No. 24-CV-1982

IN THE SUPREME COURT OF THE UNITED STATES

MONTDEL UNITED,

Petitioner,

v.

STATE OF DELMONT and DELMONT NATURAL RESOURCES AGENCY,

Respondent.

On Writ of Certiorari from the United States Court of Appeals for the Fifteenth Circuit

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BRIEF FOR RESPONDENT

TEAM 12
Counsel for Respondent

QUESTIONS PRESENTED

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

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

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The opinion and order of the United States Court of Appeals for the Fifteenth Circuit (R. at 33–45) is not yet published and may be found at *Montdel United v. State of Delmont*, C.A. No. 24-CV-1982 (15th Cir. Nov. 1, 2024). Similarly, the opinion and order of the United States District Court for the District of Delmont Western Division (R. at 1–32) is not yet published but may be found at *Montdel United v. State of Delmont*, C.A. No. 24-CV-1982 (D. Delmont Mar. 1, 2024).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment, R. at 45, on November 1, 2024, reversing the district court's opinion and grant of preliminary injunction, R. at 32, entered on March 1, 2024. Petitioner filed a petition for writ of certiorari, R. at 54, which was granted, R. at 55) by this Court on January 5, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS AND REGULATIONS

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

The relevant provisions of the State of Delmont Energy and Conservation Independence Act ("ECIA") have been set out in an Appendix to the brief.

STATEMENT OF CASE

1. This case concerns the Delmont Natural Resources Agency ("DNRA") and State of Delmont's (collectively "Respondents") transfer of land and mining rights to a private company, Delmont Mining Company, for one-fourth of Painted Bluffs State Park ("Painted Bluffs"). The sale has been authorized pursuant to the Energy and Conservation

Independence Act ("ECIA"). The ECIA authorizes Delmont to "enter into agreements with private mining companies for the transfer of land to facilitate the extraction of precious minerals." R. at 2. The state plans to use these minerals to invigorate the local economy and reduce fossil fuel dependency through the advancement of lithium-ion battery technology. R. at 7, 9. The legislation stipulates that all land transfers must be accompanied by an independent environmental and economic impact study. Upon the studies' completion, the DNRA has a statutory deadline of sixty days to determine whether it will proceed with the transfer. R. at 6. The ECIA also requires that land subject to transfer be independently appraised to ensure equivalent value. *Id.*

2. Petitioner is Montdel United, a nonprofit formed in 2016. Highcliffe Aff. ¶ 13. The nonprofit is primarily comprised of traditional practitioners of the Montdel religion known as Old Observers. *Id.* The group's purpose is to protest the transfer of Painted Bluffs and safeguard the Montdel's religious practices. *Id.* The Montdel — a monotheistic and indigenous tribe — have conducted rituals in the hills, cliffs, and forests that now form part of the park for over 1,500 years. *Id.* ¶ 6. The Montdel prize one site, in particular, referred today as Red Rock — a barren area atop one of the highest bluffs in the state park. *Id.* ¶ 7.

3. Painted Bluffs is a 100-square-mile stretch of expansive forested highlands. R. at 2. Beyond serving as a home for two endangered species, the nature preserve is also home to the largest-ever-discovered lithium ore deposit in North America — especially around Red Rock. R. at 2, 10; Greenfield Aff. ¶ 8. This launched respondents' interest in making a land transfer of lithium-rich areas of Painted Bluff. *Id.*

4. Since the ECIA's enactment, the DNRA has abandoned two land transfers in the state: a region in the Delmont Mountains with nickel deposits and another with lithium brine. R.

at 9. The DNRA halted the first transfer after an ECIA environmental impact study revealed it would destroy the habitat of the Delmont Wildcat and Blue-Winged Swift. *Id.* The second transfer was abandoned after another ECIA environmental impact study revealed a thirty-five percent likelihood that extraction activities would result in contamination to a nearby aquifer. R. at 9–10.

5. The DNRA has completed one transfer: granting mining rights to a large iron deposit. R. at 10. Unlike the earlier abandoned proposals, this transfer did not trigger environmental harms to endangered species or water sources. It nevertheless faced state-wide protests from special interest groups for teachers as well as historians. R. at 10.

6. As part of this exploration and pursuant to the ECIA, the DNRA commissioned an independent environmental report. It revealed that mining in the proposed areas could be accomplished with minimal negative effect to the rest of the state park. R. at 8. Unlike the earlier proposals, this transfer would not risk contamination of underground drinking sources, nor the destruction of endangered species' habitats. However, the report predicted with near certainty that Red Rock and its surrounding area would be destroyed by the mining. Current technology clears away land around the deposits by blasting rock. *Id.* Red Rock would be transformed into a water-filled quarry that would be too hazardous for the public to access. Greenfield Aff. ¶ 12. While Red Rock would almost certainly be unrecoverable, other parts of the transferred area could be reclaimed in twenty years. *Id.* Nonetheless, the state has ensured that those who currently participate in the equinox festivals along the Delmont River will be able to continue their traditions by simply relocating their celebrations five miles downriver. R. at 8.

