No. 04-1175

In The

Supreme Court of the United States

WYOMING SAWMILLS, INC.,

Petitioner,

v.

UNITED STATES FOREST SERVICE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. WYOMING SAWMILLS HAS STANDING TO RAISE ITS ESTABLISHMENT CLAUSE CLAIM.

A. Wyoming Sawmills Lost The Opportunity To Bid On A Timber Sale.

The U.S. Forest Service ("Forest Service") and the Medicine Wheel Coalition on Sacred Sites of North America ("Coalition"), relying on *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993), argue that Wyoming Sawmills suffered no injury in fact because Wyoming Sawmills has no "legal right" to harvest timber. Respondents' Opposition ("Opp."), 7; Coalition Opp., 10. However, the Forest Service and the Coalition fail to explain why the decision of the Eleventh Circuit in *Region 8*, like the decision of the Tenth Circuit in *Wyoming Sawmills*, is not in direct conflict with the holdings of this Court. *See e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) (wrongful denial of opportunity to bid competitively for federal highway construction contracts constitutes "an invasion of a legally protected interest"); *Northeastern Florida Chapter of the Assoc. General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993) ("injury in fact" required for standing is inability to compete in bidding process); *Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980) (plaintiffs had standing because they sought to bid for property that "might become available" if a federal law took effect); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981) (loss of an opportunity to bid for the exploration and development of mineral resources constitutes an injury). In fact, the Forest Service and the Coalition, by raising *Region 8* have demonstrated that the split described by Wyoming Sawmills

between this Court and the Tenth Circuit is ever widening.[1]

B. Wyoming Sawmills Has A Right To Nonarbitrary Land Classification.

The Forest Service argues that Wyoming Sawmills' reliance on *Arkla,* is misplaced because Wyoming Sawmills does not seek to "correct" the "bidding process." Respondents' Opp., 7-8. In so arguing the Forest Service conveniently ignores the express holding of *Arkla*, which is that the plaintiff had the right to have the federal lands in question "not classified arbitrarily" and to have the Secretary of Interior "utilize his discretion properly" when determining whether the specific federal lands would be leased for oil and gas exploration. *Arkla*, 734 F.2d at 354. Similarly, Wyoming Sawmills has the right to have 50,000 acres of the Bighorn National Forest "not classified arbitrarily" and to have the Forest Service "utilize [its] discretion properly," that is, consistent with the Establishment Clause, when determining whether those 50,000 acres would be available for timber production.

[1] The rulings of the D.C. Circuit and the Eighth Circuit are consistent with the holdings of this Court. *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1985); *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996) (a right to federal timber contracts is not required to show injury in fact).

C. Wyoming Sawmills Was "Directly Affected" By An Establishment Clause Violation.

The Forest Service argues that Wyoming Sawmills' "direct contact" with the decision by the Forest Service to manage 50,000 acres as a "sacred site" was not a cognizable injury, because "the psychological consequences presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under [Article] III." Respondents' Opp., 9. Not surprisingly, the Forest Service cites no legal authority, let alone a ruling by this Court, for this novel proposition, which distorts and, if adopted, would destroy this Court's Establishment Clause jurisprudence. By so arguing, the Forest Service attempts to convert the constitutional violation that was given when the Forest Service designated 50,000 acres of federal land as a "sacred site" and off limits to Wyoming Sawmills into a non-justiciable emotional psychological reaction to offensive conduct.

Moreover, by so arguing, the Forest Service places itself in conflict with this Court, *e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), as well as the Fourth, Sixth, Tenth, Eleventh, and D.C. Circuits, which recognize Establishment Clause standing based solely on allegations of direct personal contact with the offensive governmental embrace of a religious symbol in a public place. *Suhre v. Haywood County,* 131 F.3d 1083 (4th Cir. 1997); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973). Were it left to the Forest

Service, it would have dismissed all of these plaintiffs because the psychological consequences of observing conduct that they disagreed with did not provide them Article III standing.

D. This Court's Religious Symbol Jurisprudence Applies To The Designation Of Federal Land As An Off-Limits "Sacred Site."

The Forest Service argues, as Wyoming Sawmills anticipated in footnote 2 of its Petition, that the Tenth Circuit's decision in *Wyoming Sawmills* does not conflict with those of other Circuits because the cases relied on by Wyoming Sawmills involved governmental displays of sectarian religious symbols on government property, and the present case does not involve the display of any religious item or symbol. Petition, 9; Respondents' Opp., 10.

The Forest Service's distinction is one without a difference, as this Court recognized in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), where it declared:

> Nothing in the principle for which [the American Indians] contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands.

