No. 24-CV-1982

IN THE SUPREME COURT OF THE UNITED STATES

MONTDEL UNITED,

***Petitioner*,**

v.

STATE OF DELMONT and
DELMONT NATURAL RESOURCES AGENCY,

Respondents.

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

BRIEF FOR PETITIONER

Team 9

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Does a State violate the Free Exercise Clause when it destroys a site necessary to the practice of a religious group in pursuit of purported environmental and economic benefits?

2. Does a State violate the Free Speech Clause when it closes the only available site for an indigenous group to practice its longstanding religious rituals through sale and alteration?

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The opinion of the United States Court of Appeals for the Fifteenth Circuit is unreported and provided within the Decision on Appeal. See Record ("R.") at 33-45. The opinion of the United States District Court for the District of Delmont, Western Division is unreported and provided in the Decision on Appeal. R. at 1-32.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifteenth Circuit upon granting a writ of certiorari under 28 U.S.C. § 1254(1). The Fifteenth Circuit had jurisdiction to review the District Court's final decision pursuant to 28 U.S.C. § 1291. The District Court for the District of Delmont, Western Division had original jurisdiction for this federal question under 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Free Speech Clause and Free Exercise Clause of the First Amendment of the United States Constitution.

STATEMENT OF CASE

I. Statement of Facts

The Montdel people are a Native American group indigenous to the land currently known as the State of Delmont, and have been present in the area since 400 A.D. R. at 2. Their complex religious system has centered at Red Rock, located in present-day Painted Bluffs State Park (hereinafter, "Painted Bluffs"), for over 1,500 years uninterrupted. R. at 2-3, 50. The Montdel people believe that the only way they can reach their Creator is through rituals and collective supplication at Red Rock during the fall and spring equinoxes and the summer and winter solstices. R. at 3.

The State of Delmont (hereinafter, "Delmont") was established in 1855 on the same area of land occupied by the Montdel people. *Id.* In 1930, Delmont acquired Painted Bluffs and established it as a park for recreational use by the public. R. at 4. This acquisition did not impede Montdel religious practices because Delmont never restricted access to Painted Bluffs, including the Red Rock area. *Id.* During the opening of Painted Bluffs, the Governor of Delmont acknowledged the historic presence of the Montdel People and stated that "[t]heir supplications to the Almighty in the Painted Bluffs are part of a legacy that the state proudly cherishes." R. at 4-5. Throughout this time, the only hindrance to the Montdel rituals were the World Wars and the Great Depression, which temporarily prevented the practice. R. at 4.

In 1950, James and Martha Highcliffe, Delmont residents with Montdel heritage, undertook the formalization of the Red Rock rituals as the "Montdel Observance." R. at 5. The Montdel Observance continued the traditions of the historic rituals but added structure to the practicing group. *Id.* Participants of the formalized ritual are known as the "Old Observers." Id. The rituals occur during each solstice and equinox, in which the Old Observers gather along the region of Painted Bluffs surrounding Red Rock. *Id.* Then, the Montdel elders hear prayers from the members of their community, which "include everything from illness to financial difficulties to political issues relevant to the community." R. at 51. The elders then ascend Red Rock to seek divine aid on behalf of the group while the remaining participants perform rituals and meditation at the base of Red Rock. R. at 5.

The equinox rituals have since transformed into "festival-like event[s]." *Id.* During these events, attendees such as college students and festival goers join the Old Observers in the area surrounding Red Rock. *Id.* The festivals span a mile down from Red Rock into other areas of Painted Bluffs. R. at 15. Delmont has issued licenses to vendors for food, music, and merchandise

for these festivals through its Park Service. R. at 6.

Three years ago, Delmont enacted the Energy and Conservation Independence Act (hereinafter, "the ECIA"). *Id.* The ECIA authorized Delmont "to enter into land transfer agreements with private mining companies for the extraction of . . . valuable minerals." *Id.* Mining is a significant portion of the Delmont economy, and Delmont contains substantial mineral reserves throughout the state. *Id.* The transfers are managed by the Delmont Natural Resources Agency (hereinafter, "the DNRA"). *Id.* All land transfers are independently appraised and undergo independent environmental and economic impact studies. R. at 6. The DNRA Secretary Alex Greenfield then has sixty days to decide whether to proceed with the transfer. *Id.* The Act gained support from the federal government, which recently enacted a law mandating the use of sustainable energy resources in defense contracting. R. at 7.

