No. 08-846

In the Supreme Court of the United States

NAVAJO NATION, ET AL., PETITIONERS

v.

UNITED STATES FOREST SERVICE, 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 erred in concluding that the use of recycled wastewater to make artificial snow on a mountain owned by the government and deemed sacred by petitioners does not "substantially burden" petitioners' exercise of religion under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-113a) is reported at 535 F.3d 1058. The opinion of the district court (Pet. App. 186a-267a) is reported at 408 F. Supp. 2d 866.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2008. On October 29, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 8, 2008. On November 20, 2008, Justice Kennedy further extended the time to January 5, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause of the First Amendment does not require neutral laws of general applicability to be justified by a compelling government interest, even if they substantially burden a religious practice. *Id.* at 882-890. In response, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*

In RFRA, Congress sought to overcome the effect of *Smith* by "restor[ing] the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)" and "guarantee[ing] its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1). Congress explained that the "compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5). Congress therefore provided:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000bb-1(b).

Although this Court invalidated RFRA as applied to the States and their subdivisions in *City of Boerne* v. *Flores*, 521 U.S. 507, 532-536 (1997), RFRA continues

to apply to the federal government, see 42 U.S.C. 2000bb-3(a).

2. a. The San Francisco Peaks (Peaks) are a series of mountains located in the Coconino National Forest, just north of Flagstaff, Arizona. Pet. App. 8a. One percent of the area of the Peaks is occupied by the Snowbowl ski resort area (Snowbowl). *Id.* at 8a, 216a. The United States Forest Service (Forest Service) designated the Snowbowl as a public recreation facility because the area "represent[s] an opportunity for the general public to access and enjoy public lands in a manner that the Forest Service could not otherwise offer in the form of a major facility anywhere in Arizona." *Id.* at 8a (internal quotation marks and citation omitted).

The Snowbowl has been in operation as a ski resort area since the 1930s. Pet. App. 9a. The Snowbowl currently is operated by respondent Arizona Snowbowl Resort Limited Partnership (ASR), pursuant to a special use permit issued by the Forest Service. *Id.* at 217a.

The Peaks have "long-standing religious and cultural significance to Indian tribes," including petitioners. Pet. App. 9a. Petitioners consider the Peaks to be a living entity. *Id.* at 9a, 224a. They conduct religious ceremonies on the Peaks and collect plants, water, and other materials from the Peaks for use in medicinal bundles and healing ceremonies. *Ibid.* According to petitioners, the very presence of the Snowbowl desecrates the spirituality of the Peaks for them. *Ibid.*

b. Indian Tribes have previously challenged the operation of the Snowbowl. In 1979, the Forest Service approved a number of upgrades for the Snowbowl, which included the installation of new lifts, trails, and facilities. Pet. App. 9a, 218a. Certain Tribes sued to halt the proposed development and to remove all existing ski facili-

ties, contending, *inter alia,* that the proposed development would violate their First Amendment right to the free exercise of religion. See *Wilson* v. *Block*, 708 F.2d 735, 739-740 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983), and 464 U.S. 1056 (1984). The Tribes argued that further "development of the Peaks would be a profane act" and would "seriously impair their ability to pray and conduct ceremonies upon the Peaks, and to gather from the Peaks the sacred objects * * * which are necessary to their religious practices." *Id.* at 740.

The D.C. Circuit held that the proposed Snowbowl upgrades did not impermissibly burden the Tribes' free exercise of religion. *Wilson*, 708 F.2d at 739-745. The court explained that the government "has not conditioned any benefit upon conduct proscribed or mandated by plaintiffs' beliefs," "has not directly or indirectly penalized the plaintiffs for their beliefs," and has not "prevent[ed] them from engaging in any religious practices." *Id.* at 741-742, 745. Since *Wilson*, the Tribes have "continued to use the Peaks for religious purposes." Pet. App. 218a.

c. In recent years, snowfall at the Snowbowl has been sporadic, threatening the ski resort's continued operation. Pet. App. 10a, 218a-219a. In 2002, ASR submitted a proposal to the Forest Service to upgrade its operations at the Snowbowl. *Id.* at 10a. ASR did not propose to expand the Snowbowl area on the Peaks, but only to upgrade existing facilities and infrastructure. *Id.* at 187a n.2, 222a. One aspect of the proposal is that, to maintain the continued viability of the Snowbowl, ASR plans to make artificial snow using recycled wastewater. *Id.* at 10a-11a. The area proposed for snowmaking constitutes "approximately one quarter of one percent" of the Peaks. *Id.* at 222a.

