No. 15-826

In the Supreme Court of the United States

LA CUNA DE AZTLAN SACRED SITES PROTECTION CIRCLE ADVISORY COMMITTEE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the declarations submitted by petitioners in the district court were too conclusory and lacking in detail to establish that the government's approval of the construction of a solar power plant on federal land substantially burdened petitioners' exercise of religion under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 603 Fed. Appx. 651. The order of the district court (Pet. App. 5a-31a) is not published in the *Federal Supplement* but is available at 2013 WL 4500572.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2015. A petition for rehearing was denied on July 27, 2015 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on October 26, 2015 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Ivanpah Solar Electric Generating System (Ivanpah Project) is a solar power plant built on land

owned by the federal government and administered by the Bureau of Land Management (BLM). The project is located in the Mojave Desert in California, about 40 miles southwest of Las Vegas. It consists of three fields of computer-controlled mirrors that focus the sun's rays on elevated boilers, producing steam that generates electricity. The project occupies roughly 5.4 square miles of land. Pet. App. 7a-8a, 108a.

Before approving construction of the Ivanpah Project, the BLM prepared an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* Pet. App. 9a-11a. Among other things, the EIS examined the project's possible impacts on Native American cultural and religious resources. 13-56799 Docket entry No. 40-2 (Apr. 20, 2015). The BLM solicited public comments, consulted with Indian tribes and other Native American groups, examined literature and public records, and made inquiries of the California Native American Heritage Commission's Sacred Lands File. *Id.* at 4.4-24 to 4.4-26. The BLM found no information indicating the presence of religious or cultural sites at the location of the Ivanpah Project. *Ibid.* Additionally, archaeologists carefully examined the area and found a "complete absence of prehistoric or historic cultural resources." *Id.* at 4.4-34.

The BLM approved the construction of the Ivanpah Project in October 2010, and the Department of Energy provided loan guarantees to help fund the project. Pet. App. 10a-12a. Construction is now complete, and the plant began operating in February 2014.[1]

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[1] See U.S. Dep't of Energy, *Energy Secretary Moniz Dedicates World's Largest Concentrating Solar Project* (Feb. 13, 2014),

2. Petitioners are seven individuals and two non-profit organizations. Pet. App. 6a. In January 2011, while the Ivanpah Project was under construction, petitioners filed this action against the BLM, other federal agencies and officials, and the project's private sponsors. Petitioners asserted a variety of statutory challenges to the BLM's approval of the Ivanpah Project and the Department of Energy's decision to provide loan guarantees. As relevant here, petitioners contended that the approval of the project violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which provides that the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1.

Petitioners' RFRA claim rests on their assertion that the Ivanpah Project is located in a large area that is sacred to the Chemehuevi and other Indian tribes. According to petitioners, that area extends "100 miles to the east and 100 miles to the west of the Colorado River from Spirit Mountain (about 15 miles northwest of Laughlin, Nevada) in the north to the Gulf of California (in Mexico) in the south." Pet. App. 52a. That description encompasses approximately 40,000 square miles, an area roughly the size of Kentucky. Petitioners assert that this sacred area contains "Salt Song Trails," which "span four states and represent ancient villages, gathering sites for salt and medicinal herbs, trading routes, historic sites, sacred areas, ancestral lands, and pilgrimages in a physical and spiritual landscape of stories and songs." *Id.* at 49a.

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http://www.energy.gov/articles/energy-secretary-moniz-dedicates-world-s-largest-concentrating-solar-power-project.

Petitioners did not raise their religious concerns during the administrative process. In the district court, however, petitioners submitted declarations stating that the Ivanpah Project is located in a sacred area and that it has "significant portions of the Salt Song Trails running through it." Pet. App. 49a, 53a. Petitioners further asserted that they would be prosecuted for trespassing if they attempted to visit the areas of the project site that had been fenced off during construction. *Id.* at 50a, 55a, 62a. But neither petitioners' declarations nor anything else in the record identifies the specific location of any Salt Song Trail or any other sacred site within the Ivanpah Project. *Id.* at 3a.

3. The district court rejected petitioners' claims on cross-motions for summary judgment. Pet. App. 5a-31. As relevant here, the court held that petitioners' RFRA claim failed because the denial of access to government-owned land cannot substantially burden the exercise of religion under RFRA. *Id.* at 25a-27a.

4. The court of appeals affirmed in a short unpublished opinion. Pet. App. 1a-4a. The court emphasized that petitioners' declarations "provide[d] little more than conclusory statements" and failed to establish "where the alleged sacred sites are located at the Ivanpah Project site." *Id.* at 3a. The court therefore held that the record "is insufficient to support [petitioners'] claim that the loss of access to the limited area taken by the Ivanpah Project imposes a substantial burden" on their exercise of religion. *Ibid.*

5. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 32a-33a.