7. The DNRA explored theoretical alternatives to extract the voluminous and precious ore, but found the earliest predicted use-date to be two decades away. Greenfield Aff. ¶ 15. Most importantly, none of these predicted technologies would avoid significant damage to Red Rock. *Id.*; R. at 8.

8. On March 1, 2024, the district court granted petitioner's motion for preliminary relief, holding that respondents' land transfer and the ECIA violated petitioner's rights to Free Exercise and Free Speech under the First Amendment. R. at 25, 31.

9. First, the court adopted petitioner's view that Red Rock is a traditional public forum. R. at 14, 17. It disagreed with respondent's argument that government sales and physical alterations of land need only be reasonable and viewpoint neutral. R. at 18. Consequently, the Court assessed whether the decision to close Red Rock satisfies strict scrutiny. Since it found that the defendants failed to demonstrate that the Red Rock transfer did meet the strict scrutiny analysis, the Court held that petitioner was likely to succeed on the merits of the Free Speech Claim.

10. As to petitioner's free exercise claim, the Court applied strict scrutiny after finding the transfer not generally applicable for two reasons. The transfer applied only to once piece of land, and the state had previously withdrawn from two land transfer agreements due to secular objections. R. at 28. The Court concluded that defendants lacked a compelling state interest for restricting the Montdel's religious exercise, thus finding petitioner was likely to succeed on the merits of their free exercise claim.

11. On November 1, 2024, the Fifteenth Circuit reversed the district court's grant of preliminary relief. It held Red Rock to be a nonpublic forum, concluding there was no need to analyze whether the closure was a permissible time, place, and manner restriction. R. at

42. Additionally, it declined to subject the land transfer decision to strict scrutiny given a lack of coercive prohibition on the petitioner's religious exercise. R. at 45. Stating that the facts in the case at hand were closely analogous to those in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, holding that the State of Delmont was entitled to manage its own land, and that doing so did not prohibit the Montdel's religious exercise. R. at 44. Thus, it held petitioner was unlikely to succeed on the merits. *Id.*

12. On January 5, 2025, this Court granted petitioner writ of certiorari. R. at 55.

SUMMARY OF ARGUMENT

This Court should affirm the Fifteenth Circuit's denial of preliminary relief. Petitioner advances a core mistake about states' authority to execute land transfers and to pass legislation effectuating such authority. Public land transfers for economic and environmental objectives cannot be equated to violations of First Amendment free speech and exercise.

A. As to its Free Exercise claim, petitioner must demonstrate a "prohibition" on their free exercise of religion through coercive restrictions. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988). Respondent's activity does not place a "prohibition" on petitioner's right to free exercise, as state land transfers have "no tendency to directly or indirectly coerce individuals into acting "contrary to their religious beliefs." *Id.* at 440. Nor do respondent's actions impose a penalty such as a fine or forfeiture of government benefits. Furthermore, because respondent's land transfer is an internal procedure executed pursuant to the ECIA's administrative protocol, the Free Exercise Clause does not apply. *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986).

As a neutral law of general applicability, respondent's land transfer satisfies rational basis. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 531 (1993). A law's lack of neutrality can be established if its object is to "infringe upon or restrict practices because of their

religious motivation." *Id.* at 533. Since the record unequivocally indicates that the land transfer's object is to achieve a "plethora" of state economic and environmental objectives, any incidental religious burdens placed on the Montdel are a consequence of religiously neutral motivations.

The land transfer also functions as a generally applicable government action with respect to the Montdel religion. The law does not invite the government to consider particular reasons for a religious person's conduct through a system of discretionary "individual exemptions." *Fulton v. City of Philadelphia*, 593 U.S. 522, 535–36 (2021). Neither does it prohibit religious conduct while permitting secular conduct that similarly undermines Delmont's environmental interests. *Id.*

Even if the Red Rock land transfer fails general applicability, the petitioner's claim fails to demonstrate a "substantial burden." Free Exercise claimants must make a "threshold showing" of "substantial burden" on their religious beliefs. *Firewalker-Fields v. Lee*, 58 F.4th 104, 114 n.2 (4th Cir. 2023). Here, petitioner does not face a substantial burden on their free exercise: There is neither coercive pressure, nor denial of "rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50.

B. As to petitioner's free speech claim, respondents also ask this Court to affirm. Red Rock is a nonpublic forum, making reasonableness the appropriate standard to evaluate respondent's land sale and ECIA. Even if this Court were to disagree and find Red Rock is a public forum, at most, the transfer and ECIA would merit intermediate scrutiny — never strict scrutiny. Respondent's sale and legislation easily clear both constitutionally required standards.

Red Rock is a nonpublic forum. Painted Bluff's collection of hills, forests, and cliffs were established for recreation, not expression. It bears greater similarity to the "special purpose" environments acknowledged in cases such as *Greer v. Spock*, 424 U.S. 828, 863–40 (1976), and *United States v. Kokinda*, 497 U.S. 720, 727 (1990), which collectively hold that publicly

accessible areas may still be nonpublic forums if they bear a special purpose or physical features which limit what the public can do in those spaces.

