No. 25 - 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
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team 016
Counsel for Respondent

January 31, 2025

QUESTIONS PRESENTED

1. Do the Delmont Energy and Conservation Independence Act (ECIA) and subsequent transfer of a portion of Painted Bluffs State Park implicate and violate the First Amendment Free Speech rights of Petitioner?
2. Do the ECIA and Respondents' subsequent transfer of state-owned land to further environmental, defensive, and economic interests trigger protection under the First Amendment Free Exercise Clause for Petitioner's religious use of the land?

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The District Court's opinion is unreported but reproduced in the Record at 1. The Fifteenth Circuit's opinion is unreported but reproduced in the Record at 33.

STATEMENT OF JURISDICTION

In accordance with 28 U.S.C. § 1254(1), this Court has jurisdiction over this case. The Court of Appeals for the Fifteenth Circuit issued its opinion on November 1, 2024. A petition for writ of certiorari was filed and granted by this Court on January 5, 2025.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions (U.S. Const. amend. I; U.S. Const. amend. XIV § 1) are reproduced in full in the appendix.

INTRODUCTION

The First Amendment to the United States Constitution protects the rights of individuals to free speech and the free exercise of religion without undue government interference. However, these rights are not absolute. They depend on whether Constitutional provisions are triggered and the extent to which government actions furthering legitimate interests interfere with these rights.

In light of rising environmental and economic needs in the State of Delmont, state leaders initiated the transfer of Painted Bluffs State Park to Delmont Mining Company to facilitate a mining project in the part of the park known as Red Rock. The private mining company plans to extract abundant minerals from the area, especially lithium-bearing pegmatite. Extracting and harnessing the resources there would promote the local economy, shift the region away from the use of fossil fuels, and facilitate becoming carbon-neutral within fifty years–producing a healthier, more environmentally-conscious society. This Court should find that Painted Bluffs State Park and Red Rock are a closeable nonpublic forum and that the Free Exercise Clause has

not been triggered. Yet regardless of if the Court so finds, Petitioners cannot establish a likelihood of proving the ECIA and transfer of Red Rock violate the First Amendment. The actions of the State of Delmont and the Delmont Natural Resources Agency can satisfy the relevant intermediate and strict levels of scrutiny under which the claims may be reviewed.

STATEMENT OF THE CASE

Petitioner Montdel United initiated this action against Respondents State of Delmont and Delmont Natural Resources Agency for injunctive relief of an alleged violation of their First Amendment rights to freedom of speech and free exercise of religion. Montdel United is a non-profit organization founded by Priscilla Highcliffe to oppose disruptions, such as a land transfer, to Painted Bluffs State Park, the site of religious observances of the Native American Montdel people. (R. at 7.) Membership of the non-profit includes the Montdel people broadly and the Old Observers, the specific group who conducts their Montdel Observance ritual. (R. at 5, 7.) The Montdel people have a long history of conducting their religious practices at Painted Bluffs State Park, specifically at Red Rock. (R. at 2.) They view Red Rock as a "sacred site" and engage in rituals there including "crop sacrifices" and supplicatory prayer by their elders. (R. at 2, 3.) These rituals are performed seasonally during the equinox and solstice periods. (R. at 3.)

In the nineteenth century, the population of the Montdel people faced decline due to war and disease, and the Montdel people were largely dispersed into various other communities. (R. at 3.) However, Red Rock remains a sacred site to the dispersed Montdel people and many continue to travel to the site at the specified times throughout the year. (R. at 4.)

After Delmont was established as a state in 1855, it attained Painted Bluffs State Park through eminent domain. (R. at 4.) The state of Delmont never objected to the religious practices of the Montdel people. (R. at 4.) In 2022, as economic and environmental issues became more

imminent, the Delmont legislature passed the Energy and Conservation Independence Act (ECIA), conferring to the Delmont Natural Resources Agency (DNRA) the right to contract land transfer agreements with private mining companies. (R. at 6.) The goals of these land transfer agreements would be to promote the extraction of minerals such as nickel, copper, iron, and lithium toward reducing the use of environmentally detrimental fossil fuels. (R. at 6.) In January 2023, the DNRA entered an agreement with Delmont Mining Company to transfer a part of the park, including Red Rock, for the purpose of mining the pegmatite in the area. (R. at 7.) The pegmatite at Red Rock is the largest lithium deposit yet discovered in North America (R. at 7.) The efforts by the state of Delmont reflected state priorities and the federal mandate to reduce extraction of fossil fuels and promote sustainability and independence by becoming more carbon neutral. The economic impact study required by the ECIA further indicated that the mining project would lead to a "substantial economic boost" in the surrounding communities. (R. at 9.)

