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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner has standing to challenge an Historic Preservation Plan, memorialized by a Programmatic Agreement developed pursuant to the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, that was signed by the United States Forest Service, federal and state historic preservation agencies, the local county government and representatives of Indian tribes and whose purpose is to better protect the Bighorn Medicine Wheel National Historic Landmark.

2. Whether the Historic Preservation Plan violates the Establishment Clause, U.S. Const., Amend 1.

CORPORATE DISCLOSURE STATEMENT

There is no parent corporation of the Medicine Wheel Coalition on Sacred Sites of North America and no publicly held company owns shares in the corporation.

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BRIEF IN OPPOSITION

Respondent Medicine Wheel Coalition on Sacred Sites of North America respectfully requests that the Petition for Writ of *Certiorari* be denied.

STATEMENT OF THE CASE

The questions as presented by the petitioner are based upon an incomplete and, at times, erroneous recitation of the facts. Specifically, the claim that 50,000 acres of the Bighorn National Forest are "now off limits to timber harvesting" and being managed as a "sacred site" where all human activity other than Native American religious activity is being excluded is a patent falsehood. Rather, the factual underpinning of this case is as follows.

The Bighorn Medicine Wheel National Landmark is a stone circle approximately 80 feet in diameter with twenty-eight spokes extending from a central cairn to the perimeter. It was constructed hundreds (perhaps thousands) of years ago and is located at an altitude of 10,000 feet in the Bighorn National Forest of Wyoming. Resp. Ap. at 19.[1] To Plains tribes, the Medicine Wheel and Medicine Mountain on which it is located is an important traditional cultural property and sacred ceremonial site actively utilized by traditional cultural and religious practitioners

[1] Resp. Ap. refers to the Appendix filed with the Tenth Circuit Court of Appeals by the defendants/respondents United States Forest Service *et al.* Aplt. Ap. refers to the Appendix filed with the Tenth Circuit by petitioner Wyoming Sawmills (the appellant before the Tenth Circuit).

of those tribes. *See*, e.g., Resp. Ap. at 19, 136, 149-163, 252, Aplt. Ap. at 95, 283.

In 1988, the Bighorn National Forest ("Forest") began to recognize that its management of the Medicine Wheel was inadequate and developed a proposal to modify management of the site. Extensive public meetings were held and comments received. Resp. Ap. at 23-24. That process resulted in the preparation of a draft Environmental Impact Statement (EIS) in May 1991. The EIS recognized that the management of the Medicine Wheel National Historic Landmark by the Forest had failed to prevent the degradation of the Medicine Wheel, including damage to and destruction of archeological resources. It also found that there had been a failure to recognize and protect Native American cultural values. Resp. Ap. at 24-28.

Following the issuance of the draft EIS, the Advisory Council on Historic Preservation informed the Forest that it needed to fulfill its requirements under the National Historic Preservation Act ("NHPA"), 16 U.S.C. 470 *et seq.*, by engaging in a Section 106[2] review and consultation. Resp. Ap. at 115-117. In July 1991, the Forest commenced the section 106 process. Resp. Ap. at 120. In January 1992, the Forest agreed (as did the Advisory Council and Wyoming State Historic Preservation Office) that the Medicine Wheel Coalition on Sacred Sites of North America should be given consulting party status within the meaning of the NHPA and stated that "[t]he objectives of the 106 process . . . will be to consult on development of a long range management strategy for the Medicine Wheel." Resp. Ap.

[2] Section 106 is codified at 16 U.S.C. 470f.

at 766. Later that year, the Medicine Wheel Alliance and Big Horn County Commissioners were also granted consulting party status.[3] Resp. Ap. at 174.

After a number of meetings, including a large three-day public meeting, and exchanges of correspondence between the consulting parties, *see* Resp. Ap. at 23-24, 179-186, 189-190. Aplt. Ap. at 91, a Memorandum of Agreement ("MOA") was signed by the six consulting parties in June 1993. Aplt. Ap. at 91-100, Resp. Ap. 240, 245-246. The MOA recognized that the increased numbers of "recreational visitors" had caused "unprecedented damage to the Medicine Wheel and surrounding area" and that the Medicine Wheel and Medicine Mountain qualified as a "traditional cultural property" within the meaning of the NHPA. Aplt. Ap. at 91. The MOA established a temporary management system that included some limitations on vehicular access, on-site interpreters "to help monitor public use, and to educate and sensitize visitors to the traditional cultural importance of the Medicine Wheel" and accommodation of traditional ceremonial use by Indians. Aplt. Ap. at 92, 94, 95. The MOA also provided that the signatories would work toward a Programmatic Agreement and Historic Properties Management Plan to ensure the "long-term protection and continued traditional cultural use of the Medicine Wheel" and the "development of management goals which provide for public enjoyment of the Medicine Wheel in a manner that does not conflict

