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 from the United States Court of Appeals for the Fifteenth Circuit

BRIEF FOR PETITIONER

Team 3
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does the ECIA and subsequent transfer of Red Rock violate the First Amendment Free Exercise rights of Montdel United?

II. Does the ECIA and subsequent transfer of Red Rock violate the First Amendment Free Speech rights of Montdel United?

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OPINIONS BELOW

The unpublished opinion of the United States District Court for the District of Delmont, Western Division, may be found at *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (D. Delmont 2024). The unpublished opinion of the United States Court of Appeals for the Fifteenth Circuit may be found at *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (15th Cir. 2024).

STATEMENT OF JURISDICTION

The district court granted Montdel United's motion for a preliminary injunction. R. 32. The court of appeals reversed. R. 45. This Court then granted Montdel United's writ of certiorari. R. 55. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution, as relevant here, states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

STATEMENT OF THE CASE

1. The Montdel people practice their religion at Red Rock for centuries.

For centuries, the Montdel people have relied on a small sacred site called Red Rock as their sole place to offer supplicatory prayers to their Creator. R. 2-3. Archeologists have traced their presence in Delmont back to 400 A.D., and French explorers encountered the Montdel people and their intricate religious rituals in the 1500s. R. 2. According to Montdel oral history, the Old Observers have gathered at Red Rock during fall and spring equinoxes and the summer and winter solstices since before recorded history. R. 3. These rituals are known as the "Montdel Observance," and its participants are the "Old Observers." R. 5. Except for a few times of extreme hardship, the Old Observers participated in the Montdel Observance without fail. R. 3.

At the Montdel Observance, the Old Observers offer crop sacrifices and other supplications on behalf of the community. R. 3. The Old Observers believe that their Creator can be reached only through supplicatory prayers offered by their elders at Red Rock. R. 5. Indeed, their religious doctrine prohibits any form of personal prayer. R. 5. And the Old Observers believe that any deviation from the Montdel Observance will incur their Creator's wrath. R. 5.

In the twentieth century, the State of Delmont acquired Painted Bluffs State Park, including Red Rock. R. 4. Since then, Delmont has allowed the Old Observers to access Red Rock for the Observance. R. 4. Delmont even relied on the Observance to promote the park and encourage tourism to boost the surrounding counties' economies. R. 5. As the Observance gained cultural significance with the broader public, Delmont also set up nearby campgrounds and profited from park-issued food, music, and merchandise licenses. R. 5-6. Although the Old Observers never participated in these festivals, they never objected to them. R. 6.

2. Delmont passes the Energy and Conservation Independence Act and rejects several alternative mining locations before deciding to turn Red Rock into a mine.

Delmont recently passed the Energy and Conservation Independence Act ("ECIA") to leverage its mineral-rich deposits across the state. R. 6. The federal government supported the ECIA's passage due to the Federal Natural Resources Defense Act ("FNRDA") that mandates the use of renewable energy in defense contracts. R. 7. The ECIA allows Delmont to enter into land transfer agreements with private mining companies for the extraction of resources. R. 6. The transfers are managed by the Delmont Natural Resources Agency ("DNRA") and are subject to both environmental- and economic-impact studies. R. 6. After receiving these studies, the DNRA has sixty days to decide whether to finalize a proposed transaction. R. 6.

Shortly after Delmont passed the ECIA, Delmont revoked two transfer agreements at the behest of secular groups. R. 9-10. Delmont cancelled the first agreement after the environmental

impact study showed that the extraction process would destroy two endangered species' habitats. R. 9-10. And Delmont halted the second transfer agreement after the environmental impact study revealed a 35% risk of polluting a 50-person town's reserve water supply. R. 10.

The symbiotic relationship between the Old Observers and Delmont soured shortly after the enactment of the ECIA. R. 7. Despite knowing for twenty years that the Painted Bluffs State Park contained a large lithium deposit, Delmont only recently decided to transfer one-fourth of the park—including the entire Red Rock area—to Delmont Mining Company. R. 7. This choice marked a startling change in Delmont's prior resistance to the idea of selling the mining rights to Red Rock. R. 7. The environmental impact study revealed the mining would render Red Rock a water-filled quarry. R. 8. The same study concluded that Red Rock would not be susceptible to rehabilitation, meaning the rock shearing and erosion would render the entire area too hazardous for any visitation ever again. R. 8. Yet five miles away from Red Rock, down the Delmont River, visitors would still be able to safely visit. R. 8.

Montdel United objected to the mining agreement, explaining to Delmont that the agreement would prevent them from practicing their religion by destroying the sacred site for the Observance. R. 52-53. The state rejected these concerns about the future of the Observance—which Delmont's governor previously labelled a "nuisance." R. 47.

After Delmont rebuffed their concerns and embarked on the transaction, Montdel United sued, seeking to enjoin the sale and mining of Red Rock. The district court granted an injunction, holding that the sale likely violated the First Amendment's Free Exercise and Free Speech Clauses. R. 32. The Fifteenth Circuit reversed and lifted the injunction. R. 45. Montdel United petitioned for certiorari, which this Court subsequently granted. R. 55.

SUMMARY OF THE ARGUMENT

Delmont's attempt to sell Red Rock for mining violates the First Amendment because it would destroy the Montdel's only forum for their religious expression while the state could achieve its interests through other means. The transaction thus violates the First Amendment in two ways.