As a result of the mining operations at Painted Bluffs State Park, Red Rock and the immediate area will be unusable and unreclaimable (R. at 8.) However, the Montdel people will still be able to partake in their religious practices freely within Painted Bluffs State Park, just moved beyond the zone where entry will be prohibited to all based on safety concerns. (R. at 8.)

The District Court granted Montdel United's petition for a preliminary injunction. The Court of Appeals for the Fifteenth Circuit reversed in favor of the State of Delmont and Delmont Natural Resources Agency.

SUMMARY OF ARGUMENT

The Fifteenth Circuit Court was correct in denying Montdel United injunctive relief. For a preliminary injunction to be proper, Montdel United must be likely to succeed on the merits of

their claim, which they are unable to do as there was no First Amendment violation. *See Winter v Natural Resources Defense Council, Inc.* 555 U.S. 7, 20 (2008); FED. R. CIV. P. 65.

The State of Delmont did not abridge the free speech rights of Montdel United as Painted Bluffs State Park is a nonpublic forum, where the government reserves the right to restrict speech and expression as long as the restriction is reasonable and viewpoint-neutral. *Cornelius v. NAACP Legal Defense & Education Fund Inc.,* 473 U.S. 788, 800 (1985). However, if this Court finds Painted Bluffs State Park to be a traditional public forum, there is still no violation of the free speech rights of the Montdel people under the First Amendment as the state imposed a proper time, place, and manner restriction. *Ward v. Rock Against Racism.,* 491 U.S. 781, 791 (1989). These restrictions are permissible in a traditional public forum as long as the restriction is content-neutral, is narrowly tailored to serve a significant government interest, and allows alternative means for expression. *Id.* The transfer meets these requirements and is an appropriate place restriction. Since the restriction is not based on content, strict scrutiny is not triggered. *Reed v Town of Gilbert, Arizona,* 576 U.S. 155, 163 (2015)**.** Intermediate scrutiny is the most rigorous appropriate framework of analysis.

Furthermore, the ECIA and the transfer of Red Rock do not constitute a First Amendment free exercise violation. As Delmont's actions do not coerce the Montdel people to stop practicing or violate their religion, there is no violation of the Free Exercise Clause. Delmont's actions in this case will have only an "incidental" effect on religion and will thus be outside the scope of the Free Exercise Clause. *Lyng v. Northwest Indian Cemetery Protective Association.,* 485 U.S. 439, 450 (1988). If this Court finds that First Amendment protections are triggered, strict scrutiny should not be applied as the transfer is neutral and generally applicable. *Employment Div. v. Smith,* 494 U.S. 872, 881 (1990). Yet, should this Court find strict scrutiny the applicable

standard, the land transfer still passes as it is narrowly tailored to serve a compelling government interest. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993).

STANDARD OF REVIEW

The Court reviews interlocutory appeals on preliminary injunctions *de novo* for legal rulings and under abuse of discretion for ultimate conclusions. *McCreary Cty. v. ACLU*, 545 U.S. 844, 867 (2005). A preliminary injunction is proper if the plaintiff is likely to succeed on the merits, they would suffer irreparable harm if the injunction is not granted, the balance of equities tips in the plaintiff's favor, and it is in the public interest. *Winter v Nat. Res. Def. Council, Inc,* 555 U.S. 7, 22 (2008). The question on review is likelihood of success on the merits.

ARGUMENT

I. Montdel United is Unlikely to Succeed on the Merits of Its Free Speech Claim.

The First Amendment's Free Speech Clause, as incorporated to the states through the Fourteenth Amendment, requires that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Determining whether government action triggers First Amendment protections follows a three-step inquiry. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 796, 800, 807 (1905). The first step asks whether the form of speech is covered by the First Amendment. *Id.* at 796. The second looks to the type of forum serving as the setting. *Id.* at 800. The third applies the standard corresponding to the forum. *Id.* at 807. This analysis, paired with the content-neutral nature of the ECIA and transfer of Red Rock, reveals that Montdel United is unlikely to succeed on the merits of their Free Speech claim. Red Rock should be classified as a nonpublic forum, but it also can satisfy the intermediate scrutiny of closing a traditional public forum.

A. Red Rock Is Best Classified as a Nonpublic Forum.

The government owns lands beyond those regularly used by the public. Thus, public access, including on First Amendment grounds, is not guaranteed at all government property. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 112, 131 (1981). When it is acting as a "proprietor" of its internal affairs, including transferring lands, government action is subject to less scrutiny than for lawmaking. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (citing *United States v. Kokinda*, 497 U.S. 720, 729-30 (1990) (plurality opinion)). Through its transfer of Red Rock under the ECIA, the State of Delmont and DNRA are acting as proprietors of state land best classified as a nonpublic forum.

