No. 04-1175

In the Supreme Court of the United States

WYOMING SAWMILLS, INC., PETITIONER

v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner has standing to bring an Establishment Clause challenge to the United States Forest Service's decision to manage a national forest area in a manner that protects its archaeological, cultural, and religious significance, because either (i) the Forest Service's plan allegedly makes timber sales in the area less likely, or (ii) a for-profit corporation is offended by the Forest Service's management of the site.

2. Whether the Forest Service's preservation plan violates the Establishment Clause because it treats the religious significance of the site as one of many factors that it considers in its decisionmaking process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 383 F.3d 1241. The opinion of the district court (Pet. App. 24-68) is reported at 179 F. Supp. 2d 1279.

JURISDICTION

The court of appeals entered its judgment on September 20, 2004. A petition for rehearing was denied on December 3, 2004 (Pet. App. 69-70). The petition for a writ of certiorari was filed on March 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Medicine Wheel National Historic Landmark is located within the Bighorn National Forest in north-central Wyoming. Pet. App. 4. The Medicine Wheel is a prehistoric stone structure that consists principally of a circle of

stones, 80-feet in diameter, with a large cairn in the center of the circle and 28 spokes of rocks radiating from the center to the rim. *Ibid.* Archaeological evidence indicates a human presence in the area that spans 7500 years. Numerous tepee rings, trails, and other archaeological features are located in the vicinity of the Medicine Wheel. *Ibid.* The Medicine Wheel and nearby Medicine Mountain have significant historical, cultural, and religious significance to many Native Americans Tribes. *Id.* at 4, 25. In 1957, approximately 200 acres of the Bighorn National Forest were set aside "for the protection and preservation of the archaeological values of the Medicine Wheel and adjacent historic area." 22 Fed. Reg. 4135 (1957); see Pet. App. 4, 25. The Medicine Wheel was designated a National Historic Landmark in April 1969. Pet. App. 4.

A significant increase in the flow of visitors to the area in the 1980s generated concern both for the visitors' safety and for preservation of the area's unique features and artifacts. Pet. App. 4. The Forest Service responded by adopting, in 1996, a Historic Preservation Plan for the Medicine Wheel National Landmark and Medicine Mountain (Preservation Plan). That Preservation Plan was the product of more than a decade of development, study, and consultation between the federal government and state, local, and tribal governmental officials and other interested parties. *Id.* at 6-7.

The purpose of the Preservation Plan is "to establish a process for integrating the preservation and traditional use" of the Medicine Wheel area "with the multiple use mission of the Forest Service, in a manner that gives priority to the protection of the historic properties involved by continuing traditional cultural use." Pet. App. 27. The Preservation Plan provides, among other things, for consultation between the Forest Service and other parties to

the Preservation Plan concerning projects proposed within a designated area surrounding the Medicine Wheel. *Id.* at 27-28. That area consists of approximately 18,000 acres of Forest Service land, roughly equivalent to the Medicine Mountain viewshed. *Id.* at 7. The purpose of consultation is to provide for enhanced public input and to ensure consideration of alternative means of minimizing and mitigating the impact of projects on historic resources and traditional cultural uses. *Id.* at 28.

The Plan documents that only 10% of the land in the area of consultation is suited for timber production, and the area historically has had relatively few timber sales. Pet. C.A. App. 347-348. Nevertheless, the Preservation Plan permits timber harvesting within the consultation area as part of a "vegetative management plan" that "limits logging to what is required for maintaining overall health of the Forest." *Id.* at 349; see also Pet. App. 22. No hauling of logs or other commercial products is permitted on Forest Development Road 12, because that road passes within yards of the Medicine Wheel itself. Pet. C.A. App. 349.

Eight years ago, the Forest Service advertised for bids on a timber sale in an area north of Medicine Mountain referred to as Horse Creek. However, the Forest Service cancelled that sale before opening the bids, pending the consultation required by the Preservation Plan, when it learned that the sale would result in logging trucks traversing a portion of the consultation area. See Pet. App. 8, 30. That consultation process exposed "process violations, conflicting data, and incomplete [National Environmental Policy Act] analysis." *Id.* at 30-31. While the Horse Creek sale has not been re-offered, no final decision to cancel the project has been made. *Id.* at 8.

