No. 24-CV-1982

IN THE SUPREME COURT OF THE UNITED STATES

MONTEDEL 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 THE PETITIONER

TEAM OO7

QUESTIONS PRESENTED

1. Whether the State of Delmont's transfer of Red Rock infringed on Montdel United's free exercise rights by preventing the Montdel Observance through the destruction of Red Rock.

2. Whether the State of Delmont's transfer of Red Rock infringed on Montdel United's free speech rights by restricting access to government property, where the property had been opened by the state to the public for expressive activity.

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PARTIES TO THE PROCEEDINGS

Petitioner (plaintiff-appellee below) is Montdel United, an organization formed to further the interests of the ancient Native American tribe, the Montdel people, and their religion.

Respondent (defendant-appellant below) is the State of Delmont and the Delmont Natural Resources Agency.

OPINIONS BELOW

Pages 1–32 of the record contain the opinion from the District Court for the District of Delmont. *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (D. Delmont, Mar. 1, 2024). Pages 33–45 of the record contain the opinion from the Court of Appeals for the Fifteenth Circuit. *Delmont v. Montdel United*, C.A. No. 24-CV-1982 (15th Cir., Nov. 1, 2024).

JURISDICTIONAL STATEMENT

Original jurisdiction is conferred upon the District Court pursuant to 28 U.S.C. § 1331 as the civil action presents a federal question under the Constitution of the United States. The Fifteenth Circuit entered judgement against the Petitioner. 28 U.S.C. § 1343(a)(3) gives this Court jurisdiction over claims asserted to redress deprivation under State law of any rights guaranteed by the Constitution. Petitioner timely filed a petition for writ of certiorari. This Court has proper appellate jurisdiction under 28 U.S.C. § 1254(1) and exercised this jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment, in relevant part, states "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech[.]" U.S. Const. amend I.

STATEMENT OF THE CASE

This case is before the Court on appeal where the State of Delmont intends to transfer a sacred religious site to private developers that will forever harm Montdel United. R. at 7–8. Montdel United challenges the Fifteenth Circuit's denial of a preliminary injunction to prevent the permanent desecration of Red Rock as it is protected under both Montdel United's First Amendment Free Speech and Free Exercise rights. R. at 33.

I. Statement of Facts

The Montdel are an indigenous Native American group with roots to the land, now designated as Painted Bluffs State Park, dating back to 400 A.D. R. at 2. Painted Bluffs State Park is located within the State of Delmont and spans 100 miles of forest highlands. *Id.* Within the park stands Red Rock, a geological highpoint used for the Montdel's most sacred ritual. *Id.*; R. at 50. The ritual, which involves crop sacrifices and supplicatory prayers shared by Montdel elders, must be conducted upon the top of Red Rock. R. at 3. The ritual cannot be done by anyone but the elders and cannot be done through individual prayers. *Id.* The Montdel believe that failing to abide by these principles leads to the Creator's wrath. *Id.* This religious practice is the only way for the Montdel to gain forgiveness from the Creator. *Id.*

Oral histories recount that the Montdel performed the ritual continuously for centuries during the fall and summer equinoxes. *Id.* The only times that the ritual did not occur were due to army service or financial complications during the Great Depression and World War II. R. at 4. Even as the Montdel's population dwindled and disease and tribal wars forced them to move, the Montdel survivors continued to trek each season to Red Rock. *Id.*

Although settlers established the State of Delmont in 1855, Red Rock remained unclaimed land until 1930. *Id.* at 3–4. In 1930, Delmont claimed ownership of Painted Bluffs State Park,

including Red Rock, for the purpose of preserving the land's beauty. R. at 4. Beyond admiring the park's beauty, visitors further use the park for activities such as camping, fishing, and hiking. *Id.* The state's ownership of the park did not prevent continuation of the Montdel's rituals. *Id.* State Park Services not only permitted the Montdel's practices, but the State capitalized on the practices and advertised the rituals in promotional materials for the park. *Id.* Delmont signified support for the Montdel's practices since the park's beginning when Governor Ridgeway publicly addressed that the rituals are integrated into the land's "legacy." R. at 4–5.

In 1952, modern Montdel leaders, in an effort to preserve the 1500-year-old ritual, deemed its formal name "Montdel Observance." R. at 5. Since then, the rituals evolved to include festivities that touch upon different topics such as environmental issues. *Id.* The festivals were not solely limited to the hundreds of Montdel, but also included tourists like festival goers and students. R. at 5, 52. Delmont approves and supports the festivals through licenses for food, music, and merchandise vendors; festivalgoers participate in dance, singing, and art displays. R. at 6.