1. Red Rock Is Not a Designated Public Forum.

Public fora are most easily understood in terms of their basic form. Traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 43 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Government-owned lands are classified in three main categories: traditional public fora, designated public fora (divided into unlimited and limited public fora), and nonpublic fora. *Perry,* 460 U.S. at 43-46; *Int'l Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992). As both courts below noted, Red Rock is not a designated public forum.

A designated public forum is formed when "government property that has not traditionally been regarded as a public forum is *intentionally* opened up *for that purpose*." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (emphasis added). The "policy and practice" of the government determines its intent. *Cornelius*, 473 U.S. at 788, 802. Three factors must be considered: the terms of any policy governing forum access, the policies' implementation, and the nature of the property. *Seattle Mideast*, 781 F.3d at 497. Painted Bluffs

State Park's history shows a designated public forum has not been created: it was acquired and opened with the "intent to preserve its natural beauty," not to create a forum for speech. (R. at 4.) Its terms of access are not speech-related, there is no policy made for the Montdel people, and the property is public land for Delmont and the DNRA to manage. (R. At 4.) As emphasized by the Fifteenth Circuit, "[T]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." (R. at 36-37); *Cornelius,* 473 U.S. at 802. Not impeding the Montdel people's practices is at most "permitting." (R. at 4.)

Should Painted Bluffs State Park or Red Rock be considered a designated public forum, however, the government, which gave that designation, may choose to close that forum. *Seattle Mideast,* 781 F.3d 489, 496; *Lee,* 505 U.S. 672, 699 (1992) (Kennedy, J., concurring).

2. Red Rock Is Not a Traditional Public Forum.

The Fifteenth Circuit correctly found the District Court to have erred in determining Red Rock is a traditional public forum.

i. Red Rock Does Not Meet the Definition of a Traditional Public Forum.

Traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate" and are dedicated to "communicating thoughts between citizens and discussing public questions." *Perry,* 460 U.S. at 37, 43, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Red Rock does not meet this definition. First, it does not satisfy the long tradition of being *devoted,* which connotes consistency. The only speech petitioners claim has consistently occurred at Red Rock is that of the Montdel Observance. Yet it is inconsistent: the Montdel people had grown few by the late 1800s and stayed so such that the Montdel Observance needed to be "rekindled" in 1952, Highcliffe Aff. ¶ 11. The Observance

stopped during the Great Depression and World War II. (R. at 4.) Second, Red Rock does not satisfy "government fiat" since, again, it has not been opened by the government for that purpose. (R. at 4.) Since it meets neither of the criteria and a traditional public forum cannot develop incidentally, Red Rock is not a traditional public forum. *Cornelius,* 473 U.S. at 788, 802.

ii. Purpose Analysis Resolves the Unclarity of Classifying by "Park" Status.

Petitioner and the District Court consider the classification of Painted Bluffs State Park as a "park" enough to make it a traditional public forum. This interpretation rests on *United States v. Grace*, 461 U.S. 171, 177 (1983), which notes, "Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, *without more*, to be public forums." (emphasis added and internal quotation marks removed). However, *Grace* merely says "public forums," leaving it unclear as possibly meaning traditional *or designated*. *Id.* The Court also adds to its statement, noting, "[P]roperty is not transformed into 'public forum' property merely because the public is permitted to freely enter and leave the grounds at practically all times." *Id.* at 178 (citing *Greer v. Spock*, 424 U.S. 828, 843, 96 (1976)). Since specificity is lacking, more information may change the inquiry, and access is not enough, *Grace* does not settle the question here.

Similarly, the District Court looked to *Frisby v. Schultz,* 487 U.S. 474, 480 (1988), to claim that "a determination of the nature of the forum would follow automatically from this identification " and that a "particularized inquiry into the precise nature of the forum is unnecessary." However, *Frisby* was an easier determination as a street that served the daily purpose of use and communication. *Id.* at 476; *Perry,* 460 U.S. at 43; *Grace*, 461 U.S. at 177. *Frisby* further notes the determination will "differ depending on the character of the property at issue." *Frisby*, 487 U.S. at 479 (citing *Perry,* 460 U.S. at 37). A park need not be so clear, as

evidenced by the circuit split on point. The Eleventh Circuit follows an approach that an area's being named a park settles the question. *Naturist Soc. Inc. v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir. 1992). However, other circuits, such as the Fifth and Sixth, look to specifics including purpose. *See Brister v. Faulkner*, 214 F.3d 675, 681 (5th Cir. 2000) (quoting *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677 (1998) (noting "traditional public fora 'are defined by the objective characteristics of the property.'"); *United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992) (noting "Th[e] [First Amendment] test . . . must be applied in a realistic manner which takes into account the nature and traditional uses of the particular park involved."). Since state and national parks vary widely in their objective characteristics and in their uses, looking to specific instances and any given area's tradition and purpose provides the solution most in line with forum classification doctrine. *Compare Leydon v. Town of Greenwich*, 777 A.2d 552, 558 (2001) (considering a town park on the beachfront) *and Fillyaw*, 958 F.2d at 1517 (involving a small, heavily used public beach) *with Boardley v. United States Dept. of Interior*, 615 F.3d 508, 514 (D.C. Cir. 2010) (involving the expansive park around Mount Rushmore).