I. Delmont's attempt to sell and destroy Red Rock is barred by the Free Exercise Clause because this case is distinguishable from *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Alternatively, if *Lyng* does control, then it should be overturned. Strict scrutiny should apply because the law is not generally applicable or neutral towards religion. Delmont fails strict scrutiny here because they fail to identify a compelling state interest.

This case is distinguishable from *Lyng* because it would involve the total destruction of the Old Observers' religion. In *Lyng*, this Court held that the Free Exercise Clause did not apply because the respondents would still be able to practice their religion, but with interruption. In this case, there is no religion if there is no Red Rock. Because Delmont's plan would thoroughly destroy Red Rock, it eliminates the Old Observers' religion, and *Lyng* does not apply.

Should this Court find that *Lyng* does apply, it should be overturned because it commits a grievous error by insufficient reasoning and there are no valid reliance interests. The *Lyng* precedent leaves no room for the practice of land-centric religions, a common feature in Native American religions. The Court committed this mistake by discounting the religious practices of Native Americans, thereby rendering the Free Exercise Clause but a moot surplusage for those whom it was designed to protect. Finally, governments cannot have a reliance interest in the continual erosion of a constitutional right. If *Lyng* applies, it should be overturned.

Strict scrutiny applies because the law is not generally applicable or neutral towards religion. Under the ECIA, Delmont can choose mining sites based on unknown criteria. Without

clear criteria, Delmont can choose to destroy religious sites without recourse, as they have done here. Thus, the law is not generally applicable; in fact, it was used to target a religion. For the same reason, it is not neutral towards religion. Indeed, the DNRA has previously cancelled sale of other mining projects for secular reasons. The ECIA thus empowers the DNRA to attack religion, precluding neutrality. The ECIA and this transaction must face strict scrutiny.

This action fails strict scrutiny because it lacks a compelling interest. Delmont's stated interests are (1) addressing the climate crisis and (2) complying with FNRDA requirements. The first fails because the destruction of Red Rock specifically is insignificant in the fight for the climate. The second fails because it is unclear that the lithium mined at Red Rock would be used toward this end. Both fail to address the question of using alternative, non-religious sites. Delmont's attempt to destroy Red Rock cannot survive strict scrutiny analysis.

Because Red Rock is protected by the Free Exercise Clause, and because Delmont's actions cannot withstand strict scrutiny, Delmont cannot be permitted to sell and destroy Red Rock.

II. Delmont's attempt to sell and destroy Red Rock violates the Free Speech Clause because the area is a traditional public forum, and the transaction fails intermediate scrutiny.

Red Rock is a traditional public forum because the Montdel have used it for their religious expression since before recorded history. Because Red Rock has been a crucial forum for religious expression for centuries, it is a traditional public forum.

Because Red Rock is a traditional public forum, Delmont's attempt to shutter it for mining must satisfy intermediate scrutiny. But Delmont's attempt to destroy Red Rock fails intermediate scrutiny for three reasons.

First, Delmont's sale of Red Rock does not advance any substantial governmental interests. While the state's interests are substantial in theory, in reality they are talismans

untethered from the state's actions that Delmont waives around to justify closing Red Rock and destroying the Montdel's only forum for their religious expression. Indeed, Delmont offers nothing more than speculation and conjecture that selling Red Rock for mining purposes will make any material difference in advancing its stated goals.

Second, Delmont's sale of red rock is not narrowly tailored because the state has less-burdensome alternatives at its disposal to further its asserted interests. Because of Delmont's substantial mineral deposits across the state, less-expression-burdensome alternatives to mining Red Rock abound. Indeed, Delmont could mine the portions of Painted Bluffs State Park that contain the lithium and exclude Red Rock. Or Delmont could revive any of the mining agreements it recently cancelled at the behest of secular groups. The land sale thus fails narrow tailoring.

Third, Delmont's sale of Red Rock destroys the only forum for the Montdel's religious expression, leaving them without any alternative channels for their expression. Because of their religious beliefs, Red Rock is the only forum where the Montdel can join in group supplicatory prayer—their religion's only permissible prayer form. But environmental impact studies confirm the proposed mining operations will destroy Red Rock without any hope of reclamation. Thus, the land sale and mining activity would destroy the only forum for the Montdel's religion and leave them without ample alternative channels for their expression.

Delmont's sale and destruction of Red Rock thus fails intermediate scrutiny and violates the First Amendment's Free Speech Clause.

ARGUMENT

I. Delmont's destruction of Red Rock violates the Free Exercise Clause.

The First Amendment prevents the federal and state governments from passing laws that prohibit the free exercise of religion. U.S Const. amend. 1; *Cantwell v. Connecticut*, 310 U.S. 296,

303 (1940) (incorporating the Free Exercise Clause against the states through the Fourteenth Amendment). The Free Exercise Clause reflects the "exalted" role religion plays in our society as the "inviolable citadel of the individual heart and mind." *Abington School Dist. v. Schempp*, 374 U.S. 203, 226 (1963). The importance of spirituality does not change for minority practitioners, like the Old Observers. *See Sherbert v. Verner*, 374 U.S. 398, 416 (1963) (Stewart, J., concurring). Yet Delmont's destruction of Red Rock will irreversibly bar the Old Observer's from offering supplicatory prayers to their Creator. R. 51.

