No. 24-CV-1982

IN THE SUPREME COURT OF THE UNITED STATES

MONTDEL UNITED,

Petitioner,

V.

STATE OF DELMONT AND
DELMONT NATURAL RESOURCES AGENCY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TEAM 2
Counsel for the Respondent

QUESTIONS PRESENTED

1. Whether the ECIA and subsequent transfer of Red Rock violate the First Amendment Free Exercise rights of Montdel United.
2. Whether the ECIA and subsequent transfer of Red Rock violate the First Amendment Free Speech rights of Montdel United.

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The opinion of the court of appeals is not published in the Federal Reporter but is available at C.A. No. 24-CV-1982. The opinion of the district court is also not published but is available at C.A. No. 24-CV-1982.

JURISDICTION

The court of appeals has entered final judgment. R. at 45. This Court granted a timely petition for a writ of certiorari. R. at 55. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Three years ago, the State of Delmont began an ambitious state-wide mining initiative to "reduce fossil fuel dependency and invigorate the state's economy." R. at 6 (opinion of the district court). The Energy and Conservation Independence Act ("ECIA"), enacted as part of that agenda, authorizes the State of Delmont to enter land transfer agreements with private mining companies to facilitate the extraction of valuable minerals, including "lithium, nickel, iron, and copper." *Id.* Before a land transfer may take place, it must be independently appraised and undergo rigorous environmental and economic impact studies. *Id.* The Delmont Natural Resources Agency ("DNRA") then has sixty days to decide whether to proceed with the transfer. *Id.* The State passed the ECIA in part to comply with a new federal law, the Federal Natural Resources Defense Act

("FNRDA"), which requires states to use "sustainable energy resources in defense contracting." *Id.* at 7.

Painted Bluffs State Park ("the Park") is a well-known nature preserve owned by the State of Delmont. *Id.* at 4. A geological study recently discovered that the Park contains the largest lithium deposit in North America. *Id.* at 7. The deposit is concentrated around Red Rock, a prominent landmark within the Park. *Id.* at 2, 7. Pursuant to the ECIA, the State decided to transfer one-quarter of the Park's land to Delmont Mining Company ("the Company"), including the area around Red Rock. *Id.* at 7. The Company intends to extract lithium from the deposit. *Id.* at 7–8. The Company and the DNRA expect that at the end of this process, the area around Red Rock will be transformed into a water-filled quarry, and it will no longer be possible to visit the area. *Id.* at 8. However, the broader environmental impact of this project is expected to be "relatively minimal," and other parts of the Park will not be as adversely affected. *Id.* at 8. While the DNRA has explored alternative mining methods, these methods will not be available for at least twenty years; even then, they would result in significant alteration to Red Rock. *Id.* at 8–9.

Petitioner Montdel United is an organization composed of members of the Montdel Native American tribe, many of whom consider the Red Rock area sacred. *Id.* at 2. The Montdel people's religious practices traditionally centered on a ritual performed at Red Rock during the fall and spring equinoxes and the summer and winter solstices. *Id.* at 3. While these practices have tended to take place at Red Rock since approximately 1952, this has not always been the case. *Id.* at 3, 5. During the "mid and late nineteenth century," the Montdel "no longer existed as a distinct and separate indigenous culture," and the "rituals did not occur during the World Wars and the Great Depression." *Id.* at 3–4. Today, the Montdel people's rituals have "evolved into a festival-like event," including activities such as dancing, stargazing, and speeches by environmentalists. *Id.* at

5–6. After the DNRA announced its decision to transfer the portion of the Park containing Red Rock to the Company, Montdel United sought and was granted injunctive relief in the district court, arguing that the transfer violated their free speech and free exercise rights. *Id.* at 10.

The court of appeals reversed. *Id.* at 45 (opinion of the court of appeals). The Fifteenth Circuit explained that *Lyng v. Northwest Indian Cemetery Protective Association*, which approved the government's construction of a road through sacred Native American land even though it was likely to virtually destroy the challengers' ability to practice their religion, precludes Petitioner's free exercise claim. *Id.* at 42–43 (citing 485 U.S. 439 (1988)). The court of appeals also found that this Court's forum precedents foreclose Petitioner's free speech claim. *Id.* at 35.

SUMMARY OF ARGUMENT

I. Petitioner's claim is not cognizable under the Free Exercise Clause.

A. The facts of this case are analogous to those in *Lyng*, where this Court rejected a free exercise challenge to a proposed road through a California forest that local Native American tribes considered sacred, even though it was virtually certain that the road would destroy the tribes' religious practice. *Lyng* and its predecessor case *Bowen v. Roy* instruct that the government's use of its own land is not "coercion" under the Free Exercise Clause. Nor does that Clause arm religious believers with the power to "demand that the Government join in their chosen religious practices."