iii. The District Court's Rejection of *Boardley* Lacks a Holistic Approach.

Boardley v. United States Dept. of Interior provides a close analogue to the type, extent, and tradition of park at issue here. As the Fifteenth Circuit noted, *Boardley* makes clear that First Amendment protections "do not rise or fall depending on the characterization ascribed to a forum by the government" but rather that the "dispositive question is [the] 'purpose it serves,'" 613 F.3d 508 at 514-15. It notes that the nature of Mount Rushmore does not change by being labeled a "park" just as it would not if labeled a "museum," which would, by the name-focused approach, be a nonpublic forum. *Id.* at 515. *Boardley* further notes that distinct areas *within* a park may each achieve a different forum status. *Id.* If *Boardley* were applied to Red Rock and

Painted Bluffs State Park, the analysis should be decided against traditional public forum status. The reasons are the same as why it never became a designated public forum: Delmont acquired and opened the land for a reason completely separate from serving as a public forum for speech.

The District Court relied on five arguments to not apply *Boardley*, all of which fail to holistically apply traditional public forum doctrine. First, it looked to *Leydon v. Town of Greenwich,* 777 A. 2d 552, 558 (2001), as an example of a state park considered a traditional public forum. (R. at 14.) However, the analysis was simple in *Leydon* because the park at issue was small and frequented. In contrast, in *State v. Ball*, 260 Conn. 275, 285 (2002), the same Connecticut Supreme Court only a year later looked to purpose analysis for an undeveloped state forest and determined it was *not* automatically a traditional public forum by being named a park. The District Court also looked to Eleventh Circuit precedent but failed to address the other side of the circuit split. The small beach in *Fillyaw* is less comparable to the expansive land and resources here than is *Ball*'s public forest. *Fillyaw,* 958 F.2d at 1517; *Ball,* 260 Conn. At 278.

The District Court's second response looked to whether the activities held at Red Rock are "clearly incompatible" with traditional public forum status. (R. at 14). However, that question presumes that a government-owned area will be given traditional public forum status unless that status is unavailable. There is no basis for this approach: the threshold question is qualifying to be a traditional public forum, not becoming exempt from being one.

The third response was to find Red Rock and Painted Bluffs State Park unlike "a remote wilderness area." (language not used in *Boardley*) (R. at 15.) No articulation was given by the District Court for why Red Rock would be more like the small, frequented park in *Leydon* than the more expansive parks in *Boardley* and *Ball*. Even the District Court's referring to both Red

Rock and the festivals that take place a mile away from Red Rock during the Montdel Observance reveals the expansive nature of the area. (R. at 6.)

The District Court's fourth response equivocates between the openness of the park for public visitation and the use of it for speech. The distinguishing feature missed by the District Court in *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 643-51 (1981), relates to the distinction between permitted activities at a fair that only occurred during limited times—regardless of whether the land stayed open to the public at other times—and the everyday use of a street as "a necessary conduit in the daily affairs of a locality's citizens." The activity at issue here resembles *Heffron*. As the fair is only open for activities at certain times, so does the Montdel Observance occur only during a few limited times. (R. at 3, 5.) Thus, Petitioners neither establish that Red Rock serves as a "conduit" for "daily" activities nor even explain what any *daily* activities are. Heffron, 452 U.S. at 651. The Fifteenth Circuit was correct to draw a similar distinction here: just as fairgrounds—not traditional public fora—draw crowds onto public land for isolated and specific times and reasons, so does Red Rock.

Finally, the District Court artificially isolated part of the typical description of a traditional public forum, looking merely to the type of speech taking place at Red Rock rather than the *consistency* with which such speech occurs. Its reliance on *DeBoer v Vill. of Oak Park,* 267 F. 3d. 558, 567 (7th Cir. 2001) is misguided since that case hinged on content and unequal exclusion from a village hall that remained accessible to and was used by others.

