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Saving Grace: The Role of Religious Organizations in Disaster Recovery and the Constitutionality of Federal Funding to Rebuild Them

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SAVING GRACE: THE ROLE OF RELIGIOUS ORGANIZATIONS IN DISASTER RECOVERY AND THE CONSTITUTIONALITY OF FEDERAL FUNDING TO REBUILD THEM

Chelsea Till*

ABSTRACT

Natural disasters are on the rise and religious organizations, the same organizations that came to victims' rescue in the wake of the last natural disaster, are often left in the path of destruction. Under President Trump's administration, FEMA recently amended its disaster assistance program to provide funding for religious organizations. Opponents argue this amendment is a violation of the Establishment Clause, while proponents argue the amended plan finally gives religious organizations the fair treatment they deserve. This new aid program needs to be modified and restricted. Though there is clear precedent to support providing some Public Assistance funding to religious organizations, FEMA's current program results in government funding that advances religion. This paper traces Supreme Court precedent discussing the relevant tests when evaluating the receipt of federal funds by religious organizations, and ultimately concludes that FEMA's disaster relief aid program goes too far.

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I. INTRODUCTION

HURRICANE Harvey's landfall in Rockport, Texas, on August 25, 2017, marked the beginning of what seemed like an endless string of catastrophic devastation along the coastal United States.¹ In what is being called "the storm of the century," Hurricane Harvey blew past the national storm record with over five feet of reported rainfall.² Bringing back memories of Hurricanes Katrina and Rita from 2005, Hurricane Irma made landfall on the coast of Florida just days later on September 10, 2017.³ In the weeks that ensued, aid and relief came from many sources, including Federal Emergency Management Agency (FEMA), local governments, and private nonprofits.⁴ Though the federal government relies on FEMA for coordinated relief following a natural disaster, private—specifically faith-based—nonprofits account for roughly 80% of all natural disaster recovery efforts annually.⁵ Hurricanes Harvey and Irma were no different, as more than 300 voluntary organiza-

1. See *Hurricane Harvey: Facts, FAQs, and How to Help*, WORLD VISION, <https://www.worldvision.org/disaster-relief-news-stories/hurricane-harvey-facts> [https://perma.cc/6PX6-8PPP] (last updated Feb. 14, 2018).

2. Jason Samenow, *60 Inches of Rain Fell From Hurricane Harvey in Texas, Shattering U.S. Storm Record*, WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/news/capital-weather-gang/wp/2017/08/29/harvey-marks-the-most-extreme-rain-event-in-us-history/?utm_term=.ab06fa2b3af0 [https://perma.cc/6PG6-68HM].

3. *Hurricane Irma Makes Landfall in Lower Florida Keys*, CBS NEWS (Sept. 9, 2017, 6:00 PM), <https://www.cbsnews.com/news/hurricane-irma-track-update-florida-path-live-09-09-2017/> [https://perma.cc/2RA8-4BJR].

4. See Press Release, FEMA, *Historic Disaster Response to Hurricane Harvey in Texas* (Sept. 22, 2017) [hereinafter Press Release, *Historic Disaster Response*], <https://www.fema.gov/news-release/2017/09/22/historic-disaster-response-hurricane-harvey-texas> [https://perma.cc/G3FZ-HM8Z].

5. Paul Singer, *Faith Groups Provide the Bulk of Disaster Recovery in Coordination with FEMA*, USA TODAY (Sept. 10, 2017, 3:10 PM), <https://www.usatoday.com/story/news/politics/2017/09/10/hurricane-irma-faith-groups-provide-bulk-disaster-recovery-coordination-fema/651007001/> [https://perma.cc/823N-8Z74].

tions, many of which were religious in nature, were involved in supporting Houston survivors alone.⁶

FEMA's Public Assistance policies in place at the times of both storms categorically barred impacted houses of worship and religious institutions from eligibility for public funding.⁷ Additionally, the policy guide precluded religious non-profits from eligibility for reimbursement of costs associated with sheltering and caring for victims.⁸ These restrictions resulted in a significant controversy, which ultimately led three Texas-based churches and two Florida-based synagogues to sue FEMA in the federal courts for discrimination and violations of the Stafford Act.⁹

In early January 2018, the Trump Administration and FEMA worked to modify FEMA's policy guide, deleting the language that preempted houses of worship and religious institutions from eligibility.¹⁰ Though popular among nonprofits, this decision was challenged by advocacy groups that favor a separation of church and state, arguing that this action violates the Establishment Clause.¹¹

Just a few months later in April 2018, FEMA took things a step further by amending their disaster relief aid policy guide.¹² Specifically, the new policy guide lists houses of worship as eligible facilities and makes clear that buildings "used primarily for religious purposes or instruction . . . are eligible regardless of their religious character."¹³

The fairness, necessity, and legality of providing federal disaster relief to religiously affiliated nonprofits and houses of worship is a critical issue for America today. With tensions rising between secular and religious institutions, and with natural disasters becoming increasingly more common and destructive, the significance of this issue only stands to increase. It must be recognized that modern Supreme Court precedent preempts FEMA from categorically excluding houses of worship and religious or-

6. Press Release, Historic Disaster Response, *supra* note 4.

7. FEMA, U.S. DEP'T OF HOMELAND SEC., FP 104-009-2, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE 15 (2d ed. 2017) [hereinafter 2017 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE], [https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf).

8. *Id.*

9. See Michelle Boorstein, *In a Shift, Trump Administration Says Houses of Worship Can Apply for Hurricane Relief*, WASH. POST (Jan. 9, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/01/04/in-a-shift-trump-administration-says-houses-of-worship-can-get-direct-fema-funding-after-disasters/?utm_term=.f9174aecde6e [https://perma.cc/2KZ5-WHL9].

10. FEMA, U.S. DEP'T OF HOMELAND SEC., FP 104-009-2, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE 15 (3d ed. 2018) [hereinafter 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE], https://www.fema.gov/media-library-data/1515614675577-be7fd5e0cac814441c313882924c5c0a/PAPPG_V3_508_FINAL.pdf (Version 3.0); see Boorstein, *supra* note 9.

11. See Boorstein, *supra* note 9.

12. FEMA, U.S. DEP'T OF HOMELAND SEC., FP 104-009-2, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE 15 (3d ed. 2018) [hereinafter AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE], https://www.fema.gov/media-library-data/1525468328389-4a038bbe9081cd7dfe7538e7751aa9c/PAPPG_3.1_508_FINAL_5-4-2018.pdf (Version 3.1).

13. *Id.*

ganizations from funding eligibility solely based on their religious nature. However, the Establishment Clause places fundamental limits on the types of funding available to religious organizations, and the amended policy guide allows funding beyond the scope of these fundamental limits.

Part I of this comment will address the historical background of religious nonprofit involvement in disaster recovery. Part II will address various historical developments in the interpretation of the Establishment Clause. Part III will discuss the current status of the law as defined by *Trinity Lutheran* and the revised FEMA Policy Guide.¹⁴ Finally, Part IV will address the constitutionality of FEMA's updated Public Assistance policies and consider the legitimacy of various arguments in favor of expanding the funding available to houses of worship.

