No. 24-CV-1982

IN THE SUPREME COURT OF THE UNITED STATES

MONTDEL UNITED,

Petitioner,

v.

STATE OF DELMONT and
DELMONT NATURAL RESOURCES AGENCY,

Respondent.

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

BRIEF FOR PETITIONER

Team 15
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether Respondents transfer of Red Rock to a private mining company violates Petitioners First Amendment rights to free speech?

II. Whether Respondents transfer of Red Rock to a private mining company violates Petitioners First Amendment rights to free exercise?

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The Opinion of the United States District Court for the District of Delmont, Western Division, may be found at *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (D. Delmont 2024). R. at 1-32. The Opinion of the United States Court of Appeals for the Fifteenth Circuit may be found at *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (15th Cir. 2024). R. at 33-45.

JURISDICTION

The Opinion of the Fifteenth Circuit was filed on November 1, 2024. This Court's order granting a writ of certiorari to review the Fifteenth Circuit's decision was issued on January 5, 2025. R. at 55. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

I. Statement of Facts

The Montdel people, an Indigenous Native American group, represented by Montdel United ("Petitioner") maintains a profound connection to the area now known as the state of Delmont, specifically the Red Rock region of what is now known as Painted Bluffs State Park. R. at 2. The Montdel people trace their presence in the region back to 400 A.D., with Red Rock being a central site for their religious practices and cultural identity. *Id*. The Montdel people's religious practices include rituals performed at Red Rock during the fall and spring equinoxes and summer and winter solstices. R. at 3. These rituals have been uninterrupted since before human history, except for during the World Wars and the Great Depression, due, understandably, to economic hardships, wartime obligations, and other challenges. R. at 4. Further, these rituals, according to

the Montdel people's religious doctrine, are the only way to reach their Creator, and any deviation from this practice will incur the Creator's wrath. R. at 3.

The area now known as Painted Bluffs State Park was acquired by the state of Delmont in 1930 with the intent to preserve the natural beauty of the area. R. at 4. The state has not in any way impeded the Montdel's religious observances since that time. *Id*. Additionally, the state has used these practices to promote the park since its inception, stating that the Montdel have been "part of the land for centuries" and that their "supplications to the Almighty in the Painted Bluffs are part of a legacy that the state proudly cherishes." R. at 4, 5.

In 1950, Delmont residents of Montdel heritage sought to regularize and formalize the religious practices at Red Rock as the "Montdel Observance" by recruiting members of other Native American tribes into which the Montdel people had assimilated and reinitiating formal pilgrimages to Red Rock at the traditionally designated times. R. at 5. Since 1952, the Montdel Observance has been conducted as formal rituals four times a year and has evolved into a festival-like event. *Id*. In the past twenty years, due to the popularity of these events, the state has issued vendor's licenses for food, music, and merchandise. R. at 5, 6.

However, three years ago the government of Delmont initiated a transformative agenda aimed at promoting the mining of lithium, nickel, iron, and copper to reduce fossil fuel dependency and invigorate the state's economy. R. at 6. To do this, the Delmont government enacted the Energy and Conservation Independence Act ("ECIA") authorizing the state to enter land transfer agreements with private mining companies, with transfers managed by the Delmont Natural Resources Agency ("DNRA"). *Id*. Unfortunately, a geological study conducted twenty years ago revealed that the deposits in Painted Bluffs State Park, specifically the Red Rock area, represent the largest lithium deposit ever discovered in North America. Thus, ever since, mining companies

have sought the rights to deposit these minerals. R. at 7. In response to this, Priscilla Highcliffe established a non-profit organization named "Montdel United" in 2016 to oppose the transfer of Painted Bluffs and to safeguard the Montdel Observance's religious site and ritual practices. *Id.*

In January of 2023, the DNRA entered an agreement to transfer one-fourth of the park, including the Red Rock area, to a private mining company called Delmont Mining Company. R. at 7. An environmental impact study conducted in response to this agreement concluded that the mining operations will result in the destruction of Red Rock and its surrounding areas, turning them into a water-filled quarry that will be too hazardous for visitation. R. at 8. While other sections of Painted Bluffs could be reclaimed approximately twenty years from now, reclamation of Red Rock would never be feasible. *Id.* The study did also explore alternative mining technologies that would be able to mitigate the damage to Red Rock, but these will not be feasible for another twenty years. R. at 9.

