No. 24-CV-1982

IN THE

SUPREME COURT OF THE UNITED STATES

MONTDEL UNITED

Petitioner

v.

STATE OF DELMONT & DELMONT NATURAL RESOURCES AGENCY

Respondent

On Writ of Certiorari from the

U.S. Court of Appeals for the Fifteenth Circuit

The Honorable Judge T.W. Swan

Respondent's Opening Brief

Oral Argument Requested

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Attorneys for Respondent,
State of Delmont

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PARTIES TO THE PROCEEDING

Petitioners were the appellees in the court of appeals. They are: Montdel United

Respondents were the appellants in the court of appeals. They are the State of Delmont and the Delmont Natural Resources Agency.

OPINIONS BELOW

The opinion from the District Court for the District of Delmont, Western Division has yet to be published in the Federal Reporter but is reported at C.A. No. 24-CV-982 (2024). Similarly, the opinion of the court of appeals has not yet been published in the Federal Reporter, but is reported at C.A. No. 24-CV-1982 (2024).

JURISDICTIONAL STATEMENT

This Court is authorized to review the recent reversal of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). On writ of certiorari following an intermediate appeal, this Court relies on the abuse of discretion standard of review to assess the validity of a preliminary injunction ruling. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 664 (2004). Upon further review, this Court should uphold the prior decision should it be deemed that the lower tribunal acted in accordance with the correct legal standards and applied them appropriately. *Id.* Where the "underlying constitutional question is clear," the vacated injunction should remain final *Id.* at 664-665.

STATEMENT OF ISSUES

I. Does the ECIA enacted transfer of Red Rock violate the First Amendment Free Speech rights of Montel United if it merely implicates a non-public forum?

II. Does the ECIA enacted transfer of Red Rock violate the First Amendment Free Speech rights of Montel United when the regulation is generally applicable?

STATEMENTS OF FACTS

For the past ninety-five years, the state of Delmont ("the State") has exercised unilateral control over the Painted Bluffs State Park ("the Park") and, upon its acquisition, reserved the land for outdoor recreational activities such as "camping, hiking, and fishing." R. at 4.[1] Located in the

[1] In 1930, the State gained ownership of the Park via "eminent domain" following a proper condemnation process. *Id.*

remote region of Painted Bluffs, the Park once generated an adequate amount of tourism revenue for its surrounding communities, but ultimately depreciated in financial gains, and resultingly became "insufficient" to sustain the adjacent counties' "economic needs." *Id.* at 7. Due to the significant decrease in commercial value, the localities comprising Painted Bluffs succumbed to an economic depression rendering the overall populace into a "struggling community." *Id.* at 47. To alleviate this predicament, the State passed the Energy and Conservation Independent Act ("ECIA") which "initiated a transformative agenda" that would not only "invigorate the economy," but also "reduce fossil fuel dependency" by extracting mineral ores to procure renewable energy. *Id.* at 6. By conjoining these two benefits, the ECIA furthered Delmont's mission to become "carbon neutral within the next fifty years" while bolstering "federal mandates aimed at reducing fossil fuel consumption." R. at 1. Notably, the Federal Natural Resources Defense Act ("FNRDA") made it a "national objective" to combat the ongoing climate change crisis through the production of ion batteries, which, in turn, would secure a stable form of green energy. *Id.* at 9.

Unlike most states, Delmont contains "substantial lithium deposits" sourced in one of the Park's landmarks: Red Rock. *Id.* at 47.[2] In particular, Red Rock holds an astonishing amount of lithium as the deposits therein "represent the largest lithium deposit ever discovered in North America." *Id.* at 7. This breakthrough discovery led the Delmont Natural Resources Agency ("the Agency") to conduct an "economic impact study" that confirmed "substantial economic benefits" would flow from harnessing Red Rock's mineral resources. R. at 48. Two alternative sites were considered, but Red Rock presented the most plausible option due to the other areas' mineral

[2] *See* Dr. Tom Moorehouse, et al., *Fact Sheet: Lithium Supply in the Energy Transition*, CTR. ON GLOB. ENERGY POL'Y, (Dec. 20, 2023) https://www.energypolicy.columbia.edu/publications/fact-sheet-lithium-supply-in-the-energy-transition/ ("Currently, the only lithium production in the United States is from Albemarle's Silver Peak brine facility in Nevada.").

reservoirs being "significantly smaller compared to the vast lithium deposits in [] Painted Bluffs." *Id.* at 10. Without sufficient lithium, the FNRDA's goal of developing ion batteries would not be able to conjunctively function alongside the ECIA which would leave both laws idle. *Id.* at 9.[3] Additionally, the prior alternatives were excluded from consideration after it became clear that tapping into the first option—the Delmont Mountains—would "destroy the habitat" of two endangered species in violation of federal law.[4] *Id.* at 10. And resorting to the second—the Delmont Plateau—would contaminate a local town's water supply. *Id.* As such, the Agency opted to transfer a quarter of the Park to a private mining company as a means of maximizing mineral extraction "while keeping the majority of the park intact" except for Red Rock R. at 47.