II. BOOTS ON THE GROUND: RELIGIOUS NONPROFIT INVOLVEMENT IN DISASTER RECOVERY

Nonprofits, both religious and secular in nature, play a fundamental role in disaster recovery. After witnessing the efficacy of nonprofit involvement in disaster recovery and realizing that this impact could be magnified through strategic coordination, FEMA has established guidelines to coordinate their work alongside nonprofit organizations.¹⁵ For example, in the weeks following Hurricane Katrina, FEMA and the American Red Cross organized a national operations center in Washington, D.C. that included representatives from various national charities, including the Salvation Army and the Southern Baptist Convention.¹⁶ Additionally, this operations center organized daily conference calls between FEMA, National Volunteer Organizations Aiding in Disasters (VOAD), and over forty other nonprofit organizations where the federal government and private nonprofits were able to share information and address each organization's ability to meet identified needs.¹⁷ As explained by Jamie Johnson, Director of the Department of Homeland Security's Center for Faith-Based & Neighborhood Partnerships, "FEMA cannot do what it does so well without the cooperation of faith-based nonprofit organizations and churches."¹⁸

This cooperation comes in many forms, and the following statements represent just a few examples:

- FEMA helped expedite a customs process to enable Samaritan's Purse (an evangelical nonprofit) to bring in disaster response equip-

14. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *supra* note 12 and accompanying text.

15. See *To Review the Responses By Charities To Hurricane Katrina: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 109th Cong. 23–24 (2005) [hereinafter *Hearing*] (statement of Cynthia M. Fagnoni, Managing Director, Education, Workforce & Income Sec., U.S. Gov't Accountability Office).

16. *Id.* at 24.

17. *Id.*

18. Singer, *supra* note 5.

ment from Canada.¹⁹

- FEMA often requests the Convoy of Hope (a non-denominational Christian organization), a group specialized in food distribution, to set up feeding stations in the wake of disaster.²⁰
- FEMA has also taken note of the Seventh Day Adventists' "unique expertise in disaster 'warehousing,'" and is currently working with the group to identify a facility in Texas that the state will own but the Adventists will manage.²¹

However, nonprofit involvement extends beyond just coordination with FEMA—nonprofits often step in when the federal government simply cannot. In the wake of Hurricane Katrina in 2005, religious nonprofits, such as the Salvation Army, were documented working in areas that FEMA was unable to reach due to safety and flooding regulations.²² Additionally, local churches in Birmingham, Alabama, opened their doors to shelter over 7,000 evacuees when FEMA was unable to provide sufficient shelter for them.²³

In conclusion, as a large-scale federal agency, FEMA has the resources and capacity to expedite change, coordinate large groups of people, and utilize federal funds. However, FEMA recognizes the unique specialization, manpower, and passion that each of these nonprofits stands to offer and gladly accepts their support in the aftermath of disaster.²⁴ As Johnson explained, FEMA wants to work with these nonprofits "because they have their people on the ground"—they know the area, they know the people, and they are uniquely equipped to know how to help.²⁵

III. THE ESTABLISHMENT CLAUSE HISTORICALLY

As explained by the Supreme Court, the Establishment Clause was intended to protect against government "sponsorship, financial support, and active involvement of the sovereign in religious activity."²⁶ The Supreme Court historically addressed issues of funding and religious institutions under the *Lemon Test* (the Test), which calls for strict separation.²⁷ However, in recent years there has been a shift towards a sense of neutrality.²⁸ Thus, because *Lemon v. Kurtzman* has not been overruled, despite the more neutral holdings of *Agostini v. Felton* and *Trinity Lutheran Church v. Comer*, there is room to argue as to how the Supreme Court will address issues of funding religious institutions moving forward.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Hearing, supra* note 15, at 25.

23. *Id.*

24. *See Singer, supra* note 5.

25. *Id.*

26. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

27. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

28. *See Trinity Lutheran Church of Columbia v. Cromer*, 137 S. Ct. 2012 (2017); *Agostini v. Felton*, 521 U.S. 203 (1997).

A. FUNDING PAROCHIAL AND RELIGIOUS SCHOOLS
IN PRE-*LEMON* WORLD

During the 1960s and 1970s, the court system was flooded with cases challenging state funds being used to benefit parochial schools or the families who sent their children to them. The Supreme Court heard many of these cases, the first of which was *Board of Education v. Allen*.²⁹ In *Allen*, the petitioners challenged a New York state program which required state school boards to loan textbooks to all schools within the state, both public and private.³⁰ Even though receiving free textbooks stood to help parochial schools save money, the Court held that the program did not violate the Establishment Clause because the statute was facially neutral—that is, it did not benefit students in parochial schools any more than it benefited students in public schools.³¹ The Court also found policy considerations for the benefits of promoting education fundamental to their holding.³² Finally, and most notably, was the Court's recognition that even though school boards were required to furnish parochial schools with loaned textbooks, the school board had discretion over the titles provided.³³ Thus, state funds could be used to provide books on secular topics, such as math and literature; however, the state would have the ability to deny requests for books of a religious nature.³⁴

Even with the financial support of the loaned textbooks, parochial schools were still struggling. As a result, many states began providing more resources to parochial schools in the form of aid packages. These aid packages were the root issue in *Lemon v. Kurtzman*.

B. THE *LEMON* TEST—1971

In *Lemon v. Kurtzman*, the Supreme Court gleaned a three-part test from decades' worth of Supreme Court precedent.³⁵ Under this test, a statute "must have a secular legislative purpose, . . . its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and] the statute must not foster 'an excessive government entanglement with religion.'"³⁶ Further explaining this test, the Court stated that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."³⁷

29. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

30. *Id.* at 238–39.

31. *Id.* at 243–44.

32. *Id.* at 247.

33. *Id.* at 244–45.

34. *Id.* at 245.

35. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

36. *Id.* (citation omitted).

37. *Id.* at 615.

The facts of *Lemon* were quite simple—activists were challenging two state plans that reimbursed private schools for all or part of their costs associated with teaching secular topics.³⁸ The logic behind this was clear—the state schools would otherwise have had to provide the secular education to students. Thus, the private schools were saving the state money and deserved to be compensated.³⁹ However, the Court disagreed, ruling that the state programs violated the Establishment Clause. The decision hinged on the third element of the Test, and the Court found that requiring the state to monitor teacher planning, classroom activities, and overall expenditures would result in “excessive [government] entanglement” with the religious schools.⁴⁰ The key element here was that the monitoring would have to be ongoing and continuous, thus resulting in the excessive entanglement.⁴¹

The reach of the *Lemon* Test peaked in the mid-1980s when two similar cases reached the Supreme Court.⁴² *Grand Rapids School District v. Ball* challenged a Michigan school program which provided funding for the salaries of private school teachers who taught secular topics and provided private schools with teachers from public schools who could teach on secular topics.⁴³ The Supreme Court found these programs to be unconstitutional based on the *Lemon* Test’s second prong, arguing that by reducing costs associated with secular teaching, the religious schools would be able to funnel more funding into facilitating religious instruction and activities.⁴⁴ The Court also raised concerns that providing resources to religious schools might be perceived as supporting religious causes by the public, essentially creating a symbolic link.⁴⁵

In *Aguilar v. Felton*, the Court was presented with a similar program, but focused its analysis on the *Lemon* Test’s third prong.⁴⁶ New York City realized that children growing up in poverty or low-income areas were likely to struggle academically. In an effort to combat this, the city instituted a program where public school teachers would offer free, remedial education lessons to young students from poor neighborhoods.⁴⁷ Because the lessons were to occur in both public and private schools, the program included mechanisms for the city to ensure the teachers’ content remained entirely secular in nature, even when working in a religious school.⁴⁸ The Court noted that the plan for monitoring potentially eliminated any violation of the *Lemon* Test’s second prong. However, the plan

38. *Id.* at 606–07.

39. *See id.* at 607–08.

40. *Id.* at 614.

41. *See id.* at 619.

42. *See Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985).

43. 473 U.S. at 375.

44. *See id.* at 385.

45. *Id.*

46. *See Aguilar*, 473 U.S. at 402.

47. *Id.* at 404.

