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

QUESTIONS PRESENTED

I. Whether the state of Delmont violated the Montdel's free speech rights by making the only public forum available for their expression "too hazardous for public access."

II. Whether the state of Delmont violated the Montdel's free exercise rights when it targeted the Indigenous group's holy site for "total destruction," thereby halting centuries-old religious pilgrimages that the state derided as a "nuisance."

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STATEMENT OF THE CASE

The Montdel people are part of an Indigenous tribe that for over a millennium has performed religious pilgrimages to their holy site, Red Rock, in what is known today as the Painted Bluffs State Park ("Park") in Delmont. R. at 3. They have long done so not just with the state's knowledge, but its encouragement. *Id.* at 6. Indeed, when establishing the Park back in 1950, then-Governor Rupert Ridgeway commemorated the Montdel's "supplications to the Almighty in the Painted Bluffs" as "part of a legacy that the state proudly cherishes." *Id.* at 5. But what Delmont's former governor prided as "legacy" its current governor derides as a "nuisance." Greenfield Aff. ¶ 9; R. at 2. And sure enough, he hatched a plan to wipe the Montdel's holy site off the face of this planet, thereby halting their religious pilgrimages altogether and forever. R. at 9.

In 2021, Delmont enacted a law that would allow the Governor to choose public lands to transfer to mining companies. Greenfield Aff. ¶ 7. The law was a boon for the mining industry, which had long been salivating over the state's mineral rich areas. R. at 7. The law instructed the state to conduct economic and environmental studies before transferring lands, but the Governor remained free to override any concerns those studies revealed. R. at 6. As part of the law, the Governor launched what he dubbed as the "Energy and Conservation Independence Act" initiative ("mining initiative"). Greenfield Aff. ¶ 7. The Governor framed the initiative as aimed at reducing fossil fuel dependence and promoting economic development. *Id.* But beyond completing one prior land transfer, he did not give mining companies rights to Granite International, a public land with rich nickel deposits. R. at 9. Nor did he give them rights to the public lands near the town of Grove Flats, which boast rich lithium deposits. *Id*. He did not even give mining companies rights to most of Painted Bluff State Park, which contains the largest

known lithium deposit in North America. *Id*. Instead, he instructed his team to transfer for "total destruction" only one sliver of the Park: the Montdel's holy site of Red Rock. *See* Greenfield Aff. ¶ 12.

Red Rock sits on top of the highest peak in the Painted Bluff State Park, which the state acquired in 1930 through eminent domain. Highcliffe Aff. ¶ 7. The Montdel believe their God made Red Rock as a holy site for the special purpose of hearing communal supplications during spring and fall equinoxes. *Id.* On these days, Montdel religious leaders gather below the holy site to hear the Montdel people's prayers for divine aid. *Id.* at ¶ 7. At sunset, the leaders begin a pilgrimage to the holy site, carrying their community members' prayers for health, success, and more to their God. *Id.* Once at the holy site, the leaders perform a sacred prayer ritual that has been passed by sacred tradition since the Montdel became a people. *Id.* While the leaders ascend to the park's highest peak, the remaining Montdel engage in praise rituals and meditations at the holy site's base. *Id.* According to Montdel faith, communal pilgrimages to the holy site during solstices and equinoxes are the only avenues for seeking divine intervention. *Id.* at ¶ 9. Failure to perform pilgrimages is considered a serious transgression. *Id.* Indeed, except for World War II and the Great Depression, the Montdel have religiously performed these pilgrimages since before the fall of the Roman Empire. R. at 4.

In recent decades, the Montdel's religious pilgrimages to their holy site of Red Rock have become a regional attraction. R. at 15. Though the Montdel performed the pilgrimages independent of the State Park Service, the state of Delmont marketed the pilgrimages in advertising campaigns. *Id.* Hundreds of people started to flock to the Park to observe. *Id.* Soon, festivals featuring dances, singing, crafts, and art displays began coinciding with the Montdel pilgrimages. *Id.* The state even licensed vendors to sell goods at the Equinox festivals, which

Montdel's religious leaders did not partake in. But unlike the state's former governors, Delmont's current governor finds the festivals to be a "nuisance." *Id.*