B. This Court should not overrule *Lyng*. Doing so would subject every government action that might affect religious exercise to strict scrutiny. The government would lose all ability to control its own property, and free exercise jurisprudence would be consigned to chaos. If the First Amendment means anything, it is that all religions are equal—just as no religion may claim

special treatment, no religion has the right to impose its views on others, including on the government.

C. Even if this Court were to overrule *Lyng*, other free exercise precedents foreclose Petitioner's arguments. Under *Smith* and this Court's subsequent gloss on *Lyng*, the challenged government action in *Lyng* was neutral and generally applicable. So too is the State's action here. And in any event, the State can survive strict scrutiny.

II. The First Amendment likewise bars Petitioner's free speech claim.

A. Under this Court's forum precedents, Painted Bluffs State Park cannot be considered a traditional public forum. Traditional public forums are those few places which have "immemorially" been held in trust for public use and used for public speech and assembly. It is impossible to squeeze the Park into this box. While this Court has often assumed without deciding that city "parks" are traditional public forums, Painted Bluffs is a nature preserve with little in common with those spaces besides its name.

Instead, the Park is a nonpublic forum. This Court's precedents, lower court decisions, and the federal government's regulation of national parks confirm this view. As such, the State is free to close the Park at any time. What's more, any speech restrictions in nonpublic forums must be merely reasonable and viewpoint neutral. Respondent's proposed regulations are both.

B. Even if the Park were a traditional public forum, this Court has approved time, place, and manner limitations significantly more restrictive than those at issue here. Such limitations are not invalid "simply because a court concludes that the government's interest could be adequately served by some less-speech restrictive alternative." The First Amendment does not require governments to accommodate all forms of speech, and it does not "guarantee the right to

communicate one's views at all times and places or in any manner that may be desired." The land transfer at issue here is a permissible time, place, and manner restriction.

ARGUMENT

I. PETITIONER'S FREE EXERCISE CLAIM FAILS UNDER BOTH *LYNG* AND *SMITH*

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I. To state a free exercise claim, a plaintiff must plausibly allege that "a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (quoting *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 877 (1990)). This understanding of First Amendment doctrine recognizes that the Founders contemplated *some* limits on religious practices. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding a federal law that criminalized polygamy in the earliest case to consider the Free Exercise Clause). Among these limits is the right of the government to dispose of its own property as it sees fit. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) (noting that Native American tribes' right to access a sacred site did not "divest the Government of its right" to use the land as it wished); *Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

At the same time, it is undisputed that the "Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Carson ex rel. O. C. v. Makin*, 596 U.S. 767, 778 (2022) (quoting *Lyng*, 485 U.S. at 450). This guarantee is rooted in the text of the Free Exercise Clause, which bars the government from "*prohibiting* the free exercise [of religion]." U.S. CONST. amend. I (emphasis added). This

Court has consistently rejected a broad reading of that text (on which "prohibiting" would be synonymous with "preventing"). *See Lyng*, 485 U.S. at 456 (rejecting the idea that the Free Exercise Clause is "directed against any form of government action that frustrates or inhibits religious practice"). *Lyng* determined that this Court had ruled out such a reading in *Roy*—in that case, this Court upheld "Government activities that the religious objectors sincerely believed would 'rob the spirit of [their] daughter and *prevent* her from attaining greater spiritual power.'" *Id.* at 456 (quoting *Roy*, 476 U.S. at 696). Thus, where the government's management of its own affairs has the collateral effect of impeding an individual's religious exercise, there has been no "prohibition" in the sense relevant to the Free Exercise Clause. Instead, the Free Exercise Clause is violated only when "the law at issue *discriminates* against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added).

A. This Court's Pre-*Smith* Precedents Control This Case

1. *Lyng* Is Indistinguishable

The Fifteenth Circuit correctly noted that the facts of this case are "analogous to those in *Lyng*." R. at 44 (opinion of the court of appeals). Indeed, the key facts of the two cases are indistinguishable. The dispute in *Lyng* arose from the U.S. Forest Service's decision to build a road through the Chimney Rock area of Six Rivers National Forest, which local Native American tribes had "historically . . . used for religious purposes." *Lyng*, 485 U.S. at 442. The tribes claimed that the Forest Service's actions "could have devastating effects on traditional Indian religious practices," *id.* at 451, and the Forest Service's own report found that building the road would cause "serious and irreparable damage" to the tribes' sacred areas, *id.* at 442. Even so, this Court concluded that the burden on the tribes' religious practices was not "heavy enough to violate the Free

Exercise Clause." *Id.* at 447. "Whatever rights the Indians may have to the use of the area," the *Lyng* Court stated, "those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453. Similarly, in *Bowen v. Roy*, this Court rejected a free exercise challenge to a federal law requiring states to use Social Security numbers to administer certain welfare programs. *Roy*, 476 U.S. at 695–98. The *Roy* Court stated that the Free Exercise Clause does not empower citizens to "demand that the Government join in their chosen religious practices," *id.* at 700, even though the Native American challenger there sincerely believed that obtaining a Social Security number would "rob the spirit of his daughter and prevent her from attaining greater spiritual power," *id.* at 696. *Roy* explicitly anticipated *Smith*'s neutrality and general applicability principles, noting that the "statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable." *Roy*, 476 U.S. at 703. In turn, the *Lyng* Court relied on *Roy* for the proposition that even where government actions stand to "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," the "affected individuals" are often not being "coerced by the Government's action into violating their religious belief." *Lyng*, 485 U.S. at 449. *Lyng* and *Roy*, then, found that the First Amendment allowed some hindrances to religious exercise.