2. Petitioner, a commercial timber company, filed suit challenging the Preservation Plan on Establishment Clause

grounds.[1] The district court concluded that petitioner lacked standing to bring its Establishment Clause claim. Pet. App. 37-48. The district court first found that petitioner was not injured by its corporate exposure to the effects of the Preservation Plan because mere exposure to allegedly impermissible governmental policies alone is insufficient to confer standing. *Id.* at 42-43. The court further questioned "whether a for profit corporation has the capacity to be offended" by mere exposure to governmental conduct. *Id.* at 43. The court did find, however, that petitioner suffered an economic injury arising from the Preservation Plan because petitioner "could potentially have earned the right to log in Big Horns if it submitted a successful bid." *Id.* at 40. The district court nevertheless held that petitioner lacked standing because its lost bidding opportunity would not be redressed by a ruling striking down the Preservation Plan on Establishment Clause grounds. *Id.* at 47-48. The court reasoned that petitioner has never had a "right to log" in the consultation area, and striking the Preservation Plan would not require reopening of the bidding process, let alone make it likely that petitioner would be awarded a logging contract. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-23. The court first held that, "[a]s an artificial person, [petitioner] has not shown how it experienced the kind of constitutional injury" that might give rise to standing based on exposure to "religious symbolism." The court further held that the federal government's alleged failure to classify and manage federal land "consistently with the Establishment Clause" does not itself amount to an Article III injury. *Id.* at 12. The court accordingly concluded that petitioner suffered

[1] Petitioner also raised a number of statutory objections to the Preservation Plan, see Pet. App. 48-67, but none of those claims are at issue before this Court.

"no * * * cognizable injury separate from the alleged loss of opportunity for profitable logging." *Ibid.* The court then ruled that the loss of that potential opportunity did not constitute the type of injury to a legally protected interest that conferred Article III standing. *Id.* at 16-17. The court noted that petitioner "has not alleged that it was treated differently from any other timber company" that might be interested in bidding on timber in the area. *Id.* at 15. The court further explained that, because the Forest Service "has complete discretion" over whether to offer the land for timber contracts, petitioner has failed to "show[] that a timber lease would 'likely' become available on the lands within the area of consultation if [petitioner] were to have the [Preservation Plan] set aside." *Id.* at 16. Thus, because "the courts do not have the power to grant the only relief that would rectify the alleged injury," *ibid.*, the court concluded that petitioner lacks standing to bring its Establishment Clause challenge to the Preservation Plan.

ARGUMENT

1. The court of appeals' holding that petitioner lacks standing does not merit this Court's review. This Court held in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), that the "irreducible constitutional minimum of standing" requires that the plaintiff (1) "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) show that it is "likely, as opposed to merely speculative, that the injury

will be redressed by a favorable decision." *Id.* at 560-561 (internal quotation marks and citation omitted). Absent the concrete invasion of a legally protected interest, federal courts cannot vindicate "the value interests of concerned bystanders." *Allen* v. *Wright*, 468 U.S. 737, 756 (1984) (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Instead, plaintiffs must make "a factual showing of perceptible harm." *Lujan*, 504 U.S. at 566.

The decision below reflects a straightforward application of *Lujan*. Petitioner, for its part, does not dispute that *Lujan* provides the proper framework for analysis (see Pet. 8 n.1), or that the court relied on *Lujan* in holding that petitioner lacked standing. Petitioner simply disagrees with the court of appeals' application of settled law to the facts of this case. That case-specific and record-bound determination does not merit further review by this Court.

a. The court of appeals correctly held that petitioner's alleged loss of opportunity to bid on a contract for timber sales in the Preservation Plan area does not confer standing. As the court of appeals held (see Pet App. 13-16), petitioner's claimed injury would not be redressed by a judgment invalidating the Preservation Plan on Establishment Clause grounds. With or without the Preservation Plan, the Forest Service is under no obligation to offer timber sales in the area at issue, and petitioner made no showing that sales would be likely in the absence of the Preservation Plan, much less that petitioner would likely be awarded any timber harvesting contract. See *id.* at 16. Indeed, with respect to the proposed Horse Creek sale, the Forest Service identified a number of barriers to the initial sale plan that were unrelated to the Preservation Plan. See *id.* at 8, 30-31 (noting failure to comply with the

National Environmental Policy Act and other "process violations").[2]

The court of appeals' decision parallels the Eleventh Circuit's decision in *Region 8 Forest Service Timber Purchasers Council* v. *Alcock*, 993 F.2d 800 (1993), cert. denied, 510 U.S. 1040 (1994), in which that court held that timber companies lacked standing to challenge a policy that would allegedly reduce the amount of timber available for future contracts. The Eleventh Circuit reasoned that "no right is conferred on the Timber Companies to harvest a set amount of timber each year," and "Timber Companies have no right to compel the Forest Service to sell any future timber to them." *Id.* at 808.