The destruction of Red Rock violates the Free Exercise Clause for three main reasons. First, the Free Exercise Clause applies and *Lyng* does not control because the annihilation of the Old Observer's *only* place to fulfill their sacred obligation constitutes a prohibition on free exercise. *See Lyng*, 485 U.S. at 451. Second, Delmont's decision is neither generally applicable nor neutral under *Employment Division v. Smith*. 494 U.S. 872, 879 (1990). Third, the destruction fails strict scrutiny because Delmont's stated interests do not compellingly justify the destruction of Red Rock. Accordingly, the Fifteenth Circuit's decision must be reversed.

A. The Free Exercise Clause protects Red Rock because *Lyng* does not apply.

In *Lyng*, this Court found that the Free Exercise Clause does not apply to government actions on government-owned land that cause incidental burdens on religious practice, if the actions do not coerce individuals to act against their beliefs. *Lyng*, 485 U.S. at 449. The Fifteenth Circuit concluded that the Free Exercise Clause is inapplicable to the destruction of Red Rock—the Old Observer's sole sacred site—because of *Lyng*'s holding. R. 42-45. This misunderstanding of case law is a reversible error.

1. The Court decided *Lyng* before *Smith* and this case is factually distinguishable from *Lyng*.

The rule articulated in *Lyng* does not apply here based on two considerations. To begin,

this Court decided *Lyng* before it decided *Smith*. *Compare Lyng*, 485 U.S. at 439 (1988), *with Smith*, 494 U.S. at 872 (1990). And *Smith* marked a pivotal shift in Free Exercise Clause analysis by requiring government actions to be both generally applicable and neutral towards religion. *Smith*, 494 U.S. at 879. Nowhere in the *Lyng* opinion does the Court discuss general applicability or neutrality. *Compare Lyng*, 485 U.S. at 447-58 *with Smith*, 494 U.S. at 879. This omission is fatal because the destruction of Red Rock is neither generally applicable nor neutral.

Furthermore, *Lyng* is also inapplicable because the destruction of Red Rock is factually distinct from the mere interference with a sacred site at issue in *Lyng*. *Lyng* involved the United States Forest Service's plan to permit timber harvesting and to build a paved road in the Chimney Rock area of a national forest. *Lyng*, 485 U.S. at 442-43. Various tribes opposed the plan, arguing that the timber harvesting and new road would frustrate the spiritual activities that are scattered throughout Chimney Rock. *Id.* Specifically, the tribes complained that the loud noises produced by timber harvesting and the road would harm their ability to focus during prayer. *Id.* at 442.

The irreversible destruction of Red Rock totally precludes any spiritual activity in the area. R. 53. Unlike Delmont's mining operation, the Forest Service's plan purposefully preserved religious sites from physical harm. *Lyng*, 485 U.S. at 443. The Forest Service's plan created protective zones that prohibited timber harvesting around all of Chimney Rock's religious sites. *Id.* And the Forest Service also placed the route for the road as far from the religious sites as possible. *Id.* While the spiritual practice of the tribes in *Lyng* may have been frustrated to a great degree, their centuries old practices could nevertheless continue. *Id.* at 451. But here the Old Observers' sole religious site will become a "water-filled quarry." R. 8. Delmont's rock shearing and erosion will "render[] the region too hazardous for any visitation," forcing the Elders to never again be able to fulfill their sacred obligation. R. 8, 51. The extinction of an entire religion

separates this case from *Lyng*. The Free Exercise Clause must apply.

The Fifteenth Circuit wrongly concluded that a departure from *Lyng* would permit tribes to "sacraliz[e] the world" as a means to invalidate duly enacted laws. R. 44. This Court rejects similar slippery slope arguments in cases where the government argues stronger religious protection will increase administrative burdens. *See e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 369 (2015); *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682, 735 (2014). Furthermore, applying the Free Exercise Clause to prevent religious extinction is a narrow holding that strikes the appropriate balance between protecting the most vulnerable groups and allowing the government to make administrative decisions. Montdel United is not arguing that Delmont may never use Red Rock for a different purpose. Rather, their argument is simple: before Delmont can sell this land, it must demonstrate its actions meet the appropriate level of constitutional scrutiny. If Delmont's actions were narrowly tailored to achieve a compelling interest, then this Court's precedents would allow the land transfer to proceed. And while strict scrutiny is the most demanding form of constitutional review, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), it is not insurmountable, *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015). But Delmont simply has not met that burden here. Delmont's purported interests are weak, not compelling.

In sum, this Court should hold that *Lyng* does not control and apply free exercise protections to the destruction of Red Rock.

2. If *Lyng* does apply, it should be overturned.

If the Court finds that the Free Exercise Clause does not apply, then the Court must overturn *Lyng*. Stare decisis "is at its weakest when," as here, the Court "interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The Court recognizes five factors relevant in deciding whether to overturn precedent: (1) "the nature of their error," (2) "the quality of their reasoning,"

(3) "the 'workability' of the rules they imposed on the country," (4) "their disruptive effect on other areas of the law," and (5) "the absence of concrete reliance." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 268 (2022). The stare decisis factors support overruling *Lyng*.