Delmont is known for its mineral-rich soil and a significant portion of the state's economy thrives off of mining these geological deposits. *Id.* These mineral deposits are dispersed throughout the region, including large deposits in the Delmont Mountain Range and Delmont Flats Desert. *Id.* Delmont passed the Energy and Conservation Independence Act ("ECIA") to reduce reliance on fossil fuel and grow the state's economy. *Id.* The ECIA enables the state to create land transfers with private mining companies. *Id.* While Delmont is not required to defer to federal law on disputed issues, the state enacted the ECIA in response to the federal government's initiative requiring sustainable energy resources in defense contracting under the Federal Natural Resources Defense Act ("FNRDA"). R. at 6–7.

After the transfer, the Montdel Observance will be impossible to continue. R. at 8. The methods proposed by Delmont Mining Company to extract mineral deposits would result in the complete destruction of Red Rock. *Id.* The area would be transformed into a water-filled quarry with dangerous rock erosion. *Id.* Consequently, the quarry would be closed to observers, never to be reclaimed for future visitation. *Id.* Moreover, the equinox festival must move five miles down the riverbank to a new location. *Id.* Delmont Natural Resources Agency conducted impact studies that revealed alternatives. *Id.* The agency acknowledged methods that would not fully destroy Red Rock; however, they would not be available for twenty years and their environmental risks are unknown. R. at 8–9. The agency dismissed the alternatives. *Id.* The resulting effect on the Montdel is the complete inability to communicate with their Creator. R. at 3.

For previous transfers similar to this one, Delmont weighed the input of concerned citizens, and as a result, chose to decline those transfer agreements. R. at 9. Delmont declined the transfer of parts of the Delmont Mountains due to the endangerment of two wildlife species. R. at 9–10. Further, Delmont declined the transfer of parts of Grove Flats based on a thirty-five percent likelihood of drinking water contamination for the fifty-person population. R. at 10. One agreement survived despite the State Teachers Association's objections that the land transfer would end a mining museum camp. *Id.* For the land transfer at issue, the agreement received express approval from the residents of the two counties where the State Park is located. R. at 7.

Without a preliminary injunction, the clearing process will begin and access to the site will be eliminated to all visitors. R. at 9. Delmont's reasons for approving the transfer included: (1) its commitment to fossil fuel reduction, (2) impractical alternatives, (3) economic gains, and (4) the Governor's stance that Delmont has helped the Montdel long enough. *Id.* Montdel United, established in 1950 as an organization to advocate for the preservation of the Montdel people, met

with Alex Greenfield, Secretary of the Delmont Natural Resources Agency, to ask for reconsideration of the transfer. R. at 52. Secretary Greenfield exposed that "[the Governor] emphasized that he had no concerns about the festivals that occur at the equinoxes, describing them as a nuisance and expressing his frustration with the ongoing cleanup after festival activities." R. at 47. He elaborated that while economic benefits may be balanced by job creation, tourism will decline. R. at 48. Secretary Greenfield stated that Delmont "has been very patient with the Montdel. We've Tolerated these rituals for a long time..." R. at 53. As a result of the state's inability to provide a compromise that allows the Montdel to exercise their religion and free speech rights, Montdel United brought this suit to prevent the destruction of their sacred site. R. at 53.

II. Procedural History

Montdel United filed for a temporary restraining order and preliminary injunction to prevent the land transfer in the United States District Court for the District of Delmont. R. at 10. The district court granted the preliminary injunction stating that the land agreement violated the Montdel's free exercise and free speech rights. R. at 32. The State of Delmont and Delmont Natural Resources Agency appealed the judgment. R. at 33. The United States Court of Appeals for the Fifteenth Circuit reversed. R. at 45. Montdel United filed a petition for writ of certiorari to this Court to review the judgment. R. at 54.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fifteenth Circuit and hold that the state cannot eliminate the Montdel's only available site for speech and religious expression.

The Free Exercise clause protects the Montdel from the state prohibiting access to Red Rock, their ancient, sacred religious site. Under the Free Exercise Clause, state action that is not neutral, nor generally applicable, is subject to strict scrutiny. Delmont has withdrawn public land

transfers due to public concern, providing an exception which renders the transfer not generally applicable. The stated goals are not compelling, and even if they were, there are less religiously restrictive means available. The Red Rock area has offered Delmont a festival to monetize, and there are not only other mineral deposits, but other ways of mining this lithium that would not destroy Red Rock and the Montdel's religious sacraments.

Under the Free Speech clause, Red Rock is a public forum because Delmont, either through history and tradition or intentionally opening the park for public assembly, facilitated expression prior to the contested sale. The complete destruction of Red Rock is not a narrowly tailored means to meet the state's interests of economic revitalization and clean energy. More speech than necessary is burdened when resources can be mined elsewhere and there are no alternative channels for the supplication to continue. Even if Red Rock is a limited forum, the state's interests still do not survive because Delmont officials' invidious statements render the state action neither viewpoint neutral nor reasonable.