The Montdel themselves halted visits to Red Rock during the Great Depression and World War II, citing temporal circumstances that "made travel impossible." Highcliffe Aff. ¶ 11. But public forums, by definition, cannot be "financial[ly] . . . impossible" to access. *Id.* "[T]raditional public forums are defined by the objective characteristics of the property . . . such as whether the property has been 'devoted to assembly and debate.'" *Ark. Educ. Tel. Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (quoting *Perry Educ. Ass'n v. Perry Local Educs.' Ass'n*, 460 U.S. 37, 45 (1983)).

Additionally, Delmont's past inaction is immaterial for First Amendment forum analysis. Government inaction has never been held to create a public forum, much less in areas where the geographic and spatial characteristics of land make it impractical for expression.

Even if this Court were to hold Red Rock is a public forum, the transfer and legislation at issue are content neutral, making the proper maximum test intermediate scrutiny. *Turner Broad. Sys. v. FEC*, 512 U.S. 622 (1994). The ECIA and land transfer easily satisfy intermediate scrutiny. The ECIA is facially neutral, and there is no evidence that the DNRA sold the land to "restrict" Montdel expression. The sale was made for the purposes of satisfying two compelling and legitimate state interests: decreasing the State of Delmont's dependence on fossil fuels by expanding into mineral mining and economically aiding struggling counties. Greenfield Aff. ¶ 7. There is similarly no evidence of respondents imposing content-based restrictions for access to Red Rock once the land sale is complete. No one will be able to access the mining site, because the region will become surrounded by water and exploding rock. *Id.*; R. at 8.

Petitioner equates respondent's sale of public land to an impermissible government restriction on expressive activity. The two are nothing alike. Whereas land sales are a core state

function, regulations designed to "suppress, disadvantage, or impose differential burdens upon speech because of . . . content" are "presumptively invalid" and merit the most "exacting scrutiny." *Turner Broad. Sys.*, 512 U.S. at 642; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). While respondents' land transfer and legislation also meet that standard under *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015), it would be a grave error for this Court to place that standard upon such a critical and mundane administrative activity.

ARGUMENT

I. THE LAND TRANSFER AND ECIA, AS A NEUTRAL LAW OF GENERAL APPLICABILITY, DO NOT PROHIBIT PETITIONER'S FREE EXERCISE OF RELIGION.

A. The transfer of government-owned property does not burden petitioner's free exercise rights.

The Free Exercise Clause of the First Amendment holds that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U. S. Const. amend. I. Under the Supreme Court's free exercise framework, neutral laws of general applicability that incidentally burden religious free exercise are not subject to strict scrutiny to pass constitutional muster. *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 878–82 (1990). Consequently, strict scrutiny is triggered only if a party can demonstrate that a government action was either not neutral or generally applicable. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

Montdel United is required to demonstrate that its free exercise of religion is being prohibited through coercive restrictions that violate First Amendment protections. Since petitioner fails to make this showing of coercion, its free exercise rights are not being infringed.

1. The State of Delmont's proposed land transfer does not prohibit the free exercise of the Montdel's sincere religious beliefs.

It is undisputed that the petitioners' religious practices are sincere and that the destruction of Red Rock as a result of the government's land transfer will significantly impair the practice of their faith. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 713 (1981) (holding that courts should defer to claimants regarding subjective burdens on religion). However, the land transfer at issue does not implicate the protections of the First Amendment since the state does not coercively "prohibit" the practice of the Montdel religion.

In *Lyng v. Northwest Indian Cemetery Protective Association*, this Court held that individuals are "prohibit[ed]" from free exercise when the government "coerce[s]" "affected individuals . . . into violating their religious beliefs," or penalizes "religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. 439, 449 (1988). While the construction of a public road on government land would have incidentally impacted the Indian tribes' ability to practice their faith, this action was deemed to have no tendency to "coerce individuals into acting contrary to their religious beliefs." *Id.* at 450.

The building of a road on publicly owned land in *Lyng* and the transfer of Red Rock cannot be meaningfully distinguished. In both cases, the government action at issue would interfere significantly with the ability of persons to "pursue spiritual fulfillment according to their own religious beliefs." *Id.* at 449. However, just like the plaintiffs in *Lyng*, the Montdel are not coerced in any way to act contrary to their religious beliefs. Specifically, the petitioners are unable to identify any coercion directed at them, such as a fine or penalty. *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950) (holding that imprisonment, fines, injunctions, or taxes, could have a coercive effect upon the exercise of First Amendment rights). While mining activities risk

"destr[oying] . . . Red Rock and its surrounding area," the state has ensured that those who participate in the Montdel Observance and equinox festivals along the Delmont River can still enter state-owned land and continue to freely practice their religion by simply relocating "their celebrations an additional five miles" downriver. R. at 8, 26.

Additionally, Montdel United would further be precluded from asserting that the land transfer would pose indirect coercive pressures. *Lyng* recognized that indirect coercion or penalties on the free exercise of religion would be subject to scrutiny under the First Amendment. *Id.* at 450. However, the Court cited previous examples of indirectly coercive actions, such as the denial of government benefits "based solely" on the claimant's religious beliefs. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that a party's ineligibility for unemployment benefits, based solely on her refusal to violate the Sabbath, can be analogized to a fine imposed on Sabbath worship). Here, there is no evidence demonstrating that the Montdel were prevented from accessing any government benefits or coerced into acting "contrary to their religious beliefs." *Lyng*, 485 U.S. at 450. Thus, the challenged transfer lacks the necessary elements to qualify as a "prohibition" on the free exercise of religion. *Apache Stronghold v. United States*, 101 F.4th 1036, 1055 (9th Cir. 2024).