Because of the dire straits plaguing Painted Bluffs, the local townsfolk "celebrated" upon receiving news of the State's plan to transfer over Red Rock. R. 47. If successfully implemented, the Red Rock transaction will revive the State's formerly "profitable mining industry," create "numerous employment opportunities," and thereby stimulate much needed "economic growth." *Id.* at 41. The mining operation, however, faced stiff opposition from a small group of Native American descendants known as "Montdel United." *Id*. at 7. Since its inception in 2016—less than a decade ago—Montdel United has striven to insulate Red Rock from government alteration out of religious attachment to the natural site. *Id.* Throughout the tribe's history, the Montdel have treated Red Rock as a ceremonial ground to engage in ritualistic prayer four times a year "independent[ly] of the State Park services." R. at 4. Despite enduring multiple periods of lengthy

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[3] *See* U.S. DEP'T OF ENERGY, *Lithium*, (last accessed on Jan. 30, 2025), https://www.energy.gov/eere/geothermal/lithium ("[A] critical mineral necessary for rechargeable electric batteries, lithium has been identified as a material essential to the economic or national security of the United States.").

[4] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174-75 (1978) (clarifying state construction projects effecting "the *eradication* of an endangered species" violate the Endangered Species Act of 1973).

abstention during both World Wars and the Great Depression, the Montdel's Red Rock observance reemerged in the 1950s. *Id.* at 4-5. During the early 2000s, the group's ceremonial practice expanded "into a festival-like event," hosting "college students on spring break and seasonal festival goers" seeking a recreational thrill. *Id.* Although the Montel sermons "do not participate in these festival activities," the secular "gatherings" grew into a commercialized venue with on-site vendors offering "food, music, and merchandise" around Red Rock. *Id*. at 6.

PROCEDURAL HISTORY

After the announcement of Red Rock's forthcoming closure, Montdel United pressed suit against the State of Delmont and sought preliminary injunctive relief in the United States District Court for the Western District of Delmont. R. at 1. There, Montdel United alleged the State violated its free speech and free exercise of religion rights under the First Amendment. R. 2. In response, the State assured the district court that its regulatory pursuit of "economic development and [environmental] sustainability" sufficed to override any constitutional challenges. *Id.* The State also raised the non-public forum doctrine as the proper classification of Red Rock. Thereafter, the district court conclusory concluded that Red Rock was a default traditional public forum because of its title as a "park." R.19. Consequently, the district court applied the heightened level of intermediate scrutiny which, according to the adjudicator's view, overcame the State's interests in environmental stability and economic revitalization. Id. at 20. This reasoning led the district judge to hold the transfer of Red Rock disproportionately singled out religion in violation of the Free Exercise Clause. *Id.* at 30. Mainly because the State refused to pursue other precedingly struck alternatives. *Id.* Montdel's motion for equitable relief was then granted. In turn, an appeal ensued where the intermediate appellate court correctly concluded that Red Rock constituted a non-public forum which could give way to the state's significant interests. R. 39-40. The appeal also found the land transfer to be generally applicable and reversed the Montdel's free exercise claim. *Id.*

SUMMARY OF THE ARUGMENT

As shown by the State's maintenance of Red Rock, the site therein has been devoid of frequent communal discourse and hence constitutes a non-public forum. As a result, the State has refrained from violating the Montdel's free speech rights under the First Amendment. Should this Court correctly conclude that Red Rock is a non-public forum, and uphold the prior holding in the process, the State easily passes the less rigid "reasonableness" standard. To pass constitutional muster thereunder, the State has set forth a satisfactory tri-pronged interest behind the transfer of Red Rock: (1) combatting climate change, (2) salvaging an impoverished region, and (3) furthering the FNRDA mandate requiring ample extraction of lithium. Although the Montdel claim a religious entitlement to Red Rock, the State maintains that its longstanding history reveals the Park's inherent purpose was that of environmental conversation and outdoor recreational convenience. Any subsequent Montdel activity on Red Rock was immaterial to the Park's creation and, at the most, a result of the State's acquiescence. Absent an affirmative intent by the State to create a channel for public communication, there can be no finding to the contrary.

