of the church and manager of the church grounds, if they could host a few township events each year in the chapel, since no other space in Lima was large enough to accommodate particularly contentious city council meetings. Mayor Berry offered to pay a “fair rent” to the

church for each event; however, Chaplain Hudson refused to accept any rent, stating that his church and its buildings were open to anyone, anytime.

As time progressed, more and more civic and private events were held at the chapel. In order to accommodate the growing church needs and the needs of the larger Lima community, the Cowboy Church of Lima held a regional bake sale each year. The funds from the bake sale and private donations were enough to allow the Cowboy Church of Lima to expand. An event center annex was added to the chapel in 2005. An affidavit from Chaplain Hudson shows that the chapel sought in 2006 to have the event center annex declared as tax exempt as a government building, but the record reflects that the County of Nyada rejected the application. In 2008, the City of Lima looked to develop and build their own events center located on the property of Councilwoman Mercedes Jones; however, the event center was voted down, mainly due to citizens' concerns on why the town needed two event centers.

As the flood waters rose throughout Lima in August 2016, the water began encroaching on the western edge of the 88 acre tract of the Cowboy Church of Lima and concerns grew that the flood waters would enter the chapel and event center. Chaplain Hudson and the staff of the Cowboy Church rushed to the chapel and began to remove the Bibles, hymnals, religious pamphlets, and religious paraphilia to the storage sheds located beyond the rodeo arena. The staff and Chaplain Hudson then moved the tables, chairs, podiums, and kitchen supplies from the event center and placed them into an unused storage building. The rest of the items in the event center were placed as high as possible in the building.

At 11:45pm on August 15, 2016, the flood waters breached the doors of the chapel and event center, and water proceeded to flow through the entire 5,500 square feet of the structure (the chapel comprised 2,250 square feet and the event center comprised 2,250 square feet).

Judging by the water marks and debris lines left after the flood waters receded, the interior experienced at least three feet of flooding throughout, with up to forty-two inches in some locations; the waters coated the inside of the church and event center with mud, silt, grass, and other assorted plant debris as well as possible raw sewage and chemicals. Carpets, flooring, drywall, insulation, doors, furniture, pews, and a variety of other materials were destroyed by the flooding.

Three large trees next to the chapel were downed by the flood event, and other trees between the chapel and the rodeo arena were also damaged and may need to be removed sometime in the future. None of the other structures on the rodeo grounds received enough water to warrant significant repairs.

The water stayed within the buildings from August 15, 2016 until around 9:30 am on August 17, 2016. Chaplain Hudson and his staff began to assess the damage at 10:45 am on August 18, 2016. By 1:15 p.m. that same day, the staff began remediation on the chapel and the event center. The staff removed four feet of sheetrock and insulation from the walls throughout the buildings. Additionally, they removed all of the floorings, including carpet, marble, and wood floors throughout. During the following week, Chaplain Hudson oversaw every item being removed from the chapel and the event center. This included removing altars, kitchen goods, artwork, dry erase boards, supplies used solely for religious purposes, and other items used solely for civic purposes.

During the clean-up of the chapel and the event center, Chaplain Hudson noticed that the building seemed to have an odd look to it. Something did not feel quite right. Chaplain Hudson called his friend Kurt Hummel, a local home designer, structural engineer, and Chaplain Hudson's step-brother, to look over the chapel and event center. During his

inspection, Mr. Hummel concluded there was likely structural damage to the chapel and event center. It was his assessment that repairs needed to be made in the next few months or there was a risk the structure might fail and parts of the buildings could collapse.

Neither the church nor the event center had flood insurance as the church was determined to be located outside the 100-year flood plain and deemed unlikely to flood.

B. Hurricane Rhodes Declared a Natural Disaster, and Cowboy Church of Lima Seeks FEMA relief.

On August 19, 2016, President Barack Obama declared the floods and storm damage caused by Hurricane Rhodes to be a major natural disaster, allowing Federal Emergency Management Agency (“FEMA”) relief to be supplied to the areas of New Tejas affected by the storm.