Petitioner's reliance (Pet. 9) on the Eighth Circuit's decision more than two decades ago in *Arkla Exploration Co.* v. *Texas Oil & Gas Corp.*, 734 F.2d 347 (1984), cert. denied, 469 U.S. 1158 (1985), to demonstrate a circuit conflict warranting this Court's review is misplaced. In that case, the court found that the oil company was injured when

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[2] The decision that petitioner lacks standing was also correct because petitioner did not suffer any legally cognizable injury arising from the Forest Service's decision not to go forward with the Horse Creek timber sale. Petitioner has no "legally protected interest," *Lujan*, 504 U.S. at 560, in having National Forest land opened up for timber sales. The decision to put the timber contracting process on hold thus did not infringe any legal protected interest of petitioner's. In addition, the nexus between the Forest Service's wholly discretionary decision to open National Forest land for timber harvesting, its consultation process, and the ultimate award of a hypothesized timber harvesting contract to petitioner is too remote to support Article III standing. See *ibid.* Indeed, it is hard to understand how, in this Administrative Procedure Act suit, non-final agency action (withdrawing a proposed timber sale for further study) can give rise to a cognizable injury-in-fact. See Pet. App. 51 n.15 (holding that withdrawal of the timber sale was not final agency action).

it was excluded from a bidding process that actually occurred. *Id.* at 353-354. In *Arkla*, unlike the present case, a court order could redress the injury by requiring that the government conduct a lawful bidding process. Here, there has been no sale, nor is any sale scheduled. There thus is no bidding process to correct.[3]

Petitioner's argument (Pet. 8-9) that the court's decision conflicts with rulings of this Court is equally flawed. In *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 211 (1995) (cited at Pet. 8), the Court held that a "discriminatory [bidding] classification [which] prevent[s] the plaintiff from competing on an equal footing" for Government contracts constituted an injury-in-fact. That is of no help to petitioner, who does not allege any disparity in the treatment of bidders.

Watt v. *Energy Action Education Foundation*, 454 U.S. 151 (1981) (cited at Pet. 8), is even further afield. There, California had standing because a bidding system adopted by the Secretary of the Interior allegedly precluded California from receiving an adequate return on its statutory right to a share of lease royalties. The flawed bidding system thus had a concrete and identifiable financial impact on the State that a court could redress. *Id.* at 160-161. Petitioner has no statutory right to a timber contract and no concrete or identifiable financial injury arising from the government's failure to go forward with a competitive bidding process. See also *Bryant* v. *Yellen*, 447 U.S. 352, 367-368 (1980) (cited at Pet. 8) (standing existed because it was "highly improbable" that application of federal law would not directly reduce the price of land that the plaintiffs wished to purchase, and judicial relief would make it "likely" that below-market priced land would become available).

[3] In *Mountain States Legal Foundation* v. *Glickman*, 92 F.3d 1228 (1996), the District of Columbia Circuit held that a lumber company had standing to challenge, on a variety of statutory grounds, final agency action adopting a particular logging plan because the logging cutbacks it permitted would "clearly inflict injury on the firm's economic well-being, which an order reducing the cutbacks would redress." *Id.* at 1233. Petitioner, by contrast, has failed to demonstrate that similarly concrete and immediate economic harms have befallen it or that its economic interests would *likely* be advanced by a court order invalidating the Preservation Plan. In any event, that aspect of the court of appeals' opinion was not necessary to its decision because it found standing on alternative grounds. *Id.* at 1232 ("We find that the plaintiffs have set forth facts showing those [standing] elements in two independent ways.").

b. The court of appeals also correctly ruled that petitioner's "direct contact" (Pet. 9) with the Preservation Plan did not amount to a cognizable injury. The "psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under [Article] III, even though the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982). Framing the complaint in terms of unwanted "exposure" to a governmental policy does not change the analysis.