ARGUMENT

This case is before the Court on an interlocutory appeal for a preliminary injunction. 28 U.S.C. § 1292(a)(1). Courts should grant a preliminary injunction where the plaintiff shows likelihood of success on the merits, likelihood of suffering irreparable harm, balance of the equities favors granting the injunction, and the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Courts review the lower court's legal rulings de novo, and the final decision for abuse of discretion. *McCreary Cnty., Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005) (citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660–61 (2004)). The only factor raised on appeal is the likelihood of success on the merits. R. at 35.

I. The transfer of Red Rock violates the Free Exercise Clause because the agency's use of withdrawal power is not generally applicable.

The transfer of Red Rock for its destruction violates the Free Exercise Clause of the First Amendment because it is not neutral nor generally applicable and does not satisfy strict scrutiny. *Employment Div., Dept. of Human Resources of Ore v. Smith*, 494 U.S. 872, 877 (1990). Government actions are subjected to strict scrutiny under the Free Exercise Clause when the state action is neither neutral towards religion nor generally applicable. *Id.*; *Church of Lukumi Babalu Aye, Inc. City of Hialeah*, 508 U.S. 520, 542 (1993). A law is not generally applicable where the law provides exceptions. *Fulton v. City of Philadelphia, Pa.*, 593 U.S. 522, 537 (2021). Native American religions have been recognized and consistently accepted by this Court, and the over 1500-year history of the Montdel deserves that same respect. *See Smith*, 494 U.S. at 874, 878; *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988).

In *Lyng v. Northwest Indian Cemetery Protective Association*, two years prior to the articulation of the neutral and general applicability test in *Employment Division v. Smith*, the Court held that the construction of a road that did not prohibit Native Americans from accessing their religious sites did not violate the Free Exercise Clause because there was no coercion and no penalty for practicing their religion. 485 U.S. at 447–49. The court below in this case held that *Lyng* controlled, not *Employment Division v. Smith*, because Delmont similarly prevented a Native American group from accessing their religious site.

The Court of Appeals below stated "the facts here are analogous to those in Lyng. The DNRA's plan to transfer public land, though it would undoubtedly destroy the Appellee's ability to practice their religion, nevertheless does not coerce the Montdel into acting contrary to their religious beliefs." R. at 44. By the Court of Appeals rationale, it is less problematic for the

government to destroy a religion than for it to coerce people into not practicing its tenants. This is only true where the law is neutral and generally applicable, the test in *Smith*.

The court below followed the Ninth Circuit's rationale in *Apache Stronghold v. United States*. R. at 44; *See* 101 F.4th 1036, 1052 (9th Cir. 2024). There, the court found that the government's closure of Oak Flat—an area the Apache used for religious ceremonies—to mine a large copper deposit did not rise to a prohibition of free exercise of religion. *Id.* at 1051–52.

Delmont goes beyond coercion and flatly *prohibits* the Montdel's religious expression. *See Apache*, 101 F.4th at 1148 (Murguia, C.J., dissenting) ("[T]his case does not ask us to determine at what point 'frustrating' religious exercise qualifies as a substantial burden; instead, we are confronted only with the utter erasure of a religious practice"). The Ninth Circuit in *Apache* admitted that in certain circumstances, prevent and prohibit are synonymous. 101 F.4th at 1052. The dissent in *Apache* rightly points out that while in *Lyng* the government designed the road to avoid religious sites for the Native Americans, in *Apache* there was a complete destruction of the religious site. 101 F.4th at 1148 (Murguia, C.J., dissenting).

The action by Delmont here prohibits the Montdel from practicing their religion through the destruction of Red Rock. Whether using contemporary dictionaries from the founding period, or those from today, prohibit means to forbid or prevent. *Prohibit*, Webster's Dictionary 1828, https://webstersdictionary1828.com/Dictionary/prohibit ("Prohibit. . . "[t]o forbid . . . to hinder; to debar; to prevent; to preclude."); *Prohibit*, Merriam-Webster (last visited, Jan. 29, 2025), https://www.merriam-webster.com/dictionary/prohibit ("[Prohibit]. . . "to forbid by authority . . . to prevent from doing something"); *Prohibit*, Oxford Learner's Dictionaries, (last visited, Jan. 29, 2025), https://www.oxfordlearnersdictionaries.com/us/definition/american_english/prohibit

("[P]rohibit. . . to stop something from being done or used"). Here, Delmont prohibits the Montdel from practicing their religion where Congress merely hindered the Native Americans in *Lyng*.

The Montdel are not using their religion to claim ownership over the property, "[s]acralizing the world[.]" R. at 44. The Montdel have a specific religious site that they have used long before the establishment of Delmont. All they ask of the government is to use the same standard it uses for all other complainants when public land is transferred to private parties.

A. The transfer of Red Rock is neither neutral nor generally applicable.

The transfer of Red Rock is not generally applicable because the state withdrew land transfers where individuals made similar complaints as the Montdel. *See Lukumi*, 508 U.S. at 531–32; *Fulton*, 593 U.S. at 533. "A law is not generally applicable if it 'invites[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (2021) (quoting *Smith*, 494 U.S. at 884).