Similarly, the State has not violated the Montedel's free exercise of religion. Of course, the transfer of Red Rock is without any religious animus and, in actuality, gains grounding in the State's accumulation of interests—the combination of pressing environmental concerns, a depressed economy, and compliance with an urgent federal mandate. Moreover, the sale generally applies to all occupants frequenting the Red Rock area—including recreational festival goers and commercial vendors—in a universal manner. Keep in mind, the Montdel oriented events only occur four times a year. To amplify this stance, the State points to the several periods of the Montdel's extensive absence from Red Rock, which confirms the group will not be coerced into abandoning their religious beliefs once the Park is transferred. Thus, Delmont's plan is not only rationally related to its tri-pronged interest, but it is also free of anti-religious compulsion.

FREE SPEECH: CLASSIFYING THE NON-PUBLIC FORUM

Akin to the other personal freedoms enshrined in the Bill of Rights, the First Amendment affords a negative right to engage in free speech without undue government interference. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319 (6th Cir. 1998); *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277, 287 (W.D. Va. 2020) ("[T]he First Amendment . . . embod[ies] negative—as opposed to positive—rights."). Unlike a positive right, which compels institutional action on behalf of a personal entitlement, the negative component of the Free Speech Clause merely requires the government to refrain from unduly interfering with one's freedom of inquiry. *Id.* at 319.[5] When the state seeks to regulate speech transpiring on government grounds, the first step to determine its regulatory permissibility consists of evaluating the "character of the property at issue." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 44 (1983). Specifically, this Court has identified three "forum" categories defining where public expression may arise and the level of state intervention that may ensue. *Id.* at 45.

First, the "traditional public forum" is best characterized as a communal setting with a "long tradition" of having "been devoted to assembly and debate." *Id.* Relevant examples are open streets, vibrant parks, and town halls. *Id.*; *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("[S]treets and parks . . . have immemorially been held in trust for [public] use . . . and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). Attaining this heightened status cannot be based on mere

[5] Among the Bill of Rights, this distinction is best demonstrated by contrasting the Eighth Amendment's imposition of affirmative care for imprisoned inmates with the Fifth Amendment's Due Process Clause which does not " impose an affirmative obligation on the State to ensure" protected liberty interests stay intact. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). Likewise, the First Amendment's Free Speech Clause simply shields one's autonomy of thought and does not confer a state-sponsored entitlement to some institutional intervention.

coincidence for a traditional public forum may only attach where the premises are historically facilitative of civil discourse and "communicat[ions] with" fellow laymen. *See, e.g. Price v. Garland*, 45 F.4th 1059, 1066 (D.C. Cir. 2022) (referencing the "National Mall and sidewalks outside the Vietnam Veterans Memorial" as model examples of a traditional public forum); *Warren v. Fairfax Cnty.*, 196 F.3d 186, 194 (4th Cir. 1999) (construing a median alongside the Fairfax County Government Center to constitute a traditional public forum for bearing the "objective use" of disseminative expression akin to a "public thoroughfare like a park or mall"); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("[The] principal purpose of traditional public fora is the free exchange of ideas.")

Secondly, the "designated public forum" is an area in which the state "intentionally" establishes "a place or means of communication" for the express purpose of communal engagement. *Cornelius*, 473 U.S. at 800. These realms can be found in, for example, a state university or municipal theatre. *Price*, 45 F.4th at 1066. For this category to accrue, the state must affirmatively alter the nature of the property to the extent of deliberately fermenting sentimental discourse and communicative thought. *See Cornelius* 473 U.S. at 800. Both traditional and designated public forums are subject to the same constitutional standards when challenged under the First Amendment: strict scrutiny where the regulation is content-based—i.e. excludes expression based on its message—or intermediate scrutiny when content-neutral. *Perry Educ. Ass'n*, 460 U.S. at 46. Both traditional and designated public forums are subject to the same constitutional standards when challenged under the First Amendment: strict scrutiny where the regulation is content-based—i.e. excludes expression based on its message—or intermediate scrutiny when content-neutral. *Perry Educ. Ass'n*, 460 U.S. at 46. An edict is typically unveiled as a valid time, place, and manner restriction by: (a) limiting when, where, and how the occupants

may partake in expressive conduct; (b) applying content-neutral principles; (c) through a narrowly tailored means; (d) while leaving adequate alternatives for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). However, as demonstrated below, Red Rock's stature unequivocally fits into a nonpublic forum shape and thereby precludes the higher levels of scrutiny. *See Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp. 2d 65, 73 (D.D.C. 2000).