Petitioner's contention (Pet. 9-11) that the court of appeals' decision conflicts with the rulings of other courts is incorrect. First, almost all of the court of appeals' standing cases cited by petitioner (see Pet. 10) predate this Court's decision clarifying the test for Article III standing in *Lujan*.

Second, the decision below, in fact, does not conflict with the decision of any other court of appeals. All of the court of appeals cases cited by petitioner involved governmental displays of sectarian religious symbols on government property. See *Suhre* v. *Haywood County*, 131 F.3d 1083

(4th Cir. 1997) (courtroom display of the Ten Commandments); *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (inclusion of image of Mormon temple in city logo), cert. denied, 495 U.S. 910 (1990); *Saladin* v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (city seal containing the word "Christianity"); *Hawley* v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (chapel in airport), cert. denied, 475 U.S. 1047 (1986); *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (large lighted cross in state park); *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.) (courthouse display of the Ten Commandments), cert. denied, 414 U.S. 879 (1973); *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (creche in federal park).

This case does not involve the display of any religious item or symbol on government property. The Medicine Wheel itself is not a governmental display of a religious symbol on property; it is property in its natural state, and the state in which it has been since time immemorial. The Preservation Plan likewise is not a public display of a religious symbol, and it does not require petitioner to undertake exceptional efforts or to forgo governmental services to avoid exposure to it. Indeed, the gist of petitioner's complaint is that it desires closer contact with the Medicine Wheel area, not that the government has erected a display or exposed it to religious symbols or rituals that it wishes to avoid. Compare *City of Edmond* v. *Robinson*, 517 U.S. 1201, 1201-1203 (1996) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from the denial of certiorari) (discussing conflict in the circuits on Article III standing to challenge "expos[ure] to a state symbol that offends his beliefs"). Beyond that, the Court could not resolve the standing issue that petitioner frames without first addressing whether a for-profit timber company, which is suing in its own right

and not in any representative capacity, can suffer the type of psychic offense that might give rise to Article III standing to challenge a religious display.

The issue presented in this case is distinct and much narrower than that presented in the cases petitioner cites. The issue is whether witnessing governmental displays of respect in its land-management policies for the religious and cultural beliefs of Indian Tribes to which the federal government has a unique trust responsibility, see *Morton* v. *Mancari*, 417 U.S. 535 (1974), invades a cognizable, legally protected interest. Not one of the decisions from the other courts of appeals cited by petitioner presented, raised, or decided that question. There thus is no conflict in the circuits warranting this Court's review. Indeed, the petition echoes the arguments advanced in the petitions for a writ of certiorari in *DeWaal* v. *Alston*, 125 S. Ct. 1294 (2005), and *Bear Lodge Multiple Use Association* v. *Babbitt*, 529 U.S. 1037 (2000), in which this Court denied review.

2. Petitioner's Establishment Clause challenge (Pet. 14-18) to the Preservation Plan does not merit this Court's review. Neither the district court not the court of appeals addressed the Establishment Clause question, so it is not properly positioned for this Court's review. See *Cutter* v. *Wilkinson*, No. 03-9877 (May 31, 2005), slip op. 8 n.7. Furthermore, no other court of appeals has addressed whether such plans violate the Establishment Clause. There thus is no conflict in the circuits that necessitates this Court's review at this time.

The Preservation Plan, moreover, fully comports with this Court's precedent. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court upheld against an Establishment Clause challenge a program of releasing students early from public elementary school classes so that they could attend inde-

pendently sponsored religion classes. In so holding, the Court explained that government "follows the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 314. The Establishment Clause does not require government to operate its programs with "callous indifference to religious groups," for "[t]hat would be preferring those who believe in no religion over those who do believe." *Ibid.*

Moreover, the government's longstanding trust responsibility for Native American Tribes makes this type of measured and calibrated accommodation of the cultural and religious interests of Tribes on land that historically belonged to them particularly appropriate. In *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 454 (1988), the Court acknowledged that the government has discretion to accommodate religious practices and noted approvingly that the government in that case "ha[d] taken numerous steps * * * to minimize the impact that construction of the * * * road [on federal land] will have on the Indians' religious activities." *Ibid.* In words that speak directly to the constitutionality of the Preservation Plan at issue here, the Court affirmed that "[t]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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