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck down a city ordinance which prohibited animal sacrifice but provided exceptions for the sale of small amounts of game and areas zoned as slaughterhouses. 508 U.S. at 527–28, 547. The effect of the ordinance was to specifically burden the Santeria population. *Id.* at 547. The statute's exceptions meant that the law was not generally applicable and further was enacted with the intent of non-neutrality. *Id.* Public discourse, the language of the statute referring to "sacrifice," and the timing of the enactment were all evidence that despite facial neutrality, the government passed the law to target the Santeria religion. *Id.* at 546–47.

There are neutral goals stated by Delmont to increase revenue and reduce fossil fuels. However, there are invidious statements from the Governor that indicate an underlying reason may have been the practice of the Montdel themselves. The affidavit from the Secretary of Delmont's

Natural Resources Agency Alex Greenfield exposed that "[the Governor] emphasized that he had no concerns about the festivals that occur at the equinoxes, describing them as a nuisance and expressing his frustration with the ongoing cleanup after festival activities." R. at 47. These remarks are not neutral and show that, like *Lukumi*, Delmont was thinking about the Montdel when they transferred Red Rock to the mining company.

Fulton v. City of Philadelphia involved a state-created mechanism for a commission to grant exceptions to the requirement that child service providers may not deny same sex couples. 593 U.S. at 542. The Court held that the system of discretionary exclusions made the requirement not generally applicable. *Id.* at 542. Here, the numerous occasions of public comment and revocations of land transfers is the same as the explicit discretionary exclusion power granted to the commissioner in *Fulton*. The Delmont Natural Resources Agency withdrew a transfer when the mining merely had a 35 percent chance of contaminating the water supply of fifty people. Whereas here, the transfer of Red Rock affects at minimum hundreds of Montdel observers.

The court below and the court in *Apache* misinterpret *Lyng* post-*Smith*. *Lyng* has new meaning after *Smith* articulated the neutral and general applicability test. Justice O'Connor, writing for the majority in *Lyng*, declared that "the Free Exercise Clause protects against laws that 'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" 485 U.S. at 449. When all citizens are equally denied a benefit, the law is generally applicable. Therefore, in *Lyng*, the effect of the road construction was generally applicable to all users of the park.

While the Court in *Lyng* used an early version of the general applicability standard, the holding is still relevant here. Unlike the Montdel here, the Native Americans in *Lyng* had varying religious practices and it was not clear that the proposed road would eliminate the possibility of

any religious ceremonies. In fact, the government designed the road to avoid religious sites. *Lyng*, 485 U.S. at 443. Conversely, the Montdel are completely prevented from their religious practices. Rather than partially closing off Red Rock, Delmont removed Red Rock altogether.

The Ninth Circuit in *Apache Stronghold v. United States* likewise dealt with the complete destruction of Oak Flat, the only site used by the Apache Native Americans for their religious sacrament to communicate with their creator. 101 F.4th at 1047. The Ninth Circuit improperly analogized the facts to *Lyng*. In *Lyng*, the state was careful to ensure that any religious site would not be obstructed. 485 U.S. at 443. The government entirely destroyed Oak Flat, leaving no possibility of meaningfully practicing the religion. *Apache*, 101 F.4th at 1047. The court should have found that this was a complete prohibition of the Apache religion, just as the Montdel are completely incapable of practicing their religion—the functional equivalent of a prohibition.

Moreover, the Congressional program in *Apache* provided requirements that Congress take into account the adverse effects on Native American tribes. 101 F.4th at 1047. Congress therefore set aside another site for the Apache to use for religious ceremonies. *Id.* Here, Delmont did take public comment, yet still declined to take this into consideration and further designated no alternative for the Montdel. Even if Delmont had tried to designate a new area, there is no other area where the Montdel can practice their sacrament to prevent their Creator's wrath.

B. The transfer of Red Rock is not supported by a compelling interest and is not narrowly tailored.

Laws which are either not neutral towards religion or not generally applicable are subject to strict judicial scrutiny, requiring the government to advance a compelling interest and exhibit that the means chosen are narrowly tailored to that interest. *Lukumi*, 508 U.S. at 546–47; *Fulton*, 593 U.S. at 533.

Delmont puts forth two interests: (1) commitment to clean energy by reducing reliance on fossil fuels and (2) boosting the economy of the surrounding area. These interests may be beneficial to Delmont, but they are not compelling. This Court has recognized compelling interests only in limited circumstances; compelling government interests are found in the Free Exercise context when the regulated conduct "poses some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 347 U.S. 398, 403 (1963); *Korte v. Sebelius*, 735 F.3d 654, 685–86 (7th Cir. 2013). The Montdel do not pose any substantial threat to public safety. General concepts such as raising money and commitment to clean energy are laudable goals, but they do not rise to the level necessary to stop the Montdel from practicing their religion.