ARGUMENT

Petitioners renew their contention (Pet. 6-13) that the BLM's approval of the Ivanpah Project violated RFRA. The court of appeals correctly rejected that argument, and its factbound, nonprecedential decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. The premise of the petition is that the court of appeals held that approval of the Ivanpah Project did not substantially burden petitioners' exercise of religion even though it "denie[d] [petitioners] access to land necessary for religious rites." Pet. i. That premise is mistaken. The court's decision rested instead on the inadequacy of petitioners' summary-judgment evidence, which consisted of declarations "that provide[d] little more than conclusory statements" and that did not even indicate "where the alleged sacred sites are located" within the area occupied by the Ivanpah Project. Pet. App. 3a.

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). Here, petitioners bore the burden of proving that the approval of the Ivanpah Project substantially burdened their exercise of religion. *Navajo Nation* v. *United States Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc), cert. denied, 556 U.S. 1281 (2009); see *Holt* v. *Hobbs*, 135 S. Ct. 853, 862 (2015) (applying the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.*). And it is well-settled that "a conclusory, self-serving affi-

davit, lacking detailed facts and any supporting evidence, is insufficient" to withstand a motion for summary judgment. *United States* v. *$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) (citation omitted); see *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (explaining that the purpose of summary judgment "is not to replace conclusory allegations of the complaint * * * with conclusory allegations of an affidavit").[2]

Under that settled rule, the court of appeals correctly held that petitioners' declarations were too conclusory to withstand summary judgment. Those declarations assert in general terms that the Ivanpah Project "is in a sacred place," that unspecified religious rituals are performed at "the site" of the project, and that the project "has significant portions of the Salt Song Trails running through it." Pet. App. 49a, 53a, 58a. But the declarations do not identify the location of any sacred site within the area occupied by the Ivanpah Project. *Id.* at 3a. To the contrary, the

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[2] See also, *e.g.*, *Rodriguez* v. *Village Green Realty, Inc.*, 788 F.3d 31, 44 (2d Cir. 2015) ("[C]onclusory declarations are insufficient to raise a question of material fact."); *Gonzalez* v. *Secretary, DHS*, 678 F.3d 254, 263 (3d Cir. 2012) ("As a general proposition, 'conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment.'") (citation omitted); *Logan* v. *Liberty Healthcare Corp.*, 416 F.3d 877, 882 (8th Cir. 2005) ("[C]onclusory affidavits, standing alone, cannot create a genuine issue of material fact, precluding summary judgment.") (citation omitted), cert. denied, 547 U.S. 1076 (2006); *Cooper-Schut* v. *Visteon Auto. Sys.*, 361 F.3d 421, 429 (7th Cir. 2004) ("[A] plaintiff's 'conclusory statements, unsupported by the evidence of record, are insufficient to avoid summary judgment.'") (citation omitted); *Garrett* v. *Hewlett-Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002) ("[Courts] do not consider 'conclusory and self-serving affidavits.'") (citation omitted).

only sites identified with any specificity are *outside* the project boundaries. The declarations refer to a sacred site known as "Metamorphosis Hill," but state that it is located "roughly 100 yards from the project site boundary." *Id.* at 50a, 54a, 59a. The declarations thus do not assert that petitioners have been denied access to Metamorphosis Hill, but only that the Ivanpah Project "will impede the view" from the Hill. *Ibid.* Similarly, although two petitioners assert that they "regularly visit the site" of the project, they substantiate that assertion by citing a photograph showing them "on a sacred ridge that overlooks the Ivanpah Solar Project site" but is outside the site's borders. *Id.* at 49a, 52a.

Petitioners' lack of specificity is particularly notable here, where they assert that their religious beliefs treat as sacred a vast area spanning tens of thousands of square miles and "four states." Pet. App. 49a, 53a, 58a. Indeed, petitioners have brought parallel RFRA challenges to four other solar projects in other areas of the California desert, and their complaints in those cases likewise assert that the other project sites have "significant portions of the Salt Song Trails running through [them]."[3] Under the circumstances, the court of appeals correctly concluded that petitioners' declarations were too lacking in detail to survive a motion for summary judgment. And even if the court had erred, that case-specific assessment of the record would not warrant this Court's review.

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[3] 12-cv-5 Docket entry No. 1, at 12 (C.D. Cal. Jan. 3, 2012); 11-cv-4466 Docket entry No. 1, at 13 (C.D. Cal. May 24, 2011); 11-cv-1478 Docket entry No. 125, at 10 (C.D. Cal. Apr. 4, 2013); 11-cv-395 Docket entry No. 53, at 12 (C.D. Cal. Apr. 4, 2012).

