No. 04-1175

In The
Supreme Court of the United States

WYOMING SAWMILLS, INC.,

Petitioner,

v.

UNITED STATES FOREST SERVICE; MICHAEL JOHANNS, Secretary of Agriculture; DALE BOSWORTH, Chief, United States Forest Service; RICK CABLES, Regional Forester, Region II; and BILL BASS, Forest Supervisor, Bighorn National Forest;

and

MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH AMERICA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a timber company has Article III standing to challenge, as a violation of the Establishment Clause, a United States Forest Service decision to manage 50,000 acres of a national forest as a "sacred site" because of "a resurgence of Native American spiritualism and [the area's] religious importance to American Indians," where the timber company is:

   a. Denied the opportunity to bid for timber sales within that area, and

   b. "Directly affected" by management of the area as a "sacred site"?

2. Whether the United States Forest Service violated the Establishment Clause when it decided to manage 50,000 acres of a national forest as "of religious importance to American Indians" and excluded all human activity but their own from that "sacred area"?

LIST OF PARTIES

Wyoming Sawmills, Inc. ("Wyoming Sawmills"), a corporation organized under the laws of the State of Wyoming, was Plaintiff in the United States District Court for the District of Wyoming and Appellant before the United States Court of Appeals for the Tenth Circuit. Wyoming Sawmills has no parent or subsidiary corporations. In accordance with Supreme Court Rule 29.6 Wyoming Sawmills is a private corporation owned by Allied Forced Products, Inc., its parent corporation.

The following or their predecessors were Defendants in the District Court and Appellees before the Tenth Circuit: United States Forest Service; Michael Johanns, Secretary of Agriculture; Dale Bosworth, Chief of the Forest Service; Rick Cables, Regional Forester for Region II; and Bill Bass, Forest Supervisor for the Bighorn National Forest.

Medicine Wheel Coalition on Sacred Sites of North America was a Defendant-Intervenor in the District Court and Appellee-Intervenor before the Tenth Circuit.

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Wyoming Sawmills, Inc., seeks review of the opinion of the United States Court of Appeals for the Tenth Circuit. *Wyoming Sawmills, Inc. v. United States Forest Service*, 383 F.3d 1241 (10th Cir. 2004). Appendix ("App.") 1. The Tenth Circuit's Order denying Wyoming Sawmills' Petition for Rehearing *En Banc* is reproduced at App. 69. The opinion of the United States District Court for the District of Wyoming is reproduced at App. 24. *Wyoming Sawmills, Inc. v. United States Forest Service*, 179 F.Supp.2d 1279 (D.Wyo. 2001).

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment sought to be reviewed was entered on September 20, 2004, by the United States Court of Appeals for the Tenth Circuit. Wyoming Sawmills' Petition for Rehearing *En Banc* was denied on December 3, 2004.

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion. . . . " U.S. Const. amend. I.

STATEMENT OF THE CASE

On February 17, 1999, Wyoming Sawmills filed its complaint in the United States District Court for the District of Wyoming alleging, *inter alia*, that the decision of the United States Forest Service ("Forest Service") to manage almost 50,000 acres of the Bighorn National Forest as a "sacred site" by means of its Historic Preservation Plan for the Medicine Wheel National Historic Landmark and Vicinity (hereinafter "HPP") violated the Establishment Clause of the First Amendment.

On December 6, 2001, the District Court ruled that "the HPP caused [Wyoming] Sawmills to lose the opportunity to bid[;]" therefore, Wyoming Sawmills "has suffered an injury in fact. . . ." *Wyoming Sawmills*, 179 F.Supp.2d at 1293. App. 40-41. The District Court then ruled, however, that Wyoming Sawmills' injury was not redressable due to the fact that "striking down the HPP will not grant [Wyoming] Sawmills a right to log . . . because[,] even if [the District Court] struck down the HPP[,] it could not eliminate the Medicine Wheel as it is a protected National Monument." App. 42. On January 30, 2002, Wyoming Sawmills appealed the District Court's decision.