Under the Governor's scheme, the mining company would sandblast the Montdel's holy site, transforming it into a "water-filled quarry" that even the state concedes would be "too hazardous for public access." Greenfield Aff. ¶ 12. The company would then extract lithium deposits the state discovered in the Park two decades ago. *Id.* While some areas of the Park could be reclaimed two decades later, the state's destruction of Montdel's holy site would be permanent and irreversible. Greenfield Aff. ¶ 13. The damage, however, could be mitigated if the state chooses alternative technologies that will be available in twenty years. Greenfield Aff. ¶ 15. The alternative technologies may be more expensive, but they would save Montdel's holy site from total and permanent destruction. *Id.*

The mining project is expected to create jobs, but will also hurt the region's tourism industry. *Id.* The state also concedes the project will destroy the Montdel's holy site and permanently halt their religious pilgrimages. Highcliffe Aff. ¶ 14. The Montdel formed a non-profit organization, known as Montdel United, to urge the state to abandon the project and protect their religious pilgrimages. Highcliffe Aff. ¶ 13. Unsuccessful in the face of the mining industry's persistent lobbying, they took to court. R. at 7. A district court granted injunctive relief to stop the land transfer and destruction of their holy site, holding the government's actions likely violated the Montdel's First Amendment rights. R. at 3. Montdel United now requests this Court reverse the 15th Circuit Court of Appeals' denial of preliminary injunction. R. at 54.

SUMMARY OF THE ARGUMENT

The sale and transformation of Red Rocks into a mining site constitutes a permanent closure of the only forum in which the Montdel people can engage in a particular expressive activity. As a publicly available state park, it is the quintessential place in which people exercise

their constitutional rights. Indeed, it has been used for this exact purpose for hundreds of years, before the Founders enshrined the freedom of speech in this nation's establishing documents. Due to this history, the State of Delmont was not permitted to close this place without sufficient justification. The State's asserted interests—as important as they are—are not enough to overcome the strong presumption against the validity of this closure, especially in light of the alternative projects the State rejected.

The state's weaponization of its property rights to target the Montdel's holy site for complete and total annihilation is a direct affront to the free exercise rights of the Montdel people. Delmont's mining initiative is neither generally applicable nor neutral. Delmont's governor pinpointed the sacred land for obliteration. He did so all while preserving other mineral rich lands—including those directly adjacent to the holy site—from "total destruction." Such a hostile mining initiative cannot stand, especially when the state can achieve its purported interest—tackling climate change by reducing reliance on fossil fuels—in a manner that does not burden religion. Indeed, the state itself has conceded time and again that it can achieve its purported interest without obliterating the Montdel's holy site. For instance, the state admits it could rely on less destructive, alternative mining technologies. It also admits it could instead extract minerals from the other public lands, like Granite International. The state could even consider installing solar panels around the Montdel's holy site, which would likely better advance the state's purported goals than, say, converting a state treasure into a hazardous waste site.

ARGUMENT

Few rights are more absolute—or fundamental to the American experiment—than the First Amendment rights to freely express one's mind and exercise one's religion. U.S. Const. amend. I. Indeed, even on government property, the First Amendment affords far-reaching

protections from unbridled suppression of speech and religion. *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). Therefore, the appellate court's order should be reversed because **(I)** Delmont's governor violated the Montdel's free speech rights by robbing them of the only public forum available for expression; and (**II**) the governor's targeted annihilation of the Montdel's holy site violates their free exercise rights.

I. The proposed sale of Painted Bluffs State Park to Delmont Mining Company violates the petitioners' free speech rights because the state park is a traditional public forum, and the sale constitutes an irreparable denial of free expression.

The First Amendment, binding on the states through the Fourteenth Amendment, prohibits the government from "abridging the freedom of speech," U.S. Const. amend. I; *Gitlow v. New York*, 286 U.S. 652, 666 (1925). Such restrictions are most suspect when they occur within the places "historically associated with the exercise of First Amendment rights." *Hudgens v. NLRB,* 424 U.S. 507, 515 (1976). This Court has repeatedly affirmed that the closure of such places—traditional public fora—to expressive activity requires the strictest scrutiny. *See Perry*, 460 U.S. at 45. Because Red Rocks is a traditional public forum under this Court's jurisprudence, and because the State of Delmont completely closed this forum to expressive activity despite less restrictive alternatives, the sale and transformation cannot be upheld. Even with a more deferential standard, the closure fails to pass muster because no justification offered by the State overcomes the reality that Red Rocks is the only forum for the activity at issue.