The third, and most applicable to this case, is the non-public forum—otherwise known as the limited public forum—which consists of state property devoid of "characteristics" that are "traditionally" associated with civic engagement for the public at-large. *United States v. Kokinda*, 497 U.S. 720, 727 (1990).[6] Differing from the previous categories, a non-traditional forum is not a free marketplace of ideas but, instead, "is [permissively] limited to use by certain groups" for their peculiar "discussion of certain subjects" in the absence of the overall community. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009). While a designated public forum is created by intentional government action, the non-public counterpart may consist of "'*permitting* limited discourse'" without further ado. *See Kokinda*, 497 U.S. at 730 (quoting *Cornelius*, 473 U.S. at 802). Comparatively, the least protected forum can be relevantly exemplified by a "large" tract of "wilderness preserve" that has "never have been dedicated to free expression and public assembly," yet irrespectively hosts some expressive activity. *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010). Accordingly, restrictions on expressive activity in such a forum are permissible so long as they are "reasonable and not [based on] an effort to suppress expression" out of ideological spite. *Perry Educ. Ass'n*, 460 U.S. at 46; *Satanic Temple v. City of*

[6] Despite the differences in description, this Court has consistently used the terms "nonpublic forum" and "limited public forum" interchangeably. *Porter v. City of Philadelphia*, 975 F.3d 374, 386, n. 75 (3d Cir. 2020); *see, e.g. Cornelius*, 473 U.S. at 788. To avoid any confusion, this Court should note the State has adhered to such dual terminology in this brief.

Belle Plaine, Minnesota, 80 F.4th 864, 868 (8th Cir. 2023). Closing off a non-public forum, regardless of whether it is due to a sale or transaction, correspondingly adheres to the First Amendment where such state action is rational and viewpoint neutral. *Id* at 868.

If the property in question fails to fulfill the criteria of a traditional or designated forum, it will default to the lesser non-public forum as a result. *See, e.g. Ctr. for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu*, 455 F.3d 910, 919 (9th Cir. 2006). In light of Delmont's longstanding management of the Painted Bluffs Park, which consists of permitting outdoor recreation and some sporadic Montdel gatherings, it only follows that the "tradition of [Red Rock] activity" fails to "demonstrate that [it] ha[s] historically been made available for speech activity." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992). Back when the Park was initially established in 1930, the state of Delmont clearly articulated the reasons for its opening: "to preserve its natural beauty" and "offer[] the public opportunities for camping, hiking, and fishing along the Delmont River." R. at 4. Nowhere in Delmont's regulatory history, nor the record, reveals that Red Rock has been relied upon as a "necessary conduit in the daily affairs of a locality's citizens." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981).

Even though local parks are often associated with a traditional public forum, this categorical rule need not apply here because "vast areas of [park] land" in the great outdoors "are not public forum[s]" despite their otherwise misleading label. *Price*, 45 F.4th at 1066. To garnish support, the State points to *State v. Ball*, where the Connecticut Supreme Court deemed a state woodland park "used for hiking, [] camping, . . . and fishing" undoubtably fell into a non-public forum notwithstanding "Native American celebrations" infrequently occurring on the acreage therein. 260 Conn. 275, 285 (2002). The similarities between that case and this one are striking as the Park's grounds were never formally bestowed to accommodate the Montdel but rather served

an "intent to preserve its natural beauty" and provide outdoor recreation. R. at 4. The State's stance is further strengthened by the D.C. Circuit's holding in *Boardley,* which explicitly clarified that remote plots of park land are to not be subject to conclusory forum conclusions on account of departmental titles. 615 F.3d at 515. Diving further, *Boardley* mirrored prior precedent rejecting a reliance on categorical labels of a location per se, such as an outdoor park or even sidewalk, without further inquiring "the location and purpose of [the] publicly owned [place]." *Kokinda,* 497 U.S. at 729-30.[7] As applied here, nothing in Red Rock's management has evinced the necessary element required to sustain a traditional public forum: a "place[] which 'by long tradition or by government fiat have been devoted to assembly and debate.'" *Cornelius* 473 U.S. at 802 (quoting *Perry Educ. Ass'n,* 460 U.S. at 45).