48. *Id.* at 407.

simultaneously created an issue with the third prong.⁴⁹ Because the city would have to continuously monitor the teachers' content on an ongoing basis, the government would be "excessively entangled" in violation of the third prong.⁵⁰

From these three cases and their respective implementations of the *Lemon* Test, it can be discerned that requirements for ongoing monitoring by the state will almost always violate the Test's third prong.⁵¹ Additionally, the Court considers saved costs as a mechanism for supplementing expenses related to religion, ultimately violating the second prong of the Test.⁵²

C. PERMISSIBLE DIRECT FUNDING OF RELIGIOUS INSTITUTIONS' FACILITIES

Though the Supreme Court's 1971 position on state funds and religious institutions seemed quite clear in *Lemon*, things got a bit confusing when the Court handed down their decision in *Tilton v. Richardson*.⁵³ Ironically, even though *Lemon* and *Tilton* were decided on the same day, their outcomes seem somewhat contradictory.

For example, in *Tilton*, the Court evaluated and ultimately upheld the Higher Education Facilities Act (HEFA).⁵⁴ This statute created federal grants for institutions of higher education to use in the construction of new facilities.⁵⁵ The lawsuit alleged that providing these grants to institutions of higher education with a religious affiliation would violate the Establishment Clause.⁵⁶ However, the Court quickly pointed out that the statute expressly excludes the funds from being used to construct "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility . . . which is used or to be used primarily in connection with any part of the program of a school or department of divinity."⁵⁷ As explained in the case, prior to receiving grant funding, the United States Commissioner of Education "require[d] applicants to provide assurances that [the] restrictions [would] be respected."⁵⁸ Additionally, if within twenty years of receiving federal funding the facility was used in a manner that violated the restrictions, the United States government was entitled to reimbursement.⁵⁹ Most significantly, the restrictions would be enforced via "on-site inspections."⁶⁰

49. *Id.* at 409.

50. *Id.* at 410–11.

51. *See id.* at 409–11; *Lemon v. Kurtzman*, 403 U.S. 602, 613–14 (1971).

52. *See Grand Rapids v. Ball*, 473 U.S. 373, 393–94 (1985).

53. 403 U.S. 672 (1971).

54. *Id.* at 689.

55. Higher Education Facilities Act, Pub. L. No. 88-204, 77 Stat. 363 (1964) (repealed 1972).

56. *Tilton*, 403 U.S. at 676.

57. *Id.* at 675 (internal quotation omitted).

58. *Id.*

59. *Id.*

60. *Id.*

The Court first noted that the desire to expand institutions of higher education as a whole was a legitimate secular objective (the *Lemon* Test's first prong).⁶¹ Regarding the second prong, the Court noted that while receiving funds for secular expenses does stand to benefit religious institutions, "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."⁶²

In regard to the third prong of the Test, the Court drew a significant distinction between two classes of cases. The Court noted that in cases like *Lemon*, religious institutions received aid in the form of teachers who were "not necessarily religiously neutral."⁶³ However, in cases like *Allen* and *Tilton*, the religious institutions received aid "in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend."⁶⁴ Because the aid is "religiously neutral," the "corresponding need for surveillance [and monitoring is] therefore reduced," thus eliminating the risk of government entanglements with religion.⁶⁵

Finally, the Court also compared the continuous nature of the payments from the programs in *Lemon* with the one-time payments for the facilities in *Tilton*.⁶⁶ The Court found this significant because the government's contact with the religious institution was limited and there were "no continuing financial relationships or dependencies, no annual audits, and no governmental analysis of an institution's expenditures on secular as distinguished from religious activities," and because "[i]nspection[s] as to use [are] a minimal contact."⁶⁷

We can derive several key points from *Tilton*. First, the Court was satisfied with an assurance from religious institutions that the funds would be used properly—it took them at their word.⁶⁸ Second, we see that the Court considered policy implications and the value of the program in its analysis.⁶⁹ Third, the Court finds factors such as "religiously neutral" aid and one-time payments to be significant considerations when assessing the requirements for monitoring and entanglements under the third prong.⁷⁰ Finally, ongoing monitoring does not necessarily equate to excessive entanglement; rather, a court must consider the factors mentioned above.⁷¹

61. *Id.* at 679.

62. *Id.* at 678–79.

63. *Id.* at 687–88; see *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

64. *Tilton*, 403 U.S. at 687.

65. *Id.* at 688.

66. *Id.*

67. *Id.*

68. See *id.* at 679–80.

69. See *id.* at 678–79.

70. See *id.* at 688.

71. See *id.*

D. PERMISSIBLE DIRECT FUNDING OF PROGRAMS OFFERED
BY RELIGIOUS INSTITUTIONS

The next important case for consideration is *Bowen v. Kendrick*.⁷² *Bowen* created precedent legitimizing the permissible use of federal funds to aid organizations—including those with a religious nature—that are involved in promoting a particular secular purpose.⁷³ This case challenged the Adolescent Family Life Act (AFLA), which provided grants to private and public organizations, including religiously affiliated nonprofits, who provide either “care services” or “prevention services” related to adolescent pregnancies.⁷⁴ In its opinion, the Court highlighted Congress’s recognition that adolescent sexuality was a complex issue and that “such problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.”⁷⁵ Another significant aspect of this opinion was the Court’s action to strike down the concept of the “symbolic link” that many opponents argue forms when a religious organization receives federal funding; the Court held that this argument was too far-reaching and would jeopardize things like government aid to religiously affiliated hospitals.⁷⁶

This case also recognized the important distinction between religiously affiliated organizations, such as hospitals, and “pervasively sectarian” organizations, such as parochial schools or churches, where the religious nature permeates the organization.⁷⁷ In response to concerns that it was not only possible, but probable, that pervasively sectarian organizations would receive funding, the Court stated that it “do[es] not think the possibility that AFLA grants may go to religious institutions that can be considered ‘pervasively sectarian’ is sufficient to conclude that no grants whatsoever can be given under the statute to religious organizations.”⁷⁸ This is significant, because the Court recognized that the Establishment Clause is not necessarily violated even when there is a risk of pervasively sectarian organizations receiving federal funds. Rather, the Court opens the door for possible consequences if a pervasively sectarian organization utilized State funds in an unconstitutional manner (such as for funding worship services).⁷⁹

Additionally, the Court also pointed to the fact that the projects authorized by the AFLA—“including pregnancy testing, adoption counseling . . . educational services, residential care, consumer education, etc.”

72. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

73. *Id.*

74. Adolescent Family Life Act, Pub. L. 97-35, 95 Stat. 578 (1982).

75. *Bowen*, 487 U.S. at 595 (internal quotation omitted).

76. *See id.* at 613–14.

77. *Id.* at 610–11.

78. *Id.* at 611.