Even if the Court finds that there is a compelling interest, the means are not narrowly tailored. Both of the interests could be achieved in less restrictive ways on the Montdel's free exercise rights. "The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception[.]" *Fulton*, 593 U.S. at 541. In *Fulton v. City of Philadelphia,* this Court required the state to articulate more than "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children." *Id.* Because the state could grant an exception and still achieve its goals, it was not narrowly tailored. *See id*. at 542. Here, even if the Court were to narrow the interests of Delmont and find them compelling, the government could achieve the goals without accessing this specific lithium mine.

In *Fulton*, granting the religious institution an exception would not harm the stated goals of raising children. 593 U.S. at 541–42. Additionally, the state could not articulate why the exceptions were granted to other organizations but not the Christian institution. *Id.* at 542. Here, there is nothing that prevents Delmont from using other clean energy sources or mining in other

locations. Around Red Rock is the largest lithium deposit in North America, but the goal of improving the local economy can be achieved in ways less restrictive on the Montdel. The Montdel ceremonies pull in tourists as the commercialization of the festivals has increased. This brings in revenue and the state could further monetize the area to get these benefits. In fact, the Delmont Natural Resources Agency indicated that there would be a decline in tourism, even though they estimated the lithium mining would balance it out.

One of the cancelled agreements from public objection was a lithium mine project which ran a 35 percent chance of contaminating a water supply for 50 residents. The hundreds of Montdel observers, according to their faith, face something far worse than contaminated water. They face their Creator's wrath in their sincere religious belief if Red Rock is destroyed.

The transfer of Red Rock violates the Free Exercise Clause because the system grants exceptions, making it not generally applicable, and there are less restrictive means of accomplishing the stated interests.

II. The sale of Red Rock infringes the Montdel's free speech rights.

The First Amendment confers that "Congress shall make no law. . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment's free speech clause binds the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The first step in a free speech claim is to determine if the First Amendment protects the Montdel's activity. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). The Montdel's expression of their religious beliefs through the rituals and festivals held at Red Rock implicate the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (using speech forum analysis for religious discussion). The second step is to determine the type of forum that the Montdel seek to access. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 44–46 (1983).

Historically, this Court has recognized three categories of public forums: traditional public forum, designated public forum, and limited public forum—each receiving different levels of protection from government interference. *See id.*

A. Red Rock is a traditional public forum due to its tradition of expression and compatibility of its characteristics for such expression.

The contested sale of one-fourth of Painted Bluffs State Park, including Red Rock, is a traditional public forum due to the long-standing history of expression on the land and characteristics similar to those of traditional parks. Traditional public forums are government properties that 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)). Traditional public forums are "defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate' and made the space available for expression through custom. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("traditional public fora are open for expressive activity regardless of the government's intent"); *see also Boardley v. U.S. Dep't of Interior,* 615 F.3d 508, 515 (D.C. Cir. 2010).

The three historically recognized properties for traditional public forums are streets, sidewalks, and parks, as these include (1) characteristics of a "public thoroughfare," (2) purposes that are compatible with expression, and (3) tradition and history of expression. *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019). Expression has "historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage." *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1128 (10th Cir. 2002). Furthermore, "a

more important factor is whether the property has traditionally been the site of expressive activities by the public." *First Unitarian Church*, 308 F.3d at 1129.

Red Rock encompasses centuries worth of history of expressive activity. For more than 1500 years, the Montdel have held rituals in the area designated now as Painted Bluffs State Park with archeologists reporting Montdel presence in the area since 400 A.D. Even upon Delmont's procurement of the Painted Bluffs State Park land in 1930, the government acknowledged the tradition of expression on the land. On the first day of the park's opening, State of Delmont Governor Ridgeway addressed to the public that the Montdel have been tied to the land for centuries and that their religious practices were part of Delmont's legacy. Delmont highlighted the Montdel's Red Rock practices in promotional materials for the park "*since its inception*," indicating Delmont considers the expression fundamental to the park and part of the park's traditional uses. R. at 4 (emphasis added). The governor's sentiment emphasizes that Delmont has by "long tradition. . . devoted [the area] to assembly" and protected the continuation of these religious practices. *See Forbes*, U.S. at 677.