The deposits in Painted Bluffs, particularly in the Red Rock area, contain the largest lithium deposits in North America. R. at 6. In response to mining companies persistently seeking the rights to Painted Bluffs, Priscilla Highcliffe, daughter of James and Martha Highcliffe, created "Montdel United" in 2016. *Id.* Montdel United is composed of Montdel people and the Old Observers and exists to oppose the transfer of Painted Bluffs and protect the sacred site of Red Rock. *Id.*

In 2023, the DNRA executed an agreement to transfer one-fourth of Painted Bluffs, including Red Rock, to Delmont Mining Company, a private Delmont corporation, pursuant to the ECIA. *Id.* The environmental impact studies conducted by the DNRA indicate that these mining operations will destroy Red Rock and its surrounding area, permanently rendering the region too hazardous for visitation. R. at 8. The same studies reported that alternate technologies may exist within the next twenty years that could reduce the damage to Red Rock, even though the area would still be significantly altered. R. at 8. In response to these concerns, the Governor of Delmont

assured the Secretary of the DNRA that "[the Montdel] practices should not be a cause for worry." R. at 47.

Ultimately, the DNRA approved the transfer for three reasons. R. at 9. First, waiting for alternative mining technologies was not practical. *Id.* Second, transitioning to lithium-ion batteries would support Delmont's commitment to reducing fossil fuel use. *Id.* Third, the economic impact study revealed the operation would significantly boost the economy. *Id.* The residents of the counties in which Painted Bluffs is located supported this transfer to support their local economy, which primarily depended on the area's tourism. R. at 7. However, this operation would result in the destruction of Red Rock. *Id.*

Over the past five years, the DNRA has considered three other proposed land transfers for mining operations. R. at 9-10. It completed a transfer agreement that faced objections from the State Teachers Association and the State Historical Society based on concerns that the transfer would destroy a local museum. R. at 10. The DNRA has also, however, withdrawn two land transfer agreements that involved mineral deposits smaller than the lithium deposits in Painted Bluffs. *Id.* First, the DNRA entered into a transfer agreement with Granite International, Inc. for a region within the Delmont Mountains known for nickel deposits. *Id.* This transfer met opposition from The Nature Conservancy, and the DNRA rescinded after the environmental impact study revealed that it would destroy the habitat of two endangered species. *Id.* The second withdrawn agreement was with McBride Brine Mining, and was ultimately cancelled when the environmental impact study indicated an approximately thirty-five percent risk of contamination to the reserve that supplies water to the unincorporated town of Grove Flats, which has a population of fifty people. *Id.*

II. Procedural History

Montdel United brought suit in the United States District Court for the District of Delmont, Western Division against the State of Delmont and the Delmont Natural Resources Agency, seeking a temporary restraining order and injunctive relief based on violations of the First Amendment. R. at 10. It was stipulated in the District Court that Delmont has no Religious Freedom Restoration Act; that the State was voluntarily waiving sovereign immunity; that no state agency was required to defer to a certain position when federal law is unclear; and that there were no issues regarding standing to bring the suit. R. at 11.

The District Court denied Montdel United's request for a temporary restraining order but, after a hearing on the matter, entered a preliminary injunction. R. at 10, 32. The District Court found that all preliminary injunction factors weighed in Montdel United's favor, including a likelihood of success on the merits of its Free Speech and Free Exercise claims. R. at 25, 30-32. Delmont and the Delmont Natural Resources Agency appealed the grant of a preliminary injunction to the United States Court of Appeals for the Fifteenth Circuit, specifically arguing that the District Court had incorrectly found a likelihood of success on the merits. R. at 33, 35. The Fifteenth Circuit found no likelihood of success on the merits of either the Free Speech or the Free Exercise claim and therefore reversed the District Court's decision to grant the preliminary injunction. R. at 42, 45. Montdel United petitioned for a writ of certiorari to the Fifteenth Circuit, which this Court granted. R. at 54-55.

SUMMARY OF ARGUMENT

Red Rock is central to the traditions of the Montdel people. For millennia, the Montdel people have regularly gathered at Red Rock, the only place in the world where they can reach their Creator and practice their religion expression. The State of Delmont and the Delmont Natural

Resources Agency now seek its destruction, hoping to mitigate the State's fossil fuel consumption and boost the State's economy. The State proposes affirmatively preventing the Montdel people from continuing their religious exercise, their longstanding tradition of expression at the site. The First Amendment to the United States Constitution protects the Montdel people against such intrusion twice over.

First, the Free Exercise Clause bars government action that prohibits the free exercise of religion; action that physically necessitates the end of a religious practice falls within the Clause's scope. This Court has held that laws prohibiting religious exercise are subject to strict scrutiny unless they are neutral and generally applicable. Neither the ECIA nor the proposed transfer of Red Rock are generally applicable, as the former grants executives discretion to weigh religious interests against secular interests, and the latter indicates a favoritism of secular activity over comparable religious activity. Such government actions must undergo strict scrutiny to pass constitutional muster, and these cannot: the State's decisions have not been narrowly tailored to their purported interests because less burdensome strategies to advance its interests remain available.