79. *See id.*

were facially neutral, regardless of whether they were performed by religious organizations or in the context of a church or room with religious symbols.⁸⁰ The Court was satisfied that these facially neutral programs, combined with a system of monitoring, were sufficient to ensure funds would be properly used, regardless of an organization's religious nature.⁸¹ Specifically, the AFLA required a detailed application outlining proposed services, evaluations of the rendered services, and financial reporting regarding the use of federal funds.⁸² Ultimately, the Court was satisfied that the systems in place via the statutory scheme were sufficient to necessitate only a minimal amount of monitoring, thus eliminating any issues of excessive entanglement.⁸³

E. REVISITING *AGUILAR* TWELVE YEARS LATER

The Supreme Court revisited the issues faced in *Aguilar* twelve years after handing down the decision when petitioners sought relief from the injunction preventing public school teachers from providing remedial services to students of private schools.⁸⁴ In its opinion, the Court stated that its interpretation of the “Establishment Clause law has ‘significantly changed’ since we decided *Aguilar*,” thus making *Agostini v. Felton* an opportunity for the Court to clarify and expand its current view on permissible aid towards religious organizations.⁸⁵

Since *Grand Rapids* and *Aguilar*, the Court had changed its “understanding of the criteria used to assess whether aid to religion has an impermissible effect” on advancing religion.⁸⁶ In *Agostini*, the Court held that providing relief that was entirely secular in nature and available to all students, regardless of their school, did not have the effect of advancing religion in an impermissible way (even though it would result in saving the religious schools money that could be used for other purposes).⁸⁷ Additionally, the Court found that “unannounced monthly visits of public supervisors” to ensure lessons were being taught in a secular nature was not a sufficient contact to create “excessive entanglement.”⁸⁸ This is significant because it reinforced the shift shown in *Bowen* away from any previous holdings that ongoing contact and monitoring violates the third prong of the *Lemon* Test.⁸⁹

Agostini was a landmark case that opened the doors for many federal aid programs and ultimately lead to additional cases questioning these programs under the Establishment Clause. One of these cases was *Mitch-*

80. See *id.* at 613, 635 (Blackmun, J., dissenting) (citing *Kendrick v. Bowen*, 657 F. Supp. 1547, 1562 (D.D.C. 1987)).

81. See *Bowen*, 487 U.S. at 615.

82. *Id.*

83. *Id.* at 616.

84. *Agostini v. Felton*, 521 U.S. 203, 208 (1997).

85. *Id.* at 237.

86. *Id.* at 223.

87. *Id.* at 225.

88. *Id.* at 234.

89. *Bowen v. Kendrick*, 487 U.S. 589, 616 (1988).

ell v. Helms, which marked the Court's continued trend towards neutrality instead of the strict separation called for in the years immediately following *Lemon*.⁹⁰

Mitchell considered an aid package that provided technology equipment to all schools in the state.⁹¹ In a notable analysis of the second prong of the *Lemon Test*, the Court explained that "the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question [of] whether any religious indoctrination that occurs in those schools could reasonably be attributed to the governmental action."⁹² The Court further explained that "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."⁹³ In other words, "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose."⁹⁴

If we were to line each of these cases up on a timeline, it would be easy to see a notable shift in the Court's interpretation of the Establishment Clause under the *Lemon Test*. Though the Test has not been overruled, and each of the three prongs are ever-present in modern analysis, it is clear that the Court has loosened its grip on its interpretation of each prong. *Bowen* marks the Court's determination that a "symbolic link" between the government and any organization that receives funding is too broad to justify invalidation.⁹⁵ Further, *Agostini* opens the door for ongoing monitoring without creating an "excessive entanglement."⁹⁶ Finally, *Mitchell* shifts the Court's inquiry to whether or not aid was offered to a large group of organizations for an entirely secular purpose.⁹⁷ Each of these transitions plays a fundamental role in the status of the law today.

IV. FEMA'S UPDATED POLICIES

In early January 2018, FEMA released the third edition of their Public Assistance Program and Policy Guide (the Guide). The purpose of this new edition was to delete any and all language categorically barring religious organizations from eligibility to receive public assistance funding.⁹⁸ The Guide explains that in light of the Supreme Court's recent holding in

90. See *Mitchell v. Helms*, 530 U.S. 793 (2000).

91. *Id.* at 801–02.

92. *Id.* at 809.

93. *Id.*

94. *Id.* at 810.

95. *Bowen v. Kendrick*, 487 U.S. 589, 613–14 (1988).

96. *Agostini v. Felton*, 521 U.S. 203, 224 (1997).

97. *Mitchell v. Helms*, 530 U.S. 793, 809–10 (2000).

98. 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 10, at vii.

Trinity Lutheran, the agency has “considered its guidance on private non-profit facility eligibility” and will no longer “exclude houses of worship from eligibility for FEMA aid on the basis of the religious character or primarily religious use of the facility.”⁹⁹

Trinity Lutheran is a landmark case that redefined the balance that must exist between the protections afforded by the Establishment Clause and those afforded by the Free Exercise Clause of the First Amendment.¹⁰⁰ The case challenged a Missouri Department of Natural Resources grant program that categorically excluded churches or other religious organizations from grant eligibility.¹⁰¹ The grants were available to qualifying schools and daycares for purchasing rubber playground surfaces made from recycled tires.¹⁰² Even though Trinity Lutheran’s daycare center was able to demonstrate that the benefits of their updated playground would stem beyond just their congregation’s families and ranked fifth among all grant applicants based on the department’s ranking for impact and sustainability, the religious nonprofit was disqualified from eligibility based on its religious affiliation.¹⁰³ In the lawsuit that followed, “[t]he [c]hurch alleged that the Department’s failure to approve the Center’s application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause of the First Amendment.”¹⁰⁴

In its analysis, the Supreme Court explained that “[a]pplying [the] basic principle [of the Establishment Clause], this 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.’”¹⁰⁵ Because any daycare or school in the state is generally able to apply for and potentially receive a playground grant, the Court stated that “the refusal to allow the church—solely because it is a church—to compete with secular organizations for a grant” is “express discrimination.”¹⁰⁶ In holding that the restriction violated the Free Exercise Clause, the Court pointed to the unavoidable choice Trinity Lutheran, or any other church, would be faced with—receive an “otherwise available benefit,” or maintain your religious affiliation.¹⁰⁷

The conclusion of the opinion clearly and succinctly demonstrates the Supreme Court’s current stance on issues such as the one above—“[t]he consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise

99. *Id.*

100. *See* *Trinity Lutheran Church of Columbia v. Cromer*, 137 S. Ct. 2012 (2017).

101. *Id.* at 2017.

102. *Id.*

103. *Id.* at 2018.

104. *Id.*

105. *Id.* at 2019 (citation omitted).

106. *Id.* at 2022.

107. *See id.* at 2021–22.

qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.”¹⁰⁸

The churches and synagogues that initiated suits against FEMA rooted their arguments in *Trinity Lutheran*, arguing that the same principles should apply to FEMA’s Public Assistance Program.¹⁰⁹ As mentioned above, in response to the lawsuit, FEMA updated their policies. Though this was a victory for those in favor of federal funding for religious organizations, both sides continued to debate the issue and argue over various interpretations of the amendment. As a result, FEMA recently released a new amendment clarifying that houses of worship “used primarily for religious purposes or instruction” are eligible for disaster relief funding.¹¹⁰

A. FEMA’S CURRENT REQUIREMENTS FOR PUBLIC ASSISTANCE ELIGIBILITY

The updated Guide, now free of any religious exclusions, outlines a very clear structure for funding eligibility. To be eligible for funding, a private nonprofit (PNP) must demonstrate that it is a nonprofit organization and that it owns or operates an eligible facility.¹¹¹ In determining facility eligibility, FEMA breaks down eligible facilities into two categories: facilities providing a critical service (“defined as education, utility, emergency, or medical [services]”) and facilities providing “non-critical, but essential social service[s].”¹¹²

The facilities at issue in the lawsuits and FEMA’s updated policies were those providing non-critical but essential social services. Under the updated policies, to qualify as a “non-critical, but essential” service facility, the facility must provide services such as: youth and senior citizen group meetings, alcohol and drug treatment, food assistance programs, homeless shelters, services for battered spouses, or houses of worship.¹¹³ Additionally, the qualifying facility must be able to demonstrate that it is open to the general public, meaning that use is not limited to certain individuals (or classes of individuals) and access is not restricted.¹¹⁴ However, a footnote in the most recent amendment clarifies that “houses of worship that limit[] leadership or membership to persons who share a religious faith or practice still provide[] essential social services to the general public.”¹¹⁵

If a nonprofit owns a facility comprised of multiple buildings, FEMA’s

108. *Id.* at 2024–25.