Thus, the DNRA approved the land transfer citing an economic boost to the state, the non-viability of the alternative mining technologies, and the state's commitment to reducing fossil fuel use through lithium-ion batteries. R. at 9. The state plans to commence the blasting and clearing process immediately. *Id.*

II. Procedural History

After the DNRA's final approval of the transfer, Petitioner sought a temporary restraining order and injunctive relief in the District Court for the District of Delmont Western Division. R. at 10. Petitioner's stated relief was to stop the land transfer due to its violation of the group's free speech and free exercise rights under the First Amendment. *Id.* The temporary restraining order was denied, and on March 1, 2024, the preliminary injunction was granted. R. at 32. On November 1, 2024, the Fifteenth Circuit reversed the judgment of the district court and denied the preliminary

injunction. R. at 45. Petitioner appealed the Fifteenth's Circuit's ruling, and this Court granted certiorari to address "(1) whether the state of Delmont's ECIA and subsequent transfer of Red Rock violates Petitioner's First Amendment Free Exercise rights, and (2) whether the ECIA and subsequent transfer of Red Rock violate Petitioner's First Amendment Free Speech rights." R. at 54.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Fifteenth Circuit and uphold the District Court's finding that Red Rock is a traditional public forum, and its proposed sale is not a valid, time, and manner restriction, violating Petitioner's First Amendment Free Speech rights.

This Court should find that Red Rock is a traditional public forum because, for centuries, it has been used for the purpose of assembly and free expression; there are no physical characteristics distinguishing it from the rest of the park as a non-public forum; and its history and tradition establish that it has been treated as a traditional public forum since before the State of Delmont existed.

Additionally, Respondents fail to provide evidence that alternatives that would not result in a complete destruction of the forum would not serve their goals. As such, the proposed sale is not narrowly tailored to their significant government interests. Further, the proposed sale cuts Petitioners off from their intended audience entirely and no comparable alternative exists, so the proposed sale does not provide an ample alternative for communication of the information. Therefore, this Court should find that Red Rock's proposed sale is not a valid time, place and manner restriction.

This Court should reverse the decision of the Fifteenth Circuit because the court erred in holding that there was no coercive prohibition of religious exercise. The Fifteenth Circuit erred in relying on *Lyng* to find Petitioners cannot state a cognizable Free Exercise claim. Respondents

substantially burden religious practices under this land transfer. Respondents prohibition of religious practice was not an "incidental effect" of legal disposition of government property but indirect coercion by selective application of waivers adjudicated on their merits.

Lastly, the ECIA is not generally applicable to determine strict scrutiny because it does not treat all waiver applicants equally and is not neutral in determining that Petitioners did not qualify for exemption when secular interests were granted waivers under similar circumstances. The State interests are not narrowly tailored, and do not exhibit a compelling interest for denying exemption of this particular transfer because they show reducing fossil fuel consumption is not a top priority when they allow objections for mineral mining to curtail their stated purpose.

ARGUMENT

I. THE FIFTEENTH CIRCUIT IMPROPERLY HELD THAT THE SALE OF RED ROCK DOES NOT VIOLATE PETITIONERS CONSTITUTIONAL RIGHTS TO FREE SPEECH.

In considering whether Respondents may restrict Petitioners access to Red Rock, the Court considers (1) whether the activity is "protected by the First Amendment"; (2) "the nature of the forum"; and (3) whether the government's "justifications for exclusion from the relevant forum satisfy the requisite standard." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 797 (1985). The parties dispute the nature of the forum and the government's justifications for exclusion in this case.

A. Red Rock is a traditional public forum.

When reviewing cases that involve the right to free speech on public property, the Court must first identify the type of forum in question in order to determine the appropriate level of scrutiny to apply to the regulations involved. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 44-46 (1983). The Supreme Court has identified three categories of fora: traditional public

forums, designated public forums, and non-public forums. *Id.* at 45. Traditional public forums consist of places such as "streets and parks which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id*. (quoting *Hague v. CIO*, 307 U.S. 496 (1939)). As a result, "parks generally are considered, without more, to be public forums." *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1199 (9th Cir. 2003) (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)) (internal quotation marks omitted). In these forums, content-based regulations will be subject to strict scrutiny while content-neutral regulations will be subject to intermediate scrutiny. *Perry*, 460 U.S. at 45. The second category are designated public forums which consist of "public property which the state has opened for use by the public as a place for expressive activity." *Id*. Regulations of such property are subject to the same constraints as those that apply to a traditional public forum. *Id*. at 45-46. Lastly, the third category are non-public forums. Non-public forums are property which do not fit in either of the first two categories because they are not a forum for public communication by tradition or designation. *Id*. at 46. Government regulation of non-public fora need only be reasonable so long as the regulation is "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id*.

At issue before this Court is which fora category Red Rock falls into. While there is no definitive test for determining when a traditional public forum exists, courts often emphasize the following factors:

> 1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; 2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area; and 3) traditional or historic use of both the property in question and other similar properties.

ACLU, 333 F.3d at 1100-01 (internal citations omitted); see, *United States v. Marcavage*, 609 F.3d 264, 275 (3d Cir. 2010); *Bowman v. White*, 444 F.3d 967, 978 (8th Cir. 2006); *Parks v. City of*

Columbus, 395 F.3d 643, 648-49 (6th Cir. 2005). These factors reflect two underlying considerations: "First, and most significantly, there is a common concern for the compatibility of the uses of the forum with expressive activity…. Secondly, the case law demonstrates a commitment by the courts to guarding speakers' reasonable expectations that their speech will be protected." *ACLU*, 333 F.3d at 1100; *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *Grace*, 461 U.S. at 177.