A. Red Rocks is a traditional public forum.

Where the government restricts expressive activity on government property, it is necessary to determine what type of forum it is. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985). This Court has recognized three types of fora: traditional public fora, designated public fora, and nonpublic fora. Traditional public fora, or quintessential public

fora, are those types of government property, like "streets and parks 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. CIO*, 307 U.S. 496, 515 (1939)). Designated public fora are like traditional public fora, except their openness to expressive activity comes from the government's own actions rather than long-standing tradition. *Id.* As a result, and further distinguishing them from traditional public fora, the government may close designated public fora to the public, but until it does so, the limits on the government with regards to traditional public fora apply. *Id.* at 46. Lastly, nonpublic fora are not open to the public, neither by tradition nor by designation, and the government's abilities to restrict expressive activity are far greater: "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

Red Rocks is a traditional public forum because parks, along with streets, are the quintessential forum for civil discourse. A wide range of analogous state and national parks—and not parks in the city center—have been recognized as traditional public fora. *See Leydon v. Town of Greenwich,* 777 A.2d 552, 568 (Conn. 2001) (holding that a town-owned park on the Long Island Sound with a single entry-point is a traditional public forum); *Paulsen v. Lehman*, 839 F. Supp. 147, 161 (E.D.N.Y. 1993) (holding that a state-owned beachfront park is a public forum); *United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000) (holding that a national park is a public forum). The trial court properly determined, in line with courts across the country, that Red Rocks, like any other park that has "immemorially been held in trust for the use of the public," is a public forum. *Hague*, 307 U.S. at 515 (1939). Furthermore, this Court has

previously recognized that all public streets fall within the category of traditional public fora even when they do not fit the cliché of a busy street in a town center. *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988); *see also Carey v. Brown*, 447 U.S. 455, 460-61 (1980). In *Frisby*, the town tried to distinguish a narrow, residential street from streets running through a town's commercial center, arguing the former has not "immemorially been held in trust for the use of the public." 487 U.S. at 480-81. This Court held that "all public streets are held in the public trust and are properly considered traditional public fora." *Id*. at 481. Just as it was wise to make no legal distinction between two types of streets, this Court should make no legal distinction between types of parks.

Setting aside this categorical approach for a moment, a particularized inquiry into this forum supports a finding that Red Rocks constitutes a traditional public forum. Prayer is a form of civic discourse, and to say otherwise ignores the long history of religious symbolism, imagery, and invocation in American government and political life. *See DeBoer v. Village of Oak Park*, 267 F.3d 558, 569-70 (7th Cir. 2001); *Lee v. Weisman*, 505 U.S. 577, 633-635 (Scalia, J., dissenting) (detailing examples of supplicatory prayer in civic ceremonies since the founding era). The Montdel people have come to the area for centuries for the purpose of expressing their religious beliefs in the only way they can, and the State has identified only a few gaps that interrupted otherwise continual use of the area for civil discourse: the Great Depression and the Second World War. Treating these gaps, in the face of the sacrifices the Montdel people, like all Americans, made during some of the greatest crises this country has faced in its history, as a mere choice makes these sacrifices out to be trivial. Once the country returned to normal, the modern observance emerged to restart the tradition, and today, the Observance draws thousands to the area. Thus, despite the attempt to classify the park as a "remote wilderness area" that

"never [has] been dedicated to free expression and public assembly [and] would be clearly incompatible with such use," *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508 (D.C. Cir. 2010), it is clear that Red Rocks is not only compatible with such uses but is also the only forum that exists for the Montdel people to engage in the same type of civic discourse as the Founders.

Moreover, even if there may be some areas of the larger Painted Bluffs State Park that are readily classifiable as traditional public fora and other areas as nonpublic fora, courts have been unwilling to cut up government property into separate parcels for forum analysis purposes. *See Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir. 1993) (holding that two sections of a city park are indistinguishable for forum purposes). Even if some parts of the state park were truly remote areas that cannot be accessed easily to qualify as a traditional public forum, it would not warrant defining separate areas as distinct for the purposes of forum analysis. Either the whole park is a public forum or none of it is, and the long tradition of use and the continued use by thousands of people a year foreclose the former conclusion.