[3] The Medicine Wheel Coalition is a political advocacy organization of traditional cultural leaders designated by several Plains tribes. Resp. Ap. at 191-195. The Alliance is an activist group including both members of federally recognized Indian tribes and environmentalists. Resp. Ap. at 175-177. Neither organization is a religious organization.

with the traditional cultural or archaeological values that make this Landmark nationally significant." Aplt. Ap. at 96.

Following additional consultation between the parties and with the public, *see, e.g.*, Resp. Ap. at 196-198, 225, 236-237, 243-247, the parties to the MOA, as well as the Federal Aviation Administration which operates a radar dome on Medicine Mountain, entered into a Programmatic Agreement ("PA1") in August 1994. PA1 continued the interim MOA management procedures and also included procedures governing the development of a long-term Historic Preservation Plan ("HPP"). Aplt. Ap. at 382-400.

A two year process was then commenced during which archeological and ethnographic surveys were prepared, consultations held and draft HPP provisions were circulated for review and comment. Aplt. Ap. at 147-148, 235-254, Resp. Ap. at 5333. The entire process continued to be open to the public, *see, e.g.*, Resp. Ap. at 201-202, 204-205, 219-222, and specifically included representatives of the local community – the Big Horn County Commissioners.

In September 1996, a Programmatic Agreement ("PA2") and HPP were approved by the seven consulting parties. Resp. Ap. 2510-2511; Aplt. Ap. at 423-428. On October 7, 1996, the Forest adopted Forest Plan Amendment No. 12 to implement the HPP. Aplt. Ap. at 573-575.

The primary purpose of the HPP was "to establish a process for integrating the preservation and traditional uses of historic properties 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 consistent with Section 110(f)[4] of the National Historic Preservation Act." *Wyoming Sawmills v. United States Forest Service*, 179 F.Supp.2d 1279, 1287 (D.Wyo. 1999), *affd.* 383 F.3d 1241 (10th Cir. 2004). In so doing, it recognized the Forest's obligation under the American Indian Religious Freedom Act, 42 U.S.C. 1996, and Executive Order 13,007 (1996) "to manage the Medicine Wheel and the Medicine Mountain environment in a manner that is sensitive to and respects the spiritual importance of these locations to Native American traditional religious practitioners." Aplt. Ap. at 314. However, as noted by the Big Horn County Commissioners in their introductory statement to the HPP, it does so "while providing for multiple use of Forest Lands that contribute to our economy and lifestyle." *Id.*

Among other things, the HPP provides for:

- Consultation with all of the parties to the HPP whenever a governmental undertaking may impact upon the Medicine Wheel HPP Management Area. This consultation is in lieu of consultation pursuant to section 106 implementing regulations. 36 C.F.R. Part 800. The Management Area varies depending upon the activity involved. At its largest, it is equal to approximately 18,000 acres or less than 2% of the land area of the Forest which contains 1,107,670 acres. Resp. Ap. at 228, 4073. Of the 18,000 acres, only 10% is currently suited for timber production. Aplt. Ap. at 347. The Forest reserves the authority to make all final decisions regarding projects in the Management Area, Aplt. Ap. at 273, and

[4] 16 U.S.C. 470h-2(f).

there is a specific requirement to provide the public with the opportunity for input as well. Aplt. Ap. at 299-300.

- Restrictions upon vehicular access to the Medicine Wheel along FDR 12 (the road that goes past the Wheel) similar to those in the initial MOA; visitors to the site must hike approximately a mile and a half to reach the site; vehicular traffic on FDR 12 is permitted, however, in the case of handicapped and emergency vehicles or vehicles accessing land northwest of the Medicine Wheel for ranching, hunting or other recreational purposes. Aplt. Ap. at 299, 301. In 1998, 20,055 people visited the Medicine Wheel, of which 841 were Native Americans. Resp. Ap. at 223-224. Thus, there has continued to be a considerable amount of tourist visitation at the site in the post-HPP era.