First, courts consider the use and purpose of a property. As noted by the Fifteenth Circuit, a property does not become a traditional public forum merely because it is called a "park." Nor does a property become a traditional public forum because it is a "publicly owned area[] in which communication could or might take place." *State v. Ball*, 260 Conn. 275, 285 (2002) (citing *Hague*, 307 U.S. at 515). Rather, a property is deemed a traditional public forum because it has actually been used for the "purpose[] of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45 (quoting *Hague*, 307 U.S. at 515).

Here, Red Rock has undoubtedly been used in such capacity as the Montdel people's religious practices have, for centuries, revolved around Red Rock. R. at 3. Over the years, the rituals at Red Rock have grown and evolved into festival-like events with music, food, and merchandise. R. at 5-6. Thus, to say that Red Rock is an area which has only been visited "sporadically" is a mischaracterization not supported by the facts. R. at 38.

In *Bloedorn v. Grube*, the Eleventh Circuit held that a university's campus was a limited public forum despite possessing "many of the characteristics of a public forum." 631 F.3d 1218, 1233 (11th Cir. 2011). The court could not categorize the campus as a traditional public forum because its primary purpose was education, not to serve as a space for general public expression and assembly. *Id.* at 1234. Similarly, in *Oberwetter v. Hilliard*, the court held that the interior of

the Jefferson Memorial was a non-public forum because it was not open to free expression. 639 F.3d 545, 551-52 (D.C. Cir. 2011). The Memorial has a "solemn commemorative purpose" of honoring Thomas Jefferson, making it "incompatible with the full range of free expression that is permitted in public forums." *Id*.

Here, Red Rock is distinguishable from both *Bloedorn* and *Oberwetter*. Red Rock serves no specified purpose which would limit the public's access or the expression permitted on its premises.

Next, under a proper forum analysis, courts look at the property's "historic use as a public forum and whether it is part of the class of property which, by history and tradition, has been treated as a public forum." *ACLU*, 333 F.3d at 1103.

Red Rock is within the class of property historically classified as a traditional public forum as it is located within a park. *United States v. Grace*, 461 U.S. 171, 177 (1983) ("public places historically associated with the free exercise of expressive activities, such as…parks, are considered, without more, to be public forums."). Further, the Supreme Court and lower federal courts have found sections within public forums to be "one and the same with the larger, undisputed public forum in which they exist." *Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir. 1993), disapproved on other grounds by *Van Arnam v. Gen. Servs. Admin*., 332 F. Supp. 2d 376 (D. Mass. 2004); *see Naturist Society v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir.1992) (held that because parks are traditional public forums, beach area inside of larger park is a public forum).

Further, not only is Red Rock within the class historically treated as a public forum, but Red Rock has *actually* been used and recognized as such by Respondents. While Petitioners concede there were lapses during the World Wars and the Great Depression, according to Montdel oral histories, the rituals have been otherwise uninterrupted since before recorded history and have

consistently taken place at Red Rock. R. at 3. This immemorial heritage was publicly acknowledged by former Delmont Governor at the parks opening in 1930, where he stated that the Montdel people have been "part of the land for centuries before there was ever a thought of such a thing as Delmont or even America[.] Their supplications to the Almighty in the Painted Bluffs are part of a legacy that the state proudly cherishes." R. at 4-5.

Lastly, courts consider a property's physical characteristics. *Bloedorn v. Grube*, 631 F.3d 1218, 1233 (11th Cir. 2011).

In *United States v. Grace*, the Supreme Court considered whether the "public sidewalks surrounding the [United States Supreme] Court building" were traditional public forums. 461 U.S. 171, 178 (1983). The Court ultimately found that they were, noting that the sidewalks were "indistinguishable from any other sidewalks in Washington, D.C.," and that there was "no separation, no fence, and no indication whatever to persons stepping from the street…that they have entered some special type of enclave." *Id*. at 179-80. Accordingly, the Court explained there was "no reason why [these sidewalks] should be treated any differently" from typical public sidewalks, which are "considered, generally without further inquiry, to be public forum property." *Ball v. City of Lincoln, Nebraska*, 870 F.3d 722, 731 (8th Cir. 2017) (quoting Grace, 461 U.S. at 179).

Courts continue to use the standard articulated in *Grace* when considering a property's physical characteristics. The Ninth Circuit in *Camenzind v. California Exposition & State Fair*, held that an enclosed portion of a state fairground could not be characterized as a traditional public forum because public access to it was not free; the area "remained locked and inaccessible for most of the year"; the public "had to pass through security checkpoint and purchase ticket to gain

entry[]"; and the area was "clearly marked by fencing surrounding it." 84 F.4th 1102, 1109 (9th Cir. 2023).