Lyng, 485 U.S. at 452-53. Whether the religious symbol is the Christian cross, carved from the trees of a forest, the Judeo-Christian Ten Commandments, carved from stone from beneath the earth, or an American Indian Medicine Mountain, whose sacredness includes the trees, the stone, and the earth itself, this Court's Establishment Clause

jurisprudence applies. Why else would this Court, as it did in *Lyng*, declare, "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng*, 485 U.S. at 452.

The Forest Service did not "display" Medicine Mountain's 20,000 acres and the surrounding 30,000 acres; they comprise, obviously, naturally occurring geological and vegetative features. However, like the governments in the cases cited by Wyoming Sawmills, the Forest Service is endorsing the religious significance of those features to some American Indians – that is, that they are sacred – thereby violating the Establishment Clause.

In the cases cited by Wyoming Sawmills, what is constitutionally offensive is not the particular symbol or words, but instead the religious significance of those symbols or words. Both *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997), and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), for example, involve challenges to placement of the Ten Commandments in a public place. Although the Ten Commandments are just words carved in stone, Jews and Christians believe that the Ten Commandments came directly from God. It is this belief, and the government's endorsement of it, that makes placement of a stone monument containing the Ten Commandments in a public place a violation of the Establishment Clause. *See, Stone v. Graham*, 449 U.S. 39 (1980).

In the Bighorn National Forest, it is not the 50,000 acres of a geological formation to which Wyoming Sawmills objects. Instead, it is the endorsement by the Forest Service of the religious belief of some American Indians that those 50,000 acres are "sacred" and must be placed off

limits that is constitutionally objectionable. The Forest Service's argument to the contrary conflicts with the decisions of this Court and those of the Circuits that the Establishment Clause applies to all religions.

E. Wyoming Sawmills May Maintain A First Amendment Challenge.

The Forest Service declined to defend its earlier argument and the subsequent ruling of the Tenth Circuit in response to that argument that, "*as an artificial person*, [] has not shown how it experienced the kind of constitutional injury found in such cases." *Wyoming Sawmills*, 383 F.3d at 1247; App., 12 (emphasis added). The Forest Service's argument was unsupportable and the decision that resulted from it is indefensible, as Wyoming Sawmills previously established. Petition, 10.

The decision of the Tenth Circuit that Wyoming Sawmills lacks standing to maintain its Establishment Clause challenge conflicts with the decisions of this Court and the Circuits. This Court should grant this Petition to resolve that conflict.

II. THE FOREST SERVICE'S ACTIONS VIOLATE THE ESTABLISHMENT CLAUSE.

The Forest Service argues that the unique trust relationship between the Indian tribes and the United States justifies the Forest Service's "accommodation" of the religious demands of some American Indians. Respondents' Opp., 12. Ironically, the Forest Service relies on *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), given that this Court, in *Lyng*, refused to grant to the American Indian Tribe what the

Forest Service granted to the American Indian religious advocates in the instant case. Specifically, this Court refused to "accommodate" the religious interests of the Tribe in *Lyng* because to have done so would have violated the Establishment Clause. In fact, *Lyng* made clear that the demands for privacy by American Indians do not justify the government's closure of public lands, even temporarily. *Lyng*, 485 U.S. at 452-53.

Moreover, although not discussed explicitly in *Lyng*, this Court made clear subsequently that purported unconstitutional government endorsement of religion is not a constitutional "accommodation" unless it lifts a "discernable burden" on the free exercise of religion, *Lee v. Weisman*, 505 U.S. 577, 607 (1992), that was "government-created." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987). The Forest Service failed to identify any "discernable burden" that was "government-created" on the free exercise of American Indian religion within the 50,000 acres at issue. Furthermore, even if the Forest Service were attempting to accommodate American Indian religion by removing "discernible burden[s]," which it has never claimed was the purpose of its closure of 50,000 acres of federal land, the "accommodation doctrine" is "not a principle without limits." *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 706 (1994). "At some point, accommodation may devolve into an unlawful fostering of religion." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. at 334-335.

Nevertheless, the decision of the Forest Service to close 50,000 acres of the Bighorn National Forest to timber harvesting because it is a "sacred site" does not implicate

the accommodation doctrine. Instead, in response to the demands for privacy and solitude of American Indian religious practitioners, the very demands that this Court rejected in *Lyng*, the Forest Service prohibited within those 50,000 acres all uses that "detract from the spiritual . . . values associate[d] with [Medicine Mountain]." 10th Cir. App., 304. Thus, as the Forest Service acknowledged in its decision documents, the 20,000 acres of Medicine Mountain and the surrounding 30,000 acres are now managed as a "sacred site." 10th Cir. App., 306. The Forest Service's actions clearly violate the Establishment Clause. *See, Lyng*, 485 U.S. at 429; *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

CONCLUSION

For all of the above reasons, this Court must grant this Petition for *Writ of Certiorari*.

Respectfully submitted,

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