No. 23-30085

In the United States Court of Appeals for the Fifth Circuit

HOLY CROSS COLLEGE, INCORPORATED, *doing business as* HOLY CROSS SCHOOL,

Plaintiff–Appellant,

v.

DEANNE CRISWELL, *in her capacity as Administrator of the Federal Emergency Management Agency*; FEDERAL EMERGENCY MANAGEMENT AGENCY,

Defendants–Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CV-1658
Hon. Eldon E. Fallon

BRIEF OF *AMICUS CURIAE* THE STATE OF LOUISIANA IN SUPPORT OF PLAINTIFF–APPELLANT AND REVERSAL

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The State of Louisiana is a governmental party that need not furnish a certificate of interested persons under the fourth sentence of Fifth Circuit Rule 28.2.1.

/s/ *Elizabeth B. Murrill*
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INTEREST OF *AMICUS CURIAE*[1]

The State of Louisiana has cultural, institutional, and pecuniary interests at stake in this APA challenge to FEMA's delayed decision to clawback nearly $5 million in disaster-relief funding allocated over a decade ago to Holy Cross—a 174-year-old Catholic boys' school—so that Holy Cross could rebuild a campus that Hurricane Katrina destroyed.

First, Louisiana has an interest in protecting historic academic institutions important to Louisiana and its people from inefficient and incompetent federal bureaucracy. Second, Louisiana has an interest in ensuring that Louisiana's ongoing recovery from Hurricane Katrina is not stymied by FEMA's arbitrary attempts to clawback decade-old funding from those who desperately needed it to rebuild. Third, Louisiana has a direct pecuniary interest, as it is the State that must ultimately return to FEMA any grant funds FEMA deobligates here.

[1] Under the first sentence of Federal Rule of Appellate Procedure 29(a)(2), the State of Louisiana "may file an amicus brief without the consent of the parties or leave of court."

SUMMARY OF ARGUMENT

The decision below allowed FEMA to clawback nearly $5 million in Stafford Act disaster-relief funding initially allocated to Holy Cross—a 174 year-old Catholic boys' school in New Orleans—over a decade ago. "[I]n a triumph of bureaucratic obfuscation," FEMA calls clawbacks like the one at issue here "deobligation." *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 982 (7th Cir. 2011) (Posner, J.).

Louisiana opposes FEMA's delayed decision to deobligate funds that Holy Cross used to reconstruct a campus destroyed by Hurricane Katrina. And Louisiana urges reversal. That's for at least three reasons.

First, FEMA's delayed decision to deobligate nearly $5 million from Holy Cross places the State's coffers at risk. Federal regulations require the State ultimately to return to FEMA whatever Stafford Act funds FEMA deobligates from subrecipients like Holy Cross. Allowing FEMA's deobligation to stand risks emboldening FEMA to continue to deobligate—a decade or more after the fact—millions in Stafford Act funding disbursed to nonprofit subrecipients like Holy Cross.

Second, FEMA's deobligation is arbitrary and capricious in violation of the APA. Among other things, FEMA failed to reasonably

consider Holy Cross's legitimate, decade-old reliance interests before seeking to deobligate almost $5 million in disaster-relief funding.

Third, the district court mangled arbitrary-and-capricious review in a manner that could have serious consequences if not corrected. Indeed, a reader of the district court's order and reasons could be forgiven for forgetting that *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1909 (2020), ever issued. For the district court makes no mention of *Regents* or the "serious bite" that APA review entails post-*Regents*. *See Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021). Instead, the district court applied the sort of all-deference-all-the-time approach this Court jettisoned long ago. Its deeply flawed decision ought not stand.

