

The amicus brief, Bear Lodge Multiple Use Association v. Bruce Babbitt and Cheyenne River Sioux Tribe, was joined by Clifton Kirkpatrick, as Stated Clerk of the Presbyterian Church (U.S.A.). The brief was filed in the United States Court of Appeals for the Tenth Circuit on September 28, 1998.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BEAR LODGE MULTIPLE USE ASSOCIATION,
a Wyoming non-profit corporation, *et al.*,
Plaintiffs-Appellants,

v.

BRUCE BABBITT, Secretary of the Interior, *et al.*,
Defendants-Appellees,

and

CHEYENNE RIVER SIOUX TRIBE, *et al.*,
Defendant-Intervenors-
Appellees.

No. 98-8021

**AMICUS CURIAE BRIEF OF
THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS,
THE BECKET FUND FOR RELIGIOUS LIBERTY,
BUREAU OF CATHOLIC INDIAN MISSIONS,
CLIFTON KIRKPATRICK, AS STATED CLERK OF THE GENERAL
ASSEMBLY, THE PRESBYTERIAN CHURCH (U.S.A.),
ENRIGHT BIGHORN, AS STATED CLERK OF THE DAKOTA PRESBYTERY IN THE
SYNOD OF LAKES & PRAIRIES AND THE PRESBYTERIAN CHURCH (U.S.A.),
THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,
FRIENDS COMMITTEE ON NATIONAL LEGISLATION,
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS,
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS,
PRISON FELLOWSHIP MINISTRIES,
UNION OF AMERICAN HEBREW CONGREGATIONS, and
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,
IN SUPPORT OF
DEFENDANTS-APPELLEES AND DEFENDANT-INTERVENORS-APPELLEES**

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INTEREST OF THE *AMICI*

Amici respectfully submit this brief *amicus curiae* in support of Defendants and Defendant-Intervenors.¹ As described below, *amici* are various religious organizations and public interest organizations concerned with religious liberty. This case has broad implications for the extent to which the government can accommodate private religious practice, particularly accommodations on land controlled by the federal government. We believe that we can add a perspective that is not duplicated by the parties.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment Clause and Free Exercise Clause is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

¹A Motion for Leave to File Brief *Amicus Curiae* has been filed concurrently with the submission of this brief.

The Becket Fund for Religious Liberty is a bipartisan and interfaith public interest law firm that protects the free expression of all religious traditions. The Becket Fund has, for example, represented Catholics, Protestants, Mormons, Jews, Muslims and Buddhists in a variety of religious liberty cases throughout the country. The Becket Fund believes that government accommodation of private religious practice and expression is not only permissible under the Establishment Clause, but is in our best traditions of pluralism.

The Bureau of Catholic Indian Missions has been the voice of the Roman Catholic Church with regard to the Indian Tribes in the United States since its founding in 1874 by Archbishop Roosevelt Bayley of Baltimore. The Bureau was officially recognized as an agency of the U.S. Roman Catholic Church in 1884 by the Third Plenary Council of the U.S. Catholic hierarchy. The Bureau raises funds for Catholic Indian ministries and is an advocate for recognition of Indian rights and respect for Indian culture before the Congress and Federal officials.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 173 Presbyteries under the jurisdiction of 16 Synods. The General Assembly does not claim to speak for all Presbyterians, nor are its deliverance and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all of the denomination's members. Since the end of the Second World War, Presbyterian General Assemblies have consistently taken progressive

positions on issues affecting Native Americans. An area of abiding concern for Presbyterians is that Native Americans have full freedom to practice their religion. Most recently the 200th General Assembly (1988) directed:

That the PC(U.S.A.), as a matter of policy, sign on as amicus curiae to briefs that argue for the protection of First Amendment rights to practice land theologies, and that the PC(U.S.A.) join with other churches, civil liberties organizations, and traditional Indian people in an effort to bring to national awareness the gross violations of the First Amendment rights of traditional Indian People.

(PC[USA]), 1985,564. The Stated Clerk believes the present matter to be such a situation.