First, the nature of the error in *Lyng* is grave. The decision in *Lyng* "essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices*."* *Lyng*, 485 U.S. at 459 (Brennan, J., dissenting). *Lyng* "threatens the very existence of Native American religion." *Id.* (Brennan, J., dissenting) (cleaned up). If *Lyng* is permitted to stand, the Old Observers and many other tribal religions face significant harm without the protections of strict scrutiny. *See e.g.*, *Apache Stronghold v. United States*, 101 F.4th 1036 (9th Cir. 2024) (allowing the government to destroy an Apache sacred site for copper mining); *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc) (permitting the government to pollute a sacred site to help a ski resort). The consequences of *Lyng* are substantially important.

Second, the reasoning supporting this grave error is weak. The majority discounted the inherently coercive relationship between a government that controls access to sacred sites and Native Americans. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1299 (2021). The ability of Native Americans to access their sacred sites can end at the whim of the government. Accordingly, Native Americans face a "baseline of omnipresent government interference" with their religion. *Id.* at 1301. And for many Native Americans, this interference can force them to make a problematic choice: violate an obligation to worship their Creator or face hazardous environmental conditions. R. 5, 8; *see Apache Stronghold*, 101 F.4th at 1045, 1047-48. The majority in *Lyng* fails to address this reality. Instead, the majority equates this baseline of coercion to a mere incidental effect. *Lyng*, 485 U.S. at 450. Regardless, *Lyng*'s reasoning fails under a different rationale. Even if exercising absolute control

over sacred sites is not coercive, the Free Exercise Clause protects individuals from both coercion and non-neutral or non-generally applicable incidental effects. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). The Free Exercise Clause "is written in terms of what the government cannot do to the individual." *Sherbert*, 374 U.S. at 412. Whether the government directly or indirectly intends to burden religious exercise makes no difference. *Lukumi*, 508 U.S. at 534.

For the third and fourth factors, Montdel United concedes that *Lyng* is both overly workable and isolated from other areas of law. But this is still a dangerous combination that leads to the conclusion that *Lyng* must be overruled. In effect, *Lyng* singles out Native American religions for anomalous treatment. For example, this Court frequently protects voluntary religious practices in cases concerning the military, prison, and zoning requirements—all areas with an inherent baseline of government interference. Barclay & Steele, *Rethinking Protections for Indigenous Sacred Sites*, at 1333-38. Yet in those situations, the Free Exercise Clause requires the government to provide religious accommodations to ensure individuals can practice their religion. *See e.g.*, *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) (holding that the government must allow a prisoner to attend a worship service); *International Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059 (9th Cir. 2011) (holding that zoning requirements that prevent plaintiffs from building a place of worship that meet their theological requirements constitutes a substantial burden on religious exercise). It is a deep injustice for the government to fail to accommodate tribes in situations where the government controls access to worship activities.

Finally, *Lyng* should be overruled because there is an absence of concrete reliance interests. Stare decisis is less powerful in constitutional cases. *Ramos v. Louisiana*, 590 U.S. 83, 115-20 (2020) (Kavanaugh, J., concurring) (collecting cases where this Court overturned constitutional precedent). Certainly, it cannot be said that Native Americans have grown to rely on the destruction

of their sacred sites. So the only party that may claim a reliance interest is the government. The government cannot be permitted to depend on the continued violation of constitutional rights under the guise of easing administrative burdens. If *Lyng* applies to this case, it should be overturned.

B. Strict scrutiny applies because Delmont's action under the ECIA is neither generally applicable nor neutral.

Strict scrutiny applies to a government action burdening religion only if the policy is generally applicable and neutral towards religion. *Smith*, 494 U.S. at 879. Strict scrutiny governs Delmont's sale of Red Rock under the ECIA because the policy is neither generally applicable nor neutral towards religion. First, because Delmont targeted a specific property, Red Rock, the policy was not generally applicable. Second, the sale of Red Rock was not neutral because Delmont approved other requests to similar mining projects when presented with secular justifications.

1. Red Rock's destruction is not generally applicable because it targets a specific property.

If a law vests the government with discretion to target one "particular property," then the law is not generally applicable. *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 92, 98 (1st Cir. 2013); *see Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983) (holding that a "special tax that applies only to certain publications" was not "generally applicable"). And when a policy gives government agents discretion to grant exemptions, it is not generally applicable. *Fulton*, 593 U.S. at 535–37 (holding that existence of discretion in a foster care contract rendered an anti-discrimination policy not generally applicable). The ECIA is not generally applicable because it permits Delmont to target specific regions without clear criteria.

The DNRA exercises discretion in choosing which land transfer agreements to cancel. R. 6. The ECIA does not automatically authorize all mining companies to have their pick of public lands. *Id.* Instead, it gives the DNRA discretion to determine which regions are worthy of transfer. *Id.* And the ECIA allows the DNRA to revoke any land transfer agreement within sixty days. *Id.*

During that revocation period, third parties may attempt to influence Delmont's decision. Although the ECIA may not explicitly refer to this framework as an exemption policy, in effect, however, the revocation period and third-party dynamic produces the same results as the policy at issue in *Fulton*. The ECIA grants the DNRA broad discretion to decide which public lands will be saved and which will be destroyed. This discretion opens the door for the DNRA to make ad hoc, or worse, discriminatory decisions and opens the door for a high level of scrutiny. Thus, the sale of Red Rock is not generally applicable and strict scrutiny should apply.

2. Delmont's action is not neutral towards religion because it targets the Montdel people for distinctive negative treatment.

