No. 17-20768

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HARVEST FAMILY CHURCH, *et al*.
Plaintiffs-Appellants,

v.

FEDERAL EMERGENCY MANAGEMENT ADMINISTRATION, *et al*.,
Defendants-Appellees.

On Appeal from the
United States District Court for the Southern District of Texas
Case No. 4:17-cv-02662, Hon. Gray H. Miller

OPPOSITION OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION, ACLU FOUNDATION OF TEXAS, INC., THE ANTI-DEFAMATION LEAGUE, THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AND INTERFAITH ALLIANCE FOUNDATION AS *AMICI CURIAE* TO APPELLANTS' EMERGENCY MOTION FOR FED. R. APP. P. 8 INJUNCTION PENDING APPEAL

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RULE 28.21 CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.21, 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) *Amici* are nonprofit entities. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

(3) The undersigned counsel of record certifies that the following listed persons and entities as described in 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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INTRODUCTION AND SUMMARY OF ARGUMENT

The government correctly argued below that this case has serious standing and ripeness problems. This Court therefore should not address the constitutional questions raised by the plaintiffs' motion. But in the event that the Court does reach the constitutional questions, the *amici* civil-liberties and civil-rights organizations[1] explain that the plaintiffs' constitutional arguments are incorrect.

Many people and institutions—including houses of worship—suffered grave harm from Hurricane Harvey. But even in the most difficult of times, we must adhere to the long-standing principles protected by the First Amendment. When houses of worship assist the government with disaster recovery, it is permissible for the government to reimburse them (on the same terms as other institutions) for the secular emergency services that they provide. But the Establishment Clause of the First Amendment prohibits public funding of repairs of church sanctuaries and other buildings that are used principally for religious activities. And the First Amendment's Free Exercise Clause does not supersede that prohibition or otherwise require public funds to be put to the support of religious uses.

The Establishment Clause was intended to preserve religious freedom by ensuring that taxpayers would not be forced to support religious beliefs to which they do not subscribe. And the Clause was intended to guarantee that houses of

[1] The *amici* are described in detail in their motion for leave to file this opposition.

worship would not become dependent on state largesse, which would cause competition among them for government money and would subject them to the governmental interference that accompanies public funding. For these reasons, the Establishment Clause prohibits the government from granting public funds for the support of religious uses, including for the construction or repair of buildings used for religious worship. The grants sought by the plaintiffs here would support repairs to church sanctuaries and other core religious facilities, and are thus plainly proscribed by the Establishment Clause. Because providing the grants would violate the Establishment Clause, denying them cannot violate the Free Exercise Clause.

But even if providing the grants would not violate the Establishment Clause, the Free Exercise Clause would not require FEMA to issue them. The Supreme Court has repeatedly rejected arguments that the Free Exercise Clause requires government to fund religious activity on equal terms with secular activity. The Court's recent decision in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), required religious institutions to be given equal eligibility for public funding only in very narrow circumstances: (i) the funding does not support religious uses but instead aids only secular, safety-related expenditures; (ii) the denial of funding is not supported by any traditional governmental antiestablishment interest; and (iii) the denial is based solely on the applicant's

religious status. Here, the requested grants would support religious activities; denial of the grants is justified by traditional governmental interests in not funding construction or repair of places of worship; and the grant determinations are based on how a facility is used, not on the religious status of the institution that owns the facility.

ARGUMENT

I. The Establishment Clause prohibits the direct cash grants sought by the plaintiffs.

The plaintiffs premise their arguments principally on the Supreme Court's decision in *Trinity Lutheran*. But in that case, the grant at issue paid only for resurfacing of a playground, and there was no evidence that the playground was used for religious purposes. 137 S. Ct. at 2017–18, 2024 n.3. The Court therefore determined that the grant would not have supported religious activity, and the Court assumed without analysis, based on the parties' agreement, that providing the grant would not violate the Establishment Clause. *See id.* at 2019, 2024 n.3. Here, the requested grants *would* violate the Establishment Clause, because the Establishment Clause prohibits public funding of construction or repair of facilities that are used for religious activities.