Enright Bighorn, as Stated Clerk of the Dakota Presbytery in the Synod of Lakes & Prairies and the Presbyterian Church (U.S.A.), is the corporate secretary of the Dakota Presbytery. The Dakota Presbytery is one of the 173 presbyteries of the Presbyterian Church (U.S.A.), with 23 congregations scattered over a four state area (Montana, South Dakota, North Dakota, and Minnesota). We are primarily a racial ethnic presbytery with a total church membership of approximately 1100 members. The racial ethnic make up of our presbytery is American Indians. Dakota Presbytery was organized in 1844 and was the first presbytery of the Presbyterian Church west of the Mississippi river. We, Dakota, Lakota and Nakoda, are commonly referred to as the Sioux people by the Euro-American people of this country. The land that the Devil's Tower lies within once belonged to the Dakota, Lakota, and Nakoda people. All land is sacred and is to be respected. Devil's Tower, along with other such sites as the Black Hills of South Dakota, are held sacred to the Dakota, Lakota, and Nakoda people. Dakota Presbytery signs on as amicus curiae to briefs that argue for the protection of First Amendment rights to practice religious beliefs . The Stated Clerk

believes that this case is of great importance. Dakota Presbytery speaks for all its church members when it gives support to this amicus brief.

The Evangelical Lutheran Church in America (“ELCA”) is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States of America. The ELCA has approximately 11,000 member congregations, which in turn have approximately 5.2 million individual members nationwide.

Since 1943, the Friends Committee on National Legislation, affiliated with the Religious Society of Friends, has endeavored to bring Quaker values of social and economic justice, peace, and good government to bear on national policy. For more than 40 years, FCNL has advocated for Native American tribal self-determination, protection of treaty rights, and religious freedom protections for Native Americans. FCNL's participation in this brief is consistent with its Statement of Legislative Policy, which articulates that "The federal government should ensure that Native Americans are able to exercise their religious beliefs and practices and fully express their cultural traditions." The FCNL Statement recommends "maintaining the constitutional separation of church and state to ensure that government funds are not used to propagate religious doctrines. This separation does not prohibit . . . teaching about the religious aspects of our pluralistic cultural heritage."

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 41,000 congregations with more than nine million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,300 congregations

in the United States with nearly 800,000 members. The Seventh-day Adventist Church strongly supports the twin concepts of free exercise of religion and the separation of church and state and actively promotes those ideals through its bi-monthly *Liberty* magazine. The Working Policy in North America points out "that religious liberty is best achieved, guaranteed and preserved when church and government respect each other's proper areas of activity and concern" and that "in matters where secular and religious interests overlap, government, in the best interests of both church and government, must observe strict neutrality in religious matters, neither promoting nor restricting individuals or the Church in the legitimate exercise of their rights." Growing out of these principles is high interest of the Church and its members in issues of religious accommodation as are found in this case.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a volunteer organization of lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious liberty in the United States. COLPA believes that accommodations of private faith by the government like the one at issue in this case are not only permissible under the Establishment Clause, but are an essential vehicle for the protection of religious liberty, particularly for that of religious minorities.

Prison Fellowship Ministries is a charitable and religious Christian organization founded in 1976 by Charles W. Colson to assist the church in its ministry to prisoners, ex-prisoners, crime victims and their families. Coordinating its ministry through 54 area offices and the service of more than 50,000 volunteers, PFM provided more than 3,000 in-prison programs in 1996 to more than 250,000 inmates nationwide.

The Union of American Hebrew Congregations (“UAHC”) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has participated as amicus in a wide array of religious liberty cases, often before the United States Supreme Court. Recent Supreme Court amicus participation includes *Board of Education of the Kiryas Joel Village School District v. Grumet* (1993) and *Flores v. City of Boerne* (1997).