Even if the Court finds that the sale of Red Rock under the ECIA is a generally applicable policy, then the action is still subject to strict scrutiny because it is not neutral towards religion. Government action is not neutral if the action "targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534, 546. Because Delmont decided to sell Red Rock even though doing so will destroy the Montdel's religious expression singles out the Montdel Observance for distinctively negative treatment and treats it as a "religious gerrymander." *Id.* at 535.

Red Rock's sale is not neutral because Delmont singled out the Montdel Observance for distinctive treatment. R. 48. Montdel United informed Delmont of the site's importance and that by mining in Red Rock "the state was effectively outlawing [the Old Observers' religion]." R. 53. Instead of ceasing the transfer, Delmont's governor labelled the Montdel Observance as a "nuisance." R. 47. Delmont intentionally decided to prioritize lithium mining over the Montdel Observance. This deliberate choice to favor lithium mining is not an incidental effect of neutral law. It is the conscious choice to target and end the religion of the Old Observers.

Additionally, Delmont's pattern of exemptions created by canceling mining projects for secular purposes while denying the Montdel's request confirms its transfer agreements are not

neutral towards religion. A pattern of exemption also supports finding that the government action is not neutral. *Lukumi*, 508 U.S. at 536-37 (holding that a government ban of ritual animal slaughter was not neutral because the ordinance contained exemptions for kosher slaughter, licensed food establishments, and other practices, but not for Santeria). Delmont has such a pattern of exemptions. Indeed, Delmont withdrew two land transfer agreements that it made pursuant to the ECIA. R. 9-10. In those instances, Delmont justified cancelling the agreements because one mining endeavor would destroy the habitat of endangered animals and the other created a 35% risk of water pollution. *Id.* But now Delmont refuses to grant an exemption that has a 100% chance of saving a cherished religious practice. R. 5. The pattern of exemptions granted for secular protections contributes to the religious gerrymander. *See Lukumi*, 508 U.S. at 537. The destruction of Red Rock is not neutral.

C. The destruction of Red Rock fails strict scrutiny because Delmont fails to assert a compelling interest.

Because the destruction of Red Rock is neither generally applicable nor neutral, Delmont's action is subject to strict scrutiny. *See Fulton*, 593 U.S. at 533. Strict scrutiny requires that the government proves its action is narrowly tailored to achieve a compelling governmental interest. *Id*. at 541. A compelling interest is an "interest of the highest order." *Id.*; *see Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972) (finding that the government has a paramount interest in education but still holding that compulsory school attendance laws should not apply to the Amish). Rather than rely on "broadly formulated interests," the Court "scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 593 U.S. at 533. Thus, the question is not whether Delmont has a compelling interest in generally transferring land rights. The proper question is whether Delmont has a compelling interest in refusing to halt the destruction of Red Rock at the expense of the Montdel Observance.

The destruction of Red Rock fails strict scrutiny because no compelling interest justifies prohibiting the Montdel Observance. Delmont asserts two justifications for the destruction: (1) the climate crisis created by fossil fuel emissions and (2) the FNRDA that requires sustainable energy in defense contracts. R. 30 (noting that the Defendants only asserted two compelling interests). Neither of these two interests are compelling.

Easing the climate crisis does not compellingly justify Delmont's actions. It is highly improbable that the destruction of Red Rock will help remedy a global climate crisis. Delmont has proffered no evidence that supports the conclusion that lithium mining at Red Rock will decrease a material amount of fossil fuel emissions. The connection between Red Rock and global warming is far too attenuated. It is unclear if even extracting and refining lithium throughout all available lithium deposits in Delmont would have a net-positive effect on climate change—let alone just Red Rock. The environmental benefits of lithium reliance are uncertain. *See, e.g.*, MIT Climate Portal, *How Much CO2 is Emitted in Manufacturing Batteries?* (July 15, 2022) (available at climate.mit.edu/ask-mit/how-much-co2-emitted-manufacturing-batteries) (noting one ton of mined lithium leads to fifteen tons of carbon dioxide emissions). An unsupported claim about aiding the climate crisis cannot sustain an infringement on the free exercise of religion.

For similar reasons, the FNRDA is also an insufficient interest. For starters, the FNRDA does not compel Delmont to mine Red Rock for lithium. Delmont offers nothing more than mere speculation to suggest they may not meet their federally mandated goal without mining at Red Rock. Although Red Rock may contain the largest lithium deposit in the state, this does not mean other areas of Delmont are devoid of lithium. Other regions of the Painted Bluffs State Park—areas that won't preclude the Old Observers' ability to worship—hold plentiful lithium deposits. R. 7. Delmont has not explained why those deposits or deposits in other parts of the State cannot

be used. And Delmont cannot guarantee that the private mining company responsible for clearing Red Rock will even use that lithium to fulfill defense contracts. The speculative need to fulfill defense contracts with Red Rock's lithium is not a compelling interest.

Delmont's environmental interest and FNRDA interest also fail because an interest is not compelling when the state "leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Delmont has cancelled two other land transfer agreements over environmental concerns despite the ways mining in those areas could have contributed to reducing fossil fuels or meeting federal defense production requirements. R. 9. Outside of those cancelled agreements, plenty of other minable regions are left untouched. R. 6. Thus, Delmont's selective enforcement of its interests undermines its claim that the environment and the FNRDA are "interests of the highest order." *Fulton*, 593 U.S. at 533.