- Future development of a timbering plan for the area which incorporates both the statutory and forest health needs of the Forest Service, as well as traditional Indian perspectives; logging is specifically permitted when necessary "for maintaining the overall health of the Forest"; FDR 12 is closed to logging traffic; this closure, however, did not change the *de facto* status of FDR 12 since timber has not been hauled on that road within recent memory and, in fact, a timber sale was withdrawn in the 1980s because of concerns about logging truck traffic near the Medicine Wheel. Aplt. Ap. at 348, Resp. Ap. at 216. All suitable timber within the Management Area can be accessed by FDR 12 below the closure or by other roads. Resp. Ap. at 2828. No restriction upon hauling timber on other roads in the consultation area, specifically FDR 11 and 14, is stated in the HPP.

- Continuation of intensive grazing within the Management Area, but management of the grazing to protect springs in the area and direct the grazing away from the vicinity of the Medicine Wheel. Aplt. Ap. at 362-364.

- Retention of the quality of the viewshed from Medicine Wheel and Medicine Mountain. Aplt. Ap. at 309-310.

- Time-limited opportunities for traditional ceremonial use of the site without disturbance, upon request. Aplt. Ap. at 314-315.

- Continued monitoring of the area by the parties to the agreement; said monitoring meetings are specifically open to the public. Aplt. Ap. at 368.

- Submission of a nomination to the Park Service for expansion of the Medicine Wheel National Historic Landmark boundary. Resp. Ap. at 207.

In 1996, the Horse Creek Timber Sale was proposed for bidding. During the scoping process, some limited consultation took place with the consulting parties to the HPP. Resp. Ap. at 218. Respondent Medicine Wheel Coalition specifically indicated that its representatives needed to visit the site as part of the consultation process. Resp. Ap. at 248. Although this never occurred, a bid package was prepared and disseminated by the Forest. Aplt. Ap. at 513-533. In September 1997, the sale was discussed at a meeting of the parties to the HPP. It became clear at that time that adequate consultation, as required by Section 106 of the NHPA, had never taken place. Resp.

Ap. at 249-251. As a result, the sale was postponed until further consultation could take place. Aplt. Ap. at 534. A review was done by the Medicine Wheel District Ranger wherein he concluded that not only was consultation inadequate, but that a moratorium on logging in roadless areas and inadequacies in the environmental analysis dictated withdrawal of the sale for the present time. Aplt. Ap. 563-570. However, the Forest specifically reserved the right to list the sale in the future and to use FDR 11 and 14 for logging trucks if appropriate. Aplt. Ap. at 571-572.

ARGUMENT

I. THE TENTH CIRCUIT RULING THAT PETITIONER LACKED STANDING IS CORRECT, IS BASED UPON THE SPECIFIC FACTS OF THIS CASE, AND WILL NOT HAVE SIGNIFICANT PRECEDENTIAL VALUE

Article III of the Constitution limits judicial power to the resolution of "cases" or "controversies". One of the requirements of a case or controversy is that a plaintiff must have standing to challenge the action sought to be adjudicated in the lawsuit. As stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), in order for a plaintiff to have standing, it must show that it has suffered an injury in fact that involves a "legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical", that the injury is traceable to the actions of the defendant and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Petitioner rests its claim of standing to challenge government action based upon an alleged violation of the Establishment Clause, U.S. Const., Amend 1, on two grounds – a lost opportunity to bid for timber contracts within portions of the Forest in general, and for the proposed Horse Creek timber sale specifically, and because it "has direct contact with government endorsement of religious symbols" in a public place. (Pet. Br. at 7-11) It asserts that the negative holdings of the Tenth Circuit Court of Appeals on both of these issues conflict with Supreme Court precedent and precedent from other Circuits. However, the conflicts that petitioner presents are illusory when the actual facts of this case are considered and compared to the past precedents cited by petitioner. Unlike the cases cited, the facts here show that there is no injury in fact attributable to the HPP and, even if injury is assumed, it is not redressable by a decision from this Court or any other Court.

Petitioner's lack of standing results from a straightforward application of the law of standing to the facts of this case. As the District Court below observed, "[t]he facts do not suggest that Sawmills had an entitlement to log anywhere in Big Horn National Forest." 179 F.Supp.2d at 1293. Thus, it is questionable whether petitioner has a "legally protected interest" sufficient to provide for standing.