The State and Fifteenth Circuit are right in noting that the State has not taken any particular action to render Red Rocks open to the public, but the ultimate conclusion, that the inaction means it is a non-public forum, is wrong. The petitioners concede that a designated public forum is not created by mere acquiescence, but the test is not simply "if there is no action, then there is a non-public forum." The Fifteenth Circuit quotes *Cornelius* for the right test but misses the key point: "[T]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a *nontraditional forum* for public discourse." *Cornelius*, 473 U.S. at 802 (emphasis added). The State did not have to do anything to make Red Rocks a public forum because it already was one: it "time out mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing

public questions." *Perry*, 460 U.S. at 45. Red Rocks had been used by the Montdel people for this very purpose before it was state land. When it became state land and now, a state park, the State of Delmont did not do anything, until now, to prevent the expressive activity to continue. Claiming that a public forum did not exist denies this history. Because the public forum existed "by tradition," *Perry*, 460 U.S. at 45, the State is not permitted to close it by sale without sufficient justification.

B. The closure of a traditional public forum should be presumptively impermissible, but even with a more deferential standard, the action is not narrowly tailored to serve the State's interests.

The closure of a traditional public forum generally receives higher scrutiny than closures of other types of government property. *See Perry*, 460 U.S. at 45. The lower courts noted that this is a case of first impression because this Court has not yet defined the legal standard for a closure by sale and subsequent physical transformation. But despite whatever differences we can identify between sale and some other direct restraint, the end result being the same warrants the same legal standard. Restricting access to traditional public fora is presumptively impermissible. *Grace v. United States*, 461 U.S. 171, 180 (1983). The petitioners argue that this is a content-based restriction on speech under the *Reed* standard, and even if it is content-neutral, it fails to pass muster because it is not narrowly drawn to serve a significant government interest and fails to leave open ample alternative channels of communication. *Perry*, 460 U.S. at 45.

i. Content-based

The sale of the state park to be used for mining is a content-based restriction on speech. The old understanding of content-neutrality was based upon viewpoint discrimination: "government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). However more recently, this Court has wisely taken a more wholistic approach: "[I]t is well established that '[t]he First

Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537 (1980)). What will happen if this sale goes forward is that a longstanding cultural practice will no longer occur. By the *Reed* standard, this action will remove from "public discussion . . . an entire topic," *id.*, and is thus a content-based restriction on speech. Such an action will only be upheld if it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45. The State had many alternatives to this project, so it cannot be said to be "necessary" to serve any interest, especially in the absence of any justification for rejecting those alternatives. Thus, this is an impermissible content-based restriction and is unconstitutional.

The petitioners conceded that this does not constitute what was traditionally seen as a content-based regulation of speech, but neither does it simply make it harder to engage in the speech at issue. This case walks a middle ground that this Court must consider with care, and because there is not a mere "burden" but an outright and irreversible silencing of an entire form of expression, this Court should treat this action with the highest level of scrutiny.

ii. Content-neutral

But even were this a content-neutral regulation, and even were this action entitled to a lower level of scrutiny, this is still impermissible. Time, place, and manner restrictions are only valid in traditional public fora when they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45. While the State does not need to choose the least restrictive means possible, the State still needs to show that interest "would be achieved less effectively absent the regulation."

United States v. Albertini, 472 U.S. 675, 689 (1985). The State identifies several legitimate interests advanced by this project: mitigating the effects of climate change by aiding in the transition from gas- to electric-powered automobiles, the positive economic effects to the state that the mining industry brings, and allowing the State to comply with the federal mandate to use sustainable energy in defense contract bids. The petitioners do not deny that these are all important interests for the State, but in light of the alternatives, the State has failed to show that this action is narrowly tailored to these interests.

First, climate change is a global crisis, and no one project is going to patch the holes we have created. In order to justify this action, the project would have to meaningfully advance the interest in reducing greenhouse gas emissions, and since such emissions will continue at high rates even with this project's advancement, the State has not cleared that bar. The State cannot strip the petitioners of their ability to use Red Rocks in order to greenlight an ineffectual project. Second, the State has not shown that either the climate interest or the economic interest could not be achieved with one of the alternative projects. While the least restrictive means is not required, to justify infringing on fundamental liberties, the State has to show that the alternatives would be worse than the Red Rocks project. They have not done so. Third, the State appears to misunderstand the federal mandate they use to justify this action. There is not federal mandate to mine lithium. There is no federal mandate to use sustainable energy. The district court noted, "It only requires that Delmont use and develop ion batteries in order to be competitive for defense contracts." *Montdel United v. State of Delmont*, No. 24-CV-1982 (D. Delm. 2024). Like before, it seems that the alternatives could also allow the State to remain competitive for defense contracts, and none of those will completely restrict a whole culture's ability to engage in their traditional

practices. In short, the State has not shown that this project is narrowly tailored to their interests, and thus, the closure is impermissible.