Here, Red Rock can be likened to *Grace* because Red Rock is "indistinguishable" from the rest of Painted Bluff. 461 U.S. 171, 179 (1983). Conversely, Red Rock is clearly distinguishable from *Camenzind* because Red Rock possesses no physical characteristics differentiating it from the rest of the park as a non-public forum; there is no separation, fence, or boundary signaling that Red Rock is a distinct area within the park. Further, Red Rock is open to the public every day of the year without cost.

B. The proposed sale of Red Rock does not constitute a valid time, place, and manner restriction of a traditional public forum because the sale is not narrowly tailored and does not leave open ample channels of communication.

As Red Rock constitutes a traditional public forum, speech may only be subject to time, place, and manner restrictions. While Respondents argue that the fact that the closure is due to a sale transforms the character of the closure of a traditional public forum, and thus only requires that the closure be reasonable and viewpoint neutral, this Court should find as precedence has that the government "may not close a traditional public forum to expressive activity altogether." *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 493 (9th Cir. 2015). Here, a sale of Red Rock to a private mining company would indeed be closing a traditional public forum to all expressive activity. Were the fact that the closure of Red Rock results from its sale dispositive, the idea of "traditional public forum(s)" would cease to exist entirely as any such forum could effectively be closed by sale at will without a substantial justification.

Therefore, when the government maintains property which has been used as a traditional public forum for the expression of opinions, the government is required to accommodate all speakers and may only restrict the time, manner, and place of speech. *Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005). Such restrictions must be justified without reference to

the content of the regulated speech, narrowly tailored to serve a significant government interest, and leave open ample channels for communication of the information. *Ward v. Rock Against Racism*, 491 U. S., 781, 791 (1989).

1. Petitioners concede that the proposed sale of Red Rock is not related to the content of Petitioner's speech.

Beginning with content neutrality, the principal inquiry, in speech cases generally and in time, place, or manner cases particularly, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Ward*, 491 U.S. at 781. Thus, a law that is designed to serve purposes unrelated to the content of protected speech is deemed content neutral even if there is an adverse effect on certain types of speech. *McCullen v. Coakley*, 573 F. Supp. 2d 382, 403 (D. Mass. 2008), aff'd, 571 F.3d 167 (1st Cir. 2009). Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 781 (citing *Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984)).

In *Ward*, a city ordinance regulating sound amplification in Central Park was justified by the need to avoid intrusion by sound pollution into surrounding residential areas and other areas of the park. There, the Court held that this justification had nothing to do with content.

Here, the provided justifications for the sale are not related to the content of the Old Observer's speech and the justifications would exist whether the Montdel Observance occurred at this site or not. Petitioners do note, however, that Respondents themselves have called the Montdel Observance a "nuisance" that should "not be a cause for worry" in deciding whether to move forward with the sale. Greenfield Aff. ¶ 9. Thus, while Petitioners do not argue viewpoint discrimination, they draw the Court's attention to the hostility and indifference shown to the

Montdel people when making the decision to sell. Nonetheless, Petitioner concedes that the sale is content-neutral and intermediate scrutiny will apply.

2. The proposed sale of Red Rock is not narrowly tailored because it burdens more speech than necessary to achieve its goals and fails to provide evidence that alternatives would be ineffective in achieving said goals.

Next, the proposed sale must be narrowly tailored to Respondents' cited significant government interest. This does not require that the government use the least restrictive means necessary, but that "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). This regulation, however, may not burden substantially more speech than is necessary to further the government's interest. In other words, the government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. *Ward*, 491 U.S. at 799.

Respondents cite three potential interests: the adoption of fossil fuel alternatives amid an expanding climate crisis demanding the increased production and use of electric alternatives to gas powered automobiles, an economic boom for the state of Delmont, and compliance with a federal mandate demanding the use of sustainable energy in defense contracts. R. at 9.

While these interests may be significant, intermediate scrutiny does require the government to present actual evidence that a speech restriction does not burden more speech than necessary. *Reynolds v. Middleton*, 779 F.3d 222, 228 (4th Cir. 2015). In *McCulle*n, buffer zones were employed around an abortion clinic to keep people from handing leaflets to people entering the clinic. The Court found that although the buffer zones did serve the recognized interest of public safety, the absence of evidence from the state that the buffer zones did not burden substantially more speech than necessary resulted in a finding that the zones were not narrowly tailored.

Additionally, the court held that to 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. *McCullen*, 573 F. Supp. 2d at 495.

Here, Respondents fail to provide evidence that the sale of Red Rock is narrowly tailored to their asserted interests or that an alternative measure would not achieve said interests.

In regard to Respondents' first justification, while mining in this area may help produce more lithium batteries for electric cars, the climate crisis will not be solved or even slightly affected by this specific mining site. Respondents fail to demonstrate how the means, will achieve the goal of solving the climate crisis. Additionally, Respondents gloss over the significant destruction that mining will cause to the earth and what negative effects this might have on the planet. The issue is too broad for this solution to be narrowly tailored to directly furthering it, resulting in a substantial portion of the burden on speech not serving to advance this goal.