Here, as in *Lyng*, Petitioners are seeking to control the government's use of its own land. Neither party disputes that the sale of the portion of the Park containing Red Rock could curtail the Montdel people's religious practices at that location. But *Lyng* did not distinguish between a land transfer that hinders religious practices and one that causes a more permanent impediment: in either case, the government must be able to conduct its own affairs as it sees fit.

2. The Government's Use of Its Own Land Cannot Constitute Unconstitutional Coercion

Under this Court's precedents, the State's actions here are simply not a religious prohibition under the Free Exercise Clause. There has been no religious discrimination, nor has the State regulated or prohibited the Montdel people's conduct for religious reasons. *See Lukumi*, 508 U.S. at 532. Instead, "there is evidence to the contrary that the State of Delmont values the Montdel people." R. at 41 (opinion of the court of appeals). The Governor of Delmont has "publicly acknowledged . . . the lasting heritage of the Montdel people," noting that they are "part of a legacy that the state proudly cherishes." R. at 4–5 (opinion of the district court).

Because Petitioners cannot allege religious discrimination, they argue that the State's transfer of Red Rock has coerced them into violating their religious beliefs. *Lyng* precludes that argument. *Lyng* made clear that no coercion is involved when the government denies tribal members access to a sacred site. *See Lyng*, 485 U.S. at 449. And make no mistake: the *Lyng* Court recognized that the government's action was nearly certain to "physically destroy" the natural conditions required by the tribes' religion. *Id.* at 449. There, the tribal members insisted that practitioners of their religion "must be surrounded by *undisturbed* naturalness," such that the proposed road construction and timber harvesting would effectively destroy an area of wilderness they considered holy. *Id.* at 453. The *Lyng* Court responded that even if the road's construction "destroy[ed] the . . . Indians' ability to practice their religion," the Constitution did not require the government to "satisfy every citizen's religious needs and desires." *Id.* at 451–52 (citation and internal quotation marks omitted). As a doctrinal matter, then, there is no question that the *Lyng* rule encompasses this case. Because the State's actions here are indistinguishable from those of the U.S. Forest Service in *Lyng*, there has been no unlawful "coercion."

3. The First Amendment Does Not Allow Individuals to Demand Government Support for Their Religious Exercise

The Justices of this Court have been clear: freedom of religion is about "what the government *cannot* do to the individual, not . . . what the individual *can* exact from the government." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) (emphasis added); *see also, e.g.*, *Roy*, 476 U.S. at 700 ("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."). Both *Roy* and *Lyng* expressly state that "the First Amendment does not 'require the Government itself to behave in ways that the individual believes will further his or her spiritual development.'" *Smith*, 494 U.S. at 900 (O'Connor, J., concurring) (quoting *Roy*, 476 U.S. at 699); *see also Lyng*, 485 U.S. at 451. To hold otherwise would be to "permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166–67).

In this case, Petitioner is not requesting a simple exemption from the ECIA—it is asking this Court to grant it "*de facto* beneficial ownership" of up to 100 square miles of public land. *See Lyng*, 485 U.S. at 453; *see also* R. at 2 (opinion of the district court). In effect, it is seeking to wield its free exercise right against the government, using it to force the State of Delmont to conform to its members' religious beliefs. The First Amendment forbids this. This Court has already stated in *Roy* that the Free Exercise Clause cannot mean that religious believers have the power to "demand that the Government join in their chosen religious practices." *Roy*, 476 U.S. at 700; *see also Lyng*, 485 U.S. at 448. This key holding of *Roy* and *Lyng*—that while the Free Exercise Clause protects against certain forms of government coercion, it does not empower religious believers to coerce the government—shows that Petitioners cannot force the State to conform its conduct to their religious beliefs.

B. This Court Should Not Overrule *Lyng*

Smith has been subject to extensive criticism in the thirty-five years since it was decided. But despite many chances to overrule *Smith*, this Court has repeatedly declined to do so. *Lyng* is older than *Smith* and rests on the same doctrinal foundation, but no Justice has ever called for its overruling. Several considerations counsel against overruling *Lyng* now.