On September 20, 2004, the Tenth Circuit held that Wyoming Sawmills did not have standing because: (1) Wyoming Sawmills lacked Article III injury; and (2) Wyoming Sawmills may not bring an Establishment Clause claim because it is a corporation. *Wyoming Sawmills*, 383 F.3d 1241 (10th Cir. 2004). App. 1. On November 4, 2004, Wyoming Sawmills filed a Petition for Rehearing *En Banc*, which, on December 3, 2004, the Tenth Circuit denied. App. 69-70.

STATEMENT OF FACTS

The Bighorn National Forest, created pursuant to the Organic Act of June 4, 1897, 16 U.S.C. § 475, is located in north-central Wyoming, primarily in Big Horn and Sheridan Counties (a small portion of the Forest is in Johnson and Washake Counties), and is managed by the Forest Service. Within the Bighorn National Forest's 1.1 million acres is the Medicine Wheel National Historic Monument (hereinafter "Medicine Wheel"), which covers an area of scarcely five acres atop Medicine Mountain, which covers an area of more than 19,000 acres. App. 71. The Bighorn National Forest is managed pursuant to the Bighorn Land and Resource Management Plan (hereinafter "Forest Plan"), which sets specific goals and objectives, including providing "timber sale offerings that satisfy requirements for the local community's economic stability." Appellant's Appendix, Tenth Circuit (hereinafter "10th Cir. App.") 638-642. The harvesting of timber is a legitimate and recognized use of the National Forests; in fact, providing for a renewable supply of timber was one of two purposes cited for the establishment of national forests in the Organic Act of June 4, 1897.

Wyoming Sawmills, a commercial timber mill and the largest non-public employer in Sheridan County with 100 direct employees and 100 independent contractors, has been the primary purchaser and harvester of timber from the Bighorn National Forest for more than 40 years. 10th Cir. App. 467. It has submitted comments on all timber-related planning documents for the Bighorn National Forest, including the HPP. 10th Cir. App. 468.

On June 21, 1993, the Forest Service entered into a Memorandum of Agreement ("MOA") with the Advisory

Council on Historic Preservation, the Wyoming State Historic Preservation Office, the Medicine Wheel Alliance ("Alliance"), the Medicine Wheel Coalition On Sacred Sites of North America ("Coalition"), and Big Horn County Commissioners, (collectively, "Consulting Parties") and established, as the first "management priority" for the Medicine Wheel and Medicine Mountain, the "continued traditional cultural use" of the area as a "sacred place and important ceremonial site." *Id.* 10th Cir. App. 91. The MOA also formed the Consulting Parties into a permanent committee created to determine how Medicine Mountain should be managed. 10th Cir. App. 91-92. Neither Wyoming Sawmills nor any other representative of commercial interests was allowed to participate as a Consulting Party in the development of what would become the HPP. *Id.* In the MOA, the Forest Service also agreed to close part of Forest Development Road ("FDR") 12, which provides access to the Medicine Wheel, although an exemption was granted for the "special needs of traditional religious practitioners." 10th Cir. App. 92.

On August 29, 1994, the Forest Service published a Programmatic Agreement with the Consulting Parties, 10th Cir. App. 72-84, for the development of a plan for the "long-term management of the Medicine Wheel and Medicine Mountain." 10th Cir. App. 72. As part of the Agreement, the Forest Service prohibited any "undertakings in an area within a radius of 2.5 miles [approximately 12,566 acres] around the Medicine Wheel, including any new mining, oil and gas development, timber harvesting, and construction activities, until completion and adoption of the HPP." 10th Cir. App. 79.

In April 1996, the Forest Service published a draft HPP, 10th Cir. App. 235, in which it affirmed "the importance of the Medicine Wheel as a American Indian Shrine" and responded to "a resurgence of Native American spiritualism and new information that *all of Medicine Mountain* was of religious importance to American Indians, *not simply the Medicine Wheel*." 10th Cir. App. 238 (emphasis added). Thus, the Forest Service proposed to close a 718-acre "core" area around the Medicine Wheel to all commercial uses, including "timber management." 10th Cir. App. 252. The Forest Service also proposed to prohibit all activity within a "peripheral area" comprising 19,525 acres of Medicine Mountain, if that activity "might detract from the values of the Medicine Wheel and associated features." *Id.*

