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.

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 BRIGHTSOURCE ENERGY, INC.; SOLAR PARTNERS I, LLC; SOLAR PARTNERS II, LLC; AND SOLAR PARTNERS VIII, LLC IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners presented sufficient evidence to survive summary judgment on their claim that construction of a solar power plant on federal land violated the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb *et seq.*), where petitioners submitted declarations stating that the project was within an area of religious significance but did not explain specifically how it would burden their exercise of religion.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents BrightSource Energy, Inc., Solar Partners I, LLC, Solar Partners II, LLC, and Solar Partners VII, LLC make the following disclosures:

BrightSource Energy, Inc., has no parent corporation. General Electric Company, a publicly held company, owns more than 10% of its stock.

Solar Partners I, LLC, Solar Partners II, LLC, and Solar Partners VII, LLC, are all owned by Ivanpah Master Holdings, LLC, which in turn is owned by BrightSource Energy, Inc., NRG Energy, Inc., and Alphabet Inc. NRG Energy, Inc., and Alphabet Inc. are publicly held companies that have no parent corporation; no publicly held company owns more than 10% of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes, and rule: Page

Other authorities:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The order of the district court (Pet. App. 5a-31a) is unreported.

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. In October 2010, the Bureau of Land Management (BLM) granted rights of way to BrightSource Energy, Inc., and its partners to use public land for the construction and operation of the Ivanpah Solar Electric Generating System (ISEGS). ISEGS is a 370-megawatt solar power plant located along Interstate 15 in the Mojave Desert of California, approximately four miles southwest of Primm, Nevada. The plant uses an array of electronically controlled mirrors to focus sunlight, producing high-temperature steam that can be used to drive a turbine to produce electricity. The total project area—including roads, natural-gas and water pipelines, transmission lines, and construction staging areas—occupies approximately 3500 acres. Pet. App. 7a-9a.

2. Petitioners include an organization that "advocates for the preservation of and respect for Native American culture, including physical sites and the protection of culturally and religiously significant plant and animal species," as well as individuals who allege that they "reside, participate in religious activities, and/or recreate in the area affected by" ISEGS. Third Am. Compl. ¶1. In November 2011, they brought this action seeking to set aside BLM's decision to approve ISEGS. Pet. App. 6a. They asserted claims under various federal statutes, including, as relevant here, the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (42

U.S.C. 2000bb *et seq.*). That statute provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" to the extent that the government's action "(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.

The district court initially dismissed petitioners' RFRA claim with leave to amend. Pet. App. 26a. In an amended complaint, petitioners alleged that "significant portions of the Salt Song Trails" run through the project area, and that petitioners "make religious pilgrimages to various sacred locations by traveling along the Salt Song Trails." Third Am. Compl. ¶40. They stated that ISEGS was "within the focus area of the Native American Creation Story * * * extending 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." *Id.* at ¶41. They further claimed that the project would "substantially burden [their] exercise of religion because, among other things, physical environs and objects that are essential to such exercise and that cannot be found anywhere else in the world * * * will be permanently destroyed or otherwise made totally inaccessible as a result" of the project. *Id.* at ¶42.

The district court granted summary judgment to respondents. Pet. App. 5a-31a. The court held that "denial of access to land, without a showing of coercion to act contrary to religious belief, does not give rise to a RFRA claim." *Id.* at 26a. It reasoned that although

"Native Americans may have some rights to use sacred sites, 'those rights do not divest the Government of its right to use what is, after all, its land.'" *Ibid.* (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988)).

3. The court of appeals affirmed. Pet. App. 1a-4a. The court explained that a RFRA claim has two elements: "First, the activities the plaintiff claims are burdened by the government action must be an 'exercise of religion,'" and "[s]econd, the government action must 'substantially burden' the plaintiff's exercise of religion." *Id.* at 2a-3a (quoting *Navajo Nation* v. *United States Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc)). The court stated that "[t]his appeal hinges on the second element," and it concluded that "the record, which includes declarations submitted by [petitioners] that provide little more than conclusory statements and which have not shown where the alleged sacred sites are located at the Ivanpah Project site, is insufficient to support [petitioners'] claim that the loss of access to the limited area taken by the Ivanpah project imposes a substantial burden." *Id.* at 3a.

ARGUMENT

Petitioners renew their claim (Pet. 6-13) that BLM violated RFRA when it granted rights of way to allow the construction of the Ivanpah Solar Electric Generating System on public lands. After determining that petitioners' vague and conclusory declarations failed to establish that the project would substantially burden their exercise of religion, the court of appeals correctly rejected petitioners' claim. Its decision does not

conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that petitioners' RFRA claim failed at the outset because petitioners did not establish "that the loss of access to the limited area taken by the Ivanpah project imposes a substantial burden" on the exercise of their religion. Pet. App. 3a; see 42 U.S.C. 2000bb-1 (stating that, with certain exceptions, the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability"). Specifically, the court examined the record and determined that petitioners' declarations "provide little more than conclusory statements" and do not show "where the alleged sacred sites are located at the Ivanpah Project site." Pet. App. 3a.