ARGUMENT

I. HURRICANE KATRINA AND FEMA'S "INCOMPREHENSIBLE RED TAPE."

In August 2005, Hurricane Katrina struck Louisiana with deadly force, killing thousands across the State. David Roth, *Louisiana Hurricane History*, National Weather Service, 54 (2010), http://www.wpc.ncep.noaa.gov/research/lahur.pdf. Because of "fatal engineering flaws" in the United States Corps of Army Engineers' system supposedly protecting the City, New Orleans was particularly devastated. Campbell Robertson and John Schwartz, *Decade After Katrina, Pointing Finger More Firmly at Army Corps*, N.Y. Times (May 23, 2015), https://www.nytimes.com/2015/05/24/us/decade-after-katrina-pointing-finger-more-firmly-at-army-corps.html. As the Corps' chief engineer later admitted, this federal flood protection system proved to be "a system in name only," and its failure inflicted "catastrophic damage and untold casualties" upon New Orleans. *Id.*; Roth, *supra*, at 54.

Katrina's impact on the region was "staggering[.]" Richard D. Knabb, Jamie R. Rhome, & Daniel P. Brown, Tropical Cyclone Report: Hurricane Katrina, 12 (2023), https://www.nhc.noaa.gov/data/tcr/AL122005_Katrina.pdf. "Thousands

of homes and businesses throughout entire neighborhoods in the New Orleans metropolitan area were destroyed by the flood." *Id.* The Lower Ninth Ward, where Holy Cross College was located, "bore some of the worst scars[.]" Oliver Laughland, '*Like a monster tried to get in': New Orleans, scarred by Katrina, surveys Ida's wreckage*, The Guardian (Aug. 31, 2021), https://www.theguardian.com/us-news/2021/aug/30/hurricane-ida-new-orleans-damage-katrina. Katrina "submerged the Lower Ninth in a story of water, sweeping away lives and livelihoods." *Id.*

New Orleans' misery was compounded by FEMA's failure to designate much of the area a flood zone, "so homeowners were not advised of their predicament, and they did not have flood insurance" when Katrina struck. *Hurricane Katrina Aftermath*, Encyclopaedia Britannica (2023), https://www.britannica.com/event/Hurricane-Katrina/Aftermath. And after Katrina hit, FEMA "failed to deliver urgently needed help and, through incomprehensible red tape, even thwarted others' efforts to help." Scott Shane, Eric Lipton, & Christopher Drew, *After Failures, Government Officials Play Blame Game*, N.Y. Times (Aug. 5, 2005), https://www.nytimes.com/2005/09/05/us/nationalspecial/after-failures-government-officials-play-blame-game.html.

For instance, "[w]hen Wal-Mart sent three trailer trucks loaded with water, FEMA officials turned them away[.]" *Id.* Other "[w]ater trucks languished for days at FEMA's staging area because the drivers lacked the proper paperwork." *Leadership vacuum stymied aid offers*, CNN.com (Sept. 16, 2005, 1:19 PM), http://www.cnn.com/2005/US/09/15/katrina.response/. And FEMA tasked doctors who had come to help those in desperate need of medical attention with mopping floors, as it was "worried about legal liability." *Id.*

At the same time it turned away supplies and expertise from volunteers eager to help, FEMA squandered the resources available to it. For example, FEMA delayed the deployment of emergency personnel so they could complete human resources seminars: "[w]arehouses in New Orleans burned while firefighters were diverted to Atlanta for [FEMA] training sessions on community relations and sexual harassment." *Id.* And FEMA spent more than $100 million on ice meant for hospitals and food storage in New Orleans and other impacted areas, only to send the truckdrivers hired to deliver it on weeks-long "circuitous routes" across the country. Scott Shane & Eric Lipton, *Stumbling Storm-Aid Effort Put*

Tons of Ice on Tips to Nowhere, N.Y. Times, (Oct. 2, 2005), https://www.nytimes.com/2005/10/02/us/nationalspecial/stumbling-stormaid-effort-put-tons-of-ice-on-trips-to.html.