Neither has the State ever evidenced an intent to furnish a designated public forum out of the land in the Park. *See* R. at 37 ("Red Rock was acquired and operated as a means of preserving the natural beauty of the state."). Considering the Montdel have occasionally used the Park's premises "independent[ly] of the State Park Service," the requisite State intent needed to recognize a designated public forum cannot be found in this case. R. 4. The caselaw in *Summum* and *Kokinda* make it crystal clear that, absent such state involvement, there can be no forum other than the non-public one. 555 U.S. at 470; 497 U.S. at 730. Particularly, in *Kokinda,* this Court clarified that allowing some access onto state property does not confer a designated public forum by default. *Id.* The holding went on to confirm that hosting "some First Amendment uses," such as the Park's seasonal acceptance of the Montdel, does not automatically uplift an otherwise non-public forum

[7] This is attributed to the benchmark distinguishing a contested forum from a "public" or limited classification which rests on the underlying function rather than its title per se. *See Greer v. Spock,* 424 U.S. 828, 838 (1976) (concluding sidewalks surrounding "federal military reservations" cannot equate to "municipal streets and parks" since the former has never "traditionally served as a place for free public assembly and communication of thoughts by private citizen").

into a designated forum class. *Id.* ("[U]nder *Perry*, regulation of the reserved non-public uses would still require application of the [non-public forum] reasonableness test"). Although the former Delmont Governor Rupert Ridgeway once acknowledged the tribe's presence "at the opening ceremony of the park," this act still casts Red Rock in a lesser forum light. R. 4. Namely because it indicates that, at the most, the-then Governor rationalized the Montdel's expressive occupancy would be "limited to use" for their peculiar "discussion of certain [ceremonial] subjects" afar from the general populace. *See Summum*, 555 U.S. at 470. Either way, the non-public forum classification remains prevalent. *Id.*

Under the lens of a non-public forum, the tribal rituals and their accompanying festivals are subject to the not-so-stringent standard of "reasonableness" which "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. So long as the State refrains from baseless viewpoint discrimination, its regulatory agenda will prevail, and the expressive activity can be excluded without violating the First Amendment. *Satanic Temple*, 80 F.4th at 868. For starters, this Court has long recognized that the State has a special "interest" to combat "climate change risks" as a "sovereign" entity seeking to protect its environment. *Mass. v. EPA*, 549 U.S. 497, 522 (2007) (noting Massachusetts' compelling state interest in curtailing climate change in light of reports revealing "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming"). As Justice Oliver Wendell Holmes similarly noted, the State of Delmont simply seeks to safeguard the preservation of its beautiful landscape, along with "all the earth and air within its domain," by augmenting the availability of renewable energy and avoiding needless reliance on destructive fossil fuels. *Ga. v. Tenn. Copper Co.,* 206 U.S. 230, 237 (1907). Fortunately, this goal is feasibly

achievable through the Red Rock lithium extraction plan which would take advantage of the "largest lithium deposit ever discovered in North America." R. at 7.

If this Court were to somehow construe Red Rock as a designated public forum—subject to intermediate scrutiny per time, place, and manner—the State's plenary powers still remain permissible. Furthermore, the sale of Red Rock is narrowly tailored to accomplish the aforementioned substantial interests as displayed by the lack of viable mining alternatives in the region and the worsening decay of the local economy. *See Gingerich v. Com.*, 382 S.W.3d 835, 843 (Ky. 2012) (upholding a statute penalizing buggy drivers who fail to use a slow-moving vehicle emblem notwithstanding regulatory clashes with the Amish's religious beliefs against such technology because "there really was no other alternative to the governmental regulation"). Other options were first explored, but ultimately proved to be futile, leaving Red Rock as the sole resort. R. at 47-48. Conversely, the Montdel tribe can feasibly seek alternative ceremonial sites around the rest of the Park—just as they did during both World Wars and the Great Depression.

Regardless of the specific standard of scrutiny, this plan cleanly adheres to the permissible bounds of the First Amendment because the Red Rock mining plan affects all speech uniformly from all speakers evenly. *Price*, 45 F.4th at 1066. But since the Park is naturally a non-public forum, nothing in the First Amendment requires the State "to keep [it] open" which is why the closure of Red Rock wholly complies with the Constitution. *Satanic Temple*, 80 F.4th at 868. Just like *Satanic Temple*, in which the Eighth Circuit found no viewpoint discrimination where the termination of a park resulted in the exclusion of all expressive groups across the board, the Red Rock operation equally impacts the Mondtel and the festival goers alike—in addition to the commercial vendors. *Id.* Ultimately, the State has no "affirmative obligation" to affix the

Montdel's purported free speech rights that are negative in nature. *Pizza,* 154 F.3d at 319. Thus, no free speech violation can be found here.