The United States could not function if every religion held the power to block any government action that did not conform to its beliefs. On this point, *Lyng* is worth quoting at length:

> However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.

Lyng, 485 U.S. at 439. If the First Amendment means anything, it is that all religions are equal—just as no religion may claim a right to favorable treatment, none has the right to impose its views on others, including on the government. *See* Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), in 10 THE PAPERS OF THOMAS JEFFERSON 154, 154–55 (J. Jefferson Looney ed., 2013) (arguing that "[n]o man has a natural right to commit aggression on the equal rights of another; and this is all from which the laws ought to restrain him"). In requiring equal treatment, *Lyng* is an indispensable bulwark against the "violence of faction." THE FEDERALIST NO. 10, at 71 (James Madison) (Clinton Rossiter ed., 1961). This Court should not dismantle it.

Overruling *Lyng* would consign free exercise jurisprudence to chaos. This Court has expressed reservations about overruling *Smith* in part because it is unclear what would replace it. *Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring) ("There would

be a number of issues to work through if *Smith* were overruled."). The same concerns call for caution before overruling *Lyng*. For example, overruling *Lyng* may require also overruling *Roy*. The *Lyng* Court itself understood the result it reached in that case to be compelled by *Roy*. *See Lyng*, 485 U.S. at 449. At the very least, overruling *Lyng* in favor of the standard proposed by Petitioners would eviscerate the government's control over its own property. For example, in *Lyng* itself, the vacated lower court order would have required the government to "subsid[ize] the Indian religion" by "permanently forb[idding] commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (*i.e.* more than 17,000 acres) of public land. *Lyng*, 485 U.S. at 453. Without *Lyng*, strict scrutiny would apply to *every* proposed decision that might affect *any* religious exercise.[1]

C. Other Free Exercise Doctrine Also Sanctions the Sale of Red Rock

1. The ECIA and Subsequent Transfer of Red Rock Are Neutral and Generally Applicable

A straightforward application of *Lyng* is sufficient to dispose of this case. But even if this Court were to overrule *Lyng*, other free exercise precedents permit the sale of Red Rock. In *Employment Division v. Smith*, 494 U.S. 872, this Court held that laws burdening religion are not subject to strict scrutiny if they are generally applicable and neutral toward religion. *Smith*, 494 U.S. at 882. There, the government denied state unemployment benefits to two members of the Native American Church who were fired from their jobs after ingesting peyote during a religious

[1] In addition, all the usual *stare decisis* factors weigh against overruling *Lyng* nearly forty years after it was decided. *See, e.g.*, *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part) (synthesizing the "*stare decisis* factors identified by the Court in its past cases"). Respondent is not aware of any Justice who has called into question the quality of *Lyng*'s reasoning—certainly not to the extent of those few cases this Court *has* decided to overrule. *Lyng* is also readily workable. Like *Smith*, it lays down a clear rule that frees courts from the burden of engaging in a strict scrutiny analysis in every free exercise case. And as noted above, *Lyng* is older than *Smith*, which this Court has declined to overrule even in the face of much fiercer criticism.

ceremony. *Id.* at 874. This Court found that the challenged law was neutral and generally applicable because it was "not specifically directed at their religious practice" and was constitutional as applied in other contexts. *Id.* at 878.

This Court has viewed *Lyng* as a proto-*Smith* decision—a case that anticipated and applied the *Smith* rule before it was announced. In *Lyng* as in *Smith*, the government's actions had nothing to do with Native American religious practices and burdened those practices only incidentally. *Lyng*, 485 U.S. at 450. Crucially, the *Smith* Court quoted *Lyng* for the idea that "[t]he government's ability to enforce generally applicable . . . [policies] 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Smith*, 494 U.S. at 885 (quoting *Lyng*, 485 U.S. at 451). This Court has continued to confirm this understanding of *Lyng*. *See, e.g.*, *Fulton*, 593 U.S. at 536 ("*Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs." (citing *Lyng*, 485 U.S. 439)); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017) (citing *Lyng* as an "example" of a case where "the laws in question have been neutral and generally applicable without regard to religion").[2]

Shortly after *Smith*, this Court addressed what counts as a neutral government action. In *Lukumi*, this Court struck down an ordinance that did not overtly target the Santeria religion, but was worded in a way that revealed that city officials did not have in mind any "religion other than

[2] Dicta from the lower courts cannot overcome this Court's clear statements in *Trinity Lutheran* and *Fulton* that Congress's actions in *Lyng* were neutral and generally applicable. While the Ninth Circuit has insisted that this Court "has not said, and could not have said, that the holding of *Lyng* rested on the view that *Lyng* was itself a case involving a neutral and generally applicable law," *Apache Stronghold v. United States*, 101 F.4th 1036, 1054 (9th Cir. 2024), it did so in an attempt to exempt *Lyng* from RFRA's rejection of *Smith*. Far from calling *Lyng* into question, the Ninth Circuit attempted to distinguish *Lyng* from *Smith* to justify applying *Lyng* even in an RFRA analysis. But, as demonstrated above, the Ninth Circuit misreads *Lyng* itself and this Court's subsequent gloss.