The artificial snow would be made from recycled wastewater designated Class A+, which is the highest quality of recycled wastewater recognized by the Arizona Department of Environmental Quality (ADEQ). Pet. App. 10a-11a. In order to obtain Class A+ status, the water would have to undergo advanced treatment, including tertiary treatment with disinfection, and it would be monitored and tested frequently to assure that any pathogens are successfully removed. *Id.* at 11a n.6. Class A+ water has been specifically approved by the ADEQ as safe for many purposes, including irrigating school grounds and food crops, fire protection, and, as relevant here, making artificial snow. *Id.* at 11a; see Ariz. Admin. Code R18-11-309 tbl. A (2003). The proposal includes the use of recycled water, rather than fresh water, because of the scarcity of fresh water in Arizona. Pet. App. 253a.

In addition to using the recycled water for snowmaking, ARS also proposed to use it for a fire suppression system on the Peaks. Pet. App. 11a. The pipeline used to transport water to the Snowbowl would provide water for fire suppression in rural residential areas. *Ibid.* A reservoir of water would also be kept on the Snowbowl for fighting forest fires. *Ibid.*

Petitioners objected to the use of recycled water at the Snowbowl. In their view, use of the water would desecrate the Peaks and offend their religious beliefs. Pet. App. 6a-7a. Although "there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow," and petitioners would "continue to have virtually unlimited access to the mountain," including the Snowbowl, "to pray, conduct their religious ceremonies, and collect plants for religious

use," petitioners contended that the use of artificial snow would affect their "subjective spiritual experience" by "decreas[ing] the spiritual fulfillment [they] get from practicing their religion on the mountain." *Id.* at 6a-7a.

d. The Forest Service conducted an extensive review of the proposed project. Pet. App. 11a. As part of its review, it consulted with several Tribes to attempt to mitigate the effects of the proposed project on their religious activities. The Forest Service made over 500 contacts with Tribes that could be affected by the proposal and held between 40 and 50 meetings with them. *Ibid.*; see *id.* at 208a n.11, 210a, 219a. The Forest Service altered the proposed project in numerous respects to accommodate concerns raised by the Tribes. For example, the Forest Service eliminated the part of the proposal calling for the installation of lights to permit night skiing because some Tribes objected. *Id.* at 209a n.12. The Forest Service also signed a Memorandum of Agreement formally stating that it would continue to allow the Tribes access to the Peaks for cultural and religious purposes and to work with the Tribes to ensure that their religious activities on the Peaks would not be interrupted. *Id.* at 12a, 250a-252a.

After completing its review, the Forest Service issued an environmental impact statement and a record of decision authorizing a number of upgrades to the Snowbowl. Pet. App. 13a, 189a-190a. The Forest Service concluded that, without the proposed upgrades, the Snowbowl would not continue to be economically viable in low-precipitation years. *Id.* at 193a-195a, 264a-265a.

Petitioners filed an administrative appeal of the Forest Service's decision, which was denied. Pet. App. 13a. They then filed suit in federal district court, claiming

that the proposed project violated a number of federal statutes, including RFRA. *Ibid.*[1]

3. The district court held an 11-day bench trial on petitioners' RFRA claim, and then granted summary judgment for the Forest Service on all claims. Pet. App. 186a-267a.

The district court made extensive findings of fact about the extent to which the Snowbowl expansion would affect petitioners' religious beliefs and practices. Pet. App. 224a-241a. It found no evidence that the project would hinder the conduct of any religious ceremony, gathering, pilgrimage, or any other religious use of the Peaks. *Id.* at 228a, 231a-232a, 239a-240a, 259a, 261a. Instead, it found that the sole effect of the project would be on petitioners' subjective religious experience. *Id.* at 239a-240a. The court also observed that, because petitioners consider almost a dozen mountains and numerous other landscapes in the Coconino National Forest sacred, the "Forest Service would be hard pressed to satisfy the religious beliefs" of all of the petitioners. *Id.* at 243a-245a, 249a.