Ultimately, a mere 41 percent of this ice reached the victims it was supposed to aid. *Id.* Astonished that most of this ice somehow ended up at storage facilities thousands of miles from the Gulf Coast, Senator Susan Collins noted that "American taxpayers, and especially the Katrina victims, cannot endure this kind of wasteful spending." *Id.* After paying $12.5 million more to store this well-traveled ice for two years, FEMA disposed of it in 2007 "because [FEMA] couldn't determine whether it was still safe for human consumption." *FEMA To Melt Ice Stored Since Katrina*, CBS News (July 15, 2007, 11:27 AM), https://www.cbsnews.com/news/fema-to-melt-ice-stored-since-katrina/.

Devastated by Katrina—as well as FEMA's and other governmental entities' bumbling response to it—New Orleans' road to recovery has been long and arduous. The City's population "fell by 29 percent since between the fall of 2005 and 2011." *Hurricane Katrina Aftermath*, *supra*. As of 2020, its population was still 20 percent lower than its pre-Katrina level. *Id.* Because FEMA had failed to designate

much of New Orleans as a flood zone, many homeowners and institutions did not have flood insurance. *Id.* So, those who remained in or returned to New Orleans have relied on grants like the one at issue here to reconstruct their buildings and their lives.

Sadly, eighteen years after Katrina, FEMA's "incomprehensible red tape" continues to hinder the City's recovery. Shane, Lipton, & Drew, *supra*. FEMA now seeks to take back funds it provided to rebuild New Orleans, without a thought to individuals' and institutions' reliance on FEMA's initial authorization of their rebuilding plans and decade-long tacit approval of the completed reconstruction. In other words, just as New Orleans and institutions like Holy Cross struggle back to their feet, FEMA has returned to pull the rug out from under them. This "tragicomic" tale—which began with the federal government's feckless flood protection system's failure, and featured FEMA's incomprehensible and deleterious red tape and "wasteful spending" like its $100 million ice misadventure—now continues with FEMA's late-in-the-day, fine-toothed-comb inquiry into recovery expenditures it approved years ago. Shane and Lipton, *supra*. It calls to mind President Reagan's remark that "the nine most terrifying words in the English language are 'I'm from the

government and I'm here to help.'" *Tucker v. Gaddis*, 40 F.4th 289, 295 (5th Cir. 2022) (Elrod, J., concurring).

II. THE STATE IS ON THE HOOK FOR FUNDS FEMA DEOBLIGATES.

As Holy Cross explains in its briefing, under the terms of the August 2005 FEMA–State agreement here—which FEMA required the State to sign before any such relief could flow into Louisiana—it is the State that must ultimately return to FEMA whatever Stafford Act grant funds FEMA deobligates from grant subrecipients like Holy Cross. 44 C.F.R. § 206.44. Notwithstanding FEMA's involvement throughout the rebuilding process—including its initial approval of project plans—FEMA assigns to the State the task of collecting from subrecipients grant funds FEMA later decides it would like to have back. And, if institutions like Holy Cross lack the funds FEMA demands, the State and its taxpayers must foot the bill. So, by its late-in-the-day deobligations on buildings constructed years ago, FEMA inflicts further financial hardship upon the victims of Katrina it's supposed to be serving.[2]

[2] And FEMA does so here at the same time it dramatically increases the cost of often mandatory flood insurance across Louisiana—by a shocking 1000% in some areas. *See, e.g.*, Marie Fazio & Stephanie Riegel, *Flood insurance rates are soaring in the New Orleans area*, Times-Picayune/New Orleans Advocate (May 21, 2023), https://www.nola.com/news/jefferson_parish/new-orleans-area-homeowners-brace-for-flood-insurance-hikes/article_742de80e-f591-11ed-84b5-3bfd38ec4539.html.

III. FEMA Arbitrarily and Capriciously Deobligated Over $4.8 Million in Disaster-Relief Funding to Holy Cross—A 174-Year-Old Catholic Boys' School—Over a Decade After FEMA Initially Approved Holy Cross's Request for Funding to Replace Campus Buildings Hurricane Katrina Destroyed.