Second, the Free Speech Clause protects the right of the Montdel people to assemble and communicate in a public forum. Red Rock is a traditional public forum because it is located within a park—a quintessential public forum—and has been used for the exchange and expression of ideas for more than fifteen centuries. Such a forum is entitled to special constitutional protection and its irreparable ravaging is only permissible if the action can withstand intermediate scrutiny. The State has not met this burden because the destruction of Red Rock is not narrowly tailored to its interests and would leave the Montdel people without an alternate venue to convey their intended messages.

ARGUMENT

I. THE ECIA AND SUBSEQUENT TRANSFER OF RED ROCK PROHIBIT THE FREE EXERCISE OF THE MONTDEL RELIGION BECAUSE THEY ARE NOT GENERALLY APPLICABLE AND CANNOT SATISFY STRICT SCRUTINY.

The ECIA and the proposed transfer of Red Rock would unconstitutionally violate the Free Exercise rights of the Montdel people. The First Amendment, as applied to the states through the Fourteenth Amendment, bars the government from "prohibiting the free exercise [of religion]." U.S. CONST. amend. I; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Delmont's actions pursuant to the ECIA would destroy the ability of the Montdel people to exercise their religion. R. at 44. Under the framework established by this Court in *Employment Division v. Smith*, laws that so prohibit free exercise are not subject to strict scrutiny so long as they are neutral towards religion and generally applicable. 494 U.S. 872, 881 (1990).

Neither the ECIA nor Delmont's actions pursuant to that statute are generally applicable: the ECIA grants individual executives discretion in the weighing of religious objections against secular interests, and Delmont's proposed transfer treats religious activity worse than comparable secular activity. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). Therefore, both the ECIA and the proposed transfer of Red Rock merit strict constitutional scrutiny—a barrier they cannot surmount, as the government's actions have not been narrowly tailored to its supposed interests. As a result, this Court should reverse the decision of the Fifteenth Circuit.[1]

[1] On appeal from a preliminary injunction, this Court reviews a lower court's legal rulings on the likelihood of success on the merits de novo, but reviews its ultimate conclusion for abuse of discretion. McCreary Cnty. v. ACLU, 545 U.S. 844, 867 (2005).

A. The proposed transfer of Red Rock would prohibit the free religious exercise of the Montdel people.

The First Amendment squarely covers any law "prohibiting the free exercise [of religion]." U.S. CONST. amend. I. As the Fifteenth Circuit recognized, the transfer and subsequent destruction of Red Rock "would undoubtedly destroy [Montdel United's] ability to practice their religion." R. at 44. The absolute denial of religious practice is the ultimate prohibition of free exercise, conflicting with the First Amendment's plain text.

The Fifteenth Circuit held otherwise, improperly relying on this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*. R. at 42-43. At issue in that case was the paving of a road on federal land which "would have significant, though largely indirect, adverse effects on Indian religious practices"; the Court assumed the road would "virtually destroy the Indians' ability to practice their religion." *Lyng v. Northwest Indian Cemetery Prot. Ass'n.*, 485 U.S. 439, 445, 451-52 (1988). The Court focused on the indirect nature of the burden on religious practice, arguing that the facts centered around "incidental interference with an individual's spiritual activities." *Id.* at 450.

The Court recognized, however, that "a law prohibiting the Indian respondents from visiting [their sacred land] would raise a different set of constitutional questions." *Id.* at 453. This concession emphasizes the crucial distinction between the facts at issue in *Lyng* and the facts of this case: here, the prohibition of religious practice is direct, not incidental. The religious objection to the development of a road through government property in *Lyng* was based on the contention that it would "disrupt[] the natural environment," and that this disruption would "distract" individuals who were visiting sites located away from the road itself. *Id.* at 448. This is an attenuated causal chain entirely unlike the one at issue here, where the government is proposing a transfer of property for the express purpose of the demolition of a religious site. R. at 9.

The Fifteenth Circuit instead read *Lyng* to stand for the broad proposition that "[s]acralizing the world cannot be a permissible way to prevent the execution of a validly enacted law." R. at 44; see *Lyng*, 485 U.S. at 439. Specifically, the Fifteenth Circuit upheld the proposed land transfer because it would "not coerce the Montdel people into acting contrary to their religious beliefs," R. at 44, even though it would obliterate a structure necessary for the Montdel people to act in accordance with their religious beliefs. This reasoning overreads *Lyng*, which stood for the narrower proposition that the incidental religious burdens of neutral government programs could not be considered fatal to those programs' enactment.