The district court explained that, to make out a prima facie claim under RFRA, petitioners were required to demonstrate that the proposed project "substantially burdens [their] ability to freely exercise

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[1] The only claim that petitioners continue to press before this Court is the claim that the proposed project violates RFRA. See Pet. App. 13a n.8 (noting that on appeal petitioners abandoned their claims under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, Grand Canyon National Park Enlargement Act, 16 U.S.C. 228a *et seq.*, and National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*); *id.* at 39a-42a (rejecting petitioners' claims under the National Environmental Policy Act of 1969, 16 U.S.C. 4321 *et seq.*, and National Historic Preservation Act, 42 U.S.C. 470 *et seq.*).

[their] religion." Pet. App. 255a (citing 42 U.S.C. 2000bb-1(b) and *Guam* v. *Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002)). If that showing is made, the court stated, the burden would shift to the government to demonstrate that the project furthers a compelling governmental interest using the least restrictive means available. *Id.* at 255a-256a.

The district court concluded that petitioners had failed to demonstrate a substantial burden on their religious exercise. Pet. App. 256a-261a. The court explained that "[t]he subjective views and beliefs presented at trial, although sincerely held, are not sufficient for the proposed project to constitute a substantial burden," because the project "does not coerce individuals into acting contrary to their religious beliefs" or "penalize anyone for practicing his or her religion." *Id.* at 260a-261a.

Citing this Court's decision in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the district court explained that "[a]llowing such a subjective definition of substantial burden would open the door to the imposition of 'religious servitudes' over large portions of federal land" and make it nearly impossible for the Forest Service to manage the "millions of acres of public lands in Arizona, and elsewhere, that are considered sacred to Native American tribes." Pet. App. 258a-260a. The district court also concluded that, even if there were a substantial burden on petitioners' religious beliefs, the government demonstrated that the proposed project was narrowly tailored to further a substantial government interest. *Id.* at 241a-255a, 261a-265a.

4. A three-judge panel of the court of appeals reversed. Pet. App. 116a-185a. The court of appeals then

granted en banc review and affirmed the district court's grant of summary judgment to the Forest Service. *Id.* at 1a-42a.

The en banc court of appeals explained that, "[w]ith the enactment of RFRA, Congress created a cause of action for persons whose exercise of religion is substantially burdened by a government action." Pet. App. 16a (citing 42 U.S.C. 2000bb-1). Noting that the government did not question whether petitioners' religious beliefs are sincere or whether petitioners' activities on the Peaks constitute an exercise of religion, *id.* at 17a, the court turned to the question whether the proposal would substantially burden petitioners' exercise of religion. *Id.* at 17a-35a.

The court explained that, under RFRA, that question is to be answered by reference to this Court's pre-*Smith* Free Exercise Clause precedents. Congress expressly stated in RFRA that its intention was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," based on its determination that that test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." Pet. App. 17a-18a (quoting 42 U.S.C. 2000bb(a)(5) and (b)(1)). The court therefore reviewed this Court's decisions in *Sherbert*, *Yoder*, and their progeny to determine what constitutes a substantial burden on the exercise of religion.

After reviewing this Court's pre-*Smith* precedents in detail, the court of appeals concluded that a government action generally constitutes a substantial burden on religion if "individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to

their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." Pet. App. 20a. "Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens." *Ibid.*

Applying those principles to the facts found by the district court (which petitioners did not challenge on appeal), the court concluded that petitioners failed to demonstrate a substantial burden on their exercise of religion. Pet. App. 21a-35a. The court observed that "[t]he only effect of the proposed upgrades is on [petitioners'] subjective, emotional religious experience"; they claim the project would "decrease the spiritual fulfillment they get from practicing their religion on the mountain." *Id.* at 21a. The court determined that, under this Court's precedents, "the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion." *Ibid.*

The court of appeals determined that this Court's decision in *Lyng* is "on point." Pet. App. 22a. In *Lyng*, the Court rejected several Tribes' claim that construction of a logging road through a national forest would substantially burden their exercise of religion. 485 U.S. at 441-442. The Court explained that the Tribes' claim that the project would "diminish the sacredness" of the land did not impose a burden "heavy enough" to violate the Free Exercise Clause. *Id.* at 447-449. The court of appeals explained that, "[l]ike the Indians in *Lyng*, [petitioners] here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment," and, like the challengers in *Lyng*, they failed to demonstrate a substantial burden. Pet. App. 25a.

Three judges dissented, contending that the use of artificial snow on the peaks would substantially burden petitioners' religious exercise. Pet. App. 43a-113a (W. Fletcher, J., dissenting).