Over a decade after the fact, FEMA wants to "deobligate" nearly $5 million in disaster-relief funds that Holy Cross used to rebuild a campus that Hurricane Katrina destroyed. That delayed decision to deobligate threatens to shutter the 174-year-old Catholic boys' school. But the deobligation is more than just a moral tragedy. It also violates the APA.

The APA directs courts to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). This "arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The Court "must ensure that 'the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.'" *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021) (quoting *Prometheus Radio Project*, 141 S. Ct. at 1158)).

"Put simply, [the Court] must set aside any action premised on reasoning that fails to account for relevant factors or evinces a clear error of judgment." *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021); *see Michigan v. EPA*, 576 U.S. 743, 750 (2015) ("[A]gency action is lawful only if it rests on a consideration of the relevant factors" and "important aspect[s] of the problem.").

Arbitrary-and-capricious review "is 'searching and careful.'" *Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d at 475 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). In undertaking that searching review here, the Court "only consider[s] the reasoning 'articulated by the agency itself.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). "*Post hoc* rationalizations offered by the Government's counsel are irrelevant." *Id.*

A. FEMA Failed to Reasonably Consider that Holy Cross Itself Paid for Any Supposed Expansion of Its Campus.

FEMA's decision to deobligate nearly $5 million from Holy Cross is arbitrary and capricious because FEMA failed to reasonably consider that Holy Cross itself paid for the so-called "improvements" to its campus.

FEMA based its multimillion dollar deobligation in large part on its belief that Holy Cross used FEMA funds to "improve" the campus that

replaced the one Hurricane Katrina destroyed. *See, e.g.*, ECF No. 1-15 at 6 (claiming Holy Cross "constructed a larger facility and greater mechanical, electrical, and plumbing capabilities"); *id.* at 11 (claiming Holy Cross "performed work beyond what was eligible when replacing the Facilities"); *id.* (claiming Holy Cross's "modifications resulted in changes that enhanced and/or expanded equipment and systems").

But Holy Cross told FEMA—repeatedly—that Holy Cross itself paid for the supposed "improvements." *See, e.g.*, ECF No. 1-16 at 4 ("Holy Cross obtained nearly $30 million in additional funds via tax credits, donations[,] and loans to pay for all 'additional' amenities at its new campus."); *id.* at 5 ("those funds came from tax credits, loans and donations raised by Holy Cross to pay for items not covered by FEMA funds"); *id.* at 6 ("FEMA ignores the nearly $30 million that Holy Cross has expended to complete the campus."); ECF No. 1-12 ("Holy Cross pooled its financial resources . . . . These private funds were added to the FEMA Public Assistance funds to help cover the total costs . . . .").

The APA required FEMA to—at the very least—"reasonably consider" Holy Cross's repeated assertions that nearly $30 million of

private funding explains the supposed "improvements" to Holy Cross's new campus. *See Wages & White Lion Invs.,* 16 F.4th at 1136.

But FEMA failed even to consider that "relevant factor[]." *Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d at 475. FEMA made no mention of the nearly $30 million in private funding in the first appeal. ECF No. 1-15 at 1–15. Nor did it mention this "important aspect of the problem," *Michigan*, 576 U.S. at 750, in the second. ECF No. 1-18 at 1–6.

FEMA's failure even to acknowledge Holy Cross's explanation for the "improvements" makes its deobligation arbitrary and capricious. And no "*post-hoc* rationalizations offered by the government's counsel" can change that. *Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d at 475.

B. FEMA Failed to Reasonably Consider the Effect of Hurricane Katrina on Holy Cross's Ability to Comply with Procurement Regulations.

FEMA's delayed decision to deobligate nearly $5 million in disaster-relief funding was arbitrary and capricious for the independent reason that FEMA failed to reasonably consider the effect of Hurricane Katrina on Holy Cross's ability to comply with procurement regulations.