Santeria." *Lukumi*, 508 U.S. at 535. Covert government hostility to a particular religion, then, can render a facially neutral law discriminatory in its operation. And just four years ago in *Fulton*, this Court addressed general applicability under *Smith*, holding that a city ordinance was not generally applicable because it allowed officials to grant discretionary exemptions from a nondiscrimination requirement in foster care contracts. *See Fulton*, 593 U.S. at 534–35.

Here, the ECIA and corresponding transfer of Red Rock are neutral and generally applicable. The State of Delmont enacted the ECIA as part of a "transformative agenda" intended to promote the mining of valuable resources such as lithium, with the goal of "reduc[ing] fossil fuel dependency and invigorat[ing] the state's economy." R. at 6 (opinion of the district court). These objectives have nothing to do with Petitioner and apply equally to them as to other groups. The State of Delmont decided to sell Red Rock because it sits atop the "largest lithium deposit ever discovered in North America," not because the State disfavors the Montdel Observance. R. at 7 (opinion of the district court). Compare these facts with *Lyng*, where Congress, after the district court had enjoined the Forest Service from constructing the road in question, passed new legislation authorizing the road's construction. Congress even "exempt[ed] a narrow strip of land, coinciding with the Forest Service's proposed route for the remaining segment" of the road from the wilderness designation the district court had relied on to issue the injunction, with the express purpose of "enabl[ing] the [road's] completion." *Lyng*, 485 U.S. at 444. If such a specific exemption was generally applicable and neutral to religion, so is the sale of Red Rock, which is far less specific in singling out land Petitioner holds sacred. Nor do the *Lukumi* or *Fulton* principles concerning neutrality and general applicability apply here: there is no evidence that the State's actions are secretly motivated by animus against Petitioner's religion; in fact, as noted above, there is

evidence to the contrary. And there is no system of discretionary exemptions like the one this Court disapproved in *Fulton* that might call into question the ECIA's general applicability.

2. Even if the ECIA and Transfer of Red Rock Are Not Neutral and Generally Applicable, Respondents Survive Strict Scrutiny

Under *Smith*, the sale of Red Rock is neutral and generally applicable, and accordingly the transfer is not subject to heightened scrutiny. But even if this Court disagrees, Respondents survive strict scrutiny.

This Court's free exercise precedents provide that if a plaintiff shows that a law is either not neutral or not generally applicable, courts should "find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 597 U.S. at 525. Strict scrutiny is a difficult, but not impossible, burden to meet. *See Johnson v. California*, 543 U.S. 499, 514 (2005) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'" (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995))).

Assuming arguendo that the sale of Red Rock is either not neutral or not generally applicable, Respondent has advanced at least three compelling interests: (1) "the [Federal Natural Resources Defense Act ("FNRDA")] that requires sustainable energy in defense contracts," (2) "the climate crisis created by fossil fuel emissions," and (3) the "economic revitalization of the surrounding areas." R. at 30, 32 (opinion of the district court).

This Court has noted that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)). The courts of appeals have readily reached the same conclusion, holding that a multitude of national security-related interests count as compelling. *See, e.g.*, *Twitter, Inc. v. Garland*, 61 F.4th 686 (9th Cir. 2023) (nondisclosure of

information). Here, the federal government has concluded that requiring states to use ion batteries will promote national security. *See* R. at 24 (opinion of the district court). Similar federal contracting requirements are routinely upheld as compelling in other contexts, and here, the State risks punishment if it does not comply with FNRDA. *See id.* (noting that states that fail to comply with FNRDA will not be considered "competitive for defense contracts"); *see also, e.g.*, *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 970 (8th Cir. 2003) (finding that the government had a compelling interest in requiring that a portion of federal highway construction funds be paid to minority-owned businesses). Ion batteries are produced using lithium, and Red Rock sits atop the largest deposit ever "discovered in North America." R. at 47 (affidavit of Alex Greenfield). Mining this deposit would undoubtedly help the State further national security; failing to mine it risks the loss of innumerable federal defense contracts. As for Respondent's other compelling interests, the State of Delmont has decided to prioritize the climate crisis in part to comply with FNRDA. *See* R. at 6–7. And the State has long relied on its mining industry to create "employment opportunities [and] stimulate[] economic growth." R. at 41 (opinion of the court of appeals). The Fifteenth Circuit correctly held that these were compelling government interests. *See id.* Accordingly, the State has a compelling interest in mining the lithium deposit beneath Red Rock.