Upon the declaration of an emergency, Chaplain Hudson sought the advice of his close personal friend and attorney for the Cowboy Church of Lima, Attorney Arthur Abrams of the Law Firm of Abrams and Evans. Attorney Abrams advised Chaplain Hudson that he needed to immediately apply to FEMA in order to receive public assistance for repairs. On August 20, 2016, Chaplain Hudson filled out the online application with FEMA and waited to hear back from the agency. On August 23, 2016, Chaplain Hudson submitted his application for a Small Business Administration (“SBA”) loan.

On August 24, 2016, an adjuster contracted by FEMA, Quinn Fabray, contacted Chaplain Hudson to schedule a tour of the damaged chapel and event center on August 25, 2016, to make a determination of the loss suffered.

During the assessment tour, Ms. Fabray made detailed notes of the damage and asked Chaplain Hudson numerous questions about the chapel and the event center. During the conversation, Ms. Fabray told Chaplain Hudson that she estimated the event center was used somewhere between 45% and 85% of the time for community projects unrelated to the church. The events included birthday parties, banquets, meetings of the Lions Club and the Rotary Club, Quinceañeras celebrations, retirement parties, local glee club concerts, rodeo meetings, a polling location for county elections, large city council meetings, school dances, substance abuse support meetings, marriage and family counseling sessions; the event center was also designated as an emergency relief shelter.

Sundays at the event center included Sunday school classes, youth group meetings, and adult Bible study meetings. Ms. Fabray also stated to Chaplain Hudson that she estimated the chapel was used about 85% to 95% of the time for religious purposes. The chapel was used exclusively for church services and related religious events on Sundays. On weekdays, the chapel held a mixture of religious and secular events, including religious concerts and non-religious concerts, such as performances by local music group The Warblers, holiday festivals, bar mitzvahs, bat mitzvahs, father-daughter dances, and receptions after funerals, christenings, and other similar activities. The chapel also hosted non-denominational weddings and occasional non-religious meetings.

Following the inspection, Ms. Fabray said to Chaplain Hudson that she “should not tell him this” but she is a member of her church back home, and she hated that FEMA does not cover monetary assistance for churches. She told Chaplain Hudson that she had never heard of FEMA granting an exception because of the Church and State Separation doctrine. Distraught, Chaplain Hudson asked if there was anything he could do to help his cause, such as talk to Ms.

Fabray's supervisor at FEMA, write his Congressman, or anything at all. He felt that if funds were not provided by FEMA, the Cowboy Church of Lima might fold. Ms. Fabray gave Chaplain Hudson a big hug and said she would "do what she could, but not to get his hopes up." Additionally, she told him it could be a few weeks before Chaplain Hudson heard from FEMA.

During the evening on August 25, 2016, Chaplain Hudson rushed to talk to Attorney Abrams about his options. Attorney Abrams advised Chaplain Hudson that FEMA would surely deny his application and that, if he wanted things to change, he would have to take action. Attorney Abrams said he would represent Chaplain Hudson *pro bono*, if Chaplain Hudson wanted to make the world better. Chaplain Hudson said that Attorney Abrams gave him a lot to think about, and he would pray about it.

After praying about the situation and talking to his congregation, Chaplain Hudson went back to Attorney Abrams' office on August 27, 2016. He told Attorney Abrams it was not fair that his church would not be covered by FEMA after he made it available for use by everyone in the community as it was often the only appropriate event space in the area. While he hated to use the courts, it would be the only way to have justice for his church.

On August 29, 2016, the Cowboy Church of Lima filed suit against FEMA in the Central District Court of Lima. FEMA immediately stopped processing the claim by the Cowboy Church of Lima while waiting on the determination of the legal process.

Not quite one year later, on July 26, 2017, the Cowboy Church of Lima reopened its doors to the public. The congregation and other members of the community had donated their time during the past several months to make repairs to the chapel and event center. Mr.

Hummel donated his time to help determine the structural repairs needed to bring the buildings back to square, and he found a construction crew willing to donate their time and efforts to repair the severe structural damage to the south wall of the chapel. Additionally, most of the materials used in the repairs of the chapel and event center were donated through the network of Cowboy Church Groups around the country and through donations solicited by Chaplain Hudson.