The concerns addressed in *Lyng* were formalized shortly thereafter by this Court's establishment of the *Smith* framework. In *Smith*, the Court held that "application of a neutral, generally applicable law to religiously motivated conduct," does not require strict scrutiny. *Smith*, 494 U.S. at 881. This holding has been treated as the overarching framework for Free Exercise claims in the years since. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Fulton*, 593 U.S. at 533. The *Smith* framework accounted for the *Lyng* Court's central concern: that laws having no direct relation to religious exercise would be challenged because of their incidental effects. *Lyng*, 485 U.S. at 450. The law governing this case, therefore, is not an abstract principle of coercion pulled from *Lyng*'s dicta, but the Court's robust doctrine developed in the application of the *Smith* framework.

B. The transfer of Red Rock is subject to strict scrutiny because the Energy and Conservation Independence Act is not generally applicable.

"[I]f prohibiting the free exercise of religion . . . is not the object of [a law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878 (1990). Laws burdening religious exercise are not generally applicable, however, and are therefore subject to strict scrutiny if they either (1) create

"a mechanism for individualized exemptions," *id.* at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)), or (2) "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interest in a similar way." *Fulton*, 593 U.S. at 534. The ECIA does the former, and Delmont's actions pursuant to that Act do the latter, rendering the scheme subject to strict scrutiny.

i. The Energy and Conservation Independence Act creates a mechanism for individualized exemptions.

This Court has long recognized that "a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions." *Fulton*, 593 U.S. at 544 (Barrett, J., concurring); *Smith*, 494 U.S. at 884 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

The ECIA authorizes the DNRA to enter into land transfer agreements with private companies, requires environmental and economic impact studies, and provides that, "[u]pon completion of these studies, the DNRA has sixty days to decide whether to proceed with the transfer." R. at 6. This authority provides the DNRA and its Secretary, Alex Greenfield, significant discretion over when to move forward with such transfers and what factors to consider in doing so. Exercising this discretion, the DNRA has withdrawn two other land transfer agreements based on environmental concerns while operating under the notion that the Montdel people's "practices should not be a cause for worry." R. at 9-10, 47. This demonstrates that the state administration heavily weighed such secular concerns and gave almost no value to religious considerations.

This discretionary scheme is precisely the kind that warrants strict scrutiny, per this Court's recent decision in *Fulton*. 593 U.S. at 544. There, this Court held that a provision in Philadelphia's standard foster care contract was not generally applicable because it granted the Commissioner of

the Department of Human Services the ability to grant exemptions from that provision "in his/her sole discretion." *Id.* at 534-35. As the Court explained, such discretionary schemes are subject to heightened scrutiny not because of the threat they would be used to discriminate against religious interests, but simply because they invite "the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 537. In fact, the Court recognized that the Commissioner in that case had never granted a discretionary exemption; the mere fact of his ability to consider reasons for approval or denial was sufficient to impose strict scrutiny. *Id.*

Similarly, evidence of discriminatory intent is unnecessary to impose strict scrutiny against Delmont because the ECIA creates a scheme under which government officials are empowered to weigh secular and religious concerns when deciding how to allocate burdens. Unlike in *Fulton*, the State here has taken advantage of its discretionary authority by opting not to undertake projects that pose environmental concerns but choosing to undertake projects that pose religious concerns. R. at 9-10. The government has "decide[d] which reasons for" transferring its land "are worthy of solicitude"; that decision demands strict scrutiny. *Fulton*, 593 U.S. at 537.

ii. Delmont's actions pursuant to the ECIA constitute a practice that is not generally applicable.

Even if the Court were to disagree with the application of the *Fulton* standard to the ECIA, the State's actions pursuant to that statute constitute a practice that is not generally applicable because they fall into the second category described by this Court in *Fulton*: laws that "lack[] general applicability [because they] prohibit religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534.

In *Tandon v. Newsom*, the Court elaborated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 593

U.S. 61, 62 (2021) (per curiam). Further, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue," *id.* at 62; that is, activities are not judged to be comparable because they impose comparable burdens, but because they are justified by comparable interests. In that case, California's restrictions related to COVID-19 were subjected to strict scrutiny because they permitted secular gatherings while forbidding at-home religious gatherings. *Id.* at 63-64. These activities were comparable because they had similar effects on the purported government interest—mitigating transmission of COVID-19. *Id.* at 63. Since the comparable secular activity was allowed while religious activity was prohibited, the Court ruled in favor of the Free Exercise claimants. *Id.* at 64.