In September 1996, the Forest Service published the final HPP, 10th Cir. App. 256-436, which created a 19,500-acre "Area of Consultation," "roughly [the] equivalent to the Medicine Mountain viewshed" that "defines the boundaries in which the [Forest Service] will consult with the [Consulting Parties]. . . ." 10th Cir. App. 305, 347. The HPP barred all activities within the Area of Consultation that might "detract from the spiritual and traditional values" associated with "Medicine Mountain and the surrounding area." 10th Cir. App. 304. *See*, Map, 10th Cir. App. 306. The Forest Service emphasized that protecting the spiritual integrity of Medicine Mountain is the Forest Service's "management priority." 10th Cir. App. 273.

Prior to the adoption of the HPP, almost 15,840 acres of the Area of Consultation were designated for livestock grazing and/or timber management, of which 6,000-7,000 acres were designated as available for timber harvesting, 10th Cir. App. 631. Moreover, the Forest Service regarded

the timber within the Area of Consultation as especially valuable because the trees therein are primarily "large and very large." *Id.* Additionally, as a result of a pest infestation that has plagued the area since 1990, 1,135 acres within the Area of Consultation had "a large amount of dead standing trees," 10th Cir. App. 348, and thus was selected for thinning to increase the "desired state of forest health" and to reduce "potential wildfire risk." *Id.* Nonetheless, the HPP prohibited any timber hauling along FDR 12, the only road by which timber may be removed from the Area of Consultation and from an additional 30,000 of acres of the Bighorn National Forest just beyond the Area of Consultation. 10th Cir. App. 349.

On October 7, 1996, the Forest Service published Amendment 12, which immediately implemented the HPP. 10th Cir. App. 573-635. Under the HPP, all of Medicine Mountain is to be managed "as a sacred site," 10th Cir. App. 221, in response to demands of American Indians who assert that all these federal lands are sacred. 10th Cir. App. 266.

On August 13, 1997, the Acting Medicine Wheel District Ranger and the Acting Forest Supervisor reviewed the Horse Creek Timber Sale Environmental Assessment ("EA") and Finding of No Significant Impact, issued in 1988, and confirmed that there were "no significant changes in actions, circumstances, or information since the EA was prepared" and that "no new issues [] had come up since the decision was made" to conduct the timber sale. 10th Cir. App. 505-506. Based on the Forest Supervisor's findings, on September 19, 1997, the Forest Service advertised the Horse Creek Timber Sale for competitive bidding. 10th Cir. App. 513-533. The Consulting Parties immediately objected to the sale because, although the site

of the sale is several miles north of and outside the Area of Consultation, the sale would require timber hauling on FDR 11, a small part of which is within the far eastern boundary of the Area of Consultation. 10th Cir. App. 533, 536-572. In response to those objections, on September 30, 1997, the Forest Service withdrew the Timber Sale, citing an alleged "procedural error on the part of the Forest Service to enter into formal consultation with the [Consulting Parties]." 10th Cir. App. 535. The Forest Service noted that:

> We plan on re-advertising this sale after consultation takes place and any potential mitigating measures if necessary are incorporated into the timber sale contract. We anticipate that re-advertisement may occur in early 1998.

Id. The Forest Service has never, however, reoffered the Horse Creek Timber Sale.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION THAT WYOMING SAWMILLS LACKS STANDING TO RAISE AN ESTABLISHMENT CLAUSE CLAIM CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

In its decision the Tenth Circuit held that Wyoming Sawmills had not suffered an injury. App. 12. Because Wyoming Sawmills has suffered two distinct injuries in fact, specifically its lost opportunity to bid for timber contracts within the Bighorn National Forest and its direct contact with the management of Medicine Mountain and the surrounding area as a "sacred site," the Tenth

Circuit's decision conflicts with the holdings of this Court and other Circuits.[1]

A. This Court And At Least One Circuit Have Held That The Loss Of An Opportunity To Bid Is An Injury.

This Court has held repeatedly that a wrongful denial of the opportunity to bid for valuable rights constitutes an injury in fact. *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). Moreover, in *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), this Court held that the loss of an opportunity to bid for the exploration and development of mineral resources constitutes an injury. The Tenth Circuit's decision conflicts with the decision of this Court.