109. Aaron Colen, *Separation of Church and State? Texas Churches Sue for FEMA Aid*, THE BLAZE (Sept. 6, 2017, 11:00 PM), <https://www.theblaze.com/news/2017/09/06/separation-of-church-and-state-texas-churches-sue-for-fema-aid> [<https://perma.cc/KHK8-VR35>].

110. AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 12, at vii.

111. *Id.* at 10–11.

112. *Id.* at 11.

113. *Id.* at 13.

114. *Id.* at 11.

115. *Id.*

policy is to evaluate each building's eligibility separately.¹¹⁶ Additionally, FEMA has policies in place for evaluating buildings utilized for more than one purpose. "[F]acilities that provide both eligible and ineligible services are considered mixed-use facilities" and their eligibility for Public Assistance is "dependent on the *primary* use of the facility, which is determined by the amount of physical space dedicated to eligible and ineligible services."¹¹⁷ If more than 50% of a facility's use is for eligible services, then the building's primary use is eligible, thus making the building eligible for funds.¹¹⁸ However, the facility will only be eligible for a prorated percentage of funding based on the building's eligible use.¹¹⁹ FEMA has addressed the issue of the same physical space being used for multiple purposes by creating specific policies for "mixed-use spaces." In a mixed-use space, "the primary use is the use for which more than 50% of the operating time is dedicated in that shared physical space."¹²⁰

In addition to Public Assistance funding for rebuilding and repairs, FEMA offers reimbursement for various qualifying costs associated with disaster recovery. For example, costs associated with the evacuation and sheltering of storm survivors are eligible for reimbursement.¹²¹ However, if a PNP shelters or feeds any evacuees, they are not eligible for direct reimbursement—instead, FEMA will reimburse the state or local government who can then reimburse the PNP.¹²²

The updated FEMA policies are a big win for all houses of worship. However, they lead to two big questions. Are the policies in compliance with the Establishment Clause? And if not, how do we provide enough support for the organizations that are often a city's saving grace in the wake of disaster while staying within the confines of the Establishment Clause?

B. AN EVALUATION OF FEMA'S UPDATED POLICIES

FEMA's original revised Public Assistance Policy Guide seemed to strike the most practical, and constitutional, balance possible when it comes to funding eligibility for religiously affiliated organizations and houses of worship. The Supreme Court's progression from strict separation to a call for neutrality clearly allows for some sort of eligibility for religious organizations to apply for FEMA's public assistance funding. However, this recent precedential shift does not rise to the level of necessitating, or even allowing, federal funds to go towards rebuilding sanc-

116. *Id.* at 15.

117. *Id.* at 16.

118. *See id.*

119. *See id.*

120. *Id.*

121. *Id.* at 66.

122. Press Release, FEMA, Faith-based, Voluntary and Nonprofit Organizations May Be Eligible for FEMA Disaster Grants (Sept. 28, 2017) [hereinafter Press Release, FEMA Disaster Grants], <https://www.fema.gov/news-release/2017/09/28/faith-based-voluntary-and-nonprofit-organizations-may-be-eligible-fema> [https://perma.cc/M4TC-7VXV].

tuaries and houses of worship that are not also used for neutral social services. With FEMA's recent policy changes, multiple lawsuits sitting in federal court, and the reality that more storms are always coming, the timing of this analysis is especially crucial. The nation is at a critical juncture where either the federal courts or the legislature (or possibly both) will soon determine the intricate balance that must exist between the protections afforded under the Equal Protection and Establishment Clauses.

Funding available to PNPs, including religious organizations, under FEMA's Public Assistance Programs includes funds for rebuilding qualified facilities and reimbursements for disaster assistance related expenses. In the case of religious congregations, the possibility of funding two separate kinds of facilities arises: (1) sanctuaries or main worship spaces, and (2) religiously neutral facilities that happen to be owned by religious organizations. Thus, this analysis will divide the constitutional analysis into three categories: reimbursements, funds for rebuilding a sanctuary or main worship space, and funds for rebuilding community centers and other neutral spaces.

1. *Reimbursements*

Reimbursements provided to religious nonprofits or houses of worship for costs associated with disaster aid and recovery do not violate the Establishment Clause. The Supreme Court has transitioned to a more neutral approach for Establishment Clause challenges. However, the Court has not overruled the *Lemon* Test, which should form the framework of this evaluation. The first prong requires that the reimbursement serve a secular purpose.¹²³ Here, the purpose is reimbursing state and local governments (and sometimes PNPs) for disaster related costs that FEMA is ultimately responsible for. These reimbursements are fundamental to FEMA's success because without reimbursements the state and local governments and PNPs might be unwilling or unable to help in the wake of future disasters, and as previously discussed, FEMA relies on their collaboration. Ultimately, the focus of the reimbursement policy is on restoring the governing bodies and organizations that stepped in to help in the aftermath of a storm, which is clearly a legitimate and secular purpose.

The next step in the analysis is the second prong—determining if the funding advances religion in an impermissible way.¹²⁴ As a reimbursement, this funding is similar to the aid programs in *Grand Rapids* and *Lemon*, where the government reimbursed parochial schools for costs associated with teaching secular topics.¹²⁵ In these cases, the logic behind the funding was that the parochial schools were providing a benefit that the government is obligated to provide to all students (and was thus ultimately saving the government money) and should be reimbursed.¹²⁶ This

123. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

124. *Id.*

125. See *Grand Rapids v. Ball*, 473 U.S. 373, 375–80 (1985); *Lemon*, 403 U.S. at 606–07.

126. *Lemon*, 403 U.S. at 616–17.

is similar to the facts at hand, because in situations of disaster, FEMA is charged with providing aid and shelter to evacuees. When state/local governments and PNPs step in to provide these benefits, they are providing something that the federal government is ultimately responsible for. Even though the aid programs in *Grand Rapids* and *Lemon* were ruled unconstitutional, the Supreme Court revisited this general line of reasoning in *Agostini* and overruled part of their previous analysis.¹²⁷

The Court reasoned in *Agostini* that aid available to all, and that is entirely secular in nature, does not advance religion in an impermissible way, even if it would ultimately save the religious organizations money.¹²⁸ This reasoning can be applied to the issue of reimbursements, because FEMA's reimbursement policy is available to all state/local governments, as well as any PNP (indirectly) who provides shelter, food, or other qualified services to evacuees.¹²⁹ Further, unlike the funding in *Agostini*, this reimbursement will not serve to advance the organizations or save them money. Rather, the reimbursement is a form of restoring the organizations to the place they were before stepping in to help. As is typical with any reimbursement plan, governments and organizations do not make a profit off of the payments they receive, the payments simply repay any monies expended in the process of sheltering evacuees (i.e. purchasing cots, buying first aid supplies, supplying food, cleaning materials, etc.).¹³⁰ The PNPs don't stand to benefit or gain anything from these reimbursements, and the opportunity for reimbursement is available to any shelter who provides qualified services; thus, under *Agostini*, there are likely no issues with the Test's second prong.

The final step in evaluating the reimbursement plan is to assess any potential excessive government entanglements. Unlike each of the forms of aid mentioned in the cases above, the money in FEMA's reimbursement plan is credited towards money already spent (as opposed to future expenses).¹³¹ This is significant, because it eliminates the need for monitoring of the funds' use in the future. In cases like *Agostini*, *Bowen*, and *Trinity Lutheran*, there will always be some concern that funds might not be used for the government's intended purpose or maybe they will be used in a way that simultaneously advances religion. However, where, as here, the money has already been spent, that concern is almost entirely eliminated. There is no question of what the money will be used for (or in what manner) because it was already used—there are receipts and invoices ready to answer those exact questions. Thus, even though FEMA will be charged with inspecting the receipts and determining which expenses qualify for reimbursements, it cannot be said that reimbursements will result in excessive entanglement. When compared with the recurring,

127. See *Agostini v. Felton*, 521 U.S. 203, 236 (1997).

128. *Id.* at 223.

129. AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 12, at 66–67.

130. See *id.* at 66.

131. See *id.*

organized inspection procedures that the Court previously upheld,¹³² a one-time inspection of receipts and financial documents requires significantly less contact and involvement, and thus, should not create an excessive entanglement.

In conclusion, the argument for reimbursements is probably the easiest argument of the three to win under the *Lemon* Test. The reimbursements involve far less contact with religious organizations than programs previously upheld by the Supreme Court, and there is no doubt as to how the funds will be spent. Should the reimbursement policy face a constitutional challenge, a court would likely uphold it.

2. *Funding for Rebuilding a Sanctuary or Worship Space*

The next step in the analysis is to consider whether FEMA's policy of providing funding for sanctuaries and houses of worship is allowable under the Establishment Clause. It seems likely that this practice would fail under at least two, but maybe three, prongs of the Test. First, it is hard to argue that the amendment to include houses of worship was proposed for an entirely secular and legitimate purpose. In its text, the amendment clearly purports to provide a mechanism for houses of worship to receive federal funding, and it cannot be said that this is an entirely secular purpose. One could argue that this amendment stands to codify the holding of *Trinity Lutheran*, as applied to FEMA funding, because it ensures applicants will not be disqualified solely based on their religious nature. This argument is mildly convincing, but the situation is quite different from that of *Trinity Lutheran*. *Trinity Lutheran* purported that it was a violation of the Free Exercise Clause to restrict applicant eligibility solely based on a religious nature in the context of playground facilities.¹³³ However, it is a quite different situation when it comes to funding an actual sanctuary. In fact, the Court noted this exact difference in footnote three of the opinion, where it limited its holding to the context of a playground and stated the Court "[did] not address religious uses of funding."¹³⁴ Additionally, the holding in *Trinity Lutheran* did not demand that the parochial preschool receive funding, rather, the holding said religious organizations could not be categorically excluded based on their religious nature.¹³⁵

It seems unlikely that the Court's reasoning from *Trinity Lutheran* would extend far enough to apply towards demanding direct government funding of houses of worship. Proponents of funding worship spaces will argue the secular purpose of the funding is rebuilding the facilities that enable the community to thrive as a whole, which could include houses of worship. This argument might work in the context of FEMA just ex-

132. See *Bowen v. Kendrick*, 487 U.S. 589, 616 (1988); *Tilton v. Richardson*, 403 U.S. 672, 688 (1971).

133. See *Trinity Lutheran Church of Columbia v. Cromer*, 137 S. Ct. 2012, 2025 (2017).

134. *Id.* at 2024 n.3.

135. See *id.*

panding their policies to include the possibility of religious organizations receiving funding. However, it seems unlikely that this argument would sway a court in the context of a policy explicitly written to ensure funding eligibility for churches.¹³⁶

The amendment would also probably fail the Test's second prong because the amendment would stand to advance religion in an impermissible way. It is undeniable that federal funds would be going towards improving houses of worship and religious sanctuaries. In *Mitchell*, the Court stated that funds generally available to any group furthering a specific secular purpose will be construed as to advance that secular purpose, and not a religious objective.¹³⁷ However, this reasoning cannot apply where, as here, there is no discrete secular purpose associated with rebuilding churches. The idea of rebuilding a church cannot, in and of itself, be secular—the two are in opposition. To provide funding to restore a sanctuary to a usable state inherently advances religion—it enables the congregation to continue worshipping, something they could not do before the receipt of the funding. Additionally, the holding in *Tilton* seems to suggest that the Court agrees with the notion that federal money should not be used to fund spaces of worship.¹³⁸ In that case, the Court relied heavily on the prohibition of using the new buildings for worship or religious instruction to justify their finding that the buildings would not advance religion in an impermissible way.¹³⁹ It would be difficult to reconcile that line of reasoning with an argument that money to rebuild churches does not advance religion in an impermissible way.

Arguing in the alternative, one could say that the funding would not advance religion. Instead, the funding would simply restore the religious congregations to where they were before the storm. This is a somewhat logical argument, and it might have some bearing. Proponents could even take the argument a step further and argue that building the “bones” of a church has nothing to do with advancing religion, because a foundation, drywall, and roofing shingles are all facially neutral products. This approach would inherently call for a separation between funding used to restore a physical structure (arguably neutral) and funding used to rebuild an altar (undeniably religious).

From a logistical standpoint, this policy would be completely ineffective and inefficient—it would be almost impossible to accurately differentiate between the costs for tiling or drywalling the “neutral” spaces as opposed to the “religious” spaces. Aside from the financial logistical difficulties, this argument creates a never ending slippery slope. Truly, how would the government draw the line between what is “neutral” and “religious”? Would the decision be based entirely on the product, or would it be based

136. See AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 12, at vii–viii.

137. *Mitchell v. Helms*, 530 U.S. 793, 810 (2000).

138. *Tilton v. Richardson*, 403 U.S. 672, 679–80 (1971).

139. See *id.*

on the religion using the product? For example, consider the case of small rugs. In a Christian church, the rugs could be argued as seemingly neutral and just used for decorative purposes. However, in the context of an Islamic mosque the analysis might be somewhat different; rugs are frequently used in mosques as prayer mats. Would the product that was “neutral” for the Christian church now be “religious” and thus ineligible for funding in the mosque? If so, would that essentially require the government to discriminate based on the specific religion? This argument seems to create more problems than it solves. Additionally, there is no precedent to support the argument that funding to restore is not the same as funding to advance. Ultimately the success of this line of reasoning would be up to the Court’s discretion, but it seems highly unlikely that this argument would be successful.

Finally, if FEMA funding houses of worship was found not to violate the first two prongs, an analysis of the third prong would be warranted. It seems to be the easiest argument that the funding would not violate the third prong. However, this is irrelevant if the funding would violate either of the first two prongs. FEMA funding of houses of worship would not require any additional monitoring or inspection—at that point, the government would already know the money was going towards a religious space, so there would be no need to check in and ensure that the space remained secular in nature. Additionally, if FEMA were providing funds for the entire facility, as opposed to only a prorated portion based on secular use, there would be no issue of blending federal and private money to fund the construction. Ongoing investigations and continued ties seem to be the crux of the Court’s analysis for excessive entanglements,¹⁴⁰ and neither of those circumstances would exist here. One could argue that funding the construction of sanctuaries would create a much more significant version of the “symbolic-link” previously discussed; however, because the Court has disregarded the symbolic-link in the past,¹⁴¹ it seems unlikely that this argument would bear sufficient weight.

In conclusion, it seems highly unlikely that any policy to fund the rebuilding of houses of worship would survive the *Lemon* Test. It would be quite difficult to argue that the funding would advance an entirely secular purpose. However, the most likely point of failure would be with the second prong of the Test. Even the most neutral and modern Supreme Court holding from *Trinity Lutheran* seems to impose limits in the context of state-funded religious spending, and it is unlikely that proponents of the funding would be able to establish that the funds would not advance religion in an impermissible way.

140. *See id.* at 688; *see also* *Aguilar v. Felton*, 473 U.S. 402, 409–11 (1985).

141. *Bowen v. Kendrick*, 487 U.S. 589, 613–14 (1988).