The transfer is also narrowly tailored to achieve the State's goal because of the sheer size of the lithium deposit relative to others discovered on the North American continent. Mining the deposit beneath Red Rock would directly advance the State's interests, while declining to take advantage of this discovery would be tantamount to giving up on the State's entire program. And the fact that the State has chosen to proceed with the transfer of Red Rock shows that it *has* taken the most narrowly tailored approach to satisfying its interests. Rather than destroying huge tracts of public land to secure the lithium it needs, the State chose the area that would give it the most

"bang for its buck." The transfer will destroy only a small piece of land, leaving the rest of the Park—and the State of Delmont—undisturbed for the enjoyment of all of its citizens.

II. PETITIONER'S FREE SPEECH CLAIM FAILS UNDER THIS COURT'S FORUM PRECEDENTS

This Court has long recognized that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (quoting *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)). Rather, the extent of an individual's right to use public spaces as a platform for personal speech depends on the kind of forum at issue. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018). This Court's precedents distinguish between three main types of forums: "traditional public forums, designated public forums, and nonpublic forums," *id.*, and the standards this Court applies "to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum," *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). In traditional public forums, "the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Mansky*, 585 U.S. at 11. Designated public forums are "spaces that have 'not traditionally been regarded as a public forum' but which the government has 'intentionally opened up for that purpose.'" *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)). By contrast, nonpublic forums are "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49. Only if this Court finds that the Park is a traditional public forum is the State required to keep it open to the public. *See id.* at 46 (noting that "a state is not required to indefinitely retain the open character" of public

property other than traditional public forums). Even then, as discussed below, many restrictions remain permissible. And the State is free to revoke public access to a designated public forum or nonpublic forum at any time.

A. Painted Bluffs State Park Is Not a Traditional Public Forum

Painted Bluffs State Park is not—and under this Court's case law, cannot be—a traditional public forum. Traditional public forums are those few spaces which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45 (quoting *Hague v. Comm. for Indus. Orgs.*, 307 U.S. 496, 515 (1939)); *see also United States v. Kokinda*, 497 U.S. 720, 743 (1990) (Brennan, J., dissenting) (noting that traditional public forums are spaces "to which the public generally has unconditional access"). "[S]treets, sidewalks, and public parks" tend to meet these criteria. *Ball v. City of Lincoln*, 870 F.3d 722, 730 (8th Cir. 2017). This Court has not readily recognized other kinds of traditional public forums. In the seminal case for the forum doctrine, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court held that a school's mail system was a nonpublic forum, rejecting an argument that the system was a limited public forum merely "because of the periodic use of the system by private non-school connected groups." 460 U.S. at 47. Neither party claimed that the mail system might qualify as a traditional public forum. *See id.* at 46. Even "quintessential" public forums often do not qualify because the forum inquiry is highly fact bound. In *United States v. Kokinda*, a plurality of this Court found that a sidewalk outside a U.S. Postal Service office was not a traditional public forum because the particular sidewalk at issue did "not have the characteristics of public sidewalks traditionally open to expressive activity." 497 U.S. at 727. Instead, the sidewalk "was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of

the post office" and led "only from the parking area to the front door of the post office." *Id.* at 727–28. This was unlike the public street in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), which the *Kokinda* Court described as "continually open" to the public and "a necessary conduit in the daily affairs of a locality's citizens." *Id.* at 727.

Unlike the "continually open" public street in *Heffron*, the State of Delmont maintains the Park for a specific purpose: to provide its citizens with a space for outdoor recreation. This makes the Park more like the sidewalk in *Kokinda*, which was not a traditional public forum because it was constructed for the sole purpose of "provid[ing] for the passage of individuals engaged in postal business." *Kokinda*, 497 U.S. at 727. Though Delmont did not "construct" the Park, it did acquire the Park in 1930 for the express purpose of "offering the public opportunities for camping, hiking, and fishing along the Delmont River." R. at 4 (opinion of the district court). And from the beginning, this outdoor recreation "designation included the Red Rock site." *Id.*

It is true that this Court has often included parks among the "quintessential" examples of traditional public forums. *See, e.g.*, *Perry*, 460 U.S. at 45; *Kokinda*, 497 U.S. at 743 (Brennan, J., dissenting) (describing "streets, parks, and sidewalks" as "[q]uintessential examples of a public forum") (internal quotation marks omitted). But this Court has never considered whether the expansive government-run nature preserves we call state and national parks are traditional public forums. And it is undisputed that what makes a given property a traditional public forum is the *purpose* the property serves, not the *label* the government attaches to it. *See Perry*, 460 U.S. at 45 (noting that traditional public forums are "streets and parks which . . . 'time out of mind, have been used for *purposes* of assembly'" and other forms of speech (quoting *Hague*, 307 U.S. at 515) (emphasis added)); *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 514–15 (D.C. Cir. 2010) ("The dispositive question is not what the forum is *called*, but what *purpose* it serves, either by tradition