Moreover, the record does not support a finding that the HPP has reduced the level of logging in the Bighorn National Forest. There are over 1.1 million acres in the Bighorn National Forest. Only about 18,000 acres are within the Management Area (also referred to as the Area of Consultation or "AOC") covered by the Historic Preservation Plan and only 1,800 acres within the AOC are

suitable for timber production.[5] Aplt. Ap. at 347. According to the Forest Plan, the Forest as a whole has a potential annual output of 49.0 million Board Feet, whereas the Forest Plan's annual objective for timber production is only 16.5 million Board Feet. Resp. Ap. at 4107. Clearly, there are many other areas within the Forest available for timber production. Thus, it is not surprising that petitioner has made no showing that the Forest is offering fewer board feet of timber for sale because of the HPP. Indeed, in its Environmental Assessment for the HPP, the Forest concluded that there would be no change in outputs projected in the Forest Plan as a result of the HPP. Aplt. Ap. at 635. That being the case, petitioner has shown no injury in fact from the HPP.

In addition to its general complaint, petitioner specifically complains that it lost an opportunity to bid for timber when the Horse Creek sale was withdrawn. But the Forest had no obligation to offer this sale at all and petitioner had no legally protected interest in the sale. Moreover, a memorandum from the Medicine Wheel District Ranger to the Forest Supervisor outlined a number of other problems which independent of the HPP caused the proposed timber sale not to be bid.[6] In short, the memo concluded that "we would have a hard time defending our decision [to allow the timber sale] based on process violations, conflicting

[5] The HPP does not actually forbid logging within the AOC – it is permitted if necessary for forest health. Aplt. Ap. at 349-350.

[6] He concluded that the 1988 environmental assessment ("EA") was inadequate, the 1997 amendment to the EA was not legally permissible, that there were inconsistencies in the analysis on issues such as elk cover and regeneration and that there was a moratorium on timber sales in roadless areas that affected the viability of the Horse Creek sale. Aplt. Ap. at 567-570.

data, and incomplete NEPA analysis." Aplt. Ap. at 567-570. His memorandum makes clear that the Forest postponed the proposed sale because of a number of issues which had nothing to do with the HPP. All that took place pursuant to the HPP was consultation; the HPP mandated no particular decision as a result of that consultation. Thus, there was no direct nexus between the HPP and the injury that has been alleged by the petitioner based upon the withdrawal of the Horse Creek sale.

Even if it is assumed that the HPP caused petitioner injury, the likelihood of Court action redressing this injury is slim. Petitioner has no more than a hope that *if* the HPP is overturned, the Forest *might* authorize Horse Creek or some other timber sale, its bid *might* be accepted by the Forest Service and it *might* gain profit as a result. Even if the HPP and related documents were invalidated, the Forest Service would *not* be compelled as a result to re-bid the Horse Creek sale or offer any other sale or to award any bid to petitioner. Thus, it is very unlikely that the alleged injury suffered by Sawmills will be redressed by a favorable court decision. In short, the denial of standing was entirely consistent with Article III standing jurisprudence on this issue.

As the Tenth Circuit fully explained in its opinion, *Wyoming Sawmills, Inc. v. United States Forest Service*. 383 F.3d 1241, 1248-1249 (10th Cir. 2004), the factual bases for standing in the cases cited by petitioner were entirely different from this case and the cases are fully distinguishable. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995), the plaintiff's claim was that it was unable to compete on an equal basis because of affirmative action requirements for Government contracts that were being offered on an ongoing basis. The injury in

fact was the loss of the ability to compete "on an equal footing" with other companies for contracts that would be offered by the government, a legally-protected harm which the court could redress, as opposed to a loss of profit caused by a discretionary government decision not to offer the contract at all.[7]

In *Watt v. Energy Action Ed. Found.*, 454 U.S. 151, 160-161 (1981), plaintiff California's claim was that the failure of the federal government to adequately test different bidding systems pertaining to off-shore drilling harmed its ability to maximize the amount of money from leases that would be awarded – money *that it had a statutory right to receive*. The Court found that an Order requiring the Secretary to test different systems would have a reasonable likelihood of securing California's *legally-protected interest* and thus the injury in fact was redressable.

Finally, in *Bryant v. Yellin*, 447 U.S. 352, 366-368 (1980), the Court found that if certain irrigation restrictions were enforced, it was very likely the land that the plaintiffs wanted to purchase would become available. Thus, unlike here, there was a "substantial likelihood" that the relief sought would address plaintiff's injury.