3. Red Rock Is a Nonpublic Forum.

Government-owned land (or "all remaining public property") that does not fit the definitions of traditional or designated public fora are nonpublic fora. *Lee*, 505 U.S. at 679-80. This class catches those places lacking a continuous traditional use for public speech and never

made public fora by government intent. States have broad responsibility and authority to use nonpublic fora. "[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry*. 460 U.S. at 46. This Court should affirm the Fifteenth Circuit's holding that Red Rock is a nonpublic forum.

B. Red Rock May Be Closed by Sale and Physical Transformation.

1. Red Rock's Closure is Content Neutral and Reasonable.

Speech restrictions in a nonpublic forum must be content neutral and reasonable. *Cornelius*, 473 U.S. at 806. The District Court noted that the closure is not content-based. (R. at 21.) Rather, it is based on the state's interests in becoming carbon neutral, fostering economic development, and complying with federal mandates. (R. at 9.) Further, the area around Red Rock will be equally closed to all people, not just the Montdel people. The closure also fits the multiple prongs of reasonable. The exclusion is based on a definite, objective standard—being closed to all people for safety reasons—and is reasonable in light of the land's purpose, as articulated above. *Cornelius,* 473 U.S. at 806, 808.

2. The Scrutiny for Closing a Traditional Public Forum Would Be Satisfied.

Traditional and designated public fora may also be closed. When the government has created a designated public forum, "the government may choose to eliminate that designation," especially through its sale or altering of the "objective physical character or uses of the property." *Lee*, 505 U.S. at 698 (Kennedy, J., concurring). By referring to eliminating streets and sidewalks, Justice Kennedy suggested that physical transformation can facilitate closing a traditional public forum. *Id.* at 698. The alteration requirement limits the government's ability to close public fora, avoiding *Greenburgh's* warning that a government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks." 453 U.S. at 134. No such arbitrary

decision is at issue here. Rather, Delmont's transfer of the land not only entails transformation but serves to comply with federal mandates and furtherance of its governmental objectives of environmental sustainability and economic prospects for the region. (R. at 6.)

i. A Standard of Reasonable and Content Neutral Should Apply.

This Court has not settled the level of scrutiny applicable to the closure of traditional public fora. The District Court looked to *Grace* and *Kresiner v. City of San Diego*, 1 F. 3d 775, 785 (9th Cir. 1993), to consider closing a traditional public forum "presumptively impermissible." (R. at 18.) However, those cases dealt with potential bans on certain speech types, not a complete closing. This Court should decline to require strict scrutiny for closing a traditional public forum, maintaining its special application to content-based restrictions.

The District Court claimed that applying a standard of reasonable and viewpoint neutral would dissolve the difference between traditional and designated public fora. That analysis is inaccurate. Traditional and designated public fora are formed differently, and governments can make choices in creating designated public fora to make them unlimited or limited. Thus, while reasonable and viewpoint neutral is the standard for closing a designated public forum, it could also be for a traditional one. *Satanic Temple,* 80 F. 4th at 868. The effect of applying the standard would differ between the two fora types, as a traditional public forum may require it be satisfied with regard to more kinds of speech than in some designated public fora. As noted in the above section, the transfer and closure of Red Rock is reasonable and content neutral.

ii. Intermediate Scrutiny Is Also Satisfied.

The District Court applied the standard of a time, place, and manner restriction to the closure of a traditional public forum. (R. at 19.) The transfer of Red Rock fits this standard of intermediate scrutiny. *Reed v. Town of Gilbert, Ariz.,* 576 U.S. 153, 163 (2015); *Ward v. Rock*

Against Racism, 491 U.S. 781, 791 (1989). Only the literal command, not hidden motive, is considered. *Menotti v. City of Seattle,* 409 F. 3d 1113, 1129 (2005). The limit to the literal command is vesting overly broad discretion in those enforcing it. *Id.* at 1142. Since Red Rock will simply be closed to the entire public, there is no broad enforcement discretion.

The closure of Red Rock can satisfy the three prongs of a time, place, or manner restriction. As the District Court found, it is content neutral. (R. at 21.); *Ward,* 491 U.S. at 791. It is not facially based on disagreement with any specific message. *Id.* Nor is there evidence of its being spurred by content or being a pretext for content regulation. *Adderley v. State of Florida,* 385 U.S. 39, 47 (1966); *Thomason v. Jernigan*, 770 F. Supp. 1195, 1203 (E.D. Mich. 1991).