C. The District Court Case.

Judge Beiste held a status conference for the lawsuit on November 2, 2016, in order to discuss the Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Civil Procedure 12(b)(1) Motion filed by U.S. Attorney Sebastian Smythe against the Cowboy Church of Lima. Judge Beiste denied the Motion, but he said that, after some discovery, a Motion for Summary Judgment would be “more appropriate.” During the next few months of the discovery period, depositions were taken by both sides.

During the depositions, Chaplain Hudson declared that due to the flood waters damaging the structure of the chapel, the roof had collapsed and the repair bills continued to escalate. Additionally, he testified that volunteers from the community helped with some repairs and costs but the donated volunteer hours were not enough to restore the chapel.

Additionally, Chaplain Hudson testified that the event center was mostly used for church-related activities. Later in his deposition, he stated that he only regularly attended church-related activities at the event center but did not attend events like the Lions or Rotary Club meetings, so it would be difficult for him to estimate how much time the event center was used for those activities. In terms of percentages, if he had to guess, he would say 60% of the event center usage was for church-based events.

During the deposition of FEMA Regional Director Jesse St. James, Mr. St. James stated that FEMA does have the ability to make different aid determinations on a case-by-case basis and that FEMA never finalized its determination on the Cowboy Church of Lima. FEMA did release the final report from Ms. Fabray that concluded, after exhaustive interviewing with community members and a sworn statement by City Planner Mike Chang, the event center was used 80% of the time for FEMA-eligible purposes and the chapel was used over 90% of the time for non-FEMA-eligible purposes. Director St. James did concede that, internally, FEMA had put the church into a preliminary denial category, but because of the close nature of the factual issue, he was planning to review the file himself and ultimately the event center might have been granted FEMA assistance. Lastly, Director St. James stated that a final determination internal deadline would have been September 30, 2016, but that they on occasion miss their internal deadlines. He conceded that October 14, 2016, may also have been when a final determination would have been made.

After the discovery period, Attorney Smythe moved for summary judgment and dismissal under two different theories. First, that this case was not yet ripe for adjudication, and second, that the FEMA church-exclusion policy was rooted in the First Amendment and was necessary to preserve the sanctity of the Establishment Clause. In his summary judgment response, Attorney Abrams, citing *Trinity Lutheran Church*, argued instead that the Cowboy Church of Lima should be eligible for relief funds; further, he stated that the failure to act by FEMA amounted to a *de facto* denial.

Judge Beiste in a short opinion granted summary judgment stating that the Establishment Clause barred recover for The Cowboy Church of Lima. The Court stated that the Court had Subject Matter Jurisdiction and denied the ripeness claim. The Cowboy Church of Lima filed

this appeal asking this Court to reverse the summary judgment and remand the matter for further proceedings. FEMA timely appealed asking this Court to grant dismissal under the Ripeness Doctrine.

II. DISCUSSION

A. FEMA Procedures.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act authorizes “[t]he President” to “make contributions” to the owner or operator of “a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses.” 42 U.S.C. § 5172(a)(1)(B).

FEMA operates the federal financial assistance in New Texas through its Public Assistance Program (“PA Program”) in accordance with FEMA regulations and FEMA policies contained in FEMA’s PA Program and Policy Guide. The PA Program is FEMA’s largest grant program under the Stafford Act. The purpose of the PA Program is to assist communities responding to and recovering from major disasters or emergencies declared by the President. The PA Program provides emergency assistance to save lives and protect property, and it assists with permanently restoring community infrastructure affected by a federally-declared natural disaster. In order to be eligible for the disaster aid under the PA Program, a private nonprofit organization must prove that it has a current letter ruling from the U.S. Internal Revenue Service granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code of 1954, and the organization must “own or operate an eligible facility.” 44 C.F.R. § 206.221(f).

An “eligible facility” is either: (1) “A facility that provides a critical service, which is defined as education, utility, emergency, or medical,” or (2) “A facility that provides non-critical, but essential governmental services and is open to the general public.”

As a general rule, eligible “non-critical” services are “institutes of public utility such as museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature.” 44 C.F.R. § 206.220(e)(7).