FEMA based its multimillion-dollar deobligation in part on Holy Cross's supposed violation of contract-procurement regulations. FEMA

cited those supposed violations to justify the deobligation in both of Holy Cross's appeals. *See, e.g.*, ECF No. 1-15 at 2 (first appeal) (claiming Holy Cross "did not follow federal procurement regulations"); *id.* at 11 (first appeal) (claiming Holy Cross's "contracts related to the facilities did not contain the proper procurement requirements"); ECF No. 1-18 at 2 (second appeal) (claiming Holy Cross "did not follow procurement standards . . . ."); *id.* at 7 (second appeal) (claiming Holy Cross did not adequately "demonstrate [that] it followed procurement standards").

But Holy Cross explained that it could not reasonably have been expected to comply with those procurement regulations given the "exigent circumstances" created by Hurricane Katrina—the costliest natural disaster in the history of the United States. *See, e.g.*, ECF No. 1-12 at 4–5 (first appeal); ECF No. 1-16 at 9–12 (second appeal). Indeed, Holy Cross even directed FEMA to the connection that the Department of Homeland Security Office of Inspector General ("OIG") itself established between (a) the point at which OIG believed that "exigent circumstances no longer existed" and (b) the point at which OIG believed that Holy Cross had to "procure[] competitive bids according to Federal

regulations." ECF No. 1-12 at 21 (OIG Report); *see* ECF No. 1-12 at 5 (first appeal); ECF No. 1-16 at 10 (second appeal).

FEMA, however, failed to reasonably consider Holy Cross's power to comply with contract-procurement regulations in the wake of Hurricane Katrina. It failed to do so in Holy Cross's first appeal. ECF No. 1-15 at 1–15. And it failed to do so in Holy Cross's second. ECF No. 1-18 at 1–8. Across both appeals, the words "Hurricane Katrina" appear a grand total of *two times*—in the first sentence of the "Background" section. ECF No. 1-15 at 4; ECF No. 1-18 at 3. FEMA's failure to reasonably consider this "relevant consideration" makes its deobligation arbitrary and capricious. *See Wages & White Lion Invs.*, 16 F.4th at 1138.

For their part, both FEMA and the district court tried to justify FEMA's arbitrary and capricious failure even to consider this "important aspect of the problem" on the ground that Holy Cross's supposed non-compliance with procurement regulations wasn't the sole basis for the nearly $5 million deobligation. ECF No. 54-3 at 17; ECF No. 65 at 10–11.

That argument does not follow. Neither FEMA nor the district court cited any authority for the proposition that an agency's failure to reasonably consider a relevant factor reflects reasoned decisionmaking

so long as that factor is not the sole driver of the agency's decision. Because there is no such authority. *See, e.g.*, *Wages & White Lion*, 16 F.4th at 1137 (agency's failure to reasonably consider one factor "alone [likely] render[ed] [the agency's] decision arbitrary and capricious").

And the district court's analysis of this issue was doubly confused. It believed the decision to deobligate was "not based on any violation of contract procurement requirements." ECF No. 65 at 11. That is wrong. In both of Holy Cross's appeals, FEMA invoked Holy Cross's supposed failure to "follow[] procurement standards for construction contracts" to justify FEMA's use of "RS means to estimate reasonable costs."[3] ECF No. 1-18 at 7; ECF No. 1-15 at 10–11. FEMA in turn used its RS means estimation to reduce the amount of Holy Cross's "eligible reasonable costs" and so drive up the total amount deobligated from the 174-year-old catholic boys' school. ECF No. 1-18 at 7; ECF No. 1-15 at 10–11.