The District Court found that the restriction was not "narrowly tailored to serve a significant governmental interest." *Ward,* 491 U.S. at 791. First, it found the rationales—supporting alternatives to fossil fuels, the economic boon that this development would be to the community, and complying with a federal mandate—provided by Delmont and the DNRA too remote and too speculative. (R. at 6, 23.) Though time, place, and manner restrictions do need to advance the government's interests in "more than a speculative way," narrow tailoring does not require their full achievement, but simply its coming about "less effectively absent the regulation." *Boardley,* 615 F.3d at 521; *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Ward*, 491 U.S. at 783. Since the pegmatite deposit at Red Rock is the largest in North America, it offers a far more substantial contribution—economically through the mining as well as environmentally—than the District Court acknowledged. Further, the District Court looked to the wrong end in determining Delmont's interest: it is not just solving climate change generally, but creating an environmental, economic, and structural security improvement in Delmont. The transfer and mining in question would directly create jobs and make resources available that help

achieve those interests. Second, the District Court found no reason why alternate plans that had been rejected would not have achieved the end. However, seeking the least restrictive means is not required and has been explicitly labeled the wrong analysis. *Ward*, 491 U.S. at 798.

The District Court also found the transfer did not "leave open ample alternative channels for communication of the information." *Ward,* 491 U.S. at 791. Generally, alternatives must exist "within the forum in question." *Boardley,* 615 F. 3d at 524 (citing *Initiative & Referendum Inst.,* 417 F.3d at 1310). However, alternatives do not need to be perfect substitutes. *Mastrovincenzo v. City of New York,* 435 F. 3d 78, 101 (2006). An alternative location is usually enough, especially within a larger forest or tract of land, as here. *United States v. Griefen,* 200 F.3d 1256, 1261 (2000). The expression does not need to be able to be conducted in exactly the same way. *Mastrovincenzo,* 435 F. 3d at 101 (citing *Connection Distrib. Co. v. Reno,* 154 F. 3d 281, 293 (6th Cir. 1998). Thus, it is sufficient that the Montdel people conduct other ceremonial practices in the greater Painted Bluffs State Park and will be able to continue to do so, Highcliffe Aff. ¶ 6.

The District Court looked to the assertion that Red Rock is the sole place that can host the Montdel Observance to hold that there is no way to minimize the effect. *Vincenty v. Bloomberg,* 476 F.3d 74, 88 (2007). However, the availability of the rest of the park *does* minimize the effect. The District Court also claimed under *Chabad of S. Ohio v. City of Cincinnati*, F.Supp. 2d 975 (S.D. Ohio 2002) that there was no sufficiently similar alternative, making the closure unallowable. However, that case was resolved on content, not alternative, grounds—implying both a different question and a different level of scrutiny than is applicable to a place restriction. *Chabad of S. Ohio v. City of Cincinnati,* 363 F. 3d 427, 433 (6th Cir. 2004). Thus *Mastrovincenzo* and *Griefen* should control here, and the transfer of Red Rock leaves ample alternatives to satisfy a place restriction.

iii. Strict Scrutiny Is Not Triggered.

Content-targeting restrictions, regardless of the forum in which they originate, trigger heightened scrutiny. *Reed,* 576 U.S. at 164; *Greenburgh*, 453 U.S. at 131.There is no such content targeting at issue here. Since we do not look to hidden motive but simply whether the regulation is neutral on its face in looking for content targeting, strict scrutiny is not triggered. *Menotti,* 409 F. 3d at 1129. Both the ECIA and subsequent decision to transfer Red Rock are content neutral, as found by the District Court (R. at 21.)

Intermediate scrutiny is satisfied. The transfer of Red Rock furthers important government interests, as detailed above, in a way not just substantially related but narrowly tailored. Thus, Montdel United is unlikely to succeed on the merits of its free speech claim.

II. Montdel United Is Unlikely to Succeed on the Merits of Its Free Exercise Claim.

A. Overview: The Transfer of Red Rock Does Not Trigger nor Violate the Free Exercise Clause.

Congress cannot make laws "prohibiting the free exercise" of religion. U.S. Const. amend. I. States may not abridge this right either. *Cantwell v. Connecticut,* 310 U.S. 296 (1940). For these protections to apply, government action must trigger the First Amendment's text by threatening to "prohibit" religious observances. *Lyng v. Nw. Indian Cemetery Protective Assn.*, 485 U.S. 439, 451 (1988). Otherwise, questions of general applicability, neutrality, and compelling interests are not at issue. As such, the District Court erroneously dismissed *Lyng* on the basis of general applicability. (R. at 29.) Instead, *Lyng* controls. Since the ECIA and the transfer of Red Rock do not *coerce* the Montdel people into violating their religion, the Free Exercise Clause does not apply, and this Court does not need to rule on whether the actions of Delmont and the DNRA are neutral, are generally applicable, or have a compelling interest.