or specific designation."). State and national parks are in no sense places that have "immemorially been held in trust . . . for purposes of public assembly, communicating thoughts between citizens, and discussing public questions." *Hague*, 307 U.S. at 515. The federal government has signaled agreement with this idea by the way it regulates expressive activity inside national parks. The Code of Federal Regulations provides for an extensive permitting system for "demonstrations" and other "speechmaking" activity, restricting speech to certain "designated park areas" outside which First Amendment activities are not permitted. 36 C.F.R. § 2.51 (2018). Courts have held that these "free speech areas" are "designated public forums." *Boardley*, 615 F.3d at 515. But state and national parks, of course, contain large swaths of land outside these designated areas; if a given area has not been specifically "dedicated to free expression and public assembly," it should be "classified as [a] nonpublic forum[]." *Id.*

Painted Bluffs State Park is a "park," to be sure, but it has little else in common with the city parks this Court has considered in previous cases. By the district court's own admission, the State acquired the Park "to preserve its natural beauty," not to provide a forum for public debate. *See* R. at 4 (opinion of the district court). From the beginning, the purpose of the Park has been "camping, hiking, and fishing"; these activities have coexisted alongside the Montdel people's religious practices, but those practices have always been "independent" of the Park's principal purposes. *Id.* And crucially, nothing in the record suggests that groups other than the Montdel have ever used the Park for speech activities. City parks, by contrast, are constructed for the specific purpose of providing a space for assembly and public debate. *See Pleasant Grove*, 555 U.S. at 469. Besides, the idea that a forum might be quintessentially public in one context but not public at all in another is hardly novel: this Court has already recognized that sidewalks and streets on military bases and near polling places are not public forums, even though they would be elsewhere.

See Greer v. Spock, 424 U.S. 828, 838 (1976); *Burson v. Freeman*, 504 U.S. 191, 215 (1992). Lastly, state parks are like national parks in all relevant respects other than their ownership: both are government-operated nature preserves dedicated to outdoor activities such as hiking and kayaking. Accordingly, this Court can readily analogize the State of Delmont's proposed restrictions to the federal regulations that limit expressive activity to "designated" park areas. 36 C.F.R. § 2.51(c). Such restrictions are antithetical to the nature of a traditional public forum, where the government cannot ban expressive activity altogether. *See Perry*, 460 U.S. at 45. Stated differently, if the government can confine speech within a park to a small zone dedicated to that purpose, and institute a strict permitting regime even within that small zone, the park cannot be a traditional public forum. Clearly, then, large areas of national parks not specifically dedicated to speech are not traditional public forums—and neither is Painted Bluffs State Park.

Because the Park is a nonpublic forum, the State is free to close access to the public. While this Court has never squarely held that the government may close a nonpublic forum, the *Perry* Court stated that governments may decide to close a designated public forum. 460 U.S. at 46 (noting that "a state is not required to indefinitely retain the open character" of designated public forums). And governments enjoy significantly greater control over nonpublic forums than over designated public forums—indeed, as the name suggests, nonpublic forums were never open to public expression to begin with. *See Mansky*, 585 U.S. at 11–12 (describing a nonpublic forum as "a space that 'is not by tradition or designation a forum for public communication'" (quoting *Perry*, 460 U.S. at 46)); *Porter v. City of Philadelphia*, 975 F.3d 374, 387 (3d Cir. 2020) ("A nonpublic forum is entitled to lesser First Amendment protection than the other two forums."). To the extent that public expression occurs in a nonpublic forum at all, it occurs with the government's

permission. Accordingly, if governments may close even designated public forums to public expression, they may also close nonpublic forums.

Further, any restrictions on speech in a nonpublic forum must merely be "reasonable and viewpoint neutral." *See Pleasant Grove*, 555 U.S. at 470. "This Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, 'no less than a private owner of property,' retains the 'power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Mansky*, 585 U.S. at 12 (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)).[3] Under this standard, the government "can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998) (quoting *Cornelius*, 473 U.S. at 800).

The restrictions here are reasonable and viewpoint neutral. In *Cornelius*, this Court allowed the District of Columbia to exclude certain legal defense and political advocacy organizations from a charity drive, emphasizing that "[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. "The First Amendment," this Court reasoned, "does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder

[3] This Court has sometimes recognized another type of forum: the "limited public forum." *See, e.g.*, *Good News Club*, 533 U.S. at 106 (noting that "the State is not required to and does not allow persons to engage in every type of speech" in "limited public forum[s]"). Some lower courts have described the limited public forum as a "sub-category of the designated public forum." *Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1203 n.8 (9th Cir. 2006). Like in nonpublic forums, restrictions on speech in limited public forums "must not discriminate against speech on the basis of viewpoint" and "must be 'reasonable in light of the purpose served by the forum.'" *Id.* at 106–07 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). Because this Court employs the same test to evaluate restrictions on speech in nonpublic forums, Respondent analyzes limited public forums together with nonpublic forums.