In conclusion, Delmont did not establish their compelling interest in the sale and destruction of Red Rock. A failure to assert a compelling interest is sufficient to find that Delmont does not survive strict scrutiny. *Id.* at 541-42. Religion plays a special role in the Constitution and American society, *Abington School Dist.*, 374 U.S. at 226, and the Fifteenth Circuit's decision must be reversed to breathe life back into this principle. Delmont cannot rob the Old Observers of their sincere means of spiritual fulfilment.

II. Delmont's sale of Red Rock violates the Free Speech Clause.

Delmont's sale of Red Rock violates the Free Speech Clause because it fails intermediate scrutiny. Intermediate scrutiny applies because Red Rock is a traditional public forum due to its immemorial use for religious assembly and expression since before recorded history.

Delmont's transfer of Red Rock fails constitutional muster under intermediate scrutiny for three reasons. First, Delmont's asserted governmental interests are too abstract and attenuated to justify destroying Red Rock. Second, Delmont's plan fails narrow tailoring because the state can

achieve its asserted interests through means that burden substantially less expression than destroying Red Rock. Third, Delmont cannot satisfy intermediate scrutiny's requirement that its plan leave the Montdel with ample other opportunities for their religious expression.

A. Intermediate scrutiny applies to Delmont's attempt to shutter Red Rock because it is a traditional public forum.

Intermediate scrutiny applies to Delmont's attempt to convert Red Rock into a mining area because it is a traditional public forum. And the area is a traditional public forum because it has "'immemorially been held in trust for the use of the public, and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). So intermediate scrutiny applies.

When, as here, a free speech claim challenges a speech restriction on government property, the Court first analyzes "the nature of the forum, because the extent to which the Government may limit access depends on" the type of forum at issue. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985). The proposed mining plan restricts the Montdel's expressive activity by limiting their access to Red Rock, which is government property. The transaction "therefore implicates" the "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (quoting *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)).

The relevant forum to be analyzed is the Red Rock area, not the entire state park. That is so because the scope of the relevant forum is defined by "the access sought by the speaker." *Cornelius*, 473 U.S. at 801. Because the Montdel only seek to preserve access to Red Rock, only that portion of the park is relevant to the forum analysis.

Red Rock is a traditional public forum because the Montdel have used it for their religious expression since before recorded history. Traditional—or quintessential—public forums are those 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*, 307 U.S. at 515). As the district court found, the Montdel people have revered and used Red Rock as a sacred group prayer site for centuries. R. 2. Indeed, archaeological evidence suggests the Montdel have been present in the Red Rock area since around 400 A.D.; and French explorers first observed the Montdel's "intricate religious practices" and rituals in the 1500s. R. 2. And aside from a few isolated instances during times of extreme hardship, the Montdel have assembled at Red Rock to perform these rituals. R. 3. Red Rock therefore has functioned as the central forum for the Montdel's religious assembly and expression for centuries R. 3. A "particularized inquiry into the precise nature" of Red Rock thus confirms it is a traditional public forum. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

Because Red Rock is a traditional public forum, Delmont's attempt to sell it for private mining must satisfy intermediate scrutiny. "In a traditional public forum" like Red Rock, "the government may impose reasonable time, place, and manner restrictions on private speech[.]" *Mansky*, 585 U.S. at 11. Delmont's attempt to transfer Red Rock is a "place" restriction because the state seeks to move the Montdel's religious expression five miles away. R. 8. The attempt to destroy Red Rock therefore must meet intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The arguments advanced by Delmont and the court below that Red Rock is a nonpublic forum are unpersuasive. Nonpublic forums are those that have "not by tradition or designation

[been] a forum for public communication." *Mansky*, 585 U.S. at 11–12 (citation omitted). But by tradition, Red Rock has been a forum for public communication and assembly, namely the Montdel's religious expression. *See Capitol Square Review and Advisory Bd. v. Pintette,* 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."). As explained above, the Montdel have used Red Rock for their religious expression since before recorded history. R. 14. And "public places historically associated with the free exercise of expressive activities, such as . . . parks, are considered without more, to be public forums." *United States v. Grace*, 461 U.S. 171, 177 (1983) (internal quotation marks omitted). And Delmont has allowed Red Rock to serve as a forum for expression for decades. *See, e.g.*, R. 4-5. The facts in the record thus belie the argument that Red Rock is a nonpublic forum.

The contention that Red Rock is a designated public forum likewise fails. A designated public forum is "public property which the state has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45; *see e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-56 (1975) (holding municipal theaters opened for public use were designated public forums). But Red Rock's status as a public forum owes to its traditional use by the Montdel, not the state's creation and subsequent opening of the forum. Indeed, since the area became a state park, Delmont has neither impeded the Montdel's religious assemblies nor restricted access to Red Rock. R. 4-5. By contrast, the festival areas located near the Observance likely are designated public forums because the state created those campgrounds and has historically required those visitors to obtain licenses. R. 5-6; *see Perry*, 460 U.S. at 45. But Red Rock is not a designated forum because its use as a public forum stems from both the Montdel's historical use of the site and the state's history of non-intervention with the

Montdel's expressive use of the land.

Thus, intermediate scrutiny governs the Free Speech Clause analysis of Delmont's attempted destruction of Red Rock because the area is a traditional public forum.