Alternatively, if the Court finds the land transfer does trigger First Amendment protection, the ECIA and transfer are neutral and generally applicable and thus do not require a compelling government interest under strict scrutiny. *Employment Div. v Smith,* 494 U.S. 872, 879 (1990). Neutral laws neither aid nor oppose religion. *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963). Laws that apply uniformly to all citizens of a state are generally applicable. *Wisconsin v. Yoder,* 92 S.Ct. 1526 (1972). Since the transfer of Red Rock applies to all Delmont citizens and neither supports nor opposes religion, it must only pass the basic test of rationality. *Korte v. Sebelius,* 735 F.3d 654, 671 (7th Cir. 2013).

If not generally applicable, Delmont's land transfer can still pass strict scrutiny. Laws comprising "interests of the highest order" and narrowly tailored policies to achieve those interests can withstand strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The state of Delmont has presented multiple of these "highest order" interests, including pressing climate concerns requiring the reduction of fossil fuels, an obligation to the Federal Natural Resources Defense Act (the FNRDA), and the need for local economic revival. (R. at 6-7.) Delmont's policy is narrowly tailored to meet these ends since Red Rock has the largest lithium deposits in North America, and no mining techniques currently exist, or may ever exist, to allow the state to preserve Red Rock while mining it. (R. at 8-9.) Moreover, the counties containing Painted Bluff need economic revival, and mining will provide the substantial economic boost that residents around Red Rock require. (R. at 9.) Given these circumstances, the transfer of Red Rock is narrowly tailored and can pass strict scrutiny. The Fifteenth Circuit's denial of the preliminary injunction to the Montdel should be affirmed.

B. First Amendment Protections Do Not Apply Because There Is No Government Coercion with Respect to Free Exercise.

1. The Holding of *Lyng* Controls.

We apply *Lyng v. Nw. Indian Cemetery Protective Assn.*'s holding that incidental effects on religion are insufficient to trigger First Amendment protection because the dispute resolved in *Lyng* is closely analogous to our case. 485 U.S. at 450. Just as Delmont seeks to mine federally-owned Red Rock, the United States Forest Service in *Lyng* sought to construct a road through federal land called Chimney Rock. *Id.* at 439. Much like how mining Red Rock would destroy the Montdel's worship site (R. at 8.), building the road in *Lyng* "would [have caused] serious and irreparable damage to [native tribes'] sacred areas." *Id*. at 442. As the Montdel people claim there is no alternative site to Red Rock for the Montdel Observance (R. at 25), the native people in *Lyng* argued that their rituals could not be conducted elsewhere without abandoning the meaningful continuation of their religious practices. *Id.* at 451. The facts that led the *Lyng* Court to conclude the First Amendment did not apply are nearly identical to the facts presented today. As such, *Lyng* is the proper standard for implicating the First Amendment.

2. There Must Be Coercion to Implicate the First Amendment.

Per *Lyng,* religious coercion is the threshold. *Id.* at 450. Coercion means that the government is *aiming* to restrict religious practice by prohibiting or compelling religious behaviors. *Apache Stronghold v. United States,* 101 F.4th 1036, 1060 (9th Cir. 2024). Just as *Lyng's* federal initiative to build a road through sacred sites did not coerce individuals to violate their religion, the sale of Red Rock does not coerce the Montdel people not to supplicate to their creator. The government leaves the Montdel the option to conduct the Observance elsewhere in Painted Bluffs State Park, and the Montdel can access Painted Bluffs in the same capacity and to the same extent that all other members of the public may. (R. at 8.) Since there is no religious coercion, the effects on religion are incidental and Free Exercise protection does not apply.

The Ninth Circuit's recent en banc decision in *Apache Stronghold* confirms that incidental effects on religion do not activate First Amendment protection, as the Circuit highlights the prudential concerns of the Amendment being implicated so easily. 101 F.4th 1036, 1052 (en banc). The land in dispute in *Apache Stronghold* involved the third largest copper deposit in the world, but the Western Apache tribe used the land for religious rituals and could not "have this spiritual connection with the land anywhere else." *Id.* at 1045. Despite how the Government's actions interfered significantly with religious practices, the Court found that the land sale "does not 'discriminate' against Apache Stronghold's members, 'penalize' them, or deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Id*. at 1051 (quoting *Lyng,* 485 U.S. at 449). Absent discrimination, the effects on the Western Apache's religion were incidental. Incidental effects cannot elicit First Amendment protection because doing so would create a "religious servitude" where the government forcibly effectuates "*de facto* ownership" of the land to the tribes. *Id*. (quoting *Lyng*, 485 U.S. at 452-53). Notably, Secretary Alex Greenfield observed this concern play out in Delmont, where "several other religious groups" made claims to public spaces and structures, Greenfield Aff. ¶ 14. Since Delmont's land sale mirrors the sale in *Apache Stronghold* in every meaningful respect, the Court should use the same standard here.