ARGUMENT

Petitioners seek review of the court of appeals' decision that the diminishment of spiritual fulfillment does not constitute a substantial burden on the exercise of their religion under RFRA. Pet. i. The decision below is correct. In determining that petitioners failed to demonstrate a substantial burden, the court of appeals followed settled law, including this Court's decision in *Lyng*, which squarely rejected a claim that is indistinguishable from the one petitioners now make. Moreover, contrary to petitioners' contention, the courts of appeals have not divided on the question of what constitutes a substantial burden under RFRA. And even if there were disagreement in the circuits, this case would be an inappropriate vehicle for resolving that disagreement, because petitioners cannot prevail under any of the suggested standards. Further review of petitioners' fact-bound claim is therefore unwarranted.

1. a. RFRA provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that the application of the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. As this Court noted in *City of Boerne*, 521 U.S. at 512-513, Congress enacted RFRA in "direct response" to the Court's decision in *Smith*, which held that neutral laws of general applica-

bility that impose a substantial burden on religious exercise need not be justified by a compelling governmental interest. See 494 U.S. at 885. Congress sought to overcome the holding of *Smith* and directed courts to apply the compelling interest test to "all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1). RFRA specifically points the courts to "Federal court rulings" prior to *Smith* to assess whether a governmental action places an impermissible burden on religion. 42 U.S.C. 2000bb(a)(5).

b. The court of appeals correctly explained that, because Congress's purpose in RFRA was to restore the state of the law prior to *Smith*, this Court's pre-*Smith* Free Exercise Clause cases should be used to determine whether the government's use of artificial snow at the Snowbowl would substantially burden their exercise of religion, thus triggering the compelling interest test. Pet. App. 15a-28a, 38a. The court noted that this Court generally has recognized a substantial burden only when "individuals are forced to choose between following the tenets of their religion and receiving a government benefit" or are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Id.* at 20a.

An example of the first category of cases is *Sherbert* v. *Verner*, 374 U.S. 398 (1963), where the Court explained that a State could not deny a person unemployment benefits because she refused to work on the Sabbath, because such a rule would substantially burden her religious exercise by forcing her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion * * * on the other." *Id.* at 404. An example of the latter category is *Wisconsin* v. *Yoder*,

406 U.S. 205 (1972), where the Court struck down application of a compulsory education law to Amish children, explaining that such a law would "unduly burden[]" the religious exercise of the children's parents by "affirmatively compel[ling] them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218, 220. In later cases, the Court continued to adhere to the view that a burden on religion is "substantial" when the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas* v. *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981); see *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (same).

At the same time, this Court rejected the view that religious offense or distress resulting from the government's management of its own programs or property could constitute a substantial burden. In *Bowen* v. *Roy*, 476 U.S. 693 (1986), two applicants for welfare benefits challenged a federal statute requiring them to supply a Social Security number, contending that using a Social Security number to identify their 2-year-old daughter would "rob [her] spirit" and "prevent her from attaining greater spiritual power." *Id.* at 696. This Court held that the claimed injury was not a sufficient burden under the Free Exercise Clause, explaining that the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700.

That principle was later reaffirmed in the specific context presented by this case—the government's management of federal lands for the public good. In *Lyng*, this Court considered three Tribes' challenges to gov-

ernment plans to permit timber harvesting in, and construction of a road through, a national forest traditionally used for religious practice by members of the Tribes. 485 U.S. at 442. The Tribes objected to the project, contending that the national forest area in question was an "indispensable part of Indian religious conceptualization and practice" and that the proposed project "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Ibid.*

The Court held that the alleged interference with the Tribes' "ability to pursue spiritual fulfillment according to their own religious beliefs" was not a substantial burden on religion that must be justified with a compelling governmental interest. *Lyng*, 485 U.S. at 448-450. Relying on *Roy*, the Court explained that, although the planned road construction would "interfere significantly with [the Tribes'] ability to pursue spiritual fulfillment according to their own religious beliefs," it would not "coerce[]" them "into violating their religious beliefs" or "penalize religious activity by denying [them] an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. The court concluded that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not sufficiently burden religion so as to "require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-451. The Court therefore rejected the Tribes' "proposed extension of *Sherbert*" and instead found the case controlled by *Roy*. *Id.* at 452.

c. The court of appeals correctly applied that settled law in holding that the proposed project does not "substantially burden" petitioners' religious exercise. Pet. App. 15a-35a. As the court explained, "[t]he only effect of the proposed upgrades is on [petitioners'] subjective, emotional religious experience," and under cases such as *Sherbert, Yoder*, *Roy*, and *Lyng,* "the diminishment of spiritual fulfillment * * * is not a 'substantial burden' on the free exercise of religion." *Id.* at 21a. The court determined that *Lyng* is dispositive of petitioners' claims, because in *Lyng*, as here, the Tribes "contended the construction would interfere with their free exercise of religion by disturbing a sacred area," and the Court concluded that the Tribes had not shown a "burden 'heavy enough' to violate the Free Exercise Clause." *Id.* at 23a (quoting *Lyng*, 485 U.S. at 447).