Constitutional free exercise protections apply to all citizens equally. It prevents one group from claiming a "veto" over a government land transaction that does not implicate the prohibition of religious free exercise. By seeking injunctive relief to prevent the land transfer, Montdel United is seeking not an "equal share of the rights," but rather a "religious servitude" that would abrogate the Delmont government's right to use its own land. *Lyng*, 485 U.S. at 452–53. There is no support for the proposition that the government's non-discriminatory use of its own property imposes a cognizable burden on one's religion. *See Apache,* 101 F.4th at 1050, 1052.

2. Montel United is not entitled to injunctive relief as the Free Exercise Clause does not require the Government to grant exemptions for internal procedures.

This Court has long held that while the Free Exercise Clause does not provide "an individual a right to dictate the conduct of the Government's internal procedures." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). For example, in *Bowen*, the Court concluded that the government was not required to make changes to its internal administrative procedures pertaining to the distribution of welfare benefits since "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* A government's internal procedures do not implicate free exercise concerns. *Id.* at 699–700.

The land in this case was transferred pursuant to the administrative steps outlined in the ECIA. R. at 6. Just like the use of Social Security numbers to provide welfare benefits in *Bowen*, Delmont's transfer of Red Rock is also an internal procedure outside the scope of Free Exercise Clause protections. Petitioners cannot "dictate . . . Government's internal affairs," including Delmont's management of its own property. *Bowen*, 476 U.S. at 699–700.

B. The ECIA is a neutral law of general applicability.

Neutral and generally applicable laws do not need to pass muster under strict scrutiny even if the law has an "incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. These laws only need to satisfy the rational basis test, which requires that laws be rationally related to a legitimate government interest. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). Since the land transfer was performed pursuant to a neutral law of general applicability, Delmont's action is only subject to rational basis review, a test that the state easily meets.

1. The land transfer functioned as a neutral government action with respect to the Montdel religion.

A law's lack of neutrality can be established if its object is to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. To determine the object of a law, it is often useful to begin with its text, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.*

The land transfer at issue was authorized pursuant to the ECIA, which permits the state to enter into land transfer agreements with private mining companies for the extraction of valuable minerals. R. at 6. The Red Rock transfer was approved specifically because the land's large lithium deposits could reduce the state's commitment to fossil fuel use, assist compliance with federal government mandates to use sustainable energy resources in defense contracting, and boost the local economy. R. at 7–9.

Therefore, the facts surrounding the Red Rock land transfer fail to demonstrate that Delmont facially targeted "religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534. This contrasts with the facts in *Lukumi*, where the express object of the Hialeah law, as evidenced by the statute's text, was to suppress the practice of the Santeria religion. *Id.* at 534, 538. Here, the land transfer's object is clearly to achieve the "plethora" of economic and environmental justifications put forth by the state. R. at 21–22. Any incidental religious burdens placed on the Montdel are a consequence of these religiously neutral motivations.

Additionally, the Governor's comments characterizing the equinox festival as a "nuisance" and his frustration with the ongoing cleanup after festival activities do not defeat the neutrality of the land transfer. Greenfield Aff. ¶ 9. Under *Arlington Heights v. Metropolitan Housing Development Corp.*, the object of a government action can also be determined by direct and

circumstantial evidence, including "legislative or administrative history . . . [and] contemporaneous statements made by . . . the decision-making body." 429 U.S. 252 (1977).

Thus, in *Lukumi*, the non-neutrality of the Hialeah law was established given the evidence of "significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion." 508 U.S. at 541. Similarly, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court likewise utilized the *Arlington Heights* framework to establish that the Commission had expressed impermissible hostility to sincere religious beliefs by analyzing various commissioners' statements. *Masterpiece*, 584 U.S. 617, 634 (2018) (holding that characterizing the petitioner's religious beliefs as "one of the most despicable pieces of rhetoric that people can use" defeats fair and neutral enforcement of Colorado's anti-discrimination law).

Applying the *Arlington Heights* framework to the Governor's comments fails to demonstrate any evidence of hostility towards religion. While the comments may demonstrate some level of indifference to the Montdel Observance, this is insufficient evidence to show that the land transfer was motivated by an animus or "impermissible hostility." *Id.* Such an indifference alone does not demonstrate that the object of the land transfer was to discriminate against the Montdel. *Lukumi*, 508 U.S. at 532. Therefore, the land transfer was a neutral government action.

2. The land transfer functioned as a generally applicable government action with respect to the Montdel religion.

Under *Smith*, laws burdening religious practice must be of general applicability to avoid strict scrutiny. 494 U.S. at 879–81. In *Fulton*, the Court outlined two different ways in which a government policy may fail general applicability. 593 U.S. at 533–34. First, "a law cannot invite the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* Second, "a law cannot prohibit religious conduct while

permitting [comparable] secular conduct that undermines the government's asserted interests in a similar way." *Id.* The *Fulton* Court held that Philadelphia's non-discrimination policy "invited the government to decide which reasons for not complying with the policy [we]re worthy of solicitude" at the "sole discretion" of the city's Commissioner. *Id.* at 537.