The Supreme Court also recognized the practical challenge of governing in a religiously diverse state and subsequently set a high bar for triggering Free Exercise protection. Unlike the District Court's broad interpretation of the Amendment's phrase "prohibiting," the *Roy* Court interpreted the phrase "prohibiting" narrowly and asserted, "[C]laims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government." *Bowen v. Roy*, 476 U.S. 693, 702 (1986). In *Roy,* the Court refused a family's

religiously motivated demand for their daughter not to be assigned a Social Security number. The Court explained simply that "not all burdens on religion are unconstitutional." *Id.* The Court upheld this standard in *Lyng* as it explained that the Constitution cannot "reconcile the various competing demands on government, many of them rooted in sincere religious beliefs." 485 U.S. at 452. Demanding that Delmont conform its environmental, defensive, and economic policies to one religion would go against the Court's decisions allowing the government to build the road in *Lyng* or to assign a Social Security number in *Roy.* Therefore, the Court should find that the District Court improperly dismissed the standard set by *Lyng* and affirm the Fifteenth Circuit's ruling that the First Amendment's Free Exercise Clause does not apply.

A. If the First Amendment Does Apply, the Government Does Not Need to Show a Compelling Interest Because the Transfer is Neutral and Generally Applicable.

If the Free Exercise Clause does apply, the government must meet a rational basis test instead of strict scrutiny because Delmont's land transfer is neutral and generally applicable. *Korte v. Sebelius* 735 F.3d 654, 671; *Smith,* 494 U.S. at 878. In *Smith,* the Court refused to make an exception for religious use of the illegal drug peyote because it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 879. Similarly, the Montdel people's religion does not change Delmont's ownership, interest, and right to transfer land in Painted Bluffs State Park. A sale is valid "absent proof of an intent to discriminate against particular religious beliefs or against religion in general," and when it is "neutral and uniform in its application" and "a reasonable means of promoting a legitimate public interest." *Roy,* 476 U.S. at 708. The transfer of Red Rock meets these criteria.

1. The Transfer of Red Rock is Neutral.

The first requirement to evade strict scrutiny is that the law be neutral on its face and in its application. *Lukumi*, 508 U.S. at 533. In response to a statute banning animal sacrifice, the *Lukumi* court provided that "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* Here, the ECIA authorizes Delmont to enter agreements with private mining companies to facilitate the extraction of precious metals. (R. at 2.) The legislation is facially neutral, making no reference to the Montdel or their religion, and its stated aim is to promote economic development and sustainability. *Id.*

Moreover, adverse impact on religion does not equate to "impermissible targeting." *Lukumi*, 508 U.S. 520, 534-35. Delmont and the DNRA acknowledge that selling and mining Red Rock would have an adverse impact on the Montdel Observance, but these actions in no way target religion. Secretary Greenfield explained that the Montdel Observance was one consideration among many in approving the transfer, as the DNRA had to balance competing interests such as the Montdel people's desire to preserve Red Rock and the locals' desire for more jobs nearby, Greenfield Aff. ¶ 16. Instead of targeting the Montdel, the DNRA made a point to allow for relocation of the Observance rather than a complete halt, Greenfield Aff. ¶ 13. In the absence of discriminatory targeting, the transfer is religiously neutral.

2. The Transfer of Red Rock Is Generally Applicable.

To escape strict scrutiny, a law must also be generally applicable. *Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2021). *Roman Catholic Diocese v. Vullo*, 42 N.Y.3d 213, 224 (2024) (quoting *Fulton v. City of Philadelphia* 593 U.S. 522), lists two violations of general applicability: 1) a law cannot invite "the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" and 2) it cannot prohibit "religious conduct while permitting secular conduct that undermines the government's

asserted interests in a similar way." The first rule is inapplicable, but the District Court found the DNRA violated the second when it withdrew transfer agreements for secular reasons but not religious ones. (R. at 29.) However, the District Court wrongly focuses on two irrelevant withdrawals; there is an example of a successful transfer despite secular protests from the Teacher's Association and State Historical Society. *Id.* Under *Fulton,* the transfer is generally applicable.

Despite what the District Court held, the Supreme Court has held that specific land transfers can be generally applicable. *Lukumi* holds that laws of general applicability cannot allow for government discretion in making exceptions to the law, but "an exception based upon objective criteria is not subject to strict scrutiny." *Lukumi,* 508 U.S. at 543; *Vullo,* 42 N.Y.3d at 228. In deciding land transfers, the DNRA does not have unchecked discretion: the ECIA requires independent economic impact reports and environmental impact reports to inform members' decisions. (R. at 8.) Such considerations are objective and were absent in *Roman Catholic