The court of appeals also explained that here, as in *Lyng*, a contrary holding would significantly interfere with the government's ability to manage its own land: "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires," because "[a] broad range of governmental activities * * * will always be considered essential" to the spiritual well-being of some citizens and "deeply offensive" to others. Pet. App. 24a-25a (quoting *Lyng*, 485 U.S. at 452). The court of appeals thus correctly concluded that petitioners failed to demonstrate a substantial burden on their religious exercise in light of this Court's pre-*Smith* precedents, especially *Lyng.*

d. The government has never challenged the sincerity of the beliefs espoused by petitioners in this case, nor does it question the sincerity of the petitioners' description of the impact of the Snowbowl project on their religious experience. And the government recognizes the

importance of sensitivity to religious beliefs and practices. The government has endeavored to "accommodat[e] religious practices like those engaged in by" petitioners and to "minimize the impact [of the proposed project] on [petitioners'] religious activities." *Lyng*, 485 U.S. at 454. Although the government desires to accommodate religious activities to the extent practicable, *Lyng* makes clear that the government was not required to do more in this case.

2. Petitioners provide a variety of arguments (Pet. 24-31) for why the court of appeals erred, none of which is persuasive.

a. First, petitioners suggest (Pet. 24-28) that the court ignored the "plain language" of RFRA by turning to this Court's pre-*Smith* precedent rather than using dictionary definitions of "substantial" and "burden." But, as the court of appeals explained, petitioners' proposed approach is directly contrary to Congress's express direction to courts to look to *Sherbert*, *Yoder*, and this Court's other pre-*Smith* Free Exercise Clause precedents to determine when the government must justify its actions with a compelling governmental interest. Pet. App. 29a-30a (citing 42 U.S.C. 2000bb(a)(4)-(5) and (b)(1)). Because "Congress incorporated into RFRA a term of art—substantial burden—previously used in numerous Supreme Court cases," the court of appeals appropriately determined that it should not "invent a new definition for 'substantial burden' by reference to a dictionary." *Id.* at 30a. Congress expected that "the courts will 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) (*1993 Senate Report*). Moreover, contrary to petitioners' contention

(Pet. 2-3, 28-29), Congress did not intend RFRA's compelling interest test to apply to any incidental effects on religious exercise; Congress created a cause of action for any individual only "where free exercise of religion is *substantially* burdened." 42 U.S.C. 2000bb(b)(1) (emphasis added).

b. Petitioners also contend (Pet. 26-28) that cases such as *Sherbert*, *Yoder*, and *Lyng* do not address what constitutes a substantial burden on religious exercise. They are mistaken. The relevant inquiry in each of those cases was whether the claimed interference with religious practice was sufficiently severe to require the government to justify its actions with a compelling governmental interest under the Free Exercise Clause. See, *e.g.*, *Sherbert*, 374 U.S. at 403 (holding that there was a sufficient "burden" on religious exercise to require the government to show a compelling governmental interest); *Yoder*, 406 U.S. at 220 (finding an "undu[e] burden[]" that required the State to show a compelling interest); *Lyng*, 485 U.S. at 447 (concluding that Tribes failed to show that "the burden on their religious practices [wa]s heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the" project at issue); see also Pet. App. 17a-28a, 30a n.17. And Congress specifically noted that *Roy* and *Lyng* would apply in cases such as this one: "[P]re-*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." *1993 Senate Report* 9 (citing *Roy* and *Lyng*).

c. Petitioners attempt to rewrite the holding of *Lyng*, contending that "[b]y any reasonable understand-

ing of the English language * * * this Court accepted that the governmental action in *Lyng* would substantially burden tribal members' exercise of religion." Pet. 28. That is incorrect. This Court squarely rejected the contention that "the burden on [the Tribes'] religious practices is heavy enough" to require the government to demonstrate that the proposed project was justified by a compelling governmental interest. *Lyng*, 485 U.S. at 447.

d. Petitioners likewise are wrong to suggest that the *Lyng* Court "held that the Free Exercise Clause subjects governmental action to strict scrutiny only when the action actually 'prohibit[s]' religious expression." Pet. 28. The *Lyng* Court made clear that there would be a substantial burden on religion if individuals were "coerced by the Government's action into violating their religious beliefs" or the government "penalize[d] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens," even if their religious exercise was not prohibited. 485 U.S. at 449. The court of appeals thus correctly concluded that this case is indistinguishable from *Lyng*.