FREE EXERCISE OF RELIGION: GAUGING GENERAL APPLICABLITY

The State has not infringed on the Montedel's rights to free exercise either because the transfer of Red Rock does not contemplate any religion - but rather environmental concerns, the local economy, and federal compliance -, the sale applies to all people in exactly the same way, and the transfer of Red Rock is rationally related to three legitimate government purposes. Should this Court find that the transfer of Red Rock is subject to strict scrutiny, the State's claim still prevails because the sale of Red Rock furthers the compelling government interests of preserving the environment, stimulating the local economy, and complying with the FNDRA, and the sale of Red Rock is the most tailored means to advance those interests.

Like the free speech clause, the First Amendment shields an individual's right to freely exercise their sincerely held religious beliefs. Its primary proscription prohibits regulations that discriminate against religion or single out religious activity. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.,* 508 U.S. 520, 532 (1993) (finding a local ordinance criminalizing animal cruelty in relation to ritualistic sacrifices discriminatorily targeted the Santeria Church for failing to proscribe other forms of secular animal abuse); *Roman Cath. Diocese of Brooklyn v. Cuomo,* 592 U.S. 14, 17 (2020) (determining New York City's COVID-19 restrictions violated the free exercise clause for "treat[ing] [secular activities] less harshly"). The First Amendment prohibits government action that discriminates against religious beliefs or prohibits religious conduct. *Lukumi*, 508 U.S. at 532 (finding that a city regulation prohibiting animal cruelty was discriminatorily passed against the Santeria faith as the law had multiple exceptions resulting in the law being neither neutral nor generally applicable). When government action is content neutral and generally applicable, the statute is valid so long as it furthers a legitimate government interest,

even if the action incidentally burdens religious practices; strict scrutiny is not required in this circumstance. *Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990) (finding that the prohibition on the use of peyote resulting in the denial of unemployment does not violate the free exercise clause since the burden was incidental and the law was not aimed at religious discrimination but the prohibition on drug use for everyone); *Lukumi*, 508 U.S. at 531, 543; *see Locke v. Davey*, 540 U.S. 712, 720 (2004), *and Roman Cath. Diocese*, 592 U.S. at 18.

A law is content neutral if it is tolerant of religious beliefs and is not made to specifically restrict religious practices. *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 533 (2021); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-450 (1988) (finding that incidental effects which burden religious practices caused by the government's use of its resources and land were content neutral and generally applicable if such government use was not religiously discriminatory). When determining if a law or regulation is content neutral, courts will look to its language, its historical background, the events leading to its enactment, and "contemporaneous statements made by members of the decision [ ] making body." *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 639 (2018); *Locke*, 540 U.S. at 725 (considering the text of a scholarship regulation when analyzing for content neutrality); *see also Lukumi*, 508 U.S. 534-536. If, given these considerations, it is determined that a law infringes or restricts practices because of their religious purpose, the law is not neutral. *Lukumi*, 508 U.S. at 534; *see Carson v. Makin*, 596 U.S. 767, 781 (2022).

When dealing with cases involving publicly enjoyed benefits, states are prohibited from denying groups access solely based on their religious affiliation. *Trinity Lutheran*, 582 U.S. 449, 458 (2017) (holding Missouri was incorrect in prohibiting a church from receiving reimbursements

for a generally available grant because of their religious status violating the free exercise clause). When dealing with government action that has a higher purpose, such as mining or road-building, Native American's traditional practices must yield. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) (Finding AIRFA does not create a cause of action for Indians but protects traditional practices from interference unless a clear need arises). When the government has a need for their real property the government cannot be divested of their rights to that property or their use of it for purposes they require. *Lyng*, 485 U.S. 439 supra at 453; *see also Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147 (1986) (O'Connor concurring in part and dissenting in part).

A law is generally applicable if it applies to all persons and affects them uniformly without regard to a peoples' religion. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022). A law will not be generally applicable if it allows secular conduct that undermines the law's purpose, but prohibits religious conduct, or provides secular exemptions when religious conduct is penalized. *Kennedy*, 597 U.S. at 526; *Fulton*, 593 U.S. at 534.

When a law is neither generally applicable nor neutral, the law must be narrowly tailored, and the law must further a compelling state interest. *Carson next friend of O.C.*, 596 U.S. at 780-781. A law is not narrowly tailored under strict scrutiny when it is either underinclusive or overinclusive. *See Lukumi*, 508 U.S. at 543-545 (finding that ordinances prohibiting animal slaughter were underinclusive because they allowed killing animals for secular purposes but not religious purposes), *and Carson*, 596 U.S. at 788 (finding that a Maine statute prohibiting private disbursement of public tuition assistance to religious schools was overinclusive because such ban unwarrantedly burdened people's expression of religion); *see also Fulton*, 593 U.S. at 541 (stating that a government must avoid burdening religion when using a law to further a compelling government interest if such possibility is feasible).