3. *Funding for Rebuilding Community Centers and Other Neutral Spaces*

Though federal funding of houses of worship likely violates the Establishment Clause, this does not mean that all disaster relief funding received by religious organizations would also violate the Establishment Clause. As a result, the concept of federal funding to rebuild other facilities owned by religious organizations warrants consideration. Based on the analysis above and for the purpose of this section, it is assumed that houses of worship have been removed from FEMA's list of eligible services.

PNPs, including faith-based organizations and houses of worship, are eligible to apply for Public Assistance funding to rebuild eligible facilities.¹⁴² Eligible facilities are those that provide a critical service (such as a parochial elementary school or a religiously affiliated hospital) or those that provide a “non-critical, but essential social service” and are open to the general public (such as homeless shelters, senior citizen centers, rehabilitation centers, and libraries).¹⁴³ Based on these classifications, one can infer that FEMA's objective is to provide funding to restore facilities that are critical or essential to a community's ability to thrive—a clearly secular purpose. Additionally, the fact that these policies were originally enacted in a manner that specifically barred from eligibility houses of worship or pervasively sectarian organizations lends significant weight to the conclusion that the policies were not enacted with an intent to advance religion but rather were enacted for an entirely secular purpose.¹⁴⁴ The threshold for the first prong of the Test has likely been met.

Moving to the second prong of the Test, we must determine if funding to rebuild a facility (other than a house of worship) that is owned by a religious congregation or faith-based PNP would advance religion in an impermissible way.¹⁴⁵ Because this federal funding would go towards rebuilding or repairing buildings, the facts are most similar to those in *Tilton*, where the Court considered federal funds being used to construct buildings on college campuses.¹⁴⁶ Funding for facility construction is significantly different than funding for ongoing programs or teacher salaries because once a building is constructed, it will be there forever; whereas with ongoing programs, the government is free to withdraw funding at any time if the programs do not meet certain criteria. However, despite this difference, the Court in *Tilton* upheld the HEFA because the statute required grant recipients to provide assurance that the facilities would not be “used for sectarian instruction or as a place for religious worship”

142. AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 12, at 10–14.

143. *Id.* at 11.

144. Compare 2017 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 7, at 14, with 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 10, at 14.

145. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

146. See *Tilton v. Richardson*, 403 U.S. 672, 675 (1971).

for at least twenty years after construction.¹⁴⁷ The Court was further satisfied with the mechanism of enforcement, because if the building was used in an impermissible way during that period, the government would be entitled to a prorated reimbursement.¹⁴⁸ We must determine if funding provided through FEMA could meet a similar threshold.

Unlike the HEFA, the revised FEMA Policy Guide does not have any express prohibition on religious instruction or worship.¹⁴⁹ Instead, the Guide limits eligibility for funding by requiring facilities to have a “primary use” of providing one of the eligible services identified within the Guide.¹⁵⁰ The list of eligible services does not exclude activities or programs with a religious affiliation;¹⁵¹ instead, it focuses on the impact or purpose of the eligible services. For example, the Guide expressly lists homeless shelters and food assistance programs as eligible services but makes no mention about whether or not the services come from a secular or religious organization.

Because FEMA’s policy guide places emphasis on the programs/services, and not the affiliations of organizations, the precedent from *Bowen* becomes relevant.¹⁵² In *Bowen*, the Court emphasized the neutral nature of the programs and services being provided (such as pregnancy testing, counseling, and educational programs) and recognized their significance in achieving a large-scale public goal, regardless of the organizations’ religious affiliation.¹⁵³ This reasoning is similar to the situation at hand, where FEMA’s objective is clearly to ensure that essential and facially neutral services (such as food assistance, drug/alcohol counseling, and sheltering the homeless) continue to be provided in the future. In the case of facilities owned by a religiously affiliated PNP, which are used solely for one or more of the eligible services, the inquiry into prong two likely stops here. As explained in *Bowen*, the funding stands to advance the facially neutral services and public objective, not the religion of the organization.¹⁵⁴ Thus, the aid program likely would not advance religion in an impermissible way.

However, further analysis is required in the situation of mixed-use facilities. As explained in Part III, “primary use” does not mean the space cannot be used for any purposes other than the eligible services. Rather, 50% or more of the physical space or 50% or more of the operating time

147. *Id.*

148. *Id.*

149. *See* AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 12, at 13–14.

150. *Id.* at 13–15.

151. *Compare* 2017 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 7, at 14, *with* AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 12, at 13.

152. *See Bowen v. Kendrick*, 487 U.S. 589 (1988).

153. *See id.* at 613.

154. *See id.* at 615.

for the facility must be dedicated to eligible services.¹⁵⁵ Thus, it is possible that a building could be used for sectarian instruction or worship in a minimal way and still qualify for FEMA funding. This possibility differentiates FEMA's policies from the HEFA, because there is a chance that some FEMA funded facilities could be used for dual purposes, including religious worship or instruction, whereas the HEFA expressly barred any conduct relating to religious advancement.¹⁵⁶ The chance of multi-use facilities is less likely in situations involving religiously affiliated organizations that exist solely to provide one or more services. However, multi-use spaces are entirely possible and common in pervasively sectarian organizations. Many religious congregations own multi-purpose community centers that are commonly used to benefit the congregation and the community as a whole. For example, a synagogue might have a community center that offers Hebrew classes, Alcoholics Anonymous meetings, youth meetings, and art classes.

FEMA seems to have accounted for the risk of mixed-use facilities in their Policy Guide. The explanation of eligible facilities expressly states that any facility with an eligible "primary use" that is also used for ineligible purposes is only eligible for funding in the proportion of the building's eligible use.¹⁵⁷ Thus, if 75% of a building's use was dedicated to eligible services but 25% was dedicated to Sunday school or other religious instruction, FEMA would prorate the funding based on the applicable percentages and only provide sufficient funding to rebuild 75% of the building. The applicant would then be required to provide the remaining balance of the funding and restore the entire facility.¹⁵⁸

These restrictions would ostensibly ensure that federal funding will only go towards rebuilding "space" that is entirely secular in nature and used for eligible services. Even though this "space" might be in the same building that hosts activities such as religious instruction or worship, the federal government would not have funded that portion of the building. The fact that FEMA requires the facility owner to front the portion of funding not being provided by FEMA to ensure the entire building is completed prevents the organization from taking FEMA's money and using it for purposes other than its original intent.¹⁵⁹ Regardless of how the money gets mixed up in the pot, or even if it all goes to the same contractor, FEMA has implemented a mechanism that ensures the federal government is providing only enough funds to rebuild the secular purpose of the facility. This mechanism, like the mechanisms in *Bowen* and *Tilton*, is likely sufficient to ensure that federal funding is not used to advance religion in an impermissible way.