The fact that expression only takes place during the equinoxes does not interfere with the history of the forum. The open space allows for expression year-round as it "is continually open, often uncongested, and constitutes. . . a place where people may enjoy the open air or the company of friends." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981) (holding a state fair ground was not a traditional forum because of its temporary placement). The issue with *Heffron* was that the forum itself, the fair, and the expression were temporary; whereas the Montdel freely choose to perform the supplication at Red Rock twice a year. *See id.*

Expression is further compatible with the purpose and characteristics of the property as the park and expression have coexisted for decades. In *United States v. Kokinda*, the Supreme Court

held that a sidewalk leading to a post office was not a traditional forum because the sole purpose of the sidewalk was for access to one building, and not as a thoroughfare for any public use. 497 U.S. 720, 727–28 (1990). Unlike *Kokinda*, the Montdel speech does not interfere with the purpose of Painted Bluffs State Park—for preservation of the park's beauty—as the expression merely entails using the open space atop Red Rock. *See* 497 U.S. at 727. Delmont did not define a single use of the park; the open land is able to be used for all at their leisure—whether that be to fish, hike, camp, or for worship. *See Freedom from Religion Found., Inc. v. City of Marshfield, Wis.*, 203 F.3d 487, 494 (7th Cir. 2000) (stating a park dedicated to public use was a traditional public forum); *but see Hotel Emps. & Rest. Emps. Union, Loc. 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 547-50 (2d Cir. 2002) (emphasizing the government plaza's purpose to support the arts in conjunction with paths to performance halls).

Notably, at no time before the proposed sale has Delmont inhibited the custom of expressive activities at Red Rock. Delmont did not have to intend for expression to occur, but rather the objective characteristics and history require expression to continue. *See Forbes*, 523 U.S. at 678. Red Rock's capability to serve as a platform for expression along with the tradition of speech indeed taking place is the quintessential nature of a traditional public forum; therefore, Red Rock is a traditional public forum.

B. In the alternative, Red Rock became a designated public forum when the state opened up the area for the expressive festivals.

In the alternative, Red Rock is a designated public forum because Delmont intentionally opened Painted Bluffs State Park, Red Rock included, with the purpose of expression in mind. Designated public forums are those in which the government intentionally opens up the property for public expression. *Perry*, 460 U.S. at 45–46. With designated public forums, the government

cannot create the forum on accident but rather must carry the intent to open the property for public expression. *Cornelius*, 473 U.S. at 802. Courts must look to the policy and practice of limiting public expression within the property, as well as compatibility of expression with the property's features. *Id.* In *Cornelius*, the government did not create a designated forum because there was a continued practice of exclusion of specific groups that contradicted the property's intended mission. *Id.* Rather, Delmont never inhibited Montdel's religious practices prior to the contested sale.

By Governor Ridgeway explicitly referencing respect for the Montdel's practices in the park's opening speech, Delmont dedicated the property with the purpose of continuing public discourse. Not only did Delmont open the park with expression in mind, but even profited off of the activity by highlighting the rituals in their promotional materials. Moreover, the Park Service takes an active role in the religious practices by dispersing vendors' licenses for entertainment at the festivals. Delmont actively opened the property when it gave out the licenses for the festivals. The festivals include not only religious acts, but other expressive activities celebrating the fall and summer equinoxes through dance, art displays, speeches. These expressive activities go past religious prayer and touch on environmental and naturalist issues. Notably, there are more festival attendees than merely the Montdel people—college students and seasonal festival goers attend as well. The preservation, and even increase, of the practices emphasizes the compatibility with the characteristics of the grounds. *See Cornelius*, 473 U.S. at 802–03.

The Montdel's expression existed well before the State of Delmont, and throughout the transformation of the state, the expression not only continued but became interwoven into the state's history. Thus, Delmont kept Painted Bluffs State Park open for the purpose of expression.

Rather than cabin the park and Red Rock's expressive conduct to the Montdel, the state has gone to great lengths to open and facilitate the park to expression.

C. As a public forum, Delmont has not presented a narrowly tailored means or left open ample channels for expression.

Government restrictions on both traditional public forums and designated public forums must be narrowly tailored. *See Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992). For content-neutral regulations in these forums, the state must articulate a significant state interest, choose narrowly tailored means to achieve the interest while not burdening more speech than necessary, and leave open ample channels for communication. *Id.* For closure of forums, specifically, the "government may close a designated public forum whenever it chooses, but it may not close a traditional public forum to expressive activity altogether. *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 496 (9th Cir. 2015). "Although a state is not required to indefinitely retain the open character of the facility, [closure] is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible. . . must be narrowly drawn to effectuate a compelling state interest." *Perry*, U.S. 460 at 46 (citing *Widmar*, 454 U.S. at 269–270).

Specifically for closures or sales of public forums, the government "may not by its own *ipse dixit* destroy the "public forum" status of streets and parks which have historically been public forums. . .." *United States v. Grace*, 461 U.S. 171, 180 (1983). Accordingly, change to a public property that results in removal of the property from the public forum category is presumptively impermissible. *Id.* The Ninth Circuit observed that "[t]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication *unless the government enactment will foreclose an entire medium of public expression* across the landscape of a particular community or setting." *Menotti v. City of Seattle*, 409 F.3d 1113, 1138

(9th Cir. 2005) (emphasis added) (using a time, place, manner restriction analysis for closure of access to downtown Seattle during protest); *see also First Unitarian Church*, 308 F.3d at 1132 (holding virtually banning all speech when the city sold an easement to a private church was invalid).