C. FEMA Failed to Reasonably Consider Holy Cross's Legitimate, Decade-Old Reliance Interests.

FEMA failed to reasonably consider Holy Cross's legitimate, decade-old reliance interests before seeking to deobligate almost $5

[3] "RS Means" is the software EMA uses to calculate costs.

million in disaster-relief funding. "[A]gencies must give notice of conduct the agency prohibits or requires and cannot surprise a party by penalizing it for good-faith reliance on the agency's prior positions." *R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 189 (5th Cir. 2023). So, "[a]t a bare minimum, when an agency changes its existing position, it must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Id.* (cleaned up).

FEMA "inexplicably switched its position" on the calculation of the reasonableness of Holy Cross's costs. *Id.* at 191. Take the "Central Services Building" for example. Back in 2009, FEMA conditionally approved Holy Cross's plans for rebuilding the "Central Services Building" as "eligible for the Federal share of the actual, reasonable costs associated with the eligible scope of work." ECF No. 1-16 at 62–63. FEMA estimated over $5.5 million as the "eligible cost of construction." *Id.* at 62. But over a decade later, long after construction was completed, FEMA changed its mind: FEMA deemed "eligible" less than $1 million of funding for the building's shell—a nearly 75% reduction in "eligible cost of construction" for the building.

FEMA omitted any reasonable explanation for the massive deviation from the estimated eligible cost of construction. "This omission is more inexcusable since [Holy Cross] ha[s] consistently asserted [its] reliance interests in the context of this litigation." *Texas v. United States*, 40 F.4th 205, 228 (5th Cir. 2022), *cert. granted*, 2022 WL 2841804. And the "unexplained inconsistency" between the eligible-cost figures before and after construction is "the hallmark of an arbitrary and capricious change." *Data Mktg. P'ship, LP v. United States Dep't of Lab.*, 45 F.4th 846, 857 (5th Cir. 2022). If FEMA aimed to clawback nearly $5 million in disaster-relief funding from Holy Cross over a decade after the fact, FEMA was "duty-bound to provide further justification." *BNSF Ry. Co. v. Fed. R.R. Admin*, 62 F.4th 905, 911 (5th Cir. 2023). It failed to do so.

In deobligating nearly $5 million of disaster-relief funding from Holy Cross, FEMA "brushed over its prior statements" approving Holy Cross's plans. *R.J. Reynolds Vapor Co.*, 65 F.4th at 192. FEMA's "disregard for principles of fair notice and consideration of reliance interests" makes its deobligation arbitrary and capricious. *Id.* at 191.

IV. AT A MINIMUM, THE COURT SHOULD VACATE AND REMAND FOR THE DISTRICT COURT TO CONDUCT THE SEARCHING AND CAREFUL REVIEW THIS COURT'S POST-*REGENTS* PRECEDENT REQUIRES.

The Court should reverse and hold FEMA's deobligation arbitrary and capricious. If the Court is not prepared to reverse on this record, however, the Court should vacate and remand. That's because the district court employed a toothless form of arbitrary-and-capricious review that is irreconcilable with the Court's post-*Regents* precedent. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1909.

A. APA Review is "Not Toothless"; It has "Serious Bite."

APA review is "not toothless." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019). "In fact, it's well-established that 'after *Regents*, it has serious bite.'" *Data Mkt'g P'ship*, 45 F.4th at 856 (quoting *Wages & White Lion Invs.*, 16 F.4th at 1136).

This Court, for its part, has routinely applied the "searching and careful" review *Regents* requires. *Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d at 475 (quotation omitted); *see id.* at 475–81; *see also Wages & White Lion Invs.*, 16 F.4th at 1136–44; *Texas*, 40 F.4th at 227–30; *R.J. Reynolds Vapor Co.*, 65 F.4th at 189–94. In applying that rigorous post-*Regents* review, the Court has been clear: courts should vacate agency action that does not reflect reasonable consideration and explanation of

the relevant issues. *See, e.g.*, *Data Mktg. P'ship*, 45 F.4th at 855–60 (affirming vacatur of agency action because the agency "ignored" "key factors" and relied on "impermissible *post hoc* rationalizations").