The sale of Red Rock is a neutral government action since the State implemented the ECIA for the purposes of decreasing fossil fuel reliance, improving its economy, and further supporting the FNDRA's mandate to combat climate change. R. at 1. Like *Smith*, where the law prohibiting the use of peyote never considered religion, including the Native American faiths for which peyote was necessary, the State's sale of Red Rock does not consider religion as well. *Compare Smith*, 494 U.S. at 879-880, *with* R. at 6, 47-48. Instead of the Montdel's faith, the sale of Red Rock was based on an "economic impact study" that determined that Red Rock had the largest supply of lithium in the country which would support that State's legitimate interests to invigorate the local economy via mining operations. R. at 48. Though there was an offhand comment when the public provided input on the sale of Red Rock, such comment is not representative of the State's official purposes for selling Red Rock because it was made by a sole representative in their personal capacity. R. at 29; *see Masterpiece Cakeshop*, 584 U.S. at 639. The State's sale of Red Rock is also generally applicable because it affects all people in the state the same. Unlike *Trinity Lutheran*, where the state imposed a unique burden on religious adherents by prohibiting public funds based on religious identity, mining Red Rock causes all individuals to lose access to Red Rock due to the mining operation, regardless of whether they seek that access for religious purposes. *Compare Trinity Lutheran*, 582 U.S. at 462-463 *with* R. at 9.

In addition to the sale of Red Rock being neutral and generally applicable, the burden placed on the Montdel is only incidental to the State's use of its own land (i.e., to mine Red Rock), further invalidating the Montdel's arguments. *Compare Lyng*, 485 U.S. at 448-449 *with* R. at 4, 7. The government's property interests allow it to use its own property and resources for its own purposes, regardless of any religious objections, so long as such use is not coercive against religious faiths *Lyng*, 485 U.S. at 453. Religious practices cannot deprive the state of its ability to

impartially use its property. *Lyng*, 485 U.S. at 453. Here, the State's use of Red Rock is content neutral and generally applicable because the State is not aiming to impede the Montdel's religious practices and the effects of the State's use of Red Rock are felt by all citizens, regardless of their faith. R. at 6, 47-48. Under eminent domain, Red Rock belongs to the State and, because the State's use satisfies rational basis, the Montdel's religious objections do not override the State's ability to use its land. *Lyng*, 485 U.S. at 448-449, 453, *with* R. at 4, 7.

Additionally, the State's sale of Red Rock does not coerce the Montdel to desist from their religious practices. *Lyng* primarily found the Government's building of a road through a Native American religious site valid under the Free Exercise Clause because such building was not coercive toward the Native Americans' faith nor did it penalize the Native Americans' for exercising their religion, despite the road irreparably destroying such sites. *Lyng*, 485 U.S. at 442, 447-450. The present case is nearly identical to *Lyng*. The inability for the Montdel to access Red Rock could be said to cause substantial harm to their religious practices. *See* R. at 9. Regardless, the law is still neutral, generally applicable, and is a non-coercive use of the State's land. *Compare Lyng*, 485 U.S. at 442, 447-45, *with* R. at 4, 6, 7, 47-48. The sale of Red Rock also satisfies strict scrutiny for these reasons.

A case that further highlights the neutrality and general applicability of the State's decision to sell Red Rock is *Roman Catholic Diocese of Brooklyn v. Cuomo*. *Cuomo* found that a New York executive order regulating the number of people that could congregate in certain areas was neither neutral nor generally applicable because religious spaces suffered more stringent restrictions on their congregants than secular spaces. *Cuomo*, 592 U.S. 14 at 16-18. There is no such discrimination here. The mining of Red Rock restricts all people from entering the space. *Compare Cuomo*, 592 U.S. 14 at 16-18, *with* R. at 6, 9, 47-48. The impartial effects of selling Red Rock is

a stark difference from the discriminatory effects of the New York executive order that highlights the neutrality and general applicability of the State's sale; the sale, therefore, ought to be subject to Rational Basis. Therefore, the transfer of Red Rock does not violate the Free exercise of the tribe because it is a neutral and generally applicable law which uses government land for a higher purpose in a way that prohibits everyone from using the park, not just the Montdel, similar to the peyote prohibition in *Smith*. As stated in *Lying* and *Bowen,* the religious practices of a group cannot dictate what the government does with its property so long as it does not specifically target those individuals, which the State of Delmont has not done here.