While the transfer in this case applies only to one piece of land, it remains generally applicable for several reasons. First, there are fundamental differences between the purely discretionary system of exemptions present in *Fulton* and the statutory scheme imposed by the ECIA. Though the DNRA had previously entered into, but subsequently withdrew from, land transfer agreements with two other mining companies, these decisions were not made "at the sole discretion" of any governmental authority. Instead, the withdrawals were determined by objective criteria put forth by the ECIA. *Roman Cath. Diocese v. Vullo*, 42 N.Y.3d 213, 227–28 (2024) (holding that an exception based on objective criteria does not fail general applicability).

Under the ECIA's statutory scheme, every land transfer is subject to an environmental impact study and the DNRA subsequently has the authority to decide whether to proceed with the transfer based on the results. R. at 6. Specifically, the first agreement was cancelled after the environmental impact study revealed that the extraction process would destroy the habitat of two endangered species. R. at 9–10. Similarly, the second transfer was cancelled after the environmental impact study indicated a roughly thirty-five percent risk of water contamination to a major aquifer. *Id.* Conversely, the environmental impact study for Red Rock concluded that the "broader environmental impact of the mining [would] be relatively minimal." R. at 8.

The decision to withdraw from these agreements was not a result of a discretionary or individualized determination but rather was made according to defined and objective ECIA procedures. *Vullo*, 42 N.Y.3d at 227. The fact that both cancelled transfers were exempted based

on objective criteria does not defeat the general applicability of the Red Rock land transfer. *See 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021), *rev'd on other grounds*, 600 U.S. 570 (2023) ("[A]n exemption is not 'individualized' simply because it contains express exceptions for objectively defined [criteria]."). Rather, appellate courts have held that only those disputes involving case-by-case discretionary exemptions are not generally applicable. *See Kane v. DeBlasio*, 19 F.4th 152, 169 (2d Cir. 2021) (holding that because an arbitration procedure for a religious accommodation was subject to an arbitrator's "substantial" discretionary review, the procedure failed general applicability.).

Moreover, Delmont's land transfer policy does not defeat *Fulton*'s second test for general applicability by restricting religious conduct while permitting comparable "secular conduct that undermines the government's asserted interests in a similar way." 593 U.S. at 534. While the district court held that Delmont "withdrew from transfer agreements due to secular objections while religious objections took a backseat" — thus defeating the ECIA's general applicability — this misunderstands the comparability of the different land transfer agreements. R. at 29.

In *Tandon v. Newsom*, this Court articulated that a government regulation is not generally applicable if it treats "any comparable secular activity more favorably than religious exercise," with comparability "judged against the asserted government interest . . . justif[ying] the regulation." 593 U.S. 61, 62 (2021). Particularly, comparability is concerned with the risks posed by the activity in question rather than the nature of the activity. *Id.* at 66. Under *Tandon*, the land transfers from which the state withdrew are not comparable with the Red Rock land transfer. The former transfer agreements posed a greater risk of environmental harm than the latter transfer, which only posed "minimal" environmental impacts. R. at 8. Since the government holds a legitimate interest in minimizing environmental degradation, the differences in the risks posed by

the transfer agreements render them incomparable. *See also We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 286 (2d Cir. 2021) (holding plaintiffs failed to show comparability between religious and medical exemptions for a state vaccine requirement, because the former's tendency to be "permanent . . . [and] more commonly sought" would be more harmful to legitimate state interest in "effective disease prevention"). Delmont's land transfer policy under the ECIA is thus generally applicable as it does not treat "comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 61–62.

C. Even assuming a failure of general applicability, the petitioner does not experience a "substantial burden."

Even if a government's action is not "neutral and generally applicable," free-exercise claimants must still make a "threshold showing" of "substantial burden. *Firewalker-Fields*, 58 F.4th at 114 n.2. The threshold showing is necessary because the Free Exercise Clause is only "implicated when a law or regulation imposes a substantial . . . burden on the litigant's religious practice." *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002).

The threshold showing has two elements. First, a claimant must show that he holds a sincere religious belief, and second, that the religious belief has been substantially burdened by the government action. *Williams v. Hansen*, 5 F.4th 1129, 1133 (10th Cir. 2021). A substantial burden, in turn, imposes an objective penalty for non-compliance, such as "pressur[ing] . . . [the claimant] to change his religious beliefs" or putting him "to a choice between . . . following his beliefs and losing some government benefit." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006).

Under *Lyng*, the disposition of government property imposes no substantial burden on religious exercise since it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, and does not deny them "an

equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. at 449–50. Even if the Red Rock land transfer is characterized as an explicitly gerrymandered parcel of land, thus failing general applicability, petitioner's free exercise claim would still fail since there is no substantial burden at issue. The Montdel do not face any coercive pressures, are not the target of any discriminatory policy, and are not being denied any "rights, benefits, and privileges enjoyed by other citizens." *Id.* Therefore, the challenged government action lacks the features that would qualify as a substantial burden on the free exercise of religion. *Apache*, 101 F.4th at 1055.