Addressing Respondents' second justification, no evidence has been provided affirmatively showing that an economic "boom" to the state could not be achieved without destroying this forum. While the transfer "could" result in economic benefits, Alex Greenfield states that a decline in tourism will also result that this boom will "likely" balance out, showing that any effect on the economy comes tit for tat. Greenfield Aff. ¶ 11. If the goal is invigorating the economy, one would suppose the best way to do so would be to add industry that does not require stifling another. Thus, Respondents fail to demonstrate that an alternative means to stimulating the economy would ineffectively foster their ends, just that the chosen means align better with their personal goals.

Finally, Respondents cite a federal mandate to produce ion batteries to stay competitive in defense production. The mandate does not require Delmont to mine Red Rock specifically, nor does it provide a specific number of batteries to be produced. Clearly the state has numerous mineral deposits under it, as shown by the fact that at least two other mining contracts have been cancelled. While a reasoning is being given, narrow tailoring requires demonstrating that alternative measures that burden substantially less speech would fail to achieve the government's interests. Here, that demonstration has not been provided.

Therefore, because Respondents' justifications fail to provide evidence that alternative measures to complete destruction of a traditional public forum would ineffectively achieve their goals, the proposed sale is not narrowly tailored and burdens more speech than necessary. In fact, the proposed sale burdens all speech in the area as it renders the area completely inaccessible. Narrow tailoring requires showing that a solution is justified directly by a problem, such as in *Ward*, not that a solution is justified by whatever sticks.

3. The proposed sale of Red Rock does not leave open ample alternative channels of communication because the suggested alternative cuts off Montdel's intended audience, and no other area is comparable to Red Rock.

Lastly, intermediate scrutiny for time, place, and manner restrictions requires that the state "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. Although speakers are not entitled to their best means of communication, *Phelps–Roper v. Strickland*, 539 F.3d 356, 372 (6th Cir. 2008), and the government is not required to provide "perfect substitutes", *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 101 (2d Cir. 2006), an alternative is not ample if the speaker is not permitted to reach the intended audience. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990).

In *Bay Area*, the court held that a 75-yard security zone rendered plaintiff's demonstration completely ineffective, and while there was an alternative to their demonstration, that alternative made plaintiff's intended audience not accessible. Therefore, the alternative was not ample. *See Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 674 (N.D. III. 1976) (parade route through black neighborhood not constitutional alternative to route through white neighborhood when intended audience was white).

Here, while Respondents are suggesting an alternative to Red Rock five miles away for the Montdel to continue their religious practices, the Montdel believe that they can only access their Creator through ceremonial practices at Red Rock, and any deviation will incur their Creator's wrath. R. at 3. Thus, the intended audience, their Creator, would be completely cut off and this alternative is not ample. As noted in *Chabad of S. Ohio v. City of Cincinnati*, when a specific site is unique with no other areas that are comparable, an ample alternative channel of communication is not available to plaintiffs. 233 F. Supp. 2d 975, 986 (S.D. Ohio 2002). Red Rock is unique as a geological monument and is unique to the Montdel people as they have used the site since before recorded history to reach their Creator. No other area, whether it be five miles or fifty-five miles from Red Rock, can compare. Therefore, the proposed sale fails to leave open ample alternative channels of communication and violates Petitioner's First Amendment Right to Free Speech.

Red Rock is a traditional public forum because it is used for the purpose of assembly and free expression; there are no boundaries or other physical characteristics distinguishing it from the rest of the park as a non-public forum; and its history and tradition establish that it has been treated as a traditional public forum. Because relevant case law and precedent compel the conclusion that Red Rock is a traditional public forum, speech may only be subject to time, place, and manner restrictions. Then, the proposed sale of Red Rock is not a valid time, place, and manner restriction

on the Montdel people's First Amendment Free Speech right because it is not narrowly tailored to serve a significant government interest and fails to leave open ample alternative channels of communication. Therefore, a preliminary injunction to stop the sale is appropriate.

II. THE FIFTEENTH CIRCUIT IMPROPERLY HELD THAT RESPONDENTS DID NOT INFRINGE UPON PETITIONERS' CONSTITUTIONAL RIGHT TO THE FREE EXERCISE OF RELIGION.

Further, an injunction is appropriate because the ECIA, the subsequent transfer of Red Rock to a private mining company, and the ensuing mining activities at Painted Bluffs State Park infringe Petitioners' Free Exercise rights under the First Amendment.

The Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 450-51 (2017) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). A "religious belief need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Whether a belief is a religious one is not a question of judicial perception. *Id*. Rather, a Free Exercise inquiry "asks whether [the] government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989). Laws or resulting conduct found not to be neutral or generally applicable are subject to strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 522 (1993).