[1] The Tenth Circuit ended its analysis immediately after determining that Wyoming Sawmills had not suffered an injury. Had it considered the other *Lujan* factors, causation and redressibility, it would have ruled in favor of Wyoming Sawmills because Wyoming Sawmills' injuries were a direct result of the Forest Service's HPP and there is a "substantial likelihood" that these injuries would be redressed if the Tenth Circuit struck down the HPP. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The Tenth Circuit's decision also conflicts with the Eighth Circuit's ruling in *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 353 (8th Cir. 1984). The Eighth Circuit held that an oil and gas company had standing to challenge a determination by the Department of Interior that the agency could lease, without competitive bidding, certain lands for oil or gas exploration. *Id.* at 354. It found that the Secretary's actions resulted in the loss of the opportunity to bid, which constitutes an injury. *Id.*

Wyoming Sawmills, which for more than 40 years has bid on, purchased, and harvested timber from the Bighorn National Forest and participated in the administrative process leading to those sales, was denied the opportunity to bid on timber sales because of the Forest Service's decision to manage 50,000 acres as sacred to American Indians. Specifically, Wyoming Sawmills was denied the opportunity to bid on the Horse Creek Timber Sale because it was withdrawn in response to the objections of American Indians. Under holdings of this Court and the Eighth Circuit, Wyoming Sawmills suffered an Article III injury. Nonetheless, the Tenth Circuit ruled that Wyoming Sawmills had not suffered such an injury. This Court should grant this Petition to resolve this conflict.

B. This Court And Five Circuit Courts Of Appeal Have Held That Persons Have Standing To Object When Governments Endorse Religious Symbols In Public Places.

This Court and five Circuit Courts of Appeal have held that Establishment Clause plaintiffs have standing when they come into direct contact with government endorsement of religious symbols in public places. In *County of*

Allegheny v. ACLU, 492 U.S. 573 (1989), this Court held that local residents who objected to the display of a crèche on city and county property had standing because the crèche conveyed a clearly religious message to local residents. *Id.* at 598-99, 601, 620.

The Fourth, Sixth, Tenth, Eleventh, and District of Columbia Circuits have recognized Establishment Clause standing based solely on allegations of direct personal contact with the offensive government embrace of a religious symbol in a public place. *Suhre v. Haywood County,* 131 F.3d 1083, 1086 (4th Cir. 1997) (injury to bring Establishment Clause claim is "unwelcome direct contact with a religion that appears to be endorsed by the state"); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (individual's visit to city airport conveyed standing to challenge city's lease of airport space for use as chapel); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (recognizing standing because challengers of government's action were confronted directly by presence of word "Christianity" on city seal); *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) (recognizing standing to bring Establishment Clause claim based on the individuals' state residency and their use of a state park); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (residents' allegation that local public park was being devoted to religious use was sufficient to confer standing); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989) (individual had standing to challenge the official logo of the City of St. George, Utah, which had picture of Mormon Temple because he had "direct, personal contact" with it); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir. 1973) (individuals had standing to challenge existence of granite monument

of Ten Commandments in city courthouse because they were city residents).[2]

Wyoming Sawmills, as a longtime harvester of timber from the Bighorn National Forest and thus a frequent visitor to and user of that Forest and as a resident of Sheridan County, within which much of the 50,000 acres managed as "sacred" lies, came into direct contact with the Forest Service's endorsement of the 50,000 acres as a religious symbol to American Indians. Under the holdings of this Court and five Circuit Courts, Wyoming Sawmills has suffered an Article III injury sufficient to bring an Establishment Clause claim. Nonetheless, the Tenth Circuit ruled that Wyoming Sawmills had not suffered such an injury. This Court should grant this Petition to resolve this conflict.

II. THE TENTH CIRCUIT'S DECISION THAT A CORPORATION MAY NOT BRING AN ESTABLISHMENT CLAUSE CLAIM CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

The Tenth Circuit held that Wyoming Sawmills, "*as an artificial person*, [] has not shown how it experienced the kind of constitutional injury found in such cases."