If this Court were to find strict scrutiny applies to the State's sale of Red Rock, Delmont still satisfies strict scrutiny because it is the most narrowly tailored means to further the State's three compelling interests in protecting the environment, vitalizing the local economy, and by complying with a federal mandate. Two clear examples of government regulations failing strict scrutiny are *McDaniel v. Patty* and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.* In *McDaniel*, the Supreme Court considered a Tennessee constitutional provision that prohibited religious ministers from serving in the state's house of representatives. *McDaniel v. Paty*, 435 U.S. 618, 620 (1978). Tennessee argued that such a prohibition was necessary to prevent entanglement between religious affairs and political offices under the Establishment Clause; Tennessee argued that such prevention was a compelling government interest. *id.* at 622. The Supreme Court found that such provision explicitly penalizes citizens because of their religion and subjected the provision to strict scrutiny. *See id.* at 627-628. The provision failed under such a standard because Tennessee's asserted interest in preventing entanglement was speculative. *id.* at 628-629.

In *Lukumi*, the Supreme Court considered city ordinances that prohibited the killing of animals for religious sacrifice but allowed such killing for secular or meal-oriented purposes.

Lukumi, 508 U.S. at 527-528, 536-537. The city of Hialeah argued that such ordinances were needed to protect public health and prevent animal cruelty. *See id.* at 529. The Court first found that the ordinances targeted the exercise of the Santeria faith and were, therefore, subject to strict scrutiny. *id*. at 534-535. The Supreme Court found Hialeah's ordinances invalid under the Free Exercise Clause because, though Hialeah had compelling interests, the ordinances were not narrowly tailored since there were ample alternatives to further the city's interests without impeding the Sateria faith. *id.* at 538-539 (stating that the compelling interests for Hialeah's ordinances could be accomplished by regulating the care, containment, killing, and disposal of animals instead of prohibiting animal sacrifice).

This case is starkly different from *McDaniel* and *Lukumi* because mining Red Rock is the most narrowly tailored means to further the State's proven compelling interests in reducing fossil fuel dependency, stimulating the local economy, and complying with a FNDRA. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 521-523 (2007) (finding the environmental protection is a state interest, and that such interest is not diminished by being widely shared). Delmont has conducted numerous studies regarding the mining of Red Rock and found that mining Red Rock will stimulate the State's economy and will reduce fossil fuel dependency. R. at 48, 10. The economic impact study proved that mining operations will stimulate the State's economy, and several environmental impact studies found that mining Red Rock is the least environmentally damaging means to comply with the FNDRA. R. at 7, 10, 47. These proofs starkly contrast the current case from *McDaniel*. Instead of mere speculation, the State has demonstrated compelling interests and has proven that Red Rock's transfer will further those compelling interests without deviation. *Compare McDaniel*, 435 U.S. 618 at 628-629, *with* R. at 7, 10, 47.

Furthermore, mining Red Rock is also the least restrictive means to accomplishing the State's goals. The FNDRA requires the state to reduce fossil fuel dependency through the manufacturing of ion batteries, the ECIA requires the State to enhance its carbon neutrality, and the local area around Red Rock uniquely needs economic support. R. at 1, 6, 9, 47. These interests are served in the most narrowly tailored way *only* by mining Red Rock. Red Rock is America's largest lithium deposit which makes it the best means to accomplish the FNDRA's objectives. R. at 7. Mining the alternatives to Red Rock, the Delmont Mountains and the Delmont Plateau, would not only be inadequate to accomplish the FNDRA's goals, but would also grossly harm both the environment and community safety. R. at 9, 10. Additionally, the local area around Red Rock is in dire need of economic support which will be provided by mining Red Rock. R. at 47-48.

Therefore, unlike *Lukumi*, the State's most narrowly tailored option to further its compelling interests is to mine Red Rock. The Delmont Mountains and the Delmont Plateau are insufficient to reduce fossil fuel dependency and the State's carbon footprint, mining them would violate the State's ECIA since environmental harm would ensue, and mining them would divert economic stimulus from areas that need it most. R. at 9, 10, 47-48. Therefore, by process of elimination, mining Red Rock is the State's only option in furthering its compelling interests - the State must mine Red Rock. *Compare Lukumi*, 508 U.S. at 538-539, *with* R. at 9, 10, 47-48.

CONCLUSION & PRAYER FOR RELIEF

Based on the foregoing reasons discussed above, along with the compelling legal authorities therein, the State of Delmon respectfully requests this Court to uphold the appellate court's judgment entered against the Petitioner's sought preliminary injunction.