2. Petitioners do not directly challenge the court of appeals' holding that their declarations were too conclusory to survive summary judgment. Instead, they assume that the court held that a government action that results in the denial of access to government land that adherents consider necessary for religious rites can never impose a substantial burden on the exercise of religion. As explained above, the court did not rely on such a rule. But this Court's review would not be warranted even if it had. RFRA's context and history make clear that the government's use of its own land does not substantially burden the exercise of religion, and petitioners cite no decision holding otherwise.

a. For several decades, in a line of cases including *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court permitted religious adherents to invoke the Free Exercise Clause of the First Amendment to seek religious exemptions from neutral, generally applicable laws. "[T]hose decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) (*Hobby Lobby*).

The Court's decisions applying the *Sherbert-Yoder* test rejected claims that the government's management of its own programs or property could impose a substantial burden on the exercise of religion. In *Bowen* v. *Roy*, 476 U.S. 693 (1986), two applicants for welfare benefits challenged a federal statute requiring welfare agencies to use Social Security numbers to identify claimants, contending that using a number to identify their two-year-old daughter would "rob [her]

spirit" and "prevent her from attaining greater spiritual power." *Id.* at 696. This Court did not question the sincerity or the weight of the parents' religious beliefs, but it held that the claimed injury was not a cognizable burden because the Free Exercise Clause "does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700.

The Court later reaffirmed that principle in the specific context presented here—the government's management of federal lands for the public good. In *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Court considered three Indian tribes' challenges to government plans to permit timber harvesting in, and construction of a road through, the Chimney Rock area, a portion of a national forest traditionally used for religious practice by members of the tribes. *Id.* at 442. The tribes asserted that the Chimney Rock area was an "indispensable part of Indian religious conceptualization and practice" and that the project "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the[ir] belief systems and lifeway." *Ibid.*

The Court acknowledged that the challenged project would have "devastating effects on traditional Indian religious practices." *Lyng*, 485 U.S. at 451. But it held that those harms did not constitute a cognizable burden under the Free Exercise Clause, explaining that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires" in matters such as the administration of public lands. *Id.* at 452. The religious beliefs asserted in *Lyng*, the Court emphasized, could allow

adherents to "seek to exclude all human activity but their own from sacred areas of the public lands." *Id.* at 452-453. The Court declined to adopt an understanding of the right to the free exercise of religion that would grant religious adherents such "*de facto* beneficial ownership of some rather spacious tracts of public property." *Id.* at 453. The Court therefore held that the tribes' religious beliefs "d[id] not divest the Government of its right to use what is, after all, *its* land." *Ibid.*

b. This Court ultimately rejected the *Sherbert-Yoder* approach as a matter of constitutional law in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause does not require religious exemptions to laws of general applicability, even if those laws substantially burden religiously motivated conduct. *Id.* at 876-890. Congress responded to the Court's decision by enacting RFRA, which "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (*O Centro*). Under RFRA, the government may not "substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," unless "application of the burden to the person" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b).

RFRA expressly provides that it is intended to "restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]." 42 U.S.C. 2000bb(b)(1). And RFRA's legislative history confirms that Congress intended for courts to "look to free exercise cases decided prior to *Smith* for guidance in determining

whether the exercise of religion has been substantially burdened." S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993) (Senate Report); see H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same). In particular, Congress recognized that, in light of *Roy* and *Lyng*, "pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." Senate Report 9; see, *e.g.*, 139 Cong. Rec. 26,193 (1993) (Sen. Hatch) (observing that *Lyng* held that "the way in which Government manages its affairs and uses its own property does not constitute a burden on religious exercise" and reaffirming that RFRA "does not [a]ffect [*Lyng*], a case concerning the use and management of Government resources"); *id.* at 26,415 (Sen. Grassley) (same).

c. The principle adopted by this Court in *Lyng* and carried forward by Congress in RFRA forecloses petitioners' claim. Here, as in *Lyng*, petitioners challenge the approval of a project on the government's own land because it will interfere with their use of that land for religious purposes. And here, as in *Lyng*, petitioners' claims would, if adopted, effectively grant them "*de facto* beneficial ownership of some rather spacious tracts of public property." 485 U.S. at 453. Indeed, petitioners assign spiritual significance to a far larger expanse of land than the area at issue in *Lyng*, see *ibid.*, and petitioners have already asserted essentially identical RFRA claims in an effort to block other solar projects located dozens of miles or more from the Ivanpah Project site. See pp. 6-7 & n.3, *supra*. In this case, as in *Lyng*, the right to the free exercise of religion "simply does not provide a

principle that could justify upholding [petitioners'] legal claims." 485 U.S. at 452.[4]