The Union of Orthodox Jewish Congregations of America (“U.O.J.C.A.”), founded in 1898, is the largest Orthodox Jewish umbrella organization in the United States. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the traditional Jewish community. The U.O.J.C.A. regularly files or joins in friend of the court briefs in cases that impact upon religious freedom in federal and state courts of all levels. In this instance, the U.O.J.C.A. and its constituency have a strong interest in ensuring that the principle of accommodating religious practices enshrined in our Constitution's First Amendment is protected and upheld.

INTRODUCTION

In the District Court below, Plaintiffs asserted that three aspects of the National Park Service's Final Climbing Management Plan for Devils Tower National Monument violated the Establishment Clause of the United States Constitution. First, they challenged the Park Service's decision to discourage rock climbers from choosing the month of June to scale the tower in order to avoid disturbance of various traditional Native American religious activities at the site in June. Slip op. at 4. In furtherance of this same goal of providing quiet access to the site for these traditional religious exercises, the Park Service placed a sign reading "The Tower is Sacred to Native Americans. Please Stay on the Trail" at a strategic position at the base of the tower, and implemented a cultural interpretive program at the Monument's visitor center to inform visitors of the traditional religious uses of the site by Native Americans and thereby encourage avoidance of any disturbances. *Id.* Plaintiffs challenged both of these practices as well. *Id.*

The District Court found that Plaintiffs did not have standing to challenge the sign and the cultural interpretive program, and Plaintiffs do not challenge these rulings on appeal. Appellants' Brief at 3 n.2. With regard to the policy of discouraging climbers from choosing June, however, the court reached the issue and held that it was a valid government action "to remove barriers to religious worship occasioned by public ownership of the Tower." Slip op. at 14.

The District Court was correct in finding no Establishment Clause violations in the Park Service's efforts to facilitate quiet access to the Tower for Native American worship and to balance this religious use with recreational uses of the Tower. The Supreme Court has consistently found "ample room for accommodation of religion under the Establishment Clause." *Corporation of the Presiding*

Bishop v. Amos, 483 U.S. 327, 338 (1987). Indeed, when the government endeavors to protect individuals' free religious exercise, it "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

ARGUMENT

I. THE CLIMBING MANAGEMENT PLAN IS AN EXAMPLE OF ACCOMMODATION OF PRIVATE RELIGIOUS PRACTICE THAT THE SUPREME COURT HAS SAID THERE IS "AMPLE ROOM FOR" UNDER THE ESTABLISHMENT CLAUSE

A. The Supreme Court Has Consistently, and Increasingly, Emphasized the Importance and Constitutional Validity of Accommodation of Religion As Permissible Under The Establishment Clause.

The Supreme Court has long held that when the government accommodates people's private religious practices, it "follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (upholding school board's policy under which students were released from class in the middle of the day so they could attend religious instruction classes off school grounds). As the Court noted generally in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* at 673.

That the federal government has substantial leeway under the Establishment Clause to "follow[] the best of our traditions" and accommodate private religious activities was made clear in *Bishop v.*

Amos, in which the Court held that “there is ample room for accommodation of religion under the Establishment Clause.” 483 U.S. at 338 (holding that the religious-employer exemption to Title VII’s prohibition on religious discrimination did not violate the Establishment Clause). The Court stated that it “ha[d] never indicated that statutes that give special consideration to religious groups are *per se* invalid.” *Id.* See also *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (exemption from property tax for churches and other religious buildings from property tax proper government accommodation, even though exemption not required by Free Exercise Clause); *Larkin v. Grendel’s Den*, 459 U.S. 116, 123-24 (1982) (secular purpose in regulating liquor sales in manner to protect disruption of church activities).

Three years after *Bishop v. Amos*, the Court clarified, and magnified, the role of the legislative and executive branches of government as accommodators of religion in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that the Free Exercise Clause did not itself provide citizens with a religious exemption from generally applicable criminal laws. This, the Court was careful to note, did not mean that the freedom to engage in a religious activity like sacramental peyote use was not a freedom contemplated by the Free Exercise Clause nor one which government may protect. Rather, the Court in *Smith* rejected the notion that courts, rather than legislatures, may craft religious exemptions to generally applicable criminal laws. The Court instructed:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so

also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Smith, 494 U.S. at 890. In short, the government may--and should--accommodate private religious practice.