That is precisely what the State of Delmont, the DNRA, and Secretary Greenfield did in this matter: they moved forward with the transfer of Red Rock over other potential land transfers because they prioritized environmental concerns over religious objections. R. at 9-10. This disparate treatment is relevant because the considered activities were comparable for the State's actions to warrant strict scrutiny.

The three comparators to the transfer of Red Rock in this matter include the two withdrawn transfers and the one completed transfer. R. at 9-10. These projects, along with the transfer of Red Rock, were initially justified by the government's interest in the extraction of minerals by private companies. *Id.* Differences in amount or type of mineral does not impact the fact that all projects were undertaken pursuant to the ECIA for the common purposes of "reduc[ing] fossil fuel dependency and invigorat[ing] the state's economy." R. at 6. As the underlying government interests were the same, the government was required to treat secular and religious objections similarly to avoid strict scrutiny. Instead, the DNRA believed that religious "practices should not

be a cause for worry." R. at 47. This dismissal of the Montdel people's interests bars Delmont's scheme from the protection of general applicability.

C. The ECIA and the transfer of Red Rock fail strict scrutiny because they are not narrowly tailored to the government's interests.

To satisfy strict scrutiny, the challenged actions "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). The stringency of this test has led one Justice to describe the Government's requirement as "show[ing] that it would commit one of 'the gravest abuses' of its responsibilities" if it acted otherwise. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 696 (2020) (Alito, J., concurring). Further, the government's interests are described specifically: the Court "scrutinizes the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The government's stated interest to be considered is not its interest in the statute generally, but its interest in applying the statute to Red Rock over the objections of the Montdel people. *Fulton*, 593 U.S. at 541.

Delmont's stated interests in the transfer of Red Rock are twofold: the reduction of fossil fuel use and the economic benefits of lithium mining in the area. R. at 9. The only facts relevant to the scope of economic benefits are that "[m]ining constitutes a significant portion of the state's economy," and that the deposits under Red Rock "represent the largest lithium deposit ever discovered in North America." R. at 6-7. Without any facts about the availability of other means of economic development, this cannot be used to meet the government's burden of showing that its proposed actions are narrowly tailored to its interest. *See Fulton*, 593 U.S. at 541 ("[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so").

Delmont similarly cannot show that the transfer of Red Rock is narrowly tailored to its interest in the reduction of fossil fuel usage. The State has repeatedly undermined its purportedly critical interest by withdrawing from potential land transfers because of environmental hang-ups—including withdrawing from the transfer to McBride Brine Mining because of a thirty-five percent chance of water contamination which would affect a single unincorporated town of fifty residents. R. at 9-10. These actions represent an implicit concession that the failure to mine lithium to reduce fossil fuel dependency is far from the "gravest abuse of its responsibilities." *Little Sisters of the Poor*, 591 U.S. at 696 (Alito, J., concurring). Further, there is nothing in the record to demonstrate that the State has pursued fossil fuel reduction strategies outside of mining. The government has the burden of demonstrating that it has exhausted its non-burdensome options before resorting to the destruction of a site central to religious practice, so this demonstrates that the transfer of Red Rock is not narrowly tailored to this interest. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (per curiam) (refuting narrow tailoring by positing "less restrictive rules that could be adopted to minimize the risk" of spreading COVID-19). Since Delmont cannot meet its burden of satisfying strict scrutiny, the judgment of the Fifteenth Circuit should be reversed.

II. THE ECIA AND SUBSEQUENT TRANSFER OF RED ROCK VIOLATE THE FREE SPEECH OF MONTDEL UNITED BECAUSE IT WOULD RESULT IN THE DESTRUCTION OF A TRADITIONAL PUBLIC FORUM AND IMPERMISSIBLY BURDEN MONTDEL SPEECH.

The ECIA as applied to Red Rock is unconstitutional because it will destroy a traditional public forum and impermissibly burden Montdel United's free speech. The Free Speech Clause of the First Amendment is applicable to the States through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). "The Free Speech Clause restricts government regulation of private speech. . ." *Pleasant Grove City v. Summum,* 555 U.S. 460, 467 (2009).

The government's right to limit speech in parks and other places that have "immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions" is strictly limited. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). In these traditional public forums, the government may only impose "reasonable restrictions on the time, place, or manner of protected speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Fifteenth Circuit erred in holding that the destruction of Red Rock would not violate Montdel United's free speech rights. This conclusion was premised on an incorrect characterization of Red Rock as a nonpublic forum. Rather, Red Rock is a traditional public forum by virtue of its location within a park and because it has been used "immemorially" for public expression. *Hague*, 307 U.S. at 515. This classification grants Red Rock a "special position in terms of First Amendment protection." *United States v. Grace*, 461 U.S. 171, 180 (1983).