The free exercise of religion protected by RFRA creates a sphere of religious liberty and autonomy that is to be free of governmental interference unless that interference is necessary to serve a compelling governmental interest. But the right to the free exercise of religion does not give religious adherents the right to dictate the government's use of its own land or resources. Petitioners do not cite any decision holding otherwise. To the contrary, the only land-use decision petitioners cite (Pet. 11-12) *rejected* a RFRA claim like the one at issue here. See *Navajo Nation*, 535 F.3d at 1073 (holding that the plaintiffs in that case "cannot dictate the decisions that the government makes in managing 'what is, after all, *its* land'") (quoting *Lyng*, 485 U.S. at 453).

d. Petitioners err in asserting (Pet. 6-13) that the court of appeals' decision conflicts with this Court's decisions in *Holt*, *Hobby Lobby*, and *O Centro*. None

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[4] In *Lyng*, this Court stated that "[t]he Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the [plaintiffs in that case] from visiting the Chimney Rock area would raise a different set of constitutional questions." 485 U.S. at 453. Petitioners do not rely on that statement, and it does not assist them. Petitioners do not and could not contend that the approval of the Ivanpah Project reflects any discriminatory intent; to the contrary, the BLM approved the project only after finding that it would not affect Native American cultural or religious sites. See p. 2, *supra*. And petitioners have not been prohibited from visiting the vast majority of the very large area they consider sacred—they lost access only to the limited area occupied by the construction of the Ivanpah Project. That area is comparable to the portions of the Chimney Rock area that were occupied by the logging and road-building activities in *Lyng*. See 485 U.S. at 442-443.

of those cases involved the use of government land. Instead, the challenged government actions in those cases substantially burdened the exercise of religion by prohibiting (or requiring) conduct that the plaintiffs' religious beliefs required (or prohibited). See *Holt*, 135 S. Ct. at 862-863 (prison grooming policy prohibiting beards); *Hobby Lobby*, 134 S. Ct. at 2777-2779 (regulation requiring employers to include contraceptive coverage in the health coverage they provided to employees); *O Centro*, 546 U.S. at 425-426 (controlled-substances law prohibiting possession of an ingredient in a sacramental tea).

Petitioners contend (Pet. 6-13) that they face an equivalent burden because they would be prosecuted for trespassing if they attempted to enter the Ivanpah Project site to engage in religious rituals. But petitioners cite no decision accepting that logic, which would effectively reverse the rule established in *Lyng* and adopted by Congress in RFRA. Under RFRA, "strict scrutiny does not apply to government actions involving only * * * the use of the Government's own property or resources." Senate Report 9. But that rule would be a dead letter if a religious objector could transform the government's use of its own land into a substantial burden by asserting a religious compulsion to trespass on the land in question or otherwise to interfere with the government's use.

e. The government has a strong policy of accommodating Native American religious practices and protecting religious and cultural sites. Agencies responsible for managing federal lands must, "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian

sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). The government often implements that policy by restricting the use of federal lands to protect Native American religious practices.[5] Here, too, the BLM would have sought to accommodate petitioners' access to any sacred sites within the Ivanpah Project if petitioners had raised the issue during the administrative process. But petitioners did not do so. And, as *Lyng* makes clear, RFRA does not permit petitioners' religious beliefs to control the government's use of federally owned land for the public good.

3. Finally, this case would be a poor vehicle in which to consider RFRA's application to the government's use of public lands even if that issue otherwise warranted review. First, petitioners' failure to raise their religious concerns during the administrative process and their vague, conclusory declarations make for an extremely sparse record. Second, petitioners challenged the BLM's approval of the Ivanpah Project and sought to block its construction, see 11-cv-400 Docket entry No. 96, at 19 (Nov. 23, 2011), but they did not obtain a preliminary injunction. Construction of the project is now complete, and at this point it is unclear what relief petitioners seek or could obtain. Third, and relatedly, petitioners' declarations were

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[5] See *e.g.*, *Access Fund* v. *USDA*, 499 F.3d 1036, 1039 (9th Cir. 2007) (ban on recreational activities in areas considered sacred); *Bear Lodge Multiple Use Ass'n* v. *Babbitt*, 175 F.3d 814, 815-816 (10th Cir. 1999) (limitation on access by non-Native Americans to sacred sites during religiously significant times of the year), cert. denied, 529 U.S. 1037 (2000).

executed in 2012 and assert that they were denied access to the Ivanpah Project site during construction. Pet. App. 50a, 55a, 62a. The record does not indicate what access restrictions are in place now that construction is complete.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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