Petitioner raises two other arguments in its effort to convince this Court to grant *certiorari*. The first argument is based upon a line of cases where individuals who were

[7] The 8th Circuit case cited by petitioner, *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 349, 353-354 (8th Cir. 1984), *cert. den.*, 469 U.S. 1158 (1985) is similar. It involved the right of the plaintiff to compete for a lease that the government decided to award, not an abstract loss of opportunity to bid for lands that might never be leased.

in contact with religious symbols on public land have had standing to raise First Amendment claims. Petitioner asserts that the denial of its claim of standing is in conflict with those cases. Essentially, the "directly affected" test applied in the line of cases cited by petitioner has been a mechanism to provide standing to individuals asserting non-economic injuries. *See, e.g., Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989), *cert. den.*, 495 U.S. 910 (1990). In most cases, those individuals have been forced to take steps to avoid the displays in question and have thereby been prevented from engaging in normal civic activities. *Id.* at 1489-1490.

As the Tenth Circuit held, however,

> [i]n its attempt to explain how it has been directly affected, plaintiff repeatedly refers to the alleged restrictions on timber cutting which it says will follow from the HPP . . . [Thus w]e discern no allegation separate from the alleged loss of opportunity for profitable logging.

[383 F.3d at 1247.]

In short, petitioner does not represent a group of individuals who are "directly affected" in a non-economic manner by the display of a religious symbol or sponsorship of a religious activity. As the Court below concluded, this for-profit corporation simply did not and was unable to assert anything *but* an economic injury. Thus, there is no legal inconsistency between the holding below and the

religious symbolism cases. Rather, the facts here are simply different.[8]

Finally, petitioner attempts to get this Court's attention by mischaracterizing language in the Tenth Circuit decision that "[a]s an artificial person, plaintiff has not shown how it experienced the kind of constitutional injury that has been found in such cases." 383 F.3d at 1247. Petitioner attempts to argue that this constitutes a broad holding that corporations have no standing to bring First Amendment claims. Pet. Br. at 11-14. The Tenth Circuit held nothing of the sort. In fact, it specifically found that it did not need to determine whether a corporation can make a claim based upon non-economic loss[9] because *the only concrete and particular injury in fact that the petitioner here actually alleged was the loss of the opportunity to bid for a contract to harvest timber for profit* – a purely economic loss. 383 F.3d at 1247.

In short, the Tenth Circuit opinion was well grounded in the law and was based upon the specific facts present in

[8] These cases can also be distinguished factually by the nature of the "symbol" involved here which is not inherently religious to most people who view it. Rather, it is perceived by most Americans as a site of great archeological and historic significance that was in fact recognized as such when it was designated a National Historic Landmark. Indeed, as the District Court noted, even if the petitioner were "offended" by the Medicine Wheel, the Court "could not redress that injury because even if it struck down the HPP it could not eliminate the Medicine Wheel as it is a protected National Monument." 179 F.Supp.2d at 1295.

[9] We would argue that a for-profit corporate entity cannot be "religiously offended" within the meaning of these cases, but agree with the Tenth Circuit that such a finding was not necessary to deny standing to petitioner given the facts of this case.

this case. Thus, this case is of minimal precedential significance and *certiorari* ought to be denied.

II. THE ESTABLISHMENT CLAUSE ISSUE THAT THE PETITIONER SEEKS TO HAVE THIS COURT REVIEW IS NOT PROPERLY BEFORE THIS COURT

Neither the District Court nor the Tenth Circuit Court of Appeals ruled upon petitioner's claim that the Historic Preservation Plan violates the Establishment Clause, U.S. Const. Amend 1. Under those circumstances, it would be premature for the Court to consider this question. Rather, in the unlikely event that the court were to accept *certiorari* and reverse on the standing issue, it would be appropriate for the lower courts to consider this issue in the first instance. *See Duignan v. United States,* 274 U.S. 195, 200 (1929) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.")

Suffice it to say, the petitioner's Establishment Clause claim is based upon a complete distortion of the facts. It is simply untrue that all but Native Americans are excluded from 50,000 acres of the National Forest. *See* p. 4-6 of this brief, *supra*. Were the lower courts to review this issue, they would find that the Historic Preservation Plan clearly has many secular purposes and falls squarely within this Court's jurisprudence on the accommodation of religious free exercise, including the Court's observations about accommodating Native American activities at sacred sites in *Lyng v. Northwest Indian Cemeteries Assn.*, 485 U.S. 454 (1988) (although it held that the First Amendment Free Exercise Clause did not require that a road through a Native American sacred site be prohibited, the Court

commended and accepted as constitutional a variety of governmental actions designed to ameliorate the impact of the road upon religious practitioners because those actions would accommodate the free exercise of religion by the affected practitioners).

Thus, this Court should reject Petitioner's Question 2 as unsuitable for *certiorari.*

CONCLUSION

For all of the above reasons, this Court should deny the Petition for Writ of *Certiorari.*

Respectfully submitted,

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