Furthermore, the sale does not leave open ample channels of communication because the communication at issue—supplicatory prayer at a holy site—cannot occur but for the openness of this forum. The closure of a forum that holds a uniquely important place for a cultural practice cannot pass scrutiny. *See Chabad of Southern Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975, 986 (S.D. Ohio 2002). In *Chabad*, the district court was faced with the closure of a town square that is the location of choice for political rallies, protests, and religious displays. *Id.* The court held that because there was "no venue for speech in Cincinnati which compares to Fountain Square," the closure to private speech was impermissible. *Id.* It seems that even if the Montdel people had numerous locations to perform these prayers and Red Rocks was the very best, under the *Chabad* reasoning, that would be impermissible. But it goes beyond that: not only does "no venue for speech . . . compare[]," *id.*, but no venue exists save for Red Rocks. Thus, because none exist, the closure of Red Rocks leaves open no alternative channels of communication. Because the closure does not advance the interests of the State and does not leave open ample alternative channels of communication, the closure of Red Rocks, a traditional public forum, is impermissible.

II. Delmont's targeted annihilation of Montdel's holy site is an affront to the religious liberties the Montdel people enjoyed for over a millennium and the state has sanctioned for decades.

Few government abuses are more sacrilegious under the American constitutional framework than the targeted annihilation of a religious site. U.S. Const. amend. I. Indeed, this Court has repeatedly held that government restrictions that target a particular religion must withstand the most demanding test known to constitutional law. *Emp't Div. v. Smith*, 494 U.S.

872 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Rarely, if ever, has such a restriction survived such strict scrutiny by this Court. *Church of Lukumi Babalu Aye*, 508 U.S. 520, 546 (1993). Delmont's land transfer must face a similar fate for (**B**) it is not narrowly tailored to achieve the state's purported interests.

A. The Governor's decision to obliterate one religious site while preserving all the areas surrounding it is neither neutral nor general—demanding the strictest scrutiny.

Sherbert—not *Smith*—provides the applicable governing standard because Delmont's governor's land transfer targets the Montdel's holy site for destruction. This Court has repeatedly held that laws that **(1)** burden religion exercise must be **(2)** generally applicable and **(3)** neutral to escape *Sherbert's* strict scrutiny. *Smith*, 494 U.S. at 872. *See Sherbert*, 374 U.S. 398, 406 (1963). Delmont's mining initiative imposes a substantial burden that is neither generally applicable nor neutral.

1. Delmont's mining initiative substantially burdens religion.

This Court would be hard pressed to find a starker example of burdening one's religion than bulldozing a holy site that predates the Notre Dame Cathedral and the Hagia Sophia. The government burdens religion when it (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.). *See Church of Lukumi Babalu Aye*, 508 U.S. at 532-33; *Niemotko v. Maryland*, 340 U.S. 268, 272–273 (1951); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988); *Thomas*, 450 U.S. at 717-18 (holding the state indirectly burdened religion when it denied unemployment compensation to an individual who was terminated for his religious practices). In *Yellowbear*, the government denied a state prisoner access to a state-

owned sweat lodge, which the prisoner utilized as a place of worship. 741 F.3d at 56 (Gorsuch, J.). Citing to this Court's decisions in *Smith*, *Lyng*, and *Thomas*, Justice Gorsuch held the government substantially burdened the prison's religious exercise. *Id*. This is because the government flatly prohibited the prisoner from accessing the government property even though his faith required access for worship. *Id*. By contrast, in *Lyng*, the government planned to build a 75-mile road through a national forest. 485 U.S. at 442. Though six of the 75 miles would run through areas that had historically been used by Native American tribes for religious purposes, the construction avoided archeological sites and provided one-half mile protection zones around all identified religious sites. *Id*., at 443. This Court held there was no substantial burden because while the construction would make it more difficult to practice religion, it would not compel individuals into acting contrary to their religious beliefs. *Id*., at 450.