While Delmont's interests of boosting the economy and reducing fossil fuel dependency may be significant, the means to this end are overinclusive. Delmont acknowledged that all of Painted Bluffs State Park contains lithium deposits as well as the Delmont Mountain Range and Delmont Flats Desert. The state's objectives are able to be obtained from mining in other locations that do not interfere with free speech, therefore, more speech than necessary is burdened. *See Forsyth County*, 505 U.S. at 130. Further, more speech is burdened by destroying all of Red Rock when an alternative, albeit a twenty-year long solution, allows mining of minerals and only partial destruction of Red Rock.

Moreover, Delmont does not leave open ample channels for communication when the sole location for the Montdel Observance will be eradicated. In *Chabad for Southern Ohio v. City of Cincinnati*, the United States District Court for the Southern District of Ohio determined that Cincinnati did not maintain a comparable forum to the city's public square for the organization to display their menorah, resulting in the inability to meaningfully share their expression. 233 F.Supp.2d 975, 986 (S.D. Ohio 2002). Destruction of Red Rock will not only leave no meaningful comparison for the Montdel Observance, but the Montdel's most sacred practice cannot occur at all. Even when traveling hundreds of miles to return for the equinox, the Montdel never performed the ritual at any other location due to being prohibited by their religious canon. Without Red Rock, the Montdel's only means of receiving forgiveness from the Creator will vanish.

Delmont's newfound animus towards Montdel practices cannot be ignored as an attempt to burden more speech than necessary and further undermines the asserted government interests. Here, Secretary Greenfield disclosed to Montdel United that Governor Ridgeway claimed, "[l]ook, the state has been very patient with the Montdel. We've Tolerated these rituals for a long time[.]" R. at 53. Further, Governor Ridgeway told Secretary Greenfield that "he had no concerns about the festivals that occur at the equinoxes, describing them as a nuisance and expressing his frustration with the ongoing cleanup after festival activities." R. at 51. These statements reveal the state's failure to consider the burden on speech or genuine weighing of other options.

The Montdel's expression stands in opposition to the county citizens living near Red Rock in need of economic revitalization; however, the Founders wrote the First Amendment with the purpose to protect minority views. *Section 230 as First Amendment Rules*, 131 Harv. L. Rev. 2027 (2018) ("At its core, the First Amendment seeks to protect unpopular views— unobjectionable views are less frequently jeopardized."). A crucial purpose of the First Amendment is to protect unpopular views, like those of the dwindling Montdel people, particularly when there are less speech burdensome alternatives.

D. In the alternative, Red Rock is a limited public forum.

Even if this Court were to find Red Rock is a limited public forum, the transfer would still violate the Free Speech Clause. The third category of public forums is limited public forum, in which the government purposely opens up a property to specific communicative activities that the space was dedicated to. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 390 (1993). A limited public forum is created by the state when it opens the property for specific limited and legitimate communicative purposes. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001); *c.f. Rosenberger v. Rector and Visitors of University of Virginia*, 515

U.S. 819, 829 (1995). The classification of property as a limited public forum requires intent from the government, similar to that of a designated public forum. *See Forbes*, 523 U.S. at 678 ("The government is free to open additional properties for expressive use by the general public or by a particular class of speakers, thereby creating designated public fora"); *see also Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 813 (1985) (Blackmun, J., dissenting); *see also Hopper*, 241 F.3d at 1075 (9th Cir. 2001). "[The] scope of the relevant forum is defined by 'the access sought by the speaker.'" *Cornelius*, 473 U.S. at 801; *see Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004) (holding that the postal box itself is the relevant fora and not the overall mail system). Thus, the relevant analysis is only on the area of Red Rock and the immediately surrounding land along the Delmont River used for religious speech and the festival.

In the alternative, the proposed-transferred land is a limited public forum because even if there has not been a long-standing custom, the government actively opened up the forum for the explicit purpose of Montdel religious observance at first and later added the festival. Such recognition can be seen through the active depiction of Montdel religious practices in marketing promotions, the public acknowledgment in the opening ceremony, and the provision of licenses for the festivals.

This Court found in *U.S. v. Grace* that while the entirety of the property would be holistically viewed as a non-public forum, the court was permitted to designate a smaller contained parcel as a public forum. 461 U.S. at 178–79. In this case, while the entirety of Painted Bluffs State Park may not appear as a public forum, the smaller parcel that contains Red Rock and the immediately surrounding area ought to be designated differently. However, in *Grace*, this Court found that there was no indication that the public would have entered into a "special type of enclave," moving from a public sidewalk to the restricted forum in the courthouse sidewalk. 461

U.S. at 180. In contrast to *Grace*, for the case at bar, there is an indication of a special enclave where the property transitions into a restricted forum, through the active use of the Montdel religious practices at Red Rock in advertising campaigns for the state park, as well as the licensing of vendors for the Equinox festival nearby.