II. THE ECIA AND TRANSFER OF NONPUBLIC RED ROCK ARE NEUTRAL IN BOTH TEXT AND JUSTIFICATION, MAKING REASONABLENESS THE APPROPRIATE STANDARD FOR PETITIONER'S FREE SPEECH CLAIM.

A. Red Rock is a nonpublic forum.

This Court recognizes three kinds of government property: the traditional public forum, designated public forum, and nonpublic forum. In seminal language, the Court in *Hague v. Committee for Industrial Organization* defined the traditional public forum as an area "immemorially . . . held in trust" for "assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. 496, 515 (1939). By contrast, a designated public forum has been voluntarily and "generally opened to the public" by the government "for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The final category of property is reserved for areas the government has "preserve[d] . . . under its control" for its own lawful use. *USPS v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129–30 (1981). Nonpublic forums are thus spaces the government has never deliberately opened to general expressive activity, by formal decree or indiscriminate invitation. *E.g.*, *Perry*, 460 U.S. at 47 (holding an

intraschool mail system a nonpublic forum, because petitioner union never expressly "secured" permission to use it).

While streets, parks, and sidewalks are often identified by courts as the archetypal examples of traditional public forums, this Court has repeatedly emphasized that mere resemblance does not conclude the analysis. *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality) ("If [it] did, then *Greer v. Spock*, [a 6–2 decision that an Army training reservation was not a public forum] . . . would have been decided differently." (citing 424 U.S. 828 (1976))). Courts must instead interrogate the *nature* of the activities conducted in the purportedly public forum and whether these spaces have lent themselves to being "immemorially . . . held in [public] trust." *Perry*, 460 U.S. at 45 (quoting *Hague*, 307 U.S. at 515).

Even the archetypal street can be a nonpublic forum if it practically lacks features lending it to "[s]uch use of th[os]e streets [which] . . . ha[ve], from ancient times, been part of the privileges, immunities, rights, and liberties of citizens." *Hague*, 307 U.S. at 515. *See also Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 651 (1981) (summarizing certain model public forum features of a street that a temporary state fairground lacked, such as being "continually open, often uncongested, and . . . a necessary conduit in the daily affairs of a locality's citizens.") These qualities have also been carried forward for identifying contemporary public forums. This Court in 2017 identified internet and social media as among the "most important places . . . for exchange of views," today, due to their "relatively unlimited, low-cost capacity for communication of all kinds," astonishingly high volumes of use among American adults, and the ability to engage with and petition elected officials. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). "While in the past there may have been difficulty in identifying the most important [public] places (in a spatial sense)," it wrote, " today the answer is clear." *Id.*

1. Red Rock lacks all classic features of a public forum.

From *Hague*'s "immemorial" streets to *Packingham*'s digital public forums, three features have surfaced over a century of jurisprudence to distinguish the archetypal public forum: general and explicit state permission for public use, ease of at-will access for expressive and democratic activity, and place in America's tradition of civic exercise. *E.g.*, *Perry*, 460 U.S. at 47 (explaining why "selective" and even continued access could not render a forum public); *Packingham*, 582 U.S. at 104 (demarcating the internet and social media as among "the most important places [today] . . . for the exchange of views"). Red Rock fails to exhibit all three of these features.

Red Rock fails the first requirement of a public forum, because respondents have only ever explicitly set it aside for recreation, not general expression. Respondents established Painted Bluffs in 1930 as an area "offering the public opportunities for camping, hiking, and fishing along the Delmont River." R. 4. All the while "the Montdel . . . continued to perform their religious ceremonies at Red Rock in a pro forma matter, independent of the State Park Service." *Id.* As the Court discusses in *Kokinda*, even though a Postal Service had previously permitted activities like picketing and leafletting on its sidewalk, that was not enough to instantly transform the sidewalk into a public forum. 497 U.S. at 730 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)). Similarly, in *Perry*, plaintiff union's "unrestricted access" to a school's mail system "prior to [another competitor union's being] certifi[ed] as [the school employees'] exclusive representative" was "unpersuasive" for public forum analysis. 460 U.S. at 47–48. That is because "the government does not create a public forum [simply] by . . . *permitting* limited discourse." *Kokinda*, 497 U.S. at 730 (quoting *Cornelius*, 473 U.S. at 802) (second alteration in original). Instead, government must "intentionally open a nontraditional forum for public discourse.'" *Id.* For similar reasons, Delmont's past inaction is immaterial for First Amendment

forum analysis. Putting photos of the Montdel Observance on advertising campaigns for the state park, and licensing vendors to sell goods for a festival attended by anyone from "college students on spring break," to curious Observance onlookers, is not unrestricted permission. *See e.g.*, *Greer*, 424 U.S. at 851 (holding that a federal military training base was a nonpublic forum despite civilians "without any prior authorization . . . pass[ing] through it . . . at all times of the day and night," "eat[ing] at the base and freely talk[ing] with recruits," and riding public buses carrying both "civilian and military passengers" in and out each day (quoting Brennan, J. dissenting opinion)); *Kokinda*, 497 U.S. at 730 (holding a post office sidewalk is a nonpublic forum despite past instances of group picketing and soliciting); *Greenburgh*, 453 U.S. 114, 133–34 (same for mailboxes despite their conduciveness for mass outreach); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681–82 (1992) (same for airport terminals despite petitioner's efforts to compare them to train stations).