Delmont's actions are much like the state's actions in *Yellowbear* and quite unlike the government's actions in *Lyng*. Like the state policy in *Yellowbear* barred the prisoner from accessing his place of worship, Delmont's mining initiative would bar the Montdel from accessing their place of worship. Like the denial of access in *Yellowbear* prohibited the prisoner from participating in his faith, Delmont's destruction of the Montdel's holy site prohibits the Montdel from participating in their centuries-old religious pilgrimages in direct violation of their religious tenets. It is true that the Montdel were unable to perform their pilgrimages during World War II and the Great Depression due to military obligations and economic hardship. But just as missing a few Sunday masses does not justify burning the entire church down, missing a few pilgrimages does not justify annihilating the Montdel's place of worship. Delmont similarly relies on a cursory glance of *Lyng* to claim the state bulldozing the Montdel's place of worship imposes no burden on the Montdel faith. But the state either misstates or misreads *Lyng*. The

federal government in *Lyng* opted for a construction route that *preserved* sacred sites. Indeed, it created one-half mile protection zones around them. And tribal groups retained access to their sites. Here, Delmont specifically chose sacred land for obliteration. It did this all while preserving non-sacred lands adjacent to it. And it is barring the Montdel access to their holy site forever. Indeed, this Court in *Lyng* unequivocally stated that "a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions." 485 U.S. at 453. That law is now before this Court. Because Delmont's mining initiative prevents the Montdel from their centuries-old pilgrimages in violation of their religion tenets, it substantially burdens religion.

2. Delmont's mining initiative is not generally applicable.

Delmont's mining initiative is not generally applicable because the Governor has repeatedly spared certain lands from its reach and used it to treat the Montdel disparately. A government action is not generally applicable when it provides a mechanism for individualized exemptions, or when it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. *Fulton*, 593 U.S. at 533-34. *See Church of Lukumi Babalu Aye*, 508 U.S. at 545; *Smith*, 494 U.S. at 884; *Bowen v. Roy*, 476 U.S. 693, 708 (1986). In *Fulton*, this Court held a city's non-discrimination ordinance was not generally applicable. *Id*. at 534. This is because the law created a system of exemptions allowing the City Commissioner to decide which reasons for noncompliance are worthy of solicitude. *Id.* at 535. Likewise, in *Church of Lukumi Babalu Aye*, a city adopted ordinances prohibiting animal sacrifice. 508 U.S. at 542. The city claimed the ordinances were necessary to protect public health from the disposal of animal carcasses in open public places. *Id*. at 544. This Court held the ordinances were not generally applicable because they did not regulate hunters' disposal of their

kills or improper garbage disposal by restaurants, both of which posed a similar hazard. *Id*. at 542–45.

Delmont's mining initiative suffers from both of the evils that led this Court to strike down the laws in *Fulton* and *Church of Lukumi Babalu Aye*. Much like the non-discrimination ordinance in *Fulton* created a system for exemptions for the City Commissioner's to grant, Delmont's mining initiative creates a system for exemptions for the governor to grant. It does this in two ways. First, it gives the Governor broad discretion to choose which public lands to transfer. Second, it gives the Governor broad discretion to override any issues environmental and economic impact studies raise. Indeed, exercising this unbridled discretion, the Governor determined it was worth exempting land transfers potentially harming the habitat of two endangered species and an aquifer supplying water to 50 people but not the transfer resulting in "total destruction" of the Montdel's holy site.

Additionally, like the ordinances in *Church of Lukumi Babalu Aye* prohibited religious animal sacrifice but permitted hunting despite similar health hazards, Delmont's land transfer would bulldoze the Montdel's sacred lands while preserving other mineral-rich areas. It would do this even though both advance Delmont's asserted interest in reducing fossil fuel reliance. It may be the case that the Red Rock area purportedly contains more lithium deposits than other public lands, but that does not negate the fact that Delmont's governor initially deemed those other lands sufficient for advancing the state's goals and only abandoned them over secular objections but not the Montdel's holy site over religious objections. That the government is purportedly managing its own internal affairs—that is, its public lands—is no justification either. This Court in *Fulton* settled that governments may not weaponize their ministerial functions—even functions as sensitive as the safety and security of foster children—to target religion. Because

Delmont's mining initiative allows for individualized exemptions and the disparate treatment of the Montdel, it is not generally applicable.