155. See AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 12, at 16.

156. See *Tilton v. Richardson*, 403 U.S. 672, 675 (1971).

157. AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 12, at 1.

158. *Id.*

159. See *id.*

One argument in opposition of this conclusion would be that none of the established precedent involves mixing federal and private funds to build a multi-use facility. One could argue this is a clear example of creating a “symbolic-link” between the religious organization and the government. However, the Court ruled in *Bowen* that the perception of a symbolic-link is not sufficient grounds to invalidate a program under the second prong.¹⁶⁰ Furthermore, the Court allowed the parochial preschool to receive funding for a new playground surface in *Trinity Lutheran*, even though the school was ultimately responsible for the remainder of the playground.¹⁶¹ Granted, the playground in *Trinity Lutheran* was already built and only the surface was being updated, so the funds wouldn’t *technically* mix, but the case does establish precedent for facilities built by a combination of state and private funds.¹⁶²

Assuming that houses of worship are removed from the list of eligible services, it would seem that FEMA’s policies establish a sufficient system for ensuring states do not directly contribute to portions of buildings that will be used for ineligible services, and possibly religious instruction.¹⁶³ Thus, FEMA has likely created enough safeguards to prevent a violation of the second prong of the *Lemon* Test. The issue of multi-use facilities receiving funding would definitely be a contested point if this policy was challenged in court. However, the Supreme Court’s tone in *Trinity Lutheran* seems to indicate that the Court prioritizes inclusion over strict separation.¹⁶⁴

Assuming that this revised program would pass the second prong, the next step in the analysis is looking at the third prong—excessive government entanglement. In this situation, the clearest argument for government entanglement would be the mixing of funds to complete one building, as discussed above. One could argue that combining federal and private funds to construct or repair one building necessarily creates a government entanglement. However, the precedent does not seem to support this. Though there is no spot-on precedent representing combined funds to build facilities, there are similar cases that are sufficiently analogous for their holdings to bear weight on this issue. As discussed above, in *Trinity Lutheran* the playground’s new surface would be paid for with government funding, even though the playground itself had already been built using the church’s money.¹⁶⁵ Furthermore, the aid program that was upheld in *Agostini* would ultimately result in students receiving educations that were funded by a combination of State and private funds.¹⁶⁶ The Court saw no issue with entanglement under these circumstances,

160. *Bowen v. Kendrick*, 487 U.S. 589, 613–14 (1988).

161. *See Trinity Lutheran Church of Columbia v. Cromer*, 137 S. Ct. 2012, 2024–25 (2017).

162. *See id.*

163. *See AMENDED 2018 PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE*, *supra* note 12, at 16.

164. *See* 137 S. Ct. at 2024–25.

165. *See id.*

166. *See Agostini v. Felton*, 521 U.S. 203, 209–14 (1997).

which gives us some insight into how a court would rule in regards to FEMA's policies.

Moreover, even though FEMA's Policy Guide would require FEMA representatives to investigate the building's former uses and future uses, these minimal inspections would not rise to the level of excessive entanglement.¹⁶⁷ This level of governmental involvement would be even less significant than that required in *Bowen*, which the Court ultimately held was permissible.¹⁶⁸ Thus, because the investigation into building use would require minimal contact and ongoing inspections, and because there is no precedent directly prohibiting a shared source of funding, this policy likely will not violate the third prong. Based on this analysis, it seems likely that this portion of FEMA's policy will survive a challenge under the *Lemon* Test. However, it will be a significantly harder argument to win as opposed to the reimbursement plan discussed above. Should the balance of the Court change, or if precedent begins to digress back towards strict separation, the outcome of this analysis could easily reverse.

C. SHOULD FEMA BE RE-BUILDING CHURCHES? DO POLICY ARGUMENTS IN FAVOR OF FUNDING CHURCHES OUTWEIGH ANY ESTABLISHMENT CLAUSE CONCERNS?

Despite the previous arguments, many proponents of funding the restoration of houses of worship argue that sound policy reasons outweigh any concerns raised under the Establishment Clause. Truthfully, these policy arguments are quite compelling. However, they are ultimately flawed arguments. The Constitution stands on its own and is not subject to limitations based on policy or what feels right. Because these arguments were at the core of the lawsuits against FEMA, their significance deserves discussion in this Comment.

Some argue that it is not strategic—and is borderline unethical—for the government to deny funding to the religious organizations they so heavily rely on in the wake of disaster. For example, in the aftermath of Hurricanes Rita, Ike, and Harvey, FEMA relied on Hi-Way Tabernacle, a church in Houston, to provide shelter, food, and medical care to many evacuees.¹⁶⁹ However, when that same church applied for funding from FEMA to help repair damage caused by three feet of Harvey flooding, the group was denied based on their religious primary function.¹⁷⁰ From a strategic standpoint, some argue this is unwise—if these churches are unable to recover, they will not be able to step in and help in future disasters. Others call on a sense of duty and fairness, and argue that FEMA

167. Cf. *Tilton v. Richardson*, 403 U.S. 672, 688 (1971).

168. See *Bowen v. Kendrick*, 487 U.S. 589, 617–18 (1988).

169. *Texas Churches Damaged by Harvey Sue FEMA*, BECKET (Sept. 5, 2017), <https://www.becketlaw.org/media/texas-churches-damaged-harvey-sue-fema-exclusion-disaster-relief-programs/>.

170. *Id.*

needs to be able to “help[] the helpers, [and] not continue a policy of irrational discrimination against churches.”¹⁷¹ Some might point to the potential consequences of churches being denied funding and argue that, unlike *Trinity Lutheran* where the “consequence [was], in all likelihood, a few extra scraped knees,”¹⁷² a failure to rebuild churches could have a detrimental impact on community services, involvement, and morality.

Others point to finances when making a policy argument in favor of financially assisting churches. The federal government requires state recipients of FEMA funding to “match” a portion of the federal funding, however, they are able to credit the value of volunteer manpower towards that contribution.¹⁷³ Volunteer hours are valued at \$25 per hour; thus, for every volunteer involved in clearing debris, rescuing evacuees, or caring for them in shelters, the state saves money that can then be used to further benefit citizens. These volunteer hours save the state a significant amount of money. For example, only weeks after Hurricane Harvey made landfall, Samaritan’s Purse volunteers had already volunteered more than 27,000 hours, which credited over \$675,000 towards Texas’ required contribution.¹⁷⁴ In some ways it seems illogical that the States can benefit financially from religious organizations, but those religious organizations are ineligible for a financial benefit in return.

These arguments pull on the heartstrings, and honestly make a lot of sense. To a person of faith, like myself, it is easy to question the legitimacy of these policy concerns and forget about the Constitution. However, as Aristotle wisely said, “law is reason without desire,” and this is the truth that we must remember when balancing policy concerns against the constitutional protections of the Establishment Clause.¹⁷⁵ Even though the arguments seem logical and valid, that alone is not enough to overcome fundamental constitutional law. These policy considerations certainly lend weight to the argument in favor of funding neutral spaces owned by religious organizations; however, strong policy concerns are not enough to justify the use of federal funds to construct or repair houses of worship.

V. CONCLUSION

In the days that are to come proponents of strict separation will likely challenge the revised FEMA policy and fight to deny the eligibility of religiously affiliated organizations and houses of worship to receive funding altogether. Meanwhile, advocates of faith-based organizations will likely fight to preserve the policy that allows funds for rebuilding sanctuaries and houses of worship. These two distinct groups are each pulling

171. *Id.*

172. *Trinity Lutheran Church of Colombia v. Cromer*, 137 S. Ct. 2012, 2024–25 (2017).

173. Singer, *supra* note 5.

174. *Id.*

175. ARISTOTLE, *POLITICS* bk. III, at 1287a.32 (C.D.C. Reeve trans., Hackett Publishing Co. 1998) (c. 350 B.C.E.).

for polar opposite results, and ultimately, the court system should deny both requests. Precedent suggests that under both the *Lemon* Test and the holding in *Trinity Lutheran*, a revised FEMA policy affording religious organizations necessary opportunities for reimbursements and funding neutral spaces while drawing sufficiently distinct lines to ensure the separation of church and state is the ideal solution. This result is the middle ground between the two sides of the argument and accurately reflects the Supreme Court's current shift from a call for strict separation to a stance of modern neutrality.

No matter the result of this debate, one thing is certain—when the next disaster strikes, religious congregations and organizations will be right there working alongside FEMA. This historic collaboration is something to be proud of, and regardless of personal religious beliefs, progress towards ensuring religious nonprofits are ready and able to step in and help during the next disaster is something we should all be striving for. In the wake of disaster, they truly are a saving grace.