Smith's statement regarding the importance of accommodation built not merely on the holding in *Bishop v. Amos* three years earlier, but also grew out of a case decided one year after *Amos*: *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In *Lyng*, the Court held that the Free Exercise Clause did not require the federal government to halt a planned road and logging operations that would "have devastating effects on traditional Indian religious practices," since the land was owned by the federal government. The Court stated that "[w]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453.

The *Lyng* decision dealt a severe blow to Native Americans' ability to protect their quiet access to sacred land, and indeed *Lyng* could have been a mortal blow. But the *Lyng* Court was careful to emphasize--indeed in its own section of the opinion--that "[t]he Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." *Id.* at 454. In fact, after *Lyng* was decided, Congress promptly moved to fulfill its constitutional role as a protector of First Amendment values by de-funding the project at issue in *Lyng* and thereby preserving the sacred land. *Department of the Interior and Related Agencies Appropriations Bill*, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) ("prohibit[ing] the use of funds for construction of the Gasquet-Orleans (G-O) road in

California, pending further review of the issue of Indian religious rights that would be significantly affected by the road construction").²

Defendants urge this court to ignore *Amos* and its progeny, and the clear directions of the Supreme Court regarding accommodations set forth in *Smith* and *Lyng*, and instead rely on *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), to strike down the Management Plan. Plaintiffs assert that in *Badoni* "[t]his Court declared that there is 'no basis in law for . . . the government to exclude the public from public areas to insure privacy during the exercise of First Amendment rights.'" Applt's Brf. at 15-16 (quoting 638 F.2d at 179). Plaintiffs use an ellipses in their quote to remove the word "ordering." See 638 F.2d at 179. Yet that deletion changes the meaning of the sentence, and highlights why their use of *Badoni* is misplaced. *Badoni* held, as did *Lyng*, that the Free Exercise Clause could not be used "for *ordering* the government to exclude the public from public areas to insure privacy during the exercise of First Amendment rights." *Id.* (emphasis added). This holding in *Badoni*, however, says nothing about the ability of the government to *choose* whether to make such an accommodation after balancing various public interests. *Badoni* does contain some dicta suggesting that its reasoning would apply to both religion clauses, stating that the relief sought by the Plaintiffs "would seem a clear violation of the Establishment Clause." *Id.* But extending this dicta to

²See also *Lee v. Weisman*, 505 U.S. 577, 628-29 (1992) (Souter, J., concurring) ("in freeing the Native American Church from federal laws forbidding peyote use, see Drug Enforcement Administration Miscellaneous Exemptions, 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.").

cover accommodations of religion would contravene the Supreme Court's holding in *Amos* and the Court's clear affirmation of government accommodation of private religious worship in *Lynng* and *Smith*.

Moreover, the *Badoni* dicta that Plaintiffs rely on would produce a curious result if applied. *Lynng* held that the government had the right to choose the manner in which to best use "what is, after all, *its* land." 435 U.S. at 453. By asking this Court to embrace the *Badoni* dicta regarding the Establishment Clause, and citing *Lynng* approvingly to support this, Appellants' Brief at 15, Plaintiffs are effectively saying that the government may use its own land as it sees fit when it hinders private Native American religious practice as in *Lynng*, but government may not use its land as it sees fit when it facilitates private Native American religious practice. This cannot be the case. *Amos*, *Smith*, and *Lynng* make clear that accommodation of religious practice is a valid policy goal that may be weighed and balanced by the branches of government along with other policy goals. In the Climbing Management Plan, the Park Service has not deprived the public of its use of the land. Rather, the Park Service has gathered information, deliberated, and come up with a policy to balance competing public uses. In doing so, it has "follow[ed] the best of our traditions." *Zorach v. Clauson*, 343 U.S. at 313-14.