For “mixed-use facilities” “that provide both eligible and ineligible services,” eligibility “is dependent on the primary use of the facility,” which means “more than 50 percent of the physical space in the facility is dedicated” to eligible services. In cases where the same physical space is used for both eligible and ineligible services, the primary use is the use to which more than 50 percent of the operating time is dedicated in that shared physical space.

If FEMA determines that 50 percent or more of a physical space is dedicated to ineligible services, the entire facility is ineligible. If the mixed-use facility is deemed eligible, FEMA prorates funding based on the percentage of physical space dedicated to eligible services.

For eligible facilities, the PA Program provides funds for both “emergency work” and “permanent work.” Emergency work is “that which must be done immediately to: Save Lives; Protect public health and safety; Protect improved property; or Eliminate or lessen an immediate threat of additional damage.” Emergency work is divided into two categories: (A) “debris removal” and (B) “emergency protective measures.” Debris removal may also be authorized “to ensure economic recovery of the affected community.” Permanent work “is work required to restore a facility to its pre-disaster design (size and capacity) and function in accordance with applicable codes and standards.”

To qualify for the PA Program, repair work must: (1) “Be required as a result of the declared incident;” (2) “Be located within the designated area, with the exception of sheltering and evacuation activities;” and (3) “Be the legal responsibility of an eligible Applicant.”

Eligible private nonprofit facilities that provide eligible non-critical services must apply for a SBA disaster loan before seeking PA Program funds for permanent work. PA Program funds are available only for the portion of permanent work that a SBA loan does not cover, or if the SBA loan application is denied. However, nonprofits may seek and receive PA Program funds for emergency work regardless of whether they have applied for a SBA loan.

Eligible facilities must submit a Request for Public Assistance form to FEMA within 30 days of the President's disaster proclamation.

In this case, it appears that the Cowboy Church of Lima complied with the regulatory rules as required by FEMA. However, this leads to the fundamental problem with this case that FEMA was not allowed to fully make an administrative determination.

B. The Question of Ripeness.

The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.¹ *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18 (1993).

Absent a statutory provision providing for immediate judicial review, administrative regulation generally is not “ripe” for judicial review under the Administrative Procedure Act (“APA”) until the scope of controversy has been reduced to more manageable proportions, and its factual components fleshed out by some concrete action applying the regulation to claimant’s situation in a fashion that harms or threatens to harm the claimant; an exception exists, though, where substantive rule, as a practical matter, requires a plaintiff to adjust his conduct immediately. 5 U.S.C.A. §§ 702, 706.

¹ We decline to address the Article III limitation but rather focus on the prudential reasons as to why we should not exercise jurisdiction.

The goal of “ripeness” is designed to prevent the courts from “entangling themselves in abstract or political disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149, (1967). “Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” *National Park Hospitality Ass’n v. Department of Interior*, 538 U.S. 803, 808 (2003), citing *Abbott Laboratories*, 387 U.S. at 149, (1967).

Taking this test in part, the first issue is the fitness of the courts to make a determination. While the question presented here may be “a purely legal one” and the “mixed use” standard promulgated under FEMA’s PA Program and Policy Guide may constitute “final agency action” within the meaning of § 10 of the APA, 5 U.S.C. § 704, we nevertheless believe that further factual development would “significantly advance our ability to deal with the legal issues presented.” *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978). In addition, we note that Congress has looked at this particular issue twice and has failed to provide a solution either time. The premature nature of this case has us concerned that the parties may inadvertently be using this Court to improperly effect political change.

In this case, the Cowboy Church of Lima is asking us to make a factual determination that they would not qualify for FEMA relief, before FEMA has the opportunity to make that determination. While there is evidence to suggest that the Church would be denied FEMA coverage, it has not yet been officially denied that assistance. It is therefore hard – if not impossible – for us to make a determination that the Church would without a doubt be denied. Without a final determination by FEMA, we feel uncompelled to substitute our judgment for

FEMA's on what we think may or even should happen. Further, this issue has been brought to Congress's attention twice before and Congress failed to act, which brings this question dangerously close to asking us to resolve a political question before there is a full determination of the facts. We are extremely reluctant to wade into these troubled waters without affording FEMA the opportunity to make a final determination in this case.

In reviewing the second prong of the test regarding hardship to the parties by withholding court consideration, we find that there is not a hardship for the Church. Taking the Church's arguments, we are not persuaded that it could not wait until FEMA made a final determination of the Church's eligibility. While there is evidence to suggest that there is structural damage to the church and the event center buildings that required immediate repairs, that in and of itself is not a sufficient hardship to deprive FEMA of the ability to fully engage in its administrative functions. Further, the Church has since reopened; therefore, the FEMA funds were not essential to repairing the chapel and event center. We are intrigued by the Church's argument that if it was eligible for FEMA relief, it would not have to fully rely on the charity of the Lima community and those resources could thus have been allocated to others in need, but we ultimately determine that this argument is too tenuous to find that there is an undue hardship to the Church.

Since we cannot find an undue hardship to the Church from us withholding our judicial consideration of these issues, we hold that this case is not ripe for judicial adjudication.

C. Free Exercise Clause of the First Amendment.

There seems to be some confusion within this Circuit on the holding in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017). Further, some groups are attempting to create discord between the First Amendment's Free Exercise Clause and the First

Amendment's Establishment Clause. This case highlights why both clauses work in harmony as our founders intended.

The Cowboy Church of Lima asks this Court to reconsider the lower court's decision to grant summary judgment dismissing the Church's free-exercise claim. In *Trinity Lutheran*, the State of Missouri had established a grant program for certain nonprofits to replace their playground surfaces with materials made from recycled tires. *Trinity Lutheran* 137 S.Ct. at 2017. Missouri's Department of Natural Resources ("DNR") had a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* Missouri's DNR therefore denied Trinity Lutheran's application solely because it was a church. *Id.* at 2018. The Supreme Court concluded that Missouri had violated the Free Exercise Clause of the U.S. Constitution because it had expressly discriminated against Trinity Lutheran based on its status as a religious organization. *Id.* at 2021. The Supreme Court concluded, "[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand." *Id.* at 2025.

The Supreme Court's decision in *Trinity Lutheran* was premised on express discrimination based on religion. *See id.* at 2024 n.3 ("This case involves express discrimination based on religious identity." (plurality)). Here, in contrast, FEMA has set up a standard that allows for religious institutions to have an opportunity to receive government funding provided that the institutions meet the content-neutral provisions of the FEMA regulation. Further, the logic of FEMA's statutory scheme is to redistribute taxpayer funds back to taxpayers or to nonprofit entities originally funded with taxpayer funds. Under the Free Exercise Clause in this instance, the Cowboy Church of Lima was not subject to a federal tax nor to the taxes of New Texas, and in exchange under the Establishment Clause, the Cowboy Church of Lima is not

allowed access to government funds. The harmony is created because the Church is not asked to support the State nor is the State asked to support the Church. We see no reason to upset this balance. Under *Trinity Lutheran* the Supreme Court establishes that the government cannot ban outright an individual or an entity solely due to their membership in a religious group. This is not the case here. Religious groups are entitled to the same rights as other non-profits, provided they comply with the rules established by FEMA.

Nothing in *Trinity Lutheran* affects content-neutral policies such as those promulgated by FEMA. Thus, the Court declines to revisit the summary judgment order.

III. CONCLUSION

In conclusion, we affirm the holding of the lower court that the Establishment Clause barred recover for The Cowboy Church of Lima and in addition order that the lower court also enter an order dismissing the case because it was not ripe for adjudication.

AFFIRMED.

Sylvester, Circuit Judge, dissenting:

For the reasons discussed below, I respectfully dissent.

I. DISCUSSION

A. The Issue of Ripeness.

My colleagues completely miss the point as to which issues are actually “ripe” in this case. In looking at *National Park Hospitality Ass’n*, it is clear that the courts are attempting to caution this Court against meddling in affairs prior to the administrative agency having the

opportunity to decide the issue. *See National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803 (2003).

In this case, the issue before us is quite clear: Churches are not as a general rule eligible for FEMA relief, and the rule presented by FEMA essentially asks whether a church conducts enough secular activities to no longer make it a church. The factual determination on whether the Cowboy Church of Lima holds more than 50% secular activities is moot, or a non-issue, because this factual determination is predicated on churches being banned from receiving FEMA relief. The true challenge in this case is whether FEMA may ban churches from receiving relief. If we determine that churches and other religious institutions are eligible for FEMA relief, then the Cowboy Church of Lima would not have to present evidence of sufficient secular activities in order to make this factual determination. This is immaterial to our analysis on the next issue, whether FEMA may determine if a religious structure qualifies under the mixed-use standard. Therefore, I would determine that the issue before us is whether the Establishment Clause applies to relief from FEMA; there is no other inquiry that needs to be made by this Court.

Hypothetically speaking, if the Church is granted FEMA relief, some entity would inevitably file a lawsuit against FEMA asking this very same Court to determine if the Establishment Clause barred the Cowboy Church of Lima from receiving FEMA relief. Yes, the plaintiff might be different, but the defendant would be the same, and this Court would be asked yet again to answer the same question it is being asked now: “Does the Establishment Clause of the First Amendment bar a church from receiving the public benefit of relief under the Federal Emergency Management Agency’s Public Assistance Program?” If the defendant in both cases remains the same and the issue does not change, then how can the case not be ripe for review?

We are not acting blindly if we take up this issue, nor are we acting in a space that would otherwise be excluded to us.

Further, my colleagues miss the actual hardship suffered by flood victims. Flood victims are constantly bombarded with paperwork and relief opportunities, many of which turn out to be scams. They are then asked to wade through a byzantine manual from FEMA to determine if they qualify for relief. All of this occurs while their property is destroyed by mold, bacteria, and trapped moisture, and they are under immense pressure to remediate their property immediately or face permanent property loss. If FEMA or any other regulatory body behaves unconstitutionally then we as the judiciary must act swiftly in order to allow individuals the best opportunity to save their property. Justice delayed is justice denied.

I would find that there is a hardship to the Cowboy Church of Lima from us withholding our judicial consideration of these issues.

B. The Free Exercise Clause of the First Amendment.

The confusion regarding *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017) rests solely with my colleagues. *Trinity Lutheran* hinges on a simple principle, that the Establishment Clause of the First Amendment can violate the Free Exercise Clause. The Free Exercise Clause “protect[s] religious observers against unequal treatment” and subjects to the strictest scrutiny any laws that target the religious observers for “special disabilities” based on their “religious status.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993).

The Cowboy Church of Lima would apparently be entitled to FEMA relief provided the congregation makes one small sacrifice: give up their church. The Supreme Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity

imposes a penalty on the free exercise of religion that can be justified only by a state interest “of the highest order.” *McDaniel v. Paty*, 435 U.S. 618, 628 (1978). FEMA relief is a generally available benefit and should remain as such. FEMA relief is designed to help communities rebuild after suffering unimaginable devastation. At the heart of so many communities are their religious institutions. Religious institutions are often places where communities gather to conduct a wide variety of activities, including civic events, such as community meetings, counseling services, meals, and school activities. Just like Lima Township does with the Cowboy Church of Lima, local governments rely on religious institutions to provide a sense of community in places where the government cannot meet these needs. Even FEMA’s own policy acknowledges that when churches engage in these civic services then the community deserves to have them restored. This is why FEMA attempted to artificially craft a mixed-use standard for relief assistance.

The dissent in *Trinity Lutheran* acknowledges that the Establishment Clause focuses on the direct funding of religious activities, and it even raises the specter that a church may never be truly engaged in purely secular activities, for lurking in the background in every secular activity at a church is the omniscient presence of religion. It is true that churches often hold civic activities in their communities because they hope to recruit new members, and these civic activities may even be in furtherance of religious activities, but the majority opinion and the concurrence touch on an even greater truth – the state and religion can cohabitate within the community and work towards the betterment of us all. If the state sets out to provide communities with new and better playgrounds, then just because one such playground sits on church property does not make it belong any less to the community.

Just because a part of the community is a church does not mean that the church should not be restored by state funds.

II. CONCLUSION

In conclusion, I would reverse the lower court and deny summary judgment and would conclude that the District Court was correct in determining that subject matter jurisdiction existed and that the case was ripe for adjudication.