The ECIA and subsequent land transfer substantially burden Petitioners' free exercise of religion. Respondents substantially burden religious practices under this land transfer when coercively prohibiting Petitioners from religious practice by unequal application of ECIA waivers,

resulting in the imminent destruction of Red Rock, a site of sacred importance central to their religious practices. This has placed a substantial burden on the Montdel Observance, and government discretion in adjudicating the merits of objections to land transfer holds the ECIA not generally applicable or neutral in its application.

Accordingly, regulations under the ECIA must pass strict scrutiny standards. The State's interests in reducing fossil fuel use and invigorating its economy are not narrowly tailored to serve a compelling interest because the government uses discretion to determine the merits of waiver requests, granting them for secular purposes independent of the ECIA's mission.

A. The Fifteenth Circuit erred in relying on *Lyng* because indirect coercion prohibiting religious exercise does not produce incidental effects.

Respondents substantially burdened religious exercise when they prohibited Petitioners' free exercise by using discretion to adjudicate the merits of waiver requests. The Fifteenth Circuit incorrectly held that *Lyng* controls because *Lyng* only analyzes "incidental effects of government programs but which have no tendency to coerce individuals into acting contrary to their religious beliefs," 485 U.S. at 450. Distinguishing facts in the present case establish the substantial burden to Petitioners is not an "incidental effect" of State law; rather, it resulted from State discrimination coercing prohibition of religious practice while exempting secular requests.

In *Lyng*, the United States Forest Services Department permitted plans to harvest timber and begin road construction to create a 75-mile road. 485 U.S. at 442. The road in question went through Chimney Rock in the Six Rivers National Forest, an area historically used for religious purposes by multiple native tribes and an "integral and indispensable part of Indian religious conceptualization and practice." *Id*. Forest Services commissioned a study which found that construction along any available routes would cause "serious and irreparable damage" to these sacred areas. *Id*. at 442. The route ultimately chosen was carefully considered and as far removed

from all religious sites as possible. *Id*. at 443. In executing this plan, the Court recognized that Forest Services minimized disturbance as much as possible. *Id*. at 454.

The Court in *Lyng* determined that the "crucial word in the constitutional text is 'prohibit'" and that an incidental effect on religious practice with "no tendency to coerce individuals into acting contrary to their religious beliefs" does not "prohibit" the free exercise of religion and does not violate the First Amendment. *Id*. at 450-51. The Court noted that any existing rights of Petitioners in the land did not "divest the Government of its right to use what is, after all, its land." *Id*. at 453. (quoting *Bowen v. Roy*, 476 U.S. 693, 724-27 (1986)). The Court acknowledged, however, that its holding does not account for indirect coercion, which the Supreme Court has "repeatedly" held is subject to scrutiny under the First Amendment. 485 U.S. at 450. *Lyng* emphasized that "[t]he Constitution does not permit the government to discriminate against religions that treat particular physical sites as sacred." *Id*. at 453.

The present facts require the Court to follow *Fulton* and the line of cases holding that a law is a substantial burden infringing First Amendment rights when the "government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." 593 U.S. 522 at 533; *Church of Lukumi*, 508 U.S. at 533; see *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617 (2018) (holding that a law must be applied neutrally toward religion and the Commission failed to do so when the government had a role in deciding whether the religious-based objection was legitimate or illegitimate).

Here, Petitioners were indirectly coerced to choose between violating their religious beliefs or foregoing religion altogether. The *Lyng* Court was not tasked with deciding a case involving government coercion or discrimination. In *Lyng*, the disposition of government land was made in the best interests of the government's purpose without any discrimination towards Petitioners'

religious beliefs. 485 U.S. at 450-51. There, the State did everything possible to minimize the impact of construction on religious activities, *Id*. at 454, while here, Respondents made no concessions to Petitioners after exhausting all potential administrative remedies. Conversely to *Lyng*, this Court is tasked with determining whether Respondents violated the free exercise rights of Petitioners when denying waiver on the merits of religious burden. Respondents implemented a system to choose causes they deem worthy of exemption from mining, waiving two land transfers for secular interests while not finding the religious exercise worthy under similar circumstances. Furthermore, the DNRA denied exemption at the governor's assurance, who called the Montdel Observance a "nuisance" and expressed "his frustration with the ongoing cleanup after festival activities." Greenfield Aff. ¶ 9. The *Lyng* Court acknowledges the Constitution does not allow the government to "discriminate against religions that treat particular physical sites as sacred." *Id.* at 453. The *Lyng* holding explicitly denies controlling effect over discrimination cases and is not binding on this Court.

Respondents prohibited the free exercise of religion by using discretion to adjudicate the merits of waiver requests. The Supreme Court's holding in *Lyng* is limited to the incidental effects of government land disposition, and therefore, this Court should not rely on its decision to dictate the outcome here.

B. The ECIA and subsequent land transfer are not neutral nor generally applicable and substantially burden Petitioners' free exercise rights.

The ECIA is not generally applicable because the DNRA adjudicates land transfer waivers on the merits of a contester's justifications, exempting secular interests twice but denying Petitioners a comparable exemption to preserve the Montdel Observance. The Supreme Court has held that a Plaintiff must demonstrate that a land transfer was either not neutral or not generally applicable to trigger strict scrutiny. *Fulton,* 593 U.S. at 523 (citations omitted).