[2] The Forest Service may argue that none of these decisions apply to Wyoming Sawmills because they involve governmental displays of sectarian religious symbols on government property. The Forest Service did not "display" Medicine Mountain and the surrounding 30,000 acres; they comprise, of course, 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 American Indians – that is, that they are sacred – and thereby are violating the Establishment Clause.

Wyoming Sawmills, 383 F.3d at 1247; App. 12 (emphasis added). The Tenth Circuit did not cite any holding of this Court or any other Circuit for its ruling. Instead, it appears to have relied on the argument propounded by the Forest Service. *Id.* at 1247; App. 12. The Forest Service argued, without reference to any controlling legal authority, that Wyoming Sawmills lacks standing as a corporation to enforce the commands of the Constitution that federal land not be managed in accordance with the religious views of particular citizens, including the view of some American Indians that Medicine Mountain is "sacred." Appellees' Brief at 25. Although the Tenth Circuit noted that it did not need to address the Forest Service's argument, App. 1, the Tenth Circuit's express holding that Wyoming Sawmills, "as an artificial person," lacks standing can have no other meaning than that a corporation lacks standing to maintain an Establishment Clause claim. *Wyoming Sawmills*, 383 F.3d at 1247; App. 12. The Tenth Circuit's holding conflicts with the decisions of this Court and the other Circuit Courts.

A. This Court Has Held Consistently That Corporations May Maintain First Amendment Challenges.

It is beyond cavil that corporations may bring First Amendment challenges, including challenges regarding violations of the Establishment Clause. *See, e.g., Two Guys From Harrison-Allentown Inc. v. McGinley*, 366 U.S. 582 (1961) (corporation had standing to challenge whether law was one respecting establishment of religion); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (when a general political issue materially affects a corporation's business property or assets, a corporation may

claim First Amendment protection); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 89 (1989) (publisher has standing to challenge Establishment Clause violation when required to pay state taxes that religious publishers were excluded from paying); *National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963) (corporation has standing to bring First Amendment claim regarding freedom of expression and freedom of association).

B. The Circuit Courts Have Held Consistently That Corporations May Maintain First Amendment Challenges.

The Circuit Courts are of one accord on the ability of corporations to bring First Amendment challenges, including challenges regarding violations of the Establishment Clause. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995) (corporation has standing to assert First Amendments rights of its employees where violation of those rights adversely affects financial interests or patronage of business); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (corporation has standing to assert First Amendment challenge to state statute regulating ballot-measure advocacy inasmuch as corporation previously had advocated for defeat or passage of ballot measures); *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000) (corporation has standing to challenge state statutes that violate First Amendment). In fact, with its decision in *Wyoming Sawmills*, the Tenth Circuit stands alone in ruling that a corporation may not bring an Establishment Clause challenge.

Wyoming Sawmills, as a frequent visitor to and user of the Bighorn National Forest and as a resident of

Sheridan County, Wyoming, has come into direct contact with the Forest Service's management of 50,000 acres of the Bighorn National Forest as sacred to American Indians and this contact has materially affected its property, assets, and financial interests. Under the holdings of this Court and the Circuit Courts, Wyoming Sawmills has standing to bring an Establishment Clause. Nonetheless, the Tenth Circuit ruled otherwise. This Court should grant this Petition to resolve this conflict.

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

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court held that government action does not offend the Establishment Clause, but only if it: (1) has a secular purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion; and (3) does not foster an excessive entanglement with religion. *Id.* at 612-613. The Forest Service's actions violate all three prongs of this test.

A. The Forest Service's Actions Lack A Secular Purpose.

The primary purpose of the Forest Service's actions in it management of Medicine Mountain is to advance religion. The Forest Service admits that its primary purpose is to manage the Bighorn National Forest "in a way that will not detract from the spiritual and traditional values associated with [Medicine Mountain]." HPP, 10th Cir. App. 304. For example, in each of the nine major sections of the HPP, the Forest Service confirms that "[t]he purpose of the HPP is to . . . protect[] the integrity of [Medicine

Mountain] *as a sacred site. . . .*" *See, e.g.*, 10th Cir. App. 221 (emphasis added). Thus, it implicitly concedes that its actions have no "secular purpose" but are designed "to favor the adherents of [American Indian religion]," *Gillette v. U.S.*, 401 U.S. 437, 450 (1971), in direct violation of the Establishment Clause. *Lemon*, 403 U.S. at 612.