E. Delmont's closure of the limited public forum is unreasonable in light of the forum's purpose and viewpoint discrimination, thus unconstitutional.

For limited public forums, the government, "like the private owner of property, may legally preserve the property under its control *for the use to which it is dedicated*." *See Lamb's Chapel*, 508 U.S. at 390 (emphasis added); *Cornelius*, 473 U.S. at 800; *see also Keister v. Bell*, 29 F.4th 1239, 1252 (11th Cir. 2022) (quoting *Cornelius* 473 U.S. at 806) ("The government may exclude a speaker from a limited public forum 'if he is not a member of the class of speakers for whose especial benefit the forum was created.'"). However, limitations on access are permitted to be based on subject matter and speaker identity. *See Lamb's Chapel*, 508 U.S. at 392. These limits must be reasonable in light of the purpose of the forum and be viewpoint neutral. *Id*. at 392–93; *Hopper*, 241 F.3d at 1075; *see also Satanic Temple v. City of Belle Plaine, Minnesota*. 80 F.4th 864, 868 (8th Cir. 2023).

The Circuit courts disagree on whether the aforementioned scrutiny is additionally applicable to closures of limited public forums, and this Court has yet to provide guidance on the matter. *Se Satanic Temple*, 80 F.4th at 868; *But see Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004). However, the Eighth Circuit has more recently and more directly addressed the issue and thus ought to be the perspective adopted by this Court. *See generally Satanic Temple*, 80 F.4th at 868. In *Satanic Temple*, the court held the challenged closing of a public park as a limited public forum was acceptable because the plaintiffs did not sufficiently allege that the closure was either unreasonable or viewpoint discriminatory. 80 F.4th at 868. In contrast to the Ninth Circuit in

Currier, which ultimately held that the postal boxes were a non-public forum and thus a distinct analysis. 379 F.3d at 728, 731. Furthermore, while the court does state that the government may close a forum whenever it wants, the court also notes the inability of the government to discriminate on the basis of viewpoint—suggesting that this limitation also applies to the closure of fora. *Id.* at 728.

This Court has held that when the access is denied to individuals espousing ideas which would otherwise be an includible subject the denial of access is unreasonable in light of the purpose of the forum. *See Cornelius*, 473 U.S. at 806. The Court need only address whether the type of speech in which the speaker wishes to engage in is consistent with the purpose that the forum was initially held open for. *See generally, id.* A purpose of the limited public forum opened at Red Rock is to facilitate the religious and expressive speech of the Montdel Observers and the festivalgoers, as evident from Governor Ridgeway's speech protecting the legacy of Montdel practices. Montdel United seeks to access the forum and prevent its closure for the purpose of engaging in Montdel religious speech, the exact subject for which the forum was initially opened. Thus, the closure and denial of access is unreasonable in light of the purpose of the forum and unconstitutional.

The Court need only determine if the closure and denial of access is either unreasonable in light of the purpose of the forum or viewpoint discriminatory. *See id.*; *see also Lamb's Chapel*, 508 U.S. at 392. While as aforementioned, the closure and denial of access is unreasonable in light of the purpose of the forum, it is also viewpoint discriminatory. This Court in *Good News Clubs v. Milford Central School* diverted from the lower court's focus on equally applying restrictions against all religious groups as a threshold for viewpoint neutrality and instead held that exclusion

due to the religious nature of the speech was sufficient to find viewpoint discrimination. *See* 533 U.S. 98, 105, 107 (2001).

Delmont's actions cannot be ignored as an attempt to exclude the Montdel people on the basis of their religious speech. Secretary Greenfield's disclosure to Montdel United regarding Governor Ridgeway's statement, "[l]ook, the state has been very patient with the Montdel. We've Tolerated these rituals for a long time. . ." is an expression of the governor's frustration with the Montdel practices, indicative of the government's intention behind this specific land sale. R. at 51. The use of Montdel's religious practices as a justification behind their exclusion at the hands of the land sale is as similarly blatant as the viewpoint discrimination in *Good News Club*, and similarly unconstitutional. Because it is unreasonable and viewpoint discriminatory, the sale of Red Rock and ultimate destruction of the Montdel holy site is unconstitutional.

CONCLUSION

For the foregoing reasons, Montdel United respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifteenth Circuit and grant the preliminary injunction.

Respectfully submitted,

ATTORNEYS FOR TEAM # 007

BRIEF CERTIFICATION

TEAM NUMBER: 007

DATE: January 30, 2025

By signing this form, each signatory certifies that the attached brief has been prepared in accordance with all Competition Rules and the work product contained in all copies of the brief are only that of the below team members.

By signing this form, each signatory certifies that each member has complied fully with our law school's governing honor code

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