B. Temporarily Designating Government Land For Private Religious Purposes and Discouraging Other Uses Is Not A *Per Se* Establishment Clause Violation

Courts have upheld a wide variety of instances where the government has designated real property for private religious purposes, despite the fact that these designations by implication mean that other uses are excluded.

The National Park Service frequently engages in such accommodations. In *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), the court held that there was no Establishment Clause violation in permitting the Pope to perform a mass on the National Mall in Washington D.C., even though the Park Service erected a chain link fence for crowd control. The Mass, and the fence, undoubtedly interfered with ordinary recreational uses of the mall, such as strolling, kite-flying, and bicycling. Defendant-Intervenors in the District Court below detailed numerous other such accommodation on Park Service-managed land that exclude other uses, such as regulations prohibiting recreational activities at Arlington National Cemetery and a sign identifying the Cemetery as "Our Nation's Most Sacred Shrine . . . Please Conduct Yourself With Dignity and Respect at All Times," Def. Int. Brf. at 28 (quoting 32 C.F.R § 553.22(c)(3) and Def. Int. App. A1); and permitting congregations to hold religious services at churches and chapels operated by the National Park Service, such as Rev. Martin Luther King, Jr.'s church, Ebenezer Baptist, *id.* at 28-30, uses which prevents other uses such as guided or unguided tours.

Such accommodations that permit religious uses to the exclusion of other uses are not unique to the National Park Service. Government designation of its property as a space for private prayer have been consistently upheld. *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988) (upholding resolution by the Illinois House of Representative setting aside a former hearing room in the Capitol as a "prayer room"); *Hawley v. City of Cleveland*, 24 F.3d 814 (6th Cir. 1994) (leasing space in airport for chapel "accommodates the religious needs of travelers" and a "reasonable observer would not conclude that the city endorses religion by allowing the diocese to maintain the chapel"); *Brashich v.*

Port Authority of New York and New Jersey, 791 F.2d 224, 226 (2d Cir. 1980) (upholding leases for express purpose of constructing chapels at JFK airport).

Chaplain programs in the military, hospitals and prisons also involve the use of the government's real property for religious purposes. The accommodation of the religious needs of military personnel through the maintenance of the military chaplaincy programs of the various branches of the armed services has been upheld against Establishment Clause challenge. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985); *see also* *Murphy v. Derwinski*, 990 F.2d 540, 547 (10th Cir. 1993) (“Government chaplaincy programs have been upheld in the face of Establishment Clause challenges.”); *Carter v. Broadlawns Medical Center*, 857 F.2d 448 (8th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989) (county hospital’s hiring of chaplain did not violate the Establishment Clause).

The Supreme Court stated in dicta in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), that the military chaplaincy program and its *use of government facilities* would withstand attack under the Establishment Clause, since in the military

the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted *with the use of government facilities*, military personnel would be unable to engage in the practice of their faiths.

Id. at 226 n.10 (emphasis added). *Cf. Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (permitting home day-care centers with religious elements on military bases would not violate the Establishment Clause).

Plaintiffs suggest that there is a *per se* Establishment Clause violation when certain uses are excluded from public land to accommodate private religious uses. Appellant's Brief at 16. But in all of

the cases cited above, by setting aside government-owned space, such as a portion of an airport, some land on a military base, or a room in a state capitol, the government most certainly excludes others who may prefer a different use for the space. A master sergeant who decided to use a base chapel on Sunday morning for combat training exercises would very quickly learn when arrested by the M.P.'s that the designation of the space for a chapel meant that other uses were excluded. The same would be true for a traveler who tried to use an airport chapel to play frisbee. Thus actually excluding other uses from a site, as in the cases above, or just having that as a goal, as in this case, do not in themselves constitute Establishment Clause violations.³ As discussed below, that conclusion can be reached only by an application of the endorsement test, whether conceived of as a free-standing test, as the Tenth Circuit suggested in *Gaylor v. U.S.*, 74 F.3d 214 (10th Cir.), *cert. denied*, 517 U.S. 1211 (1996), or as an element of the *Lemon* test as set forth in *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 2370 (1998). However, before turning to that, it is important to clarify that *Lee v. Weisman* does not provide the standard by which this case should be evaluated.