In fact, the Forest Service's actions have the "purpose or effect of 'endorsing' religion," *County of Allegheny*, 492 U.S. at 592, because they create a "symbolic union" between religion and government. *Agostini v. Felton*, 521 U.S. 203, 204 (1997). The Forest Service has created a "symbolic union" between itself and American Indian religious leaders, *id.* at 204, in the form of a permanent agreement among the Forest Service, the Alliance, and the Coalition to prohibit any and all activities on or near Medicine Mountain that are inconsistent with the area's management as a "sacred site." One of the activities that those parties agreed was inconsistent with management of the area "as a sacred site" was any timber harvesting that American Indians religious leaders found objectionable. 10th Cir. App. 573-635. The Forest Service and the Consulting Parties agreed to prohibit those activities by closing the Area of Consultation to all timber hauling. *Id.* This prohibition sends a clear message to Wyoming Sawmills that it is an "outsider[], not a full member[] of the political community," and an accompanying message to adherents of American Indian religion that they are "insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 688 (1984).

B. The Forest Service's Actions Have The Primary Effect Of Advancing Religion.

The Forest Service admits that the "principal or primary effect" of its actions is to prohibit any and all use of Medicine Mountain – including the 19,500 acres of the Area of Consultation and 30,000 additional acres that are accessible only by using roads that run through the Area of Consultation – that might interfere with management of those 50,000 areas as a "sacred site." HPP, 10th Cir. App. 302, 304. The Forest Service's actions "advance [] religion in [their] principal or primary effect," contrary to the Establishment Clause. *County of Allegheny*, 492 U.S. at 574. For example, by prohibiting all timber hauling within the Area of Consultation, 10th Cir. App. 318-319, 349-350, the Forest Service has barred timber harvesting on approximately 50,000 acres of the Bighorn National Forest. HPP, 10th Cir. App. 345, 351. The Forest Service also withdrew an official request for competitive bids on the Horse Creek Timber Sale in direct response to the demands of American Indians and, because of the continuing objections of American Indians, refuses to reoffer the Sale. HPP, 10th Cir. App. 533-535.

The Forest Service also refuses to admit, although it is true, that another "principal or primary effect" of its actions has been to assign authority for managing the Bighorn National Forest to two religious organizations, the Coalition and the Alliance. These religious groups have the authority to determine whether any proposed public activities in the Medicine Wheel/Medicine Mountain area are consistent with management of the area as a "sacred site." HPP, 10th Cir. App. 294-301. This Court held that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers

would be delegated to or shared with religious institutions." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). Nevertheless, the Alliance and the Coalition now determine whether a proposed public use of Medicine Mountain is acceptable solely on the basis of its impacts on American Indian religious practitioners. The power of the Alliance and the Coalition to determine how Medicine Mountain and the surrounding area is managed is the direct result of the Forest Service's HPP and serves solely to promote and advance American Indian religion, in violation of the Establishment Clause. *County of Allegheny*, 492 U.S. at 574.

C. The Forest Service's Actions Foster Excessive Entanglement With Religion.

The "character and purposes" of the institutions that are benefited by the Forest Service's actions are "predominantly religious." *Agostini*, 521 U.S. at 232. Those benefited institutions are American Indian religious practitioners who regard Medicine Mountain as "sacred," as well as the Alliance and Coalition, groups that were organized to promote American Indians religious activities on Medicine Mountain. Obviously, the "character and purpose" of these groups is "predominantly religious." *Id.*

The "nature of the aid" provided by the Forest Service is neither "neutral [nor] nonideological," *Agostini*, 521 U.S. at 232, because it prohibits any and all public use of Medicine Mountain that is inconsistent with its designation as a "sacred site." The Forest Service has formed a permanent union with the Alliance, the Coalition, and other individuals and entities that seek to promote American Indian religion on Medicine Mountain to ensure that no uses occur on Medicine Mountain that might, in the

view of these American Indians, "detract from the spiritual and traditional values associated with [Medicine Mountain.]" HPP, 10th Cir. App. 4.