3. Contrary to petitioners' contention (Pet. 12-20), there is no disagreement in the circuits on the question of what constitutes a substantial burden under RFRA that warrants this Court's review.

a. As an initial matter, a great number of the cases petitioners cite as evidence of a circuit conflict are inapposite. Several of them were either abrogated by or vacated in light of this Court's decision in *City of Boerne*.[2]

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[2] See, *e.g.*, *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), vacated (in light of *City of Boerne*), 522 U.S. 801 (1997); *In re Young*, 82 F.3d 1407 (8th Cir. 1996), vacated (in light of *City of Boerne*) *sub nom. Christians* v. *Crystal Evangelical Free Church*, 521 U.S. 1114 (1997); *Goodall*

Other cases address not RFRA but the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*[3] Although both RLUIPA and RFRA provide that the government may not substantially burden religious exercise absent a compelling governmental interest, there are textual differences between the two statutes, such as RLUIPA's statement that it should be "construed in favor of a broad protection of religious exercise," 42 U.S.C. 2000cc-3(g), a sentiment not echoed in RFRA. In light of the fact that there are very few precedential cases that interpret the RFRA provisions at issue here, this Court's review is not warranted.

b. In any event, there is no conflict in the lower courts, even considering the full range of cases petitioners cite. In each of the cited cases, the court of appeals took the same approach as the court below, which was to look to this Court's pre-*Smith* Free Exercise Clause cases to determine when religious exercise has been substantially burdened. See pp. 21-25, *infra*. That is not surprising, because Congress made clear in enacting RFRA that what constitutes a substantial burden would be governed by this Court's pre-*Smith* precedents. See

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v. *Stafford County Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995), cert. denied, 516 U.S. 1046 (1996), abrogated by *City of Boerne*, *supra*; *Werner* v. *McCotter*, 49 F.3d 1476 (10th Cir.), cert. denied, 515 U.S. 1166 (1995), abrogated by *City of Boerne*, *supra*.

[3] See, *e.g.*, *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) (per curiam); *Washington* v. *Klem*, 497 F.3d 272 (3d Cir. 2007); *Adkins* v. *Kaspar*, 393 F.3d 559 (5th Cir. 2004), cert. denied, 545 U.S. 1104 (2005); *Midrash Sheparди, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2006); *Civil Liberties for Urban Believers* v. *City of Chi.*, 342 F.3d 752 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004).

42 U.S.C. 2000bb(a)(5) and (b)(1). Petitioners have not identified *any* court of appeals that has cast aside those precedents and looked solely to dictionary definitions to answer that question.

In applying this Court's pre-*Smith* Free Exercise Clause precedent, the courts of appeals have all adopted essentially the same conception of what government activities substantially burden religious exercise. They have asked whether the government action in question coerces an individual to engage in or to forgo engaging in religious exercise. See pp. 21-25, *infra.* And they have understood that inquiry to follow directly from this Court's decisions in *Sherbert*, *Yoder*, and their progeny. See *Washington* v. *Klem*, 497 F.3d 272, 279 (3d Cir. 2007) (the courts of appeals "have adopted some form of the *Sherbert/Thomas* formulation").

Although the courts of appeals have sometimes used different language to explain what constitutes a "substantial burden," those differences do not evidence any divergence in legal approach that warrants this Court's review. Instead, they are a reflection of the courts' application of the test for what constitutes a substantial burden to the facts of individual cases. Importantly, the courts of appeals themselves have not identified a legal disagreement. Instead, the few courts that have identified semantic differences among the circuits have observed that those differences probably "come to nothing in practice." *Mack* v. *O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), vacated (in light of *City of Boerne*), 522 U.S. 801 (1997); see *Klem*, 497 F.3d at 279-280 (in RLUIPA context, noting "minor variations" in various courts' definitions of "substantial burden," but questioning whether those "semantic differences in definition result in any meaningful differences in application"). Because the

courts of appeals have hewed closely to this Court's precedents in assessing whether a plaintiff has demonstrated a substantial burden on his religious exercise, there is no need for this Court's intervention.