B. Delmont's destruction of Red Rock fails intermediate scrutiny.

To pass constitutional muster under intermediate scrutiny, Delmont's attempt to destroy Red Rock must (1) "serve a significant governmental interest," (2) be "narrowly tailored to" achieve such an interest, and (3) "leave open ample alternative channels for" the Montdel's expression. *Ward*, 491 U.S., at 791. The mining plan fails under all three prongs.

1. Delmont's stated interests are not substantial because they are too abstract and attenuated from the state's actions to justify destroying the only forum for the Montdel's religious expression.

Delmont attempts to justify the transfer of Red Rock with three interests: (1) mining minerals useful to reduce fossil fuel dependency, (2) promoting the state's economy, and (3) meeting national defense contracting requirements. None of these interests are substantial—let alone substantial enough to justify destroying the Montdel's only forum for their religious expression—because they are too abstract and attenuated from the government's actions.

While the state's interests are substantial in theory, closer inspection reveals they are nothing more than talismanic abstractions too attenuated to justify shuttering Red Rock and destroying the Montdel's only forum for their religious expression. The Montdel do not dispute that Delmont's asserted interests are substantial in theory. But "to recite" Delmont's stated "interests is not to end the matter" of whether or not they are substantial. *United States v. Alvarez*, 567 U.S. 709, 725 (2012). Rather, Delmont must prove a "direct causal link between" its chosen policy and "the injur[ies] to be prevented." *Id.* "This burden is not satisfied by mere speculation or conjecture[.]" *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Instead, Delmont "must demonstrate that the harms it recites are real and that" the transaction "will in fact alleviate them to a material degree."

Id. Delmont has not satisfied that burden.

Consider first Delmont's climate-related interest. The state asserts that the "necessity of adopting alternatives to fossil fuels amid an expanding climate crisis demands the increased production and use of electric alternatives to gas powered automobiles," which in turn justifies turning Red Rock into a mine. R. 22. But there is a yawning gap between promoting fossil fuel alternatives and the land transfer. Indeed, Delmont does not explain the "direct causal link between" the land transfer and "the [climate] injur[ies] to be prevented." *Alvarez*, 567 U.S. at 725. It is certainly *possible* that Delmont selling Red Rock to mining companies causes those companies to sell the lithium to battery companies, in turn causing those companies to sell batteries to electric vehicle companies, in turn causing consumers to switch to electric vehicles—all with the end result of a net-positive environmental impact despite the carbon intensive processes of mining lithium, fabricating batteries, and building and recharging electric cars. *See, e.g.*, Milad Haghani, et al., *Hidden effects and externalities of electric vehicles*, 194 ENERGY POL'Y 114335 (2024). But Delmont presents no evidence causing one to believe such an outcome is *probable*. Worse still, Delmont has not presented any evidence that it has taken steps to ensure the lithium actually goes towards electric-vehicle development compared to some other use, instead relying on "mere speculation [and] conjecture" that this mining plan "will in fact" achieve "to a material degree" its abstract goals in promoting electric vehicle production and reducing climate change. *Edenfield*, 507 U.S. at 770-71. Delmont thus fails to demonstrate that its electric-vehicle rationale is substantial.

The state's economic interest fares no better. A state pursuing an asserted interest in an underinclusive or half-hearted manner—such as by granting "[e]xemptions from an otherwise legitimate" policy—"may diminish the credibility of the government's rationale for restricting [expression] in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994). Here, despite

the purported substantiality of the economic benefits from mining, the state rejected several similar projects—including one to mine lithium—at the behest of secular groups. R. 9-10. Indeed, Delmont found the economic benefits from those projects were not substantial enough to overcome either the possibility that two endangered species' habitats would be destroyed or a 35% chance the reserve water supply for a 50-person town might be contaminated. Yet when the consequence was destroying the Montdel's millennia-old religious expression, the state suddenly viewed the economic rationale as substantial. This flip-flopping "raises serious doubts about whether [Delmont] is, in fact, serving . . . the significant interests" it invoked to support the transaction. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). While Delmont's rhetoric claims the economic rationale is substantial, its actions reveal the reality: the economic interest is not substantial.

Delmont's claim that destroying Red Rock promotes a substantial interest because it aligns with a national defense policy likewise fails. At the outset, it is unclear how substantial this interest is because Delmont has inconsistently asserted it. For example, while the courts below discussed the interest, *see* R. 6-7, 41, the DNRA Secretary did not mention this purportedly substantial interest as one of the "four primary reasons" he approved the sale, R. 49. Indeed, the Secretary did not mention this apparently substantial interest *at all* when explaining his reasoning for approving the Red Rock transaction, *see* R. 46-49, raising the specter that this interest is a "sham" or "*post hoc* rationalization," *Maine v. Taylor*, 477 U.S. 131, 149 (1986) (citation omitted). Additionally, this interest suffers from similarly fatal attenuation flaws as the state's other asserted interests. Delmont has not provided any tangible evidence beyond "mere speculation [and] conjecture" that the transaction "will in fact" achieve "to a material degree" its abstract goal in complying with federal objectives to use sustainable energy in defense contracts. *Edenfield*, 507 U.S. at 770-71. For example, Delmont has not implemented any policies to ensure the lithium mined in the Red Rock

project would actually be used for sustainable energy in the defense industry. Plus, Delmont has pursued this supposedly substantial goal in an underinclusive manner, rejecting mining projects that would have produced the same minerals useful for sustainable energy development. R. 9-10. This "underinclusiveness" once again "raises serious doubts about whether [Delmont] is, in fact, serving" a "significant" interest. *Florida Star*, 491 U.S. at 540. The state's national-defense interest thus fails to pass muster.