its effectiveness for its intended purpose." *Id.* at 811. Similarly, in *Adderley v. Florida*, this Court approved the State of Florida's removal of demonstrators from a nonpublic forum because there was "not a shred of evidence" that the state official did so because he "objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." 385 U.S. 39, 47 (1966). As in *Adderley*, the record before this Court is devoid of any evidence suggesting that the State of Delmont disagrees with Petitioner's religious speech. To the contrary, the record shows that the State values that speech. The Governor, for example, has described Petitioner as "part of a legacy that the state proudly cherishes." R. at 5 (opinion of the district court). Clearly, then, the State's transfer of Red Rock is both facially and factually neutral as to viewpoint. And as *Cornelius* demonstrates, the State must show only that its restrictions are reasonable, not that they are the *most* reasonable or the *only* reasonable limitations. Surely Respondent's actions meet this low bar: the State's transfer of a portion of the Park amounting to roughly one-quarter of the Park's area will have no effect on the rest of the Park, which is a nonpublic forum dedicated to outdoor recreation. *See Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 147 (2d Cir. 2004) ("A restriction will be reasonable if 'it is wholly consistent with the [government's] legitimate interest in preserving the property . . . for the use to which it is lawfully dedicated." (quoting *Perry*, 460 U.S. at 50–51)); *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1244 (11th Cir. 2019) (same). Accordingly, the State's restrictions on speech in the park are reasonable and viewpoint neutral, and thus constitutional.

B. Even if the Park Is a Traditional Public Forum, the Restrictions Here Are Lawful

The State's proposed transfer of the Park is permissible under the nonpublic forum doctrine. The standard this Court has announced for restrictions on speech in traditional public forums is more demanding: the government "may impose reasonable restrictions on the time, place, or

manner of protected speech" provided that "the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Even so, such restrictions are lawful and routinely upheld. Here, the State of Delmont's restrictions are a permissible exercise of its power to confine speech to certain times and places, even if this Court finds that the Park is a traditional public forum.

In *Ward*, the seminal case for time, place, and manner restrictions in traditional public forums, this Court held that New York City did not violate music performers' free speech rights by requiring the performers to use city-provided sound equipment in order to keep noise levels within Central Park to a minimum. *Ward*, 491 U.S. at 803. Under *Ward*, the means of limiting speech need only be "not substantially broader than necessary to achieve the government's interest." *Id.* at 800. Stated differently, a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* In *City of Renton v. Playtime Theatres*, this Court considered a significantly more restrictive limitation on speech than the one at issue here. 475 U.S. 41 (1986). That case involved a zoning ordinance that barred adult movie theaters from operating "within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *Id.* at 43. This Court held that there was no First Amendment violation, despite the highly restrictive nature of the ordinance, because "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Id.* at 50 (internal quotation marks and citation omitted). Similarly, in *Heffron v. International Society for Krishna Consciousness*, members of a religious sect whose

doctrines required them to distribute religious literature in particular public places challenged a Minnesota state fair rule that confined their speech to a single booth within the fairgrounds. 452 U.S. at 643, 649. Though neither party disputed that the rule severely limited their ability to practice their religion, this Court upheld the rule as a valid time, place, or manner restriction, reasoning that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Id.* at 647.

Even if the Park is a traditional public forum, the State's sale of the portion containing Red Rock is a permissible time, place, and manner restriction. *City of Renton* is instructive. There, the city's ban left barely more than "five percent" of the city's land area "open to use as adult theater sites." *City of Renton*, 475 U.S. at 53. Even then, there was evidence that "practically none" of that land was actually available for sale or lease. *Id.* This Court approved the restriction anyway. Here, unlike in *City of Renton*, the State's proposed restrictions on Petitioner's speech affect only a small percentage of the Park's area, leaving open "ample alternative channels for communication." *Ward*, 491 U.S. at 791. That the land transfer involves Red Rock is irrelevant; this Court's precedents ask only whether a speaker may still engage in protected speech outside the restricted time or place, not whether the government's restrictions would permit them to speak in exactly the manner or exactly the place they might prefer. In *Heffron*, too, this Court approved a rule confining religious speech to a single booth within a state fair occupying 125 acres of land. 452 U.S. at 643. This is far more restrictive than the limitation Respondents propose here. Even after the transfer of Red Rock, Petitioner will remain free to engage in any form of speech it desires elsewhere within the park. As the *Heffron* Court observed, the First Amendment does not grant individuals a license to dictate to the government the precise manner in which they would prefer to engage in

speech. Rather, governments are required only to leave open ample opportunities for speech outside the restricted time or place. Respondent has done so here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

TEAM 2
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January 31, 2025

BRIEF CERTIFICATE

The work product contained in all copies of this brief is the work of the members of Team 2. We have fully complied with our law school's honor code and with all Competition Rules.