c. An examination of the particular cases petitioners cite confirms that there is no disagreement in the courts of appeals on the question presented. In the decision below, the court of appeals reviewed this Court's pre-*Smith* Free Exercise Clause cases and then summarized their holdings by stating: "[A] 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." Pet. App. 20a. As petitioners acknowledge (Pet. 13), the Fourth Circuit and D.C. Circuit have stated the inquiry in the same way, asking whether the government action at issue "forces [the plaintiffs] to engage in conduct that their religion forbids or * * * prevents them from engaging in conduct their religion requires." *Henderson* v. *Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001), cert. denied, 535 U.S. 986 (2002); see *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 172-173 (4th Cir. 1995) (plaintiffs "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action that their religion mandates that they take"), cert. denied, 516 U.S. 1046 (1996), abrogated by *City of Boerne*, *supra*. That inquiry follows directly from this Court's decision in *Thomas*, which stated that there is a substantial burden "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief,

thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." 450 U.S. at 717-718; see Pet. App. 19a; *Henderson*, 253 F.3d at 16; *Goodall*, 60 F.3d at 172.

Contrary to petitioners' contention, the Eighth and Tenth Circuits have not adopted a "much broader conception of 'substantial burden.'" Pet. 13. Instead, like the court below, those courts have looked to this Court's pre-*Smith* Free Exercise Clause precedents for guidance and focused on whether the government action in question coerces a person to engage in religious activity or forgo engaging in religious activity. See *In re Young*, 82 F.3d 1407, 1417-1419 (8th Cir. 1996), vacated (in light of *City of Boerne*) *sub nom. Christians* v. *Crystal Evangelical Free Church*, 521 U.S. 1114 (1997); *Werner* v. *McCotter*, 49 F.3d 1476, 1479-1480 & n.1 (10th Cir.), cert. denied, 515 U.S. 1166 (1995), abrogated by *City of Boerne*, *supra*. In *Werner*, the Tenth Circuit tailored that inquiry to the particular factual context of state prisons, asking whether the prison regulations at issue "significantly inhibit[ed] or constrain[ed] conduct or expression that manifests some central tenet of a prisoner's individual beliefs," "meaningfully curtail[ed] a prisoner's ability to express adherence to his or her faith," or "den[ied] a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion." 49 F.3d at 1480. The Eighth Circuit used the same inquiry in the state prison context in *Weir* v. *Nix*, 114 F.3d 817, 820 (1997), and then also utilized it to evaluate a law permitting a bankruptcy trustee to void a transfer of funds debtors had tithed to their church, see *In re Young*, 82 F.3d at 1418. In none of those cases did the court suggest that it viewed its inquiry as conflicting with the approach of the Fourth,

Ninth, and D.C. Circuits. Indeed, the courts have utilized one another's explanations of what constitutes a substantial burden, evidencing their belief that their approaches are interchangeable. See, *e.g.*, *Henderson*, 253 F.3d at 16 (considering, *inter alia*, whether the government action at issue "significantly inhibit[ed] or constrain[ed] conduct or expression that manifests some tenet of [the plaintiff's] individual beliefs," the same inquiry undertaken by the Eighth and Tenth Circuits) (quoting *Werner*, 49 F.3d at 1480).

There is likewise no basis for concluding that the Third, Fifth, Seventh, or Eleventh Circuit has adopted an approach that conflicts with the decision below. Again, each of those courts has looked to this Court's pre-*Smith* Free Exercise Clause cases to determine whether a challenged government action substantially burdens religious exercise, albeit in the context of RLUIPA, rather than RFRA. See, *e.g.*, *Klem*, 497 F.3d at 278-279; *Adkins* v. *Kaspar*, 393 F.3d 559, 569-570 (5th Cir. 2004), cert. denied, 545 U.S. 1104 (2005); *Midrash Sheparди, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1226-1227 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005); *Civil Liberties for Urban Believers* v. *City of Chi.*, 342 F.3d 752, 760-761 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004). For example, the Fifth Circuit has asked whether the government action at issue "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs" by "influenc[ing] the adherent to act in a way that violates his religious beliefs" or "forc[ing] the adherent to choose between * * * enjoying some generally available, nontrivial benefit, and * * * following his religious beliefs." *Adkins*, 393 F.3d at 570; see *Longoria* v. *Dretke*, 507 F.3d 898, 903 (5th Cir. 2007) (per curiam). The

Third Circuit utilized that same inquiry in *Klem*, 497 F.3d at 280 & n.7. That inquiry tracks this Court's decision in *Sherbert*, see 374 U.S. at 404, and *Thomas*, see 450 U.S. at 717-718, and it is wholly consistent with the court of appeals' approach below, see Pet. App. 20a (asking whether "individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)").