Second, Red Rock has proven historically impossible to access for even the Montdel during times of financial hardship. Red Rock is situated on one of the highest cliffs in a 100-mile state park, a location even the Montdel halted travel to when "financial hardship[] . . . made travel impossible." Highcliffe Aff. ¶¶ 4, 7, 11. Given the grave community risks posed to the Elders who fail to perform the Montdel Observance, it is difficult to imagine non-Montdel turning to the cliff as a regular site for speech and protest. *See id.* ¶ 9 ("[F]ailure" of the Elders "to sojourn to Red Rock and perform the prayer ritual . . . . is a transgression against the Creator and may result in the loss of Elder status within the Montdel tribe."). This is especially when people can access streets by simply opening the front door — or access an audience in the thousands, if not millions with the tap of a finger. For these reasons, petitioners are categorically wrong to compare accessing a

bluff to accessing a street. Bluffs have not been "from ancient times, . . . a part of the privileges, immunities, rights, and liberties of citizens." *Hague*, 307 U.S. at 515.

B. Rational basis is the appropriate level of scrutiny to apply to respondent's content neutral regulation and transfer of nonpublic Red Rock.

For the foregoing reasons, this Court has repeatedly rejected the tautology that all streets, sidewalks, and parks are traditional public forums, simply because they are streets, sidewalks, and parks. *Contra R. at* 2 (citing *United States v. Grace*, 461 U.S. 171, 108 (1983)). Whereas level of scrutiny adjusts according to whether a space is public or nonpublic, the baseline inquiry for any forum is whether respondent discriminates against the content of another's speech. This is because the chief evil the First Amendment was designed to prevent is the "presumptively unreasonable" "pick[ing] and choos[ing]" between speakers and subjects it likes and doesn't like. *Perry*, 460 U.S. at 55. Courts' scrutiny increases — and for good reason — when states regulate expression in *public* forums, because it is only in public forums that citizen speakers and their speech become "equally situated" in relation to one another. *Id.*

In contrast, when states regulate expression in a *nonpublic* forum, those regulations need only be viewpoint neutral and reasonably related "to the special purpose for which the property is used." *Id.* at 49 ("Implicit in the concept of the nonpublic forum is [government's] . . . right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.")

1. Respondent's land sale and ECIA are content neutral.

"The essence of . . . forbidden [content-based] censorship is content control." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972); *see also Carey v. Brown*, 447 U.S. 455, 460–62

(1980) (finding a public forum and applying strict scrutiny to a content-based ordinance prohibiting residential picketing, unless done around homes involved in labor disputes). Time and again, this Court has held that in *public* forums, government cannot "accord[] preferential treatment to the expression of views on one particular subject . . . [at the exclusion of] discussion of all other issues," without being subject to strict scrutiny. *Carey*, 447 U.S. at 461. In contrast, a rule is content neutral when it facially applies to all views and subjects. *Mosley*, 408 U.S. at 98–99.

Unlike this Court's application of strict scrutiny in both *Mosley* and *Carey* — to content-based restrictions of speech in public forums, the land sale and ECIA at issue are both content neutral government decisions, enacted in light of "activit[y most] compatible with [respondent's] intended purpose." *Perry*, 460 U.S. at 49. Thus, respondent's land transfer and ECIA "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 809 (collecting cases); *see also Minn. Voters All. v. Mansky*, 585 U.S. 1, 16 (2018) (citing *Cornelius*, 585 U.S. at 808–09). Respondents easily clear this burden.

This case lacks any "objective indication . . . that the provision's primary purpose is to restrict speech." *McCullen v. Coakley*, 573 U.S. 464, 502 (2014) (Scalia, J., concurring). The sale of a fourth of Painted Bluffs, much like the regulation in *McCullen*, specifies only location, and makes absolutely no reference to any form of content or speech. Rather, the instigating rationale is the presence of a deep and unprecedented reserve of lithium ore found around Red Rock — the largest known deposit in North America. Greenfield Aff. ¶ 8. Respondent only now seeks to move the festival further down the riverbank — five miles further than the one mile from which it is currently located — in the interest of efficiency and practicality given the expedited nature of the project. *Id.* ¶ 13; R. 8–9.

In short, neither the land transfer, nor the ECIA flow from state desire to curtail speech. The ECIA's animating purpose was to spur economic and environmental progress — specifically, to help reduce need for state reliance on fossil fuels, expand the state's commitment to clean energy, and take urgent steps to boost suffering local communities and economies. Greenfield Aff. ¶¶ 10–12, 16. Respondents have repeatedly reiterated these neutral and reasonable goals both through the legislation itself, *see, e.g.*, R. 2, 6, and in meetings with petitioners. *See* Highcliffe Aff. ¶14. It also has supplied the independent data, which objectively demonstrate how their regulation will achieve these goals. Two independent ECIA-mandated reports have laid out the expected economic benefits to neighboring counties as well as minimal environmental harms. It does not risk damaging the habitats of endangered species, local flora or fauna, nor risk water contamination, features the earlier transfers respondents abandoned, could not promise. *See* R. 8, 28–29. Respondents thus easily meet the settled and appropriate bar of reasonableness. They have identified the mining of lithium ore in Painted Bluffs as the best and most compatible way to pursue its neutral and legitimate state interests. *Perry*, 460 U.S. at 49. The ECIA does not single out the Montdel for censorship, nor does it permit sale of regions in Painted Bluffs to curb the Montdel's religious expression. Rather, the sale will render those regions of the recreational park inaccessible at the exclusion of all, because the extractive activities will alter the fundamental characteristics of the land itself. *See ISKCON*, 505 U.S. at 699 (Kennedy, J., concurring).