II. THE MANAGEMENT PLAN DOES NOT COERCE ANYONE TO DO ANYTHING IN VIOLATION OF HIS CONSCIENCE AND THEREFORE DOES NOT VIOLATE *LEE V. WEISMAN'S* COERCION HOLDING

³Indeed, the same exclusion occurs whenever the government allows a temporary religious display in a public forum. *See Capital Square Rev. and Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995). Once a person or group has put up a display, the government excludes others from the space who might want to put up a different display, knock down the display, or deface it.

Plaintiffs rely heavily on the argument that by attempting to exclude them from climbing Devil's Tower and watching climbers in June, they are being coerced into respecting Native American religion in violation of *Lee v. Weisman*, 505 U.S. 577 (1992). They contend that they are required to "'confess by act their faith' in the religious beliefs of some Native Americans." Applt's Brf. at 13. This argument is specious and completely misconstrues *Lee v. Weisman*.

Most fundamentally, their use of *Lee v. Weisman* is flawed because *Lee* addressed the question of a student being coerced to *participate* in a religious exercise, not to forebear from an activity out of respect for another's religion. It is a bedrock principle of the religion clauses that no one may be forced by the government to participate in a religious activity. The Court in *Lee* determined that the invocation at issue amounted to an "overt religious exercise." 505 U.S. at 588. Since a student "has [no] real choice not to attend her high school graduation," 505 U.S. at 595, and, once there, "the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction, the Court found this to be a requirement of *participation* in the prayer. The Court held:

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character.

Id. at 594.

Plaintiffs certainly are discouraged from using the Tower for climbing. But there is no ban on climbing in June, and therefore no coercion of any kind. Even if there were a total ban on climbing in June, this would not mean that Plaintiffs would be coerced into a religious activity, forced to participate in or watch the Native American ceremonies with bowed heads or even quiet respect. They would not even have to be present at the site at all. Plaintiffs, unlike the plaintiff in *Lee v. Weisman* who had "[no] real choice not to attend her high school graduation," would be free to stay home, climb elsewhere if they like, or do anything else. Their objection is much more akin to a graduating student who wants to play basketball in the school gymnasium the day before graduation, but is upset to find that the school has permitted students and their parents to hold a religious baccalaureate service in the gym--a religious use of school property that has been consistently upheld against Establishment Clause challenge by the courts. *Shumway v. Albany County School Dist.*, 826 F. Supp. 1320 (D. Wyo. 1993) (rejecting school board's argument that a student- and parent-run religious baccalaureate service in public school gymnasium was barred by *Lee v. Weisman*); *Verbena United Methodist Church et al. v. Chilton County Bd. of Ed.*, 765 F. Supp. 704 (M.D. Ala. 1991); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991); *see also Lee v. Weisman*, 505 U.S. at 631 (Souter, J., concurring) (though high school students may not have a prayer at their graduation, "[t]hey may . . . organize a privately sponsored baccalaureate if they desire the company of like minded students.")⁴

⁴ Moreover, the coercion section of *Lee v. Weisman* addressed the special question of the coercive pressures on a child during a graduation ceremony. The Seventh Circuit recently held that the holding in *Lee* was based on the "special concerns" involved with prayers at elementary and secondary public school graduations, and that *Lee* does not bar prayers at a public university commencement. *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997).

(continued...)

Plaintiffs may find the Native Americans' use of the Devil's Tower site objectionable, troubling, or otherwise not to their liking, but so long as Plaintiffs themselves are not required to join in any act that would violate their consciences, they have no constitutional objection on the grounds of coercion. In *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Supreme Court held that it violated the First Amendment free speech and free exercise of religion rights of Jehovah's Witness children to compel them to participate in the flag salute. After *Barnette*, schools saying the flag salute must permit students with objections of conscience to sit quietly and respectfully while others say the flag salute. But the objecting students may not prevent the rest of the class from saying the salute. See *Bauchman v. West High School*, 132 F.3d at 557-58 (holding that since there was no Establishment Clause violation in school choir's singing of religious songs and performance at religious sites, there was no coercion where student was permitted to opt out of songs and performance that conflicted with her conscience).