Similarly, the Eleventh Circuit has focused on the coercive effect of the challenged government action, asking whether the government has exerted "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly," such as "pressure that tends to force adherents to forgo religious precepts" or "pressure that mandates religious conduct." *Midrash Shapardi, Inc.*, 366 F.3d at 1227. The Eleventh Circuit used that language as a shorthand for the rules announced by this Court in *Sherbert*, *Thomas*, *Hobbie*, and *Lyng*, *id.* at 1226-1227, and that language reflects essentially the same approach as used by the court below.

Finally, petitioners cite (Pet. 16) the Seventh Circuit's decision in *Civil Liberties for Urban Believers* v. *City of Chicago*, *supra* (*CLUB*), as evidence of a circuit conflict. *CLUB* addressed only a RLUIPA claim, not a RFRA claim, and the court of appeals defined substantial burden only in the particular context of land-use regulations, stating: "[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise * * * effectively impracticable." 342 F.3d at 761. The court of

appeals did not purport to define substantial burdens in other contexts, and it recognized that whether a government action imposes a substantial burden on religious exercise should be decided by applying this Court's pre-*Smith* precedents. See *id.* at 760-761. Moreover, as the Seventh Circuit had recognized in an earlier case, its approach to identifying substantial burdens in the RFRA context is consistent with that of other courts, because it too asks whether the challenged governmental action coerces a person to engage in or forgo engaging in religious exercise. See *Mack*, 80 F.3d at 1178-1179. Although there are "verbal differences" among the circuits in defining substantial burdens under RFRA, the court explained, there is no reason to believe that those differences are meaningful or that any of the courts' holdings are inconsistent. *Id.* at 1178. There is, accordingly, no division in the circuits warranting this Court's review.

d. Review is particularly unwarranted in this case because petitioners' particular claim is foreclosed by this Court's pre-*Smith* precedent in *Lyng*, as incorporated into RFRA, and petitioners could not prevail under any circuit's standard. The courts of appeals have uniformly looked to this Court's precedents to define substantial burdens under RFRA. As explained, *Lyng* makes clear that diminished spiritual fulfillment, the injury petitioners allege, does not qualify. See *Lyng*, 485 U.S. at 447-448 (Tribes' belief that the plans to build a logging road would "diminish the sacredness" of the land did not impose a burden "heavy enough" to violate the Free Exercise Clause.); see pp. 13-15, *supra*. As the court of appeals recognized, a contrary rule would make any federal government land-use decision "subject to the personalized oversight of millions of citizens," where

"[e]ach citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs," even though the land at issue "is, by definition, land that belongs to everyone." Pet. App. 7a. As the *Lyng* Court recognized, the government "simply could not operate" under those circumstances. 485 U.S. at 451-453.

Petitioners have not identified *any* circuit that has held that the type of injury they identify constitutes a substantial burden on religious exercise under RFRA. Indeed, only one cited court of appeals decision considered a challenge to a federal government land-use decision, and it squarely rejected that claim. See *Henderson*, 253 F.3d at 16-17. Further, there is no reason to believe that any court of appeals would recognize such a claim, because the courts have generally asked whether the government action in question coerces an individual to engage in or to forgo engaging in religious exercise, and petitioners have acknowledged that the use of recycled water to make snow at the Snowbowl will not coerce them to change the conduct of their religious practices. The record in fact establishes that there would be no effect on those practices. See, *e.g.*, Pet. App. 6a ("there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow" and petitioners would "continue to have virtually unlimited access to the mountain" for "pray[er], conduct[ing] their religious ceremonies, and collect[ing] plants for religious use"). Therefore, even if there were a disagreement in legal approach warranting this Court's review, this case would be a poor vehicle in which to consider it, because petitioners' claim is foreclosed by this Court's pre-*Smith* precedent in *Lyng* and

because petitioners have not demonstrated that they could prevail under *any* circuit's standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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