As a general rule, "[t]o survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations." *United States ex rel. Cafasso* v. *General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011); accord *Miranda* v. *Wisconsin Power & Light Co.*, 91 F.3d 1011, 1018 (7th Cir. 1996) ("Conclusory and generalized assertions are not sufficient to survive a motion for summary judgment."). The court of appeals correctly applied that rule in determining that the record did not support petitioners' claim of a substantial burden. In support of their claim, petitioners said that the project site was within the "focus area of the Native American Creation Story," Pet. App. 52a, 58a, but as they described that "focus area," it spans tens of thousands of square miles, see *ibid.* (area extends "100 miles to the east and 100 miles to the west of the Colo-

rado River from Spirit Mountain (about 15 miles northwest of Laughlin, Nevada) in the north to the Gulf of California (in Mexico) in the south"). The project site covers approximately 3500 acres, or less than six square miles, and petitioners did not explain why it is a particularly significant part of the vast "focus area." *Id.* at 8a. Similarly, petitioners alleged that "significant portions" of the "Salt Song Trails" run through the project site, but those trails are apparently quite extensive—petitioners said they "span four states"—and again petitioners did not explain specifically how they would be affected by the loss of access to the small portion at issue here. *Id.* at 49a, 53a, 58a.

Even if the conclusion of the court of appeals were erroneous—which it is not—the error would amount to nothing more than the misapplication of a correctly stated rule of law to the particular factual record of this case. The decision therefore does not warrant this Court's review. See Sup. Ct. R. 10.

2. Petitioners devote most of their petition to the broader question "whether there is a RFRA violation where Native Americans are denied access to land necessary for religious rites by threat of civil or criminal prosecution." Pet. 3. As explained above, that question is not presented here because the decision of the court of appeals rested not on an interpretation of RFRA but rather on the court's assessment of the factual record and its determination that petitioners had failed to show with specificity that the land in question was "necessary for religious rites." In any event, petitioners' RFRA arguments lack merit.

RFRA was enacted in response to this Court's decision in *Employment Division, Department of Hu-*

man Resources of Oregon v. *Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause of the First Amendment does not protect against burdens on religious exercise that are inflicted by neutral laws of general applicability. See 42 U.S.C. 2000bb(a)(4). Disagreeing with the holding of *Smith*, Congress found 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). It specifically identified *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and it stated that it wished "to restore the compelling interest test as set forth in" those cases. 42 U.S.C. 2000bb(b)(1). To that end, the statute provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" to the extent that the government's action "(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.

RFRA does not define "substantial burden," and consistent with Congress's purpose of "restor[ing] the compelling interest test" of *Sherbert* and *Yoder*, courts must look to pre-*Smith* cases in construing the term. 42 U.S.C. 2000bb(b)(1). Under those cases, it was well understood that the Free Exercise Clause could not be used to interfere with federal management and use of public lands. See S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993) (noting that "pre-*Smith* case law makes it clear that strict scrutiny does not apply to govern-

ment actions involving * * * the use of the Government's own property or resources"). In *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), for example, this Court rejected a claim that the construction of a road in a National Forest violated the First Amendment because it would interfere with Native American religious practice. The Court declined to conduct "a factual inquiry into the degree to which the Indians' spiritual practices would become ineffectual if the * * * road were built." *Id.* at 450. Instead, it emphasized that "the affected individuals [would not] be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449; accord *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986) ("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.").

Construing RFRA in light of pre-*Smith* case law, the court of appeals has correctly held that "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*)." *Navajo Nation* v. *United States Forest Serv.*, 535 F.3d 1058, 1069-1079 (9th Cir. 2008) (en banc). Petitioners disagree with *Navajo Nation* (Pet. 11), but they do not suggest that it is in conflict with

any decision of any other court of appeals. And while they contend (Pet. 12) that this case may be distinguished from *Navajo Nation*, that does not establish that the two cases are in conflict. Even if they were, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Finally, petitioners assert (Pet. 8-11) that the decision below is inconsistent with *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), and *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015). That is incorrect. Neither case focused on the definition of a "substantial burden" under RFRA. In *O Centro Espírita*, this Court considered the application of the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, to a hallucinogenic tea used for a sacramental practice that was "[c]entral to the [respondent's] faith." 546 U.S. at 425. Because the statutory prohibition of the tea plainly imposed a substantial burden on respondent's religious exercise, the Court's analysis focused on whether the government could satisfy the compelling-interest standard. *Id.* at 430-438. Similarly, in *Holt*, there was little dispute that a rule prohibiting prison inmates from growing beards longer than one-quarter inch imposed a substantial burden on an inmate who believed that growing a beard "is a dictate of his religious faith." 135 S. Ct. at 862. The Court's inquiry instead focused on whether the rule was the least restrictive means of furthering the State's penological interests. *Id.* at 863-867. Neither case involved decisions about public lands, and neither sheds any light

on the application of the substantial-burden test in these circumstances.

3. Even if the question presented otherwise warranted this Court's review, this case would be an inappropriate vehicle for considering it because there is a serious question whether petitioners' claims have become moot. Petitioners did not seek a preliminary injunction to stop the construction of ISEGS. Construction was completed in February 2014, and the plant is now operational. See U.S. Dep't of Energy, *Energy Secretary Moniz's Remarks at the Opening Ceremony for the Ivanpah Solar Electric Generating System* (Feb. 13, 2014).* That development raises two separate mootness issues. First, petitioners' claims appear to be based in part on construction activities themselves, which are no longer taking place. See, *e.g.*, Pet. App. 61a (declaration of petitioner Figueroa asserting that "[p]hysical grading at the project site will destroy hundreds if not thousands of culturally significant sites, artifacts, and remains of the Chemehuevi and other Native American tribes—none of which can be repaired, replaced, or recreated"). And at least some of the restrictions on site access that were imposed during construction are no longer in effect. Second, to the extent petitioners claim to be suffering ongoing injury from the existence of the project, it is doubtful whether any practical relief can be granted that would remedy that injury.

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* http://energy.gov/articles/energy-secretary-monizs-remarks-opening-ceremony-ivanpah-solar-electric-generating-system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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