1. Respondents did not generally apply the facially neutral law to secular and religious waiver requests equally.

Under the ECIA, the DNRA does not generally apply transfer waivers to Petitioners, which substantially burdens Petitioners' religious practice. Courts have held that a law is not generally applicable if it "invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions…Where such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason." *Fulton*, 593 U.S. at 523. Additionally, a law lacks "general applicability" if it prohibits religious conduct while permitting secular conduct that similarly undermines the government's asserted interests. *Id*. at 534; *Church of Lukumi*, 508 U.S. at 542-46. If a law is not neutral or generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest" *Church of Lukumi*, 508 U.S. at 521; *see Roy*, at 706 (holding that statutory requirements requiring applicants to provide a Social Security number for certain welfare benefits is wholly neutral and generally applicable to all and may burden religion but does not compel conduct objectionable for religious reasons).

In *Fulton*, the City of Philadelphia refused to honor its annual contract with Catholic Social Services, using a non-discrimination section included in all social services provider contracts, unless the Church agreed to certify unmarried couples or same-sex married couples for adoption. 593 U.S. at 522. The Church refused to comply, believing certification equated to endorsement of actions contrary to their core beliefs. *Id*. at 530. This Court followed its earlier decision in *Church of Lukumi* and held that policies are not generally applicable if they "invite the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id*. at 533 (quoting *Smith*, 494 U.S. at 884) (internal quotation marks omitted). The Court noted that the section was enforceable at the "sole discretion" of the Commissioner,

permitting the "government to grant exemptions based on the circumstances underlying each application." *Fulton*, 593 U.S. at 535, 523. The Court notes the city "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." *Id*. (citations omitted).

Here, like *Fulton*, Respondents reserved the ability to withdraw from transfer agreements on their interpretation of an objection's merits, making the entire Act not generally applicable. The contractual provision in *Fulton* allowed the Commissioner to exempt social services from the section at his discretion; however, the Commissioner denied giving the Church an exemption, coercing a choice between their beliefs and mission. 593 U.S. at 537. Likewise, Respondents' internal management granted exemptions to land transfers furthering the ECIA mission to secular interests on their merits but refused exemption to Petitioners. Pursuant to the Court's decision in *Fulton*, a policy is not generally applicable when the government may "grant exemptions based on the circumstances underlying each application." *Id*. at 535.

The DNRA goes above and beyond *Fulton*. Unlike *Fulton*, where the Commissioner had never used the system to exempt social services from the non-discrimination section, the DNRA twice allowed secular interests that similarly curtailed its mission to persuade the agency out of land transfers. 593 U.S. at 522. The secular interests do not outweigh the Petitioners regarding the number of people affected or the negative impact on the environment. The proposed mining will decimate Red Rock, completely destroying Red Rock and its surrounding area, leaving a water-filled quarry "too hazardous for public access." Greenfield Aff. ¶ 12. Like those in *Fulton*, thousands of Montdel Observance followers will be put "to the choice," *Id*. at 532, forced to violate their religious beliefs against individual supplicatory prayer or forego the religion altogether.

Respondents refused to extend the ECIA exemption system to Petitioners, therefore, requiring strict scrutiny analysis under *Fulton*.

Respondents created a system judging ECIA land transfer objections by their merits, deeming Petitioners' religious cause unworthy, violating their right to free exercise of religion.

2. The DNRA violates neutrality when it uses discretion to determine the value of Respondents' religious purpose.

Respondents use discretion to judge the merits of Petitioners' religious justification, violating neutrality and requiring strict scrutiny analysis. "Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of Lukumi*, 508 U.S. at 521. Facial neutrality does not relieve a law of free exercise analysis, as "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972). In assessing government neutrality, courts often consider factors including, "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop*, 584 U.S. at 619.

In *Masterpiece Cakeshop*, Jack Phillips refused to bake a wedding cake for same-sex marriage because he viewed it as a personal endorsement contrary to his "most deeply held beliefs." *Id*. at 626-27. The couple filed suit under the Colorado Civil Rights Commission and the Colorado Anti-Discrimination Act, which prohibits discrimination on sexual orientation in places of public accommodation. *Id*. The Court found that the "Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id*. at 634. The Court held that "government has no role in expressing or

even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate." *Id*. at 639. The law was not considered by the Commission with "the neutrality that the Free Exercise Clause requires." *Id*. The Court noted that Phillips was entitled to a "neutral decisionmaker who would give full and fair consideration to his religious objection" and that "the commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id*. at 640.