Plaintiffs therefore have not been coerced into violating their religious beliefs in violation of the First Amendment. Their objections to the management plan are more properly framed as a claim that the Park Service is advancing or endorsing religion through the Management Plan. But as set forth below, the plan does no such thing.

III. THE MANAGEMENT PLAN DOES NOT CONSTITUTE GOVERNMENT ESTABLISHMENT OF NATIVE AMERICAN RELIGION

⁴(...continued)

Justice O'Connor recently warned that it is "always appealing to look for a single test, a Grand Unified Theory that would resolve all cases that may arise under a particular clause But the same constitutional principle may operate very differently in different contexts." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498-99 (1994). As the Supreme Court stated in *Lynch*, a reviewing court should keep its focus on the fundamental question of whether religion is being established:

In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith--as an absolutist approach would dictate--the Court has scrutinized challenged legislation to determine *whether, in reality, it establishes a religion or religious faith, or tends to do so.*

Lynch, 465 U.S. at 678 (emphasis added).

There is considerable confusion over the proper approach for evaluating alleged establishments of religion. This Court in *Gaylor v. United States*, 74 F.3d 214 (10th Cir.) (upholding use of motto "In God We Trust" on U.S. currency and coins), *cert. denied*, 517 U.S. 1211 (1996), observed that the three part-test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was still good law but that the Court had "declined to apply the *Lemon* Test in several recent Establishment Clause cases." *Id.* at 216. The *Gaylor* Court noted that Supreme Court in recent cases has "focused on whether the challenged government action endorses religion, suggesting that the *Lemon* test is being supplanted by an 'endorsement test.'" *Id.* at 217 (citations omitted). In *Bauchman v. West High School*, 132 F.3d 542

(10th Cir. 1997), this Court adhered to the *Lemon* framework, but evaluated the purpose and effects prongs through the lens of endorsement analysis.

Whether evaluated by the endorsement test in the *Lemon* framework as set forth in *Bauchman*, or by the endorsement test standing alone as suggested by *Gaylor*, the management plan is constitutional. Moreover, this modest effort to provide quiet access to Devil's Tower for private religious activities simply does not “in reality . . . establish[] a religion or religious faith, or tend[] to do so.” *Lynch*, 465 U.S. at 678.

1. Purpose

Plaintiffs contend that "The District Court gave no explanation for its curious holding that closing Devil's Tower for the religious benefit of Native Americans served a 'secular purpose.'" Applt.'s Brf. at 17-18. But the District Court plainly did. Analyzing *Amos*, the District Court quoted the Supreme Court's pronouncement that "requiring a government action to serve a secular legislative purpose, "does not mean that the [policy's] purpose must be unrelated to religion." Slip op. at 14 (*quoting Amos*, 483 U.S. at 335) (alteration in original). The District Court held that, just as the religious exemptions at issue in *Amos*—which certainly singled out religion—alleviated burdens on religious exercise, so too is the purpose of the accommodations in the Management Plan "to remove barriers to religious worship occasioned by public ownership of the Tower." *Id.* at 14.

Any accommodation of private religious faith by the government requires the government to take into consideration the importance to citizens of the exercise of their faith and involves a governmental goal of protecting that exercise. But it is far too late in the day to claim that such

government purposes, which the government "follows the best of our traditions" when it pursues, *Zorach v. Clauson*, 343 U.S. at 313-14, which repeatedly have been upheld by the courts as set forth in Section I, and which the Supreme Court has pointed to in *Lyng* and *Smith* as the means by which Native Americans should seek to preserve their religious liberty, are invalid.