Thus, in order to restrain Montdel United's free speech by closing Red Rock, the action must survive intermediate scrutiny. *Ward*, 491 U.S. at 790. The closure must (1) be content neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave Montdel United with alternative channels to conduct their rituals. *Id.* Respondents fail to meet this scrutiny because the action is not narrowly tailored to state interests and does not provide alternate channels for Montdel rituals. Thus, the Fifteenth Circuit's decision should be reversed.

A. Red Rock is a traditional public forum because it is located within a park and has been immemorially used as a public place of expression.

The permissibility of free speech restraints must be evaluated in accordance with "the character of the property at issue." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). This Court has defined three categories of forums to guide this analysis. *Id*. at 45. First, traditional public forums include places that "by long tradition or by government fiat have been

devoted to assembly and debate, [in which] the rights of the State to limit expressive activity are sharply circumscribed." *Id.* Second, designated public forums are places that the State has opened for public expression. *Id.* These two forums both limit the State's ability to regulate speech, but "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) (citing *Perry*, 460 U.S. at 45-6).[2]

Red Rock is a traditional public forum because it is part of a park, and this Court has consistently held that parks are traditional public forums. *See, e.g. Perry,* 460 U.S. at 45 (describing streets and parks as "quintessential public forums"). This Court has never conditioned a park's forum status on certain qualities, stating that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague*, 307 U.S. at 515; *Summum*, 555 U.S. at 469 (using "the concept of the traditional public forum as a starting point" because speech restriction occurred within a park).

When a region inside of a park is indistinguishable from the surrounding park area, it retains the park's public forum status. *See Gerritsen v. City of Los Angeles,* 994 F.2d 570, 576 (9th Cir. 1993) (invalidating speech restrictions in designated areas that had "a unique and cultural atmosphere" within a public park because they were "indistinguishable from the park as a whole"); *see also Grace,* 461 U.S. at 180 (holding that a sidewalk on a nonpublic forum was a public forum because there was no fencing or separation from surrounding public sidewalks). Red Rock is regarded as part of Painted Bluffs by both Delmont and its citizens. The Red Rock ritual festivals span a mile down from Red Rock itself, into other areas of Painted Bluffs. R. at 15. This indicates

[2] A third type of forum is a nonpublic forum which encompasses places that are "not by tradition or designation a forum for public communication . . ." *Perry*, 460 U.S. at 45. In nonpublic forums, the State may freely restrict speech so long as restrictions are content-neutral. *Id.*

that the average festival attendee does not distinguish Red Rock from Painted Bluffs. Furthermore, Delmont has used the ritual observances at Red Rock to promote tourism of Painted Bluffs as a whole. *Id.* During the opening of Painted Bluffs, the Governor of Delmont indicated that he would not distinguish Red Rock from the rest of the park, stating that "[Montdel's] supplications . . . *in the Painted Bluffs* are part of a legacy that the state proudly cherishes." R. at 5 (emphasis added). Red Rock has never been distinguished as a separate place from Painted Bluffs, so it retains park public forum status.

Aside from its location within a park, Red Rock on its own has been "immemorially" used for assembly, communication, and discussion. *Hague*, 307 U.S. at 515. Traditionally, activities like civic discussion and debate have fulfilled this element, *see Perry,* 460 U.S. at 44, but this Court has also more generally classified this requirement as "expressive activity" or "speech activity." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

The rituals at Red Rock fall within either description. The Montdel people engage in civic discussion when they pray about political and societal issues. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108 (2001); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001) ("worship and prayer directed toward the betterment of government . . . are methods of expressing a religious viewpoint about civic subject matter"). During the rituals, the Montdel elders discuss issues that "include everything from illness to financial difficulties to political issues relevant to the community" before climbing Red Rock to seek divine aid on behalf of the community. R. at 51. The Montdel people are no less engaged in civic activity at Red Rock because their discussion comes from a religious viewpoint. *Good News Club*, 533 U.S. at 108; *DeBoer*, 267 F.3d at 569. More generally, these gatherings constitute "expressive activity." *Lee*, 505 U.S. at 678; *see Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (stating that

"the Constitution looks beyond written or spoken words as mediums of expression," and any activity that conveys a message is speech).