Delmont has thrown three interests against the wall, but none stick. While all three interests appear substantial, upon closer inquiry they are mere talismans that Delmont has not justified with sufficient evidence. Accordingly, Delmont's attempt to transfer Red Rock does not serve a substantial interest. The transfer fails intermediate scrutiny and violates the Free Speech Clause.

2. The destruction of Red Rock is not narrowly tailored because Delmont can effectively pursue its interests through means that burden substantially less expression.

Even if the Court concludes one or more of Delmont's stated interests are substantial, the land transfer of Red Rock still cannot withstand First Amendment scrutiny because the sale of Red Rock is not narrowly tailored to achieve those interests. To satisfy the narrow tailoring requirement, Delmont must not "burden substantially more [expression] than is necessary to further" its asserted interests. *Ward*, 491 U.S. at 798-99. And while the Court will not reject a policy "simply because there is some imaginable alternative that might be less burdensome on [expression]," *id.* at 797 (internal quotation marks omitted), the existence of "numerous and obvious less-burdensome alternatives . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable," *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Because Delmont can achieve its stated interests through means that burden substantially less expression than ruining Red Rock, the land transfer fails narrow-tailoring and intermediate scrutiny.

Delmont has "numerous and obvious less-burdensome alternatives" at its disposal to achieve its asserted interests. *Cincinnati*, 507 U.S. at 417 n.13. To begin, Delmont could facilitate substantial lithium mining by limiting extraction to the portions of the state park that contain lithium and exclude the Red Rock area. R. 7. Such an arrangement would allow the state to promote its stated interests without burdening the Montdel's religious expression. Other alternatives that would burden substantially less expression abound. For example, Delmont could revive the nickel-mining agreement the state cancelled because of its potential impact on two animal species. R. 9-10. Or the state could revive the other lithium mining agreement it cancelled because the project had a 35% risk of contaminating the backup water reserve for a 50-person town. R. 9-10. Any one of these alternative arrangements would allow the state to achieve its stated interests without burdening the Montdel's religious expression. By refusing these alternatives and instead destroying the Montdel's religious expression, Delmont chose to "burden substantially more [expression] than is necessary to further" its interests. *Ward*, 491 U.S. at 798-99. That choice violates narrow tailoring.

Delmont rejected the available alternative plans to promote its interests not because they would have ineffectively promoted the state's goals, but because they affected other interests Delmont deemed more important than the Montdel's constitutionally protected religious expression. R. 23. The narrow-tailoring requirement exists to prevent exactly this constitutional evil: a state "sacrificing [expression] for efficiency" by "burden[ing] substantially more [expression] than is necessary" in pursuit of other goals. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (cleaned up). Delmont's attempt to sell Red Rock therefore is not narrowly tailored and fails intermediate scrutiny.

3. The sale leaves the Montdel with no other forum for their religious expression because their religious practices are tied to the Red Rock area.

If the Court finds the Red Rock transaction is narrowly tailored to serve a substantial interest, it nonetheless fails intermediate scrutiny because it does not "leave open ample alternative channels

for" the Montdel's religious expression. *Ward*, 491 U. S. at 791. Because their religious beliefs are inextricably linked to Red Rock, the sale will destroy the Montdel's only forum for their religious expression, thus leaving them with no "alternative channels for" their religious expression. *Id.*

The Red Rock area is the only forum for the Montdel's religious expression. The Montdel believe they can reach their Creator only through the unified voice of group supplicatory prayer at Red Rock. R. 3. Montdel religious doctrine also explicitly prohibits individual supplicatory prayer, as well as personal requests for aid or forgiveness. R.3. And the Montdel religion dictates that any deviation from the Observance's group ceremonial practices at Red Rock will incur their Creator's wrath. R. 3. Plus, the Montdel believe the natural character of Red Rock is a necessary condition for the Observance. R. 8, 14. Accordingly, Red Rock is the only forum for their religious expression.

But the land sale and subsequent mining will destroy the Red Rock area, leaving the Montdel unable to access the sacred locus of their religion. R.8. Worse still, there is no hope for a reclamation project to later restore Red Rock to its natural condition. See R. 8. Thus, the land sale and mining activity would destroy the only forum for the Montdel's religious expression.

By destroying the only forum for the Montdel's religious expression, Delmont's attempt to sell Red Rock to become a mine thus fails to "leave open ample alternative channels for" the Montdel's religious expression. *Ward*, 491 U. S. at 791. The land sale therefore fails intermediate scrutiny and violates the Free Speech Clause. It is, in a word, unconstitutional.

CONCLUSION

The judgment of the Fifteenth Circuit should be reversed.

Respectfully submitted,

Team 3
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

Under Rule IV(C)(3) of the 2024-25 Seigenthaler-Sutherland Moot Court Competition's Official Rules, we, counsel of record for the Petitioner, certify that:

1. The work product contained in all copies of our brief is, in fact, the work product of our team members.

2. We have complied fully with our law school's governing honor code, and

3. We have complied with all Rules of the Seigenthaler-Sutherland Moot Court Competition.

Team 3
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