B. The District Court's Toothless APA Review Cannot Be Squared with this Court's Post-*Regents* Precedent.

The district court did not apply the "searching and careful" review this Court's post-*Regents* precedent requires. *Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d at 475. The district court instead deployed the sort of maximally deferential mode of APA review that long ago lost favor.

Start with what the district court *said*. It held FEMA's deobligation passed muster for two apparent reasons.

First, the district court said "the administrative record shows that FEMA performed a detailed analysis to determine if [Holy Cross's] claimed costs were reasonable and allowable." ECF No. 65 at 9. But the question is not whether FEMA performed a "detailed analysis"; it is whether FEMA's nearly $5 million deobligation reflects reasonable consideration and reasonable explanation of all relevant factors—including Holy Cross's decade-old, legitimate reliance interests. It does not. And the district court failed to explain—specifically—how it does.

Second, the district court said FEMA's deobligation "reduced the de-obligation amount to less than 6% of the amount identified in the DHS-OIG report." ECF No. 65 at 9. But that does not make FEMA's deobligation the product of reasoned decisionmaking. FEMA's deobligation is either arbitrary or capricious or not: that FEMA's ultimate deobligation is less costly than OIG's recommended deobligation says nothing about whether FEMA's nearly $5 million deobligation is itself arbitrary and capricious. Were it otherwise, FEMA could always end-run APA review of its otherwise unlawful deobligation decisions by (1) having OIG issue an exorbitant, unsupportable "recommended deobligation" and (2) then deobligating some lesser amount.

Next consider what the district court *cited*. All but one of its cases dates to the 1980s or 90s. ECF No. 65 at 6–7, 9–12.[4] None of its cases post-dates *Regents*. ECF No. 65 at 6–7, 9–12. And none of its cases explicitly acknowledges its obligation to set aside agency action that fails to account for important reliance interests. ECF No. 65 at 67, 9–12.

[4] The lone exception, *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), is cited for the unremarkable—and irrelevant here—proposition that an agency's decision need not be "the best one possible." ECF No. 65 at 12.

Accordingly, if the Court declines to outright reverse on the current record, the Court should at the very least vacate and remand with instructions to conduct the searching review that the Court's post-*Regents* precedent requires. *See, e.g.*, *Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d at 475–81; *Wages & White Lion Invs.*, 16 F.4th at 1136–44; *Texas*, 40 F.4th at 227–30; *R.J. Reynolds Vapor Co.*, 65 F.4th at 189–94.

CONCLUSION

"The Supreme Court has made clear that when it comes to arbitrary-and-capricious review, 'the Government should square corners in dealing with people.'" *Data Mktg. P'ship*, 45 F.4th at 860 (quoting *Regents*, 140 S. Ct. at 1909). FEMA failed to do that here. FEMA failed to reasonably consider and reasonably explain Holy Cross's legitimate, decade-old reliance interests. And in so doing, FEMA has failed the young men of Holy Cross in much the same way that it failed their parents, their grandparents, and the City of New Orleans 17 years ago.

Accordingly, the Court should (1) vacate the district court's judgment, (2) reverse the district court's order and reasons granting FEMA's cross-motion for summary judgment and denying Holy Cross's cross-motion for summary judgment, and (3) remand with instructions to

enter judgment for Holy Cross vacating, declaring unlawful, and setting aside FEMA's arbitrary and capricious deobligation of nearly $5 million in disaster-relief funding from the 174-year-old Catholic boys' school.

Dated: June 6, 2023

Respectfully submitted,

/s/Elizabeth B. Murrill

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CERTIFICATE OF SERVICE

I certify that on June 6, 2023, I caused this brief to be filed with the Clerk of Court using the Court's CM/ECF system, which will automatically send an electronic notice of filing to counsel of record.

/s/ Elizabeth B. Murrill
ELIZABETH B. MURRILL
Solicitor General

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,258 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016 (the same program used to calculate the word count).

/s/ Elizabeth B. Murrill
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