When the Establishment Clause prohibits funding, neither the Free Exercise Clause nor any other constitutional provision can override it. *See Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973); *Sloan v. Lemon*, 413 U.S. 825, 834–35

(1973). Compliance with the Establishment Clause is a compelling governmental interest that satisfies heightened scrutiny even if that scrutiny is triggered under another clause of the Constitution. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) (four-Justice plurality); *id.* at 783 (O'Connor, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

A. The Establishment Clause prohibits public funding of places of worship.

The framers of our constitutional order believed that public funding of religion would violate the freedom of conscience of taxpayers by forcing them to support religious beliefs to which they do not subscribe; would weaken religious institutions by causing them to become dependent on governmental largesse; would undermine the independence of houses of worship by leading to governmental interference in their internal affairs; and would create religiously based civil strife by triggering competition between denominations for state aid. *See* Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1785), http://bit.ly/1lfgdjl; James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶¶ 1-3, 6, 11 (1785), http://bit.ly/2pPvjz5. The Establishment Clause was intended to prevent these evils. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 12–13 (1947).

A long line of Supreme Court decisions thus holds that public funds must not be used to support religious activities. *See Mitchell v. Helms*, 530 U.S. 793,

840, 857 (2000) (controlling concurring opinion of O'Connor, J.)[2]; *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754–55, 759–60 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Everson*, 330 U.S. at 16. This principle applies even when public funding is evenhandedly allocated among religious and secular institutions through neutral selection criteria. *Mitchell*, 530 U.S. at 837–42 (controlling concurrence of O'Connor, J.).

"[P]roviding funds for the construction of churches" is therefore "palpably unconstitutional conduct" under the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83, 98 n.17 (1968). For it was the American colonists' "indignation" toward "[t]he imposition of taxes to pay ministers' salaries and to build and maintain churches and church property . . . which found expression" in the Establishment Clause. *See Everson*, 330 U.S. at 11. As Congressman Benjamin Huntington explained during debate on its language, the Establishment Clause was intended to restrict compelled funding of "building of places of worship" to the same extent that it would restrict compelled "support of ministers." *See* 5 Annals of Cong. 92 (1834), http://bit.ly/2uLkHDH.

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[2] Justice O'Connor's concurring opinion in *Mitchell* represents controlling law because she provided the decisive vote to sustain the judgment on narrower grounds than the plurality in the case. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1058 (9th Cir. 2007); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Hous. Grp.*, 247 F.3d 397, 418–19 (2d Cir. 2001); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

Indeed, the Supreme Court's cases prohibit the use of public funds not only to construct or repair places of worship but also to build or maintain other buildings that are used for religious activities. In *Tilton v. Richardson*, 403 U.S. 672 (1971), for example, the Court partially invalidated a statute that provided grants to colleges and universities, including religiously affiliated institutions, for the construction of educational facilities. The statute prohibited the funding of "any facility used or to be used for sectarian instruction or as a place for religious worship," but this restriction expired twenty years after a facility's construction. *Id.* at 675, 683. The Court concluded that the statute and the grants issued under it were unconstitutional to the extent that the restriction on religious use of the publicly funded buildings expired after twenty years. *Id.* at 683–84, 689. The Court reasoned that if, after twenty years, a building were used for religious purposes, "the original federal grant will in part have the effect of advancing religion." *Id.* at 683. The Court explained that "[i]t cannot be assumed that a substantial structure has no value after that [twenty-year] period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body." *Id.*[3]

[3] Though this opinion was by a four-Justice plurality, a fifth Justice agreed with this analysis. *See Lemon v. Kurtzman*, 403 U.S. 602, 665 n.1 (1971) (opinion of White, J., concerning *Tilton* and *Lemon*).

Likewise, in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 774–80 (1973), the Supreme Court invalidated a New York statute that provided private schools, including parochial schools, with grants for the maintenance and repair of their facilities. The grants were not accompanied by any restriction limiting them "to the upkeep of facilities used exclusively for secular purposes." *Id.* at 774. Relying on *Tilton*, the Court reasoned:

> If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use.

Id. at 776–77. The Court further stated: "If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id.* at 777. And rejecting an argument similar to the plaintiffs' contention here that providing the desired grants would be legal because they would serve a secular interest in disaster relief (*see* Doc. No. 12-5 at 20–21), the Court held that a state's "concern for an already overburdened public school system" and "interest in preserving a healthy and safe educational environment for all of its schoolchildren" could not justify state-funded maintenance or repair of buildings used for religious instruction. *Id.* at 773–74.