Finally, the "resulting relationship between the [Forest Service] and the [American Indian] religious authorit[ies]," *Lemon*, 403 U.S. at 615, results in a "delegat[ion] [of] governmental power to religious institutions [and thus] inescapably implicates the Establishment Clause." *Larkin*, 459 U.S. at 122; *see also Abington*, 374 U.S. at 222. Likewise, the Forest Service "delegated to or shared with religious institutions," the Alliance and the Coalition, the power to determine what activities are permitted on the "sacred site" that is Medicine Mountain. *Larkin*, 459 U.S. at 120. This delegation of power amounts to a "fusion of governmental and religious functions," *id.* at 126-27, and is clearly "offensive to the spirit of the Establishment Clause." *Id.*

This Court should grant this Petition to ensure adherence by the Tenth Circuit to this Court's holding in *Lemon*.

IV. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE THAT REQUIRES RESOLUTION BY THIS COURT.

A. Whether Federal Land May Be Closed To The Public Because It Is Considered "Sacred" Affects A Vast Area Of The Western United States.

One-third of the land in this country, much of it in the West, is owned and managed by the federal government.[3]

[3] Federal Land Law Review Commission, *One Third of the Nation: The Federal Land Law Review Commission Report* (1970).

In many Western States the federal government is, if not the owner of a majority of the land, the largest single landowner. Moreover, in many rural counties within the Western States the federal government is the overwhelming majority landowner.

American Indians once populated virtually all of what is today the United States, and thus all of the land owned by the federal government was at one time home to American Indians. In addition, because the religion of those Indians commonly was land based, virtually any part of the federally owned land could be considered "sacred" to descendents of those Indians.

Citizens of the Western States, particularly those of rural counties, use and rely upon land owned and managed by the federal government for their recreation and economic activities. In fact, land owned by the United States provides the economic mainstay of the overwhelming majority of rural Western counties, supporting as it does such diverse activities as tourism, forestry, ranching, mining, and oil and gas exploration and development. For example, Wyoming Sawmills is the largest private employer in Sheridan County, Wyoming. *See*, http://www.wyomingsawmills.com. Without the access to lands owned by the United States that federal law permits and has permitted for more than a century, many rural Western counties, including Sheridan County, Wyoming, would be devastated.

If the actions taken by the United States here – that is, the closure of federal land to timber activity because of the beliefs of some American Indians – are upheld, the consequences to Westerners, particularly rural Westerners, will be significant and far reaching. In fact, the federal

government has taken and is continuing to take similar actions in various locations throughout the Western States.

Because of the exceptional importance of this matter to citizens of the Western United States, in particular, citizens of rural areas of the West, this Court should grant this Petition.

B. The Decision Of The Tenth Circuit, By Allowing The Federal Government To Deny Access To Public Lands Based On Religion, Is In Direct Conflict With The Controlling Decision Of This Court.

This Court has made it clear that federal land may not be closed to the public for the purposes of religious activity. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *Lyng* concerned a challenge to the Forest Service's decision to allow timber harvesting and road construction in an area of the Six Rivers National Forest that is considered sacred by several American Indian tribes. This Court upheld the Forest Service's decision, finding "[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. This Court held that the Constitution "does not provide a principle that could justify upholding respondents' legal claim." *Id.* at 451-52.

The *Lyng* decision made clear that demands for privacy by American Indians cannot justify the government's closure of public lands, even temporarily: "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.

By its actions in the Bighorn National Forest, the Forest Service has acceded to demands of American Indians that it "exclude all human activity but their own from sacred areas of the public lands" that are the Bighorn National Forest. *Id.* The Tenth Circuit's ruling, by allowing the Forest Service's actions to continue, conflicts with this Court's holding in *Lyng*. This Court should grant this Petition to resolve this conflict.

CONCLUSION

For all of the above reasons, this Court must grant this Petition.

Respectfully submitted,

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