3. Delmont's mining initiative has all the markings of religious animosity.

Delmont did not treat the Montdel neutrally. The government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. *Fulton*, 593 U.S. at 533. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. 617, 638 (2018); *Church of Lukumi Babalu Aye*, 508 U.S. at 533. Factors relevant to this inquiry include the historical background of the challenged decision, the specific events leading to the challenged policy, and the legislative or administrative history, including contemporaneous statements made by decisionmakers. *Masterpiece Cakeshop*, 584 U.S. at 639; *Church of Lukumi Babalu Aye*, 508 U.S. at 540. The mere finding of facial neutrality is not sufficient to deem a law neutral. *Church of Lukumi Babalu Aye*, 508 U.S. at 534. In *Masterpiece Cakeshop*, the Colorado Civil Rights Commission punished a Christian bakeshop owner under the state's anti-discrimination law for refusing to serve a gay couple. *Id*. This Court held the Commission did not apply the law neutrally. *Id*. This is because the Commission had previously excused three other bakers from the law for secular purposes, yet did not excuse the Christian bakeshop owner for religious purposes. *Id*. The Commissioner at one point also described the Christian bakeshop owner's views as a "despicable." *Id*., at 636.

Much like the Commissioner in *Masterpiece Cakeshop* exempted some businesses from the state law for secular purposes but not the Christian bakeshop owner for religious purposes, Delmont's governor exempted some public lands from the mining initiative for secular purposes (endangered species; water aquifer) but not the Montdel's holy site for religious purposes. And just as the Commissioner demonstrated his hostility toward the bakeshop owner's faith by

deriding it as "despicable," Delmont's governor showed his colors by deeming the Montdel's religious pilgrimages a nuisance. It is true the Governor proceeded with one land transfer, but just because the initiative may have been applied neutrally once does not excuse the three times it was not. Delmont's land transfer is far from neutral.

B. Installing solar panels around Red Rock would better advance the state's purported interest in tackling the climate crisis than converting a state treasure into a hazardous waste site.

Delmont's mining initiative cannot survive strict scrutiny. A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Sherbert*, 374 U.S. at 406; *Lukumi*, 508 U.S. at 546; *Lyng*. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so. *Fulton*, 593 U.S. at 541. In *Lukumi*, this Court held the city did not narrowly tailor its ordinances prohibiting animal sacrifices to the government's claimed interest in advancing public health. 508 U.S. at542. This is because the city exempted disposal of animal carcasses that posed similar health risks. 508 U.S. at 543. By contrast, this Court in *Lyng* held the government did narrowly tailor its plan to build a 75-mile road through a national forest to its compelling interest in ensuring access to and use of its public lands. 485 U.S. at 453. This is because the government took multiple steps to minimize the impact of its construction on sacred lands. *Id*. Indeed, this Court found that "except for abandoning its project entirely…it is difficult to see how the Government could have been more solicitous." *Id*., at 454.

Delmont's mining initiative suffers from the same problem of underinclusivity that proved fatal to the ordinances in *Lukumi*. Delmont's governor claims he is interested in promoting economic development, tackling the climate crisis, and reducing fossil fuel reliance. Yet his initiative excludes Granite International and Grave Flats—mineral-rich lands that the

state itself concedes would advance the same interests. Indeed, the state selected these lands for mining before it even set its sights on the Montdel holy site. Delmont's mining initiative likewise bears none of the tailoring that saved the law in *Lyng*. Whereas the government in *Lyng* selected a construction route that avoided sacred sites, Delmont chose lands that bulldoze directly through sacred sites. Whereas the government in *Lyng* adopted a plan providing for protective zones around all religious sites, Delmont adopts a plan providing for destruction zones at religious sites. And whereas the government in *Lyng* had no other options to achieve its goal of connecting two dead-end roads, Delmont itself admits it had numerous other options to achieve its goals of tackling the climate crisis, reducing fossil fuels, and promoting economic development. It could wait for alternative mining technologies that the state admits could prove less destructive. If too costly or too many delays, it could mine for nickel in Granite International. It could mine for lithium in Grove Flats. It could transfer rights to any other section of the Park. Or it could install solar panels around the Park. But it is hard to believe that in a state that boasts more minerals than any other state of the United States, it was only the Montdel holy site that the Governor could find for promoting economic development and reducing fossil fuel reliance. Because Delmont itself concedes it can achieve its interests in a manner that does not burden religion, its mining initiative cannot survive strict scrutiny.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Court **reverse** the Fifteenth Circuit's conclusion on both the Free Speech issue and the Free Exercise issue and grant the Petitioner's a preliminary injunction.

Respectfully submitted,

Team 005

Attorneys for the Petitioner

HONOR CERTIFICATION

We hereby certify that the work contained herein is our own. We certify that we have fully complied with the honor code of our law school as well as the rules for the 2025 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.