Consistent with these decisions, the federal courts have repeatedly invalidated the provision of public funding or property to religious institutions for the construction, maintenance, or improvement of buildings that are or can be used for religious instruction or activity. For instance, in *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059–60 (9th Cir. 2007), the Ninth Circuit enjoined a city from leasing a homeless shelter to a religious organization for one dollar per year because the lessee held daily chapel services for its residents. *See also Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989) (striking down municipal electricity subsidy to church); *Wirtz v. City of S. Bend*, 813 F. Supp. 2d 1051, 1055, 1069 (N.D. Ind. 2011) (striking down city gift of property for construction of football field to parochial school that required all school athletic events and practices to be preceded or followed by prayer), *appeal dismissed as moot*, 669 F.3d 860 (7th Cir. 2012); *Annunziato v. New Haven Bd. of Aldermen*, 555 F. Supp. 427, 433 (D. Conn. 1982) (striking down city transfer of land for one dollar to religious organization that intended to run religious school on property).

The grants sought by the plaintiffs here would plainly violate the strict Establishment Clause rule that public funds must not pay for the construction or repair of buildings that are used for religious worship or activity. The plaintiffs concede that each of them "uses more than 50% of its physical space more than

50% of the time for religious activities." Doc. No. 11 ¶ 47.[4] And the plaintiffs make no pretense of seeking funding only for repairs to buildings (or even portions thereof) that are not used for religious activities. Instead, the plaintiffs admit that "what *this* lawsuit is about" is whether FEMA should be compelled to give a "grant to a house of worship to repair its devastated sanctuary." Doc. No. 34 at 1. The plaintiff churches also want federal money to fix other facilities that are religious in nature or support religious activity, such as a fellowship hall, a church steeple, pastoral offices, and a parsonage. *See* Doc. No. 11 ¶¶ 57–59, 72–73.

The plaintiffs seek both "Emergency Work" grants to pay for interim measures to preserve their core facilities—including fixing "structural damage"—and "Permanent Work" grants "to restore their property to their pre-disaster design and functions." *Id.* ¶¶ 61–67. For example, one of the plaintiffs has demolished and will need to rebuild its sanctuary and apparently also its fellowship hall and pastoral offices; another will also likely need to demolish and rebuild its sanctuary. *See id.* ¶¶ 72–73; Pls.-Appellants' Emergency Mot. at 3.

Hence, the plaintiffs want nothing less than federal funding to reconstruct places of worship. There can be no question that, by stabilizing, repairing, or rebuilding core church facilities, the desired grants will support religious worship and other religious activities.

[4] All record citations are to the district court's docket.

B. No federal court has upheld grants like those sought here.

The plaintiffs cite no federal cases upholding public funding that supported religious activities through repairs to integral facets of places of worship, and there are none.

As the plaintiffs pointed out below (Doc. No. 12-5 at 19), the Establishment Clause permits provision to churches of "general government services [such] as ordinary police and fire protection, connections for sewage disposal, [and] public highways and sidewalks," as those services are "so separate and so indisputably marked off from the religious function" (*Everson*, 330 U.S. at 17–18). But here, instead of basic governmental services, the plaintiffs seek direct cash grants that would substantially support their religious functions. The Supreme Court has "recogni[zed] . . . special dangers associated with direct money grants to religious institutions," for "this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." *Mitchell*, 530 U.S. at 855–56 (controlling concurrence of O'Connor, J.); *accord id.* at 818–19 (plurality opinion) ("[o]f course, we have seen 'special Establishment Clause dangers' when *money* is given to religious schools or entities directly") (quoting *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 842 (1995)). What is more, basic public services such as police, fire, sewage, and roads are universally provided to all in need, while the

FEMA grants here are competitive ones awarded based on discretionary criteria, out of a finite pot of funds. *See* Doc. No. 12-5 at 19; Doc. No. 30 at 7.

The plaintiffs also rely (Pls.' Mot. at 25) on *American Atheists v. Detroit Downtown Development Authority*, 567 F.3d 278 (6th Cir. 2009). But the grant program there funded refurbishment of building exteriors only; the money was not "diver[ted]" "to further" any church's "religious mission"; and the money was available to all property owners in a section of downtown Detroit. *See id.* at 281–83, 292–93. Again, the plaintiffs seek competitive grants, awarded on discretionary criteria, to repair church interiors and support religious worship.