Similarly, here, a neutral decisionmaker did not decide the Petitioner's request here. Like the Commission in *Masterpiece Cakeshop*, here, the Governor's clear disdain for the "nuisance" of the religious practice and trash pickup required after its exercise influenced the waiver rejection decision. The DNRA's power to adjudicate objections to land transfers on their merits is wrongful, but adding the Governor's discretion in the exemption review process and his disdain toward the Petitioners' religious practices impartially influencing the decision against Petitioners is discriminatory. The DNRA Secretary says, "the Governor's assurance that the festivals would not be viewed as significant obstacles" and the Governor's statement that "these practices should not be a cause for worry" are one of two reasons the DNRA chose to move forward with the project. Greenfield Aff. ¶ 9, 13. Again, like the Commission in *Masterpiece Cakeshop*, the government should have no role in determining the merits of the justification offered by the Petitioners, and the governor clearly is not a "neutral decisionmaker" who gave full and fair consideration to their request for exemption.

Furthermore, the decision was not neutral on its merits. The State found the following two interests worthy of waiver to protect the interests of the people: an agreement objected to by the Nature Conservancy because it would destroy the habitat of two endangered species and an agreement objected to by the Citizens of Grove Flat, Delmont where the Environmental Impact

Survey revealed a 35% possibility of water contamination to an aquifer that supplied reserve water for their town of 50 residents. R. at 28-29. Complete destruction of Petitioners' sacred site will lead to a substantial religious burden for over 1,000 followers of the Montdel Observance. Furthermore, the mining operations may lead to a decline in tourism, an industry Delmont largely depends on. Petitioners show synonymous justifications as the secular interests granted a waiver if viewed neutrally.

Respondents' non-neutral application of ECIA waivers and discriminatory basis for judgment of Petitioners' religious justification causes a substantial burden on religious practices.

3. The ECIA and the resulting land transfer fail to satisfy strict scrutiny because the exemption does not put the State interests at risk.

The government's interest in promoting the mining of lithium, nickel, iron, and copper to reduce fossil fuel dependency and invigorate the state's economy is not sufficiently compelling to survive strict scrutiny.

A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Church of Lukumi*, 508 U.S. at 546, (quoting *Yoder*, 406 U.S. at 215 (1972)). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Church of Lukumi*, 508 U.S. at 546. In applying strict scrutiny, courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants…The question, then, is not whether the City has a compelling interest in enforcing its…policies generally, but whether it has such an interest in denying an exception to Petitioner." *Fulton*, 593 U.S. at 542.

The State of Delmont asserts that the land transfer is justified by two compelling interests: the climate crisis created by fossil fuel emissions and the federal defense act that requires

sustainable energy in defense contracts. The DNRA maintains that this transfer aligns with the State's commitment to becoming carbon-neutral within fifty years and adheres to federal mandates to reduce fossil fuel consumption. However, once properly narrowed, the State's interest is not compelling and insufficient to justify denying exemption. Although Respondents' interests are important, the State cannot prove granting Petitioners' exemption puts their goals "at risk." Respondents claim that this particular location has the most minerals to serve its purpose, and this particular land transfer is of compelling interest to the ECIA's mission. This justification is not compelling, as the same purpose could be served through other operations, yet Respondents allowed waivers that curtailed this stated purpose. The state has shown that it is not of grave importance to mine for minerals immediately or gather as many as possible. The amount of minerals at Pine Bluff State Park is irrelevant because of the Respondents' actions.

Respondents show their interests are not pressing to justify the substantial burden to religion by not pursuing all minerals available when accepting waivers for other interests.

In sum, the Fifteenth Circuit erred in holding *Lyng* controlling because Respondents indirectly coerced Petitioners, which is outside the scope of the Court's decision. Respondents did not generally apply the ECIA when they refused to give equal protection to Petitioners' religious interests. By determining its decision on religious merits, the Act as a whole is not generally applicable. Furthermore, the DNRA, in conjunction with the Governor, did not neutrally apply the Act. The State's interests are important but are not narrowly tailored to the exemption and not compelling in light of the State's willingness to give waivers contrary to the ECIA's mission, failing strict scrutiny, and violating Petitioners' Free Exercise Rights under the First Amendment.

CONCLUSION

For the foregoing reasons, the proposed sale of Red Rock is an unconstitutional closure of a traditional public forum as it fails to meet the intermediate scrutiny required for content neutral time, place, and manner restrictions under the First Amendment's Free Speech Clause. Further, the ECIA and subsequent land transfer is a substantial burden of religious exercise by not generally or neutrally applying the Act in denying waiver to Petitioners. Therefore, the preliminary injunction should be granted, and the judgement of the Fifteenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

Team 15
Counsel for Petitioner

APPENDIX

Constitutional Provisions

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutory Provisions

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

CERTIFICATE OF COMPLIANCE

Pursuant to Rule III(C)(3) of the 2024-2025 Siegenthaler-Sutherland Moot Court Competition Official Rules, Counsel for Petitioner certifies that:

1. The work product contained in all copies of our brief is, in fact, the work product of our team,
2. Our team has fully complied with our law school's governing honor code, and
3. Our team has fully complied with all Rules of the Siegenthaler-Sutherland Moot Court Competition.