Respondents have conceded "that the Montdel have used Red Rock as a religious site since time immemorial . . . " but contend that this is negated by the frequency of rituals and because they did not occur during the Great Depression and the World Wars. R. at 27. The Fifteenth Circuit agreed with this contention and likened this usage to that of the fairgrounds in *Heffron v. International Society for Krishna Consciousness*, wherein this Court held that congested, temporary fairgrounds were not traditional public forums. 452 U.S. 640, 651 (1981). The contention is unsupported: the fairgrounds in *Heffron* were newly constructed each year with the intention of closure after a short span of time. *Id.* Red Rock is a permanent venue that has never been closed to the public. R. at 4. A short gap in a 1,500 year tradition on continuously open land, R. at 50, is markedly different than an intentionally temporary event venue. There is also no existing doctrine suggesting that otherwise "immemorial" use is negated merely because the usage occurs at regular intervals. Red Rock is therefore a traditional public forum because it is part of a park, and because it has been held for expressive activity immemorially. *See Perry,* 460 U.S. at 45.

B. The ECIA as applied to Red Rock would impermissibly destroy a traditional public forum.

Traditional public forums "occup[y] a special position in terms of First Amendment protection." *Grace*, 461 U.S. at 180. The State "may not by its own *ipse dixit* destroy the 'public forum' status of . . . [places] which have historically been public forums." *Id.* (quoting *U.S. Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981)). This distinguishes traditional from designated public forums: "the government may close a designated public forum whenever it

chooses, but it may not close a traditional public forum to expressive activity altogether." *King Cnty*, 781 F.3d at 496 (citing *Perry*, 460 U.S. at 45-6).

In a traditional public forum, the State may only impose reasonable restrictions on the time, place, and manner of speech. *Ward*, 491 U.S. at 790. A permissible time, place, and manner restriction must be "content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* Petitioner concedes that the speech restrictions resulting from the ECIA are content-neutral and that Delmont's stated interests are substantial.

First, regulations must be narrowly tailored to serve a significant government interest. *Id.* A regulation is narrowly tailored when it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799. When the speech regulation "clos[es] a substantial portion of a traditional public forum to all speakers," the State must also show that it cannot further its interests through less restrictive alternatives. *McCullen v. Coakley*, 573 U.S. 464, 490 (2014).

Second, any regulation must leave open "ample alternative channels of communication." *Id.* at 790. This Court has stated that "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984).

Respondents contend that the ECIA as applied to Red Rock can forgo the traditional time place, and manner analysis because it comports with an exception suggested in Justice Kennedy's concurring opinion in *International Society for Krishna Consciousness v. Lee*. In *Lee*, Justice Kennedy stated in his concurrence that the government may close a traditional public forum by "alter[ing] the objective physical character or uses of the property, and bear[ing] the attendant

costs . . .” 505 U.S. at 699. Respondents thus argue that they may close Red Rock with ease because the State is altering “the objective physical character or uses of [Red Rock] . . .” from park to mining area. *Id*; R. at 18.

Respondent’s argument is unsupported. First, Red Rock has not yet been altered and is still a traditional public forum. Therefore, any speech restriction in its current state must satisfy the time, place, and manner test. *Ward*, 491 U.S. at 799. Second, Delmont may not change Red Rock’s public forum status “by its own *ipse dixit* . . .” *Grace*, 461 U.S. at 180. Courts have not yet discussed how the State can use Justice Kennedy’s alteration doctrine to justify a forum closure *before* the property is changed, but existing doctrine bolsters the “special position in terms of First Amendment protection” afforded to traditional public forums. *Id*. As the District Court correctly noted, allowing a traditional public forum to be closed through sale and transformation under “the same level of scrutiny as a designated public forum would be in effect to abolish the former as a distinct legal category.” R. at 20. For this unexplored alteration doctrine to comport with longstanding First Amendment principles, it must be examined under the time, place, and manner test, which this Court has used to assess closures of traditional public forums traditionally. *See McCullen*, 573 U.S. at 490.

Whether this Court chooses to examine the ECIA as applied to Red Rock by looking at the property in its current state, or by assessing the effect of closure through alteration, it will result in a time, place, and manner analysis. The ECIA as applied to Red Rock cannot survive this analysis because it leaves no adequate alternative forums for Montdel expression, and Delmont’s means are not narrowly tailored to its interests.

i. The State may not destroy Red Rock because it leaves no adequate alternative forums for Montdel expression.

A regulation on speech must leave open “ample alternative channels of communication.”

Ward, 491 U.S. at 790. Regulations will be considered invalid "if the remaining modes of communication are inadequate." *Taxpayers for Vincent*, 466 U.S. at 811.