2. Even if this Court were to hold Red Rock is a public forum, the land transfer and ECIA would satisfy the appropriate standard of intermediate scrutiny required for content neutral state action.

Even if this Court were to find Red Rock is a public forum, this Court has repeatedly held that the appropriate standard to apply to content neutral activity is intermediate scrutiny, never

strict scrutiny. *Perry* , 460 U.S. at 45. Content neutral government regulation of speech in a public forum need only be a reasonable time, place, and manner restriction, leave open adequate alternatives for speech, and be narrowly tailored to achieve a government purpose. *Perry*, 460 U.S. at 45. Additionally, government has never been required to pursue the least restrictive alternative. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

Even under the most exacting scrutiny, respondents' land transfer and legislation at issue would still satisfy this unprecedented standard. As already outlined, respondent's transfer and regulation have been justified without reference to content or communicative impact: the transfer and ECIA are justified and described in terms of purely economic and environmental language, without a single mention of a desire to curtail religious observance or speech.

And just as in *Ward*, respondent's legislation and transfer of one fourth of Painted Bluff serves respondents' substantial interest by supporting struggling neighboring towns, advancing the state's mission to reduce reliance on fossil fuels by transitioning to lithium-ion batteries, and providing a substantial economic boost in the form of increased jobs — absent dangerous costs to the environment. R. 9. Respondents thus also satisfy the narrow tailoring requirement as outlined in *Williams-Yulee*, 575 U.S. 433, 435 (Narrowly tailored does "not [mean] 'perfectly tailored.'" (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992))). "Narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (alteration in original) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Again, respondent's land transfer and ECIA both clear that bar. The land transfer and ECIA constitute affirmative steps toward the practical realization of respondent's goals, which could not be attained absent the regulation at bar. Respondents' regulation also leaves ample alternative channels for expression: Festival-goers can

still visit Painted Bluffs, just five miles further down river. While the Montdel will no longer be able to perform their Observance on the site of Red Rock, for the same reason that every other individual will be unable to — the area will become surrounded by water and a site of exploding rock — the Montdel remain free to chart the future of their religious practice and aspirations, as they did in 1952, when they first reignited the Observance. Highcliffe Aff. ¶ 4.

Most importantly, the interests at issue are also compelling under *Williams-Yulee*. Just as public perception of judicial integrity is "a state interest of the highest order," state power to transfer land and mining rights for reasonable and content-neutral purposes is of paramount importance. 575 U.S. at 433 (citation omitted). As this Court has emphasized, "validity" of respondent's chosen "regulations does not turn on a judge's" — nor petitioner's — "agreement with . . . the most appropriate method for promoting significant government interests,' or the degree to which those interests should be promoted." *Albertini*, 472 U.S. at 689 (quoting *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 296–97 (1984)). The sale of Red Rock was designed to minimize environmental impact to the park as a whole, and to secure desperately needed economic benefits such as jobs for the Park's struggling neighboring counties — among the state's most economically depressed. Greenfield Aff. ¶¶ 10–11. This instant agreement and legislation allows the State of Delmont to extract the most amount of minerals, while containing the effects of the mining for minimal impact on the rest of the Park. *Id.* ¶¶ 10, 12.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

TEAM 12
Counsel for Respondent

APPENDIX

The relevant provisions of the State of Delmont Energy and Conservation Independence Act ("ECIA") are described in the Record as follows:

> [E]nacted in early 2022 . . . authorizes the State of Delmont to enter into agreements with private mining companies for the transfer of land to facilitate the extraction of precious minerals. Under this legislation, a substantial portion of the Painted Bluffs State Park, including Red Rock—has been designated for transfer.

R. 2.

> The transfers are managed by the Delmont Natural Resources Agency [DNRA]. . ., which operates under the authority granted by the [legislation].
>
> Under the provisions of the law, all land transfers must be independently appraised to ensure equivalent value. Furthermore, each transfer is subject to both independent environmental impact studies and economic impact studies. Upon completion of these studies, the DNRA has sixty days to decide whether to proceed with the transfer.

R. 6.

CERTIFICATE OF COMPLIANCE

As required by Rule III(C)(3) of the Official Rules of the 2025 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, Counsel for Respondents (Team #12) certify:

1. The work product contained in all copies of the foregoing brief is the exclusive work product of Team #12;
2. Team #12 has complied fully with its law school's governing honor code; and
3. Team #12 has complied with all Competition Rules.

Respectfully submitted,

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