The Park Service's purpose of accommodating traditional Native American worship is not one of endorsement of Native American religion or religion generally. Under the endorsement test, a Court analyzes whether "the reasonable observer" would view the [government] practice as an endorsement. The reasonable observer, much like the reasonable person of tort law, is the embodiment of a collective standard and is thus 'deemed aware of the history and context of the community and forum in which the display appears.'" *Gaylor*, 74 F.3d at 217 (quoting *Capital Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995)) (internal citation omitted); *see also Bauchman* at 551-52; 555.

Viewing the total context that the Management Plan, a reasonable observer would not see a purpose to endorse religion. The reasonable observer, rather, would see the Management Plan for what it is: a carefully constructed policy to seek a fair balance between recreational uses of the Tower and the traditional religious uses of the site. The reasonable observer, presumed to be informed of history and context, would know of the traditional religious uses of the site that the government was seeking to accommodate along with recreational uses. The reasonable observer would be aware of the special role of the federal government as a protector of Native American culture, which stems from the unique history of the federal government's interaction with the indigenous peoples of America. *See, e.g., Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1218 (5th Cir. 1991). The hypothetical reasonable observer would be aware that Native American religion has a relationship to

land that is unique in comparison to most other religions practiced in the United States. The reasonable observer also would know that we are a pluralistic society, with diverse faiths, and that the Park Service regularly accommodates faith on land under its management, as set forth in Section I. In light of all these factors, the reasonable observer would not see a purpose to endorse Native American religion.

2. *Effect*

For the same reasons that the reasonable observer would not see a purpose to endorse Native American religion, the reasonable observer would see no endorsement in the Management Plan's operation. The reasonable observer would merely see the accommodation of the private religious choices of individuals to practice their faith. *See, e.g., Hawley v. City of Cleveland*, 24 F.3d at 822 (airport chapel "accommodates the religious needs of travelers" and a "reasonable observer would not conclude that the city endorses religion by allowing the diocese to maintain the chapel.").

As this Court made clear in *Bauchman*, in reviewing the effect of a policy under endorsement analysis, the reasonable observer is an informed one who is "aware of the history and context of the community in which the conduct occurs," 132 F.3d at 551-52. The reasonable observer is *also* informed of the "purpose, context and history" of the challenged *practice*. *Id.* at 555 (considering, in evaluating singing of religious music in school choir, prevalence of religious themes in choral music generally). This reasonable, informed observer, aware that religious as well as secular uses have long

existed at Devil's Tower, aware of the Park Service's practice of accommodating religious uses on its land, aware of the unique importance of land under federal control to Native American religious practice, and aware of the historic relationship between Native American culture and the federal government, would not see any endorsement of religion in the Management Plan.

3. *Entanglement*

Plaintiffs seem to have abandoned any claim that the Climbing Management Plan entangles the government with religion. Applt.'s Brief at 3 (setting forth Plaintiffs' four issues on appeal). In any event, there is no entanglement here. The Supreme Court recently held that “the factors we use to assess whether an entanglement is ‘excessive’ are similar to the factors we use to examine ‘effect.’ . . . Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute’s effect.” *Agostini v. Felton*, 117 S. Ct. 1997, 2015 (1997).

In this case, as with the tax accommodation in *Walz*, the only way in which the Climbing Management Plan may be "entangling" is that the government is taking the private religious needs of citizens into consideration in crafting a policy to reconcile these citizens' interests with other public interests. But as set forth in the purpose and effects discussion above, this factor is common to all accommodations. This particular accommodation only “entangles” the state with Native American religion if the policy unconstitutionally advances Native American religion, a conclusion that can only be reached after applying the endorsement test. And for all of the reasons set forth above, undertaking a policy to discourage climbing in June to balance competing public uses of the Tower has neither the purpose nor effect of endorsing Native American religion. More fundamentally, these actions do not

amount to the government “in reality . . . establish[ing]” Native American religion or religious faith, or “tend[ing] to do so.” *Lynch*, 465 U.S. at 678.

CONCLUSION

For the reasons set forth above, the District Court's Order should be affirmed.

Respectfully submitted,

THE BECKET FUND FOR RELIGIOUS LIBERTY

by: _____

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