When this Court set forth the adequacy standard in *Members of City Council v. Taxpayers for Vincent,* it referred to a speaker's ability to "communicate effectively." *Id.* at 812. In that case, the city banned the posting of signs in public places. *Id.* at 791. In upholding the ordinance, this Court emphasized that "nothing in the findings indicate[d] that the posting of political posters on public property is a uniquely valuable or important mode of communication." *Id.* at 812. Alternate channels of communication were "adequate" because the communicative benefits of sign posting could readily be achieved through other means. *Id.*

Here, the destruction of Red Rock would limit the Montdel people's ability to "communicate effectively" with their sole audience member, their Creator. *Id.* Unlike in *Taxpayers for Vincent*, Red Rock is "uniquely valuable [and] important . . ." to Montdel expression. *Id.* Red Rock is the *only* venue in which the Montdel people can access their Creator . R. at 3. No other place has the necessary qualities to allow the Montdel people to effectively practice their expression and communication. Per the standards set forth in *Taxpayers for Vincent*, other forums available to the Montdel people that lack this connection to their Creator are inadequate. *Id.* Therefore, destroying Red Rock would leave no alternative channels of communication. *Ward*, 491 U.S. at 790.

ii. Destroying Red Rock is not narrowly tailored to Delmont's state interests.

A content-neutral policy that incidentally restrains speech will be a reasonable time, place, and manner regulation only if it is narrowly tailored to serve a significant state interest. *Taxpayers for Vincent*, 466 U.S. at 808. An action is considered to be narrowly tailored if it "curtails no more speech than is necessary to accomplish its purpose." *Id.* at 810. Generally, narrow tailoring is

achieved when "the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). "[E]xceptional" restrictions on speech, like "closing a substantial portion of a traditional public forum to all speakers" require the State to show that "alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 573 U.S. at 490, 495, 497.

This Court has held that an "exceptional" regulation is not narrowly tailored when the State "has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." *Id.* at 494. In *McCullen v. Coakley*, a Massachusetts statute made it a crime to knowingly stand on a public sidewalk within thirty-five feet of an abortion clinic. *Id.* at 469. This Court found that this regulation was content-neutral and served the State's significant safety interests, but described the regulation as "exceptional" because the State pursued its interests "by the extreme step of closing a substantial portion of a traditional public forum to all speakers." *Id.* at 481, 490. This Court held that the statute was not narrowly tailored because the State did not attempt to service its interests "without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes." *Id.* The Court reasoned that "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 495; *see Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) ("the First Amendment does not permit the State to sacrifice speech for efficiency").

This Court should apply the approach to narrow tailoring it used in *McCullen.* First, the closure of Red Rock would be "exceptional" because it is an "extreme step of closing a substantial

portion of a traditional public forum to all speakers." *McCullen*, 573 U.S. at 490, 497. Destroying Red Rock would close an *entire* forum that cannot be replicated. Second, *McCullen* properly considers the availability of alternative forums when considering whether a regulation survives intermediate scrutiny. *See Hill v. Colorado*, 530 U.S. 703, 726 (2000) ("when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal").

Here, Delmont has not presented any evidence that suggests its interests could not be adequately served through "alternatives that leave [Red Rock] open for its time-honored purposes." *McCullen*, 573 U.S. at 490. Delmont's first interest, reducing fossil fuels to combat climate change, can be achieved through alternative measures. Delmont is known for its "mineral-rich geology," and miners have discovered lithium deposits throughout the state. R. at 6, 7, 10. The fact that Red Rock contains the most lithium does not alter this conclusion; "[Delmont] must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 573 U.S. at 495.

Delmont's second interest, economic growth, can also be achieved without destroying Red Rock. Delmont has not produced any evidence that it has attempted to invigorate the economy in any way prior to the transfer of Red Rock. The destruction of Red Rock may be a quick solution to this decline, but "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795.

Delmont's final interest, complying with a federal mandate that demands the use of sustainable energy in defense contracts, can also be served by other means. Delmont has "mineral-

rich geology" throughout the state. R. at 6. Until Delmont demonstrates that it cannot serve its interests through alternate means, a preliminary injunction is warranted.

Destroying Red Rock is not narrowly tailored to Delmont's interests because it is taking the "extreme step of closing a substantial portion of a traditional public forum to all speakers" without showing that "alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 573 U.S. at 495, 497. Doing so would not leave adequate channels of communication because alternate forums do not allow the Montdel people to "communicate effectively," *Taxpayers for Vincent*, 466 U.S. at 812, and lack the important cultural and religious characteristics of Red Rock. Therefore, the ECIA as applied to Red Rock violates Montdel United's free speech rights. This Court should issue a preliminary injunction to prevent this harm.

CONCLUSION

For the aforementioned reasons, this Court should reverse the judgment of the Fifteenth Circuit and grant the requested preliminary injunction.

Respectfully submitted,

/s/ Team 9
Team 9
Attorneys for Petitioner, Montdel United

TEAM 9 CERTIFICATION

We hereby certify that the work product included in this brief is the work product of the team members and that we have complied fully with our law school's governing honor code. We further acknowledge that we have complied with all Competition Rules.

Respectfully submitted,
Team 9