The plaintiffs further rely (Pls.' Mot. at 26) on a 2003 U.S. Department of Justice memorandum approving historical-preservation funding for the Old North Church in Boston. *See* Authority of Department of Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Op. O.L.C. 91 (2003). But the funding there went to a nonreligious nonprofit organization—separate from the church's congregation—that managed the building's historical programs and preservation, and the building principally served as a living historical museum for the public because of its pivotal "one if by land, two if by sea" role in the Revolutionary War. Here, the grants would go directly to churches, not to secular nonprofit organizations, and the churches do not principally serve as museums.

The plaintiffs further suggest that a ruling that the Establishment Clause prohibits the grants that they seek would jeopardize governmental loan programs that assist religious institutions. Pls.' Mot at 25–26. But loan programs are not subject to the strict Establishment Clause limitations applicable to direct grants. *See, e.g.*, *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 413–15 (6th Cir. 2002).

II. The Free Exercise Clause does not compel the federal government to fund repairs to places of worship.

Even if the Establishment Clause did not bar the direct cash grants sought here, the Free Exercise Clause would not compel them. The U.S. Supreme Court and other courts have repeatedly rejected arguments that the Constitution requires that tax funding available for secular uses also be made available for religious uses—even if the Establishment Clause would permit that funding. The Court's recent decision in *Trinity Lutheran*, 137 S. Ct. 2012, did not change that rule, because it involved funding that did not serve religious uses.

A. The government cannot be compelled to fund religious activity.

In *Locke v. Davey*, 540 U.S. 712 (2004), the Supreme Court held that a Washington State regulation prohibiting use of state scholarship funds to pursue theology degrees did not violate the Free Exercise, Equal Protection, Free Speech, or Establishment Clauses. The Court explained that although allowing the scholarship funds to be so used would not violate the Establishment Clause, "there

are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 719.[5]

The Court noted that the scholarship applicant was not denied a benefit based on his religious beliefs or status; instead, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 720–21. The Court emphasized that the limitation on funding was supported by an important, traditional governmental interest in not financing the training of ministers or religious instruction. *Id.* at 722–23. Because the governmental interest was "substantial" and any burden on religion was "minor," the student's Free Exercise claim failed. *Id.* at 725. The Court rejected the student's other claims in footnotes. *Id.* at 720 n.3, 725 n.10.

Locke's conclusion was far from novel. Earlier Supreme Court decisions had also flatly rejected arguments that the Free Exercise or Equal Protection Clauses require governmental bodies to provide funding for religious education if they fund public or private secular education. *See Norwood*, 413 U.S. at 462, 469; *Sloan*, 413 U.S. at 834–35; *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), *aff'g mem.*, 332 F. Supp. 275 (E.D. Mo. 1971).

[5] *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002), had held two years earlier that scholarships delivered to parents or students who are free to use them at religious or secular institutions are not subject to the strict Establishment Clause limitations applicable to direct grants to religious institutions.

Following *Locke*, numerous appellate courts have rejected contentions that the Constitution requires governmental bodies to provide funding for religious uses on the same terms as for secular uses. *See Bowman v. United States*, 564 F.3d 765, 774 (6th Cir. 2008) (funding by federal government of religious ministry to youth); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409–10 (6th Cir. 2007) (religious programming in residential services for abused, neglected, and delinquent children); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 353–57 (1st Cir. 2004) (religious education); *Bush v. Holmes*, 886 So.2d 340, 343–44, 362–66 (Fla. Dist. Ct. App. 2004) (religious education), *aff'd on other grounds*, 919 So.2d 392 (Fla. 2006); *Anderson v. Town of Durham*, 895 A.2d 944, 958–61 (Me. 2006) (religious education).

B. The Supreme Court's recent decision in *Trinity Lutheran* is restricted to *status-based* denials of funding for *nonreligious* uses.

The recent decision in *Trinity Lutheran*—the case on which the plaintiffs principally rely—is limited to circumstances far different from those of *Locke* and the other above-cited cases. The Court held that a state violated the Free Exercise Clause by denying a grant to a church-operated preschool—solely because of its religious identity—to purchase a rubber surface for its playground. 137 S. Ct. at 2017–18, 2024–25.

The record in *Trinity Lutheran* contained no evidence that the playground was used for religious activity. *See id.* at 2017–18, 2024 n.3. The Court thus

strictly limited the scope of its holding: "This case involves express discrimination based on religious identity with respect to playground resurfacing. *We do not address religious uses of funding* or other forms of discrimination." *Id.* at 2024 n.3 (emphasis added).[6]

And *Trinity Lutheran* reaffirmed *Locke*'s holding that "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Id.* at 2019 (quoting *Locke*, 540 U.S. at 718). The *Trinity Lutheran* Court emphasized that, in the case before it, the state had "expressly den[ied] a qualified religious entity a public benefit *solely* because of its religious character." *Id.* at 2024 (emphasis added). *Locke* was different because the plaintiff there "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." *Id.* at 2023.

Moreover, the denial of funding in *Locke* was based on a governmental "interest in not using taxpayer funding to pay for the training of clergy" that "lay at

[6] Though this footnote was joined by only four Justices, it is controlling because it set forth narrower grounds for the judgment than did the two Justices who joined the body of the majority opinion but not the footnote. *See Trinity Lutheran*, 137 S. Ct. at 2025–26 (concurring opinions of Thomas, J., and Gorsuch, J.); *Marks*, 430 U.S. at 193. In addition, Justice Breyer, who did not join any of the majority opinion, wrote a concurrence expressing views similar to those in the footnote. *See id.* at 2026–27.

the historic core of the Religion Clauses." *Id.* "[N]othing of the sort [could] be said about a program to use recycled tires to resurface playgrounds." *Id.*

C. This case is like *Locke*, not *Trinity Lutheran*.

Even if the grants sought by the plaintiffs are not barred by the Establishment Clause, the FEMA policy that prohibits the grants is well within the "play in the joints" recognized in *Locke*, 540 U.S. at 718, as the district court correctly concluded. For three principal reasons, *Locke*—not *Trinity Lutheran*—governs here.

First, as in *Locke*, and unlike in *Trinity Lutheran*, FEMA's policy is based on how funds are used, not on grant applicants' identity as religious or secular. FEMA's policy permits both secular and religious institutions—including houses of worship—to receive grants for repairs to facilities that are used principally for certain kinds of "critical" or "essential" secular services, such as sheltering the homeless, feeding the hungry, treating substance abuse, or providing childcare. *See* Doc. No. 30 at 8–9 and citations therein.[7] FEMA's policy further prohibits both secular and religious institutions from receiving grants for facilities that are principally used for a variety of other kinds of purposes, including not only

[7] Such grants would violate the Establishment Clause, however, if the recipient institutions inject religion into the provision of otherwise secular services by, for example, proselytizing service beneficiaries. *See, e.g.*, *Bowen*, 487 U.S. at 621; *Cmty. House*, 490 F.3d at 1059–60.

religious worship, instruction, and activity, but also political education, vocational instruction, and athletic training. *See id.* at 9 and citations therein. Thus the use of the funded facility, not the religious or secular status of the facility's owner, determines eligibility for grants. The plaintiffs have not demonstrated that they provide the kinds of activities that render both secular and religious institutions eligible for FEMA aid—in other words, that they are otherwise eligible for the grants—so they have not shown that they have been discriminated against based on their religious character.

Second, like *Locke* and unlike *Trinity Lutheran*, this case straightforwardly involves "religious uses of funding." *Cf. Trinity Lutheran*, 137 S. Ct. at 2024 n.3. The plaintiffs seek grants not for playgrounds, but for repair of integral elements of church buildings, within which active congregations conduct worship and other "essentially religious endeavor[s]." *See Locke*, 540 U.S. at 721. Not only was there no record evidence in *Trinity Lutheran* that the playground was used for religious activities (*see* 137 S. Ct. at 2017–18, 2024 n.3), but the resurfacing grant by its nature could serve only safety purposes, not religious ones. What a playground surface is made of has no connection with whether a religious preschool can provide religious instruction or how effectively it can do so. But here, as explained above, the plaintiffs desire federal funds to repair inherently religious structures used for inherently religious purposes, including church

sanctuaries—at least one of which has been demolished and will need to be rebuilt from the ground up—a church steeple, and a fellowship hall. *See* Doc. No. 11 ¶¶ 57–59, 72–73; Pls.' Mot. at 3. Indeed, at least one of the plaintiff churches indicated that it needs repairs "to resume religious services." *Id.* ¶ 73.

Relying on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the plaintiffs appear to contend that the Free Exercise Clause prohibits the government from denying funding for activities because of their religious nature. *See* Pls.' Mot. at 20–22. That argument is contrary not only to *Locke* and *Trinity Lutheran*, which reaffirm that government is never required to fund "'essentially religious endeavor[s]'" (*see Trinity Lutheran*, 137 S. Ct. at 2023 (quoting *Locke*, 540 U.S. at 721)), but also to the Establishment Clause itself (*see supra* § I(A)); indeed, it would read the Establishment Clause's prohibition against funding of religion out of the Constitution. *Lukumi* does not support such a radical proposition. Rather, the case struck down a municipality's effort actively to *suppress*, through criminal sanctions, a particular religious practice of a particular denomination. *See* 508 U.S. at 533–40. FEMA's policy treats all religious groups equally and further treats religious activities similarly to a variety of other, comparable secular activities, such as political education and vocational instruction. *See* Doc. No. 30 at 8–9 and citations therein.

The third factor that brings this case within the scope of *Locke* rather than *Trinity Lutheran* is that FEMA's policy serves a historic and substantial governmental interest in not funding construction or repair of places of worship. In explaining the scope of traditional governmental "antiestablishment interests," *Locke* looked to the "public backlash" (*id.* at 722 n.6) that resulted from Patrick Henry's proposal in Virginia of *A Bill Establishing A Provision for Teachers of the Christian Religion* (1784), http://bit.ly/2ssSCRw, which would have provided tax funding for "the providing places of divine worship," among other aspects of religious ministries. In response to that proposal, Thomas Jefferson drafted the *Bill for Establishing Religious Freedom*, which proclaimed that "'no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.'" *See Locke*, 540 U.S. at 722 n.6 (quoting Jefferson's *Bill*). To illustrate traditional governmental antiestablishment interests, *Locke* further cited state constitutional provisions that barred compelling any person to "'erect or support any place of worship.'" *See id.* at 723 (quoting Pa. Const., Art. II (1776), and citing other, similar state constitutional clauses).

Thus, as in *Locke*, 540 U.S. at 724, and contrary to what the plaintiffs argue here (*see* Pls.' Mot. at 24–25), FEMA's policy is not motivated by "hostility toward religion." Rather, as in *Locke*, 540 U.S. at 724–25 & n.8, what matters is the use of the money: FEMA's policy permits religious institutions to receive

grants for repairs to facilities that are used principally for certain classes of "critical" or "essential" services that the government has determined should be publicly funded (*see* Doc. No. 30 at 8–9 and citations therein), without regard to the identity of the service provider.[8]

CONCLUSION

Far from compelling FEMA to provide grants to repair places of worship, the Constitution prohibits it from doing so. If the Court concludes that this case is justiciable, it should therefore hold that the plaintiffs are unlikely to succeed on the merits of their claims and deny their request for an injunction pending appeal.

[8] In passing, the plaintiffs and one of their *amici* suggested below that FEMA's policy calls for a constitutionally improper inquiry by requiring FEMA to determine whether facilities are used principally for religious activities. *See* Doc. No. 12-5 at 15–16 n.3; Doc. No. 25-2 at 12–13. But the plaintiffs admit that their facilities are used predominantly for religious activities, so no such inquiry is needed here. *See* Doc. No. 11 ¶ 47. In all events, the U.S. Constitution does not prohibit courts from inquiring about whether something is religious; courts must instead avoid analyzing whether religious beliefs are valid and must not dissect the content of religious beliefs in a manner that impermissibly embroils the courts in theological questions. *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709–10 (1976); *United States v. Seeger*, 380 U.S. 163, 184–85 (1965); *see also Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). Accordingly, federal courts routinely examine whether institutions are religious to determine, for example, whether they qualify for exemptions for religious organizations from employment or tax laws. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699 (2012); *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1388–91 (Fed. Cir. 2010); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226–31 (3d Cir. 2007).

Respectfully submitted,

By: /s/ Richard B. Katskee Date: December 8, 2017
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CERTIFICATE OF COMPLIANCE

This opposition 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 4,920 words. This opposition complies with the requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman 14 pt.) using Microsoft Word 2013.

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Dated: December 8, 2017

CERTIFICATE OF SERVICE

I certify that on December 8, 2017, this opposition was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Richard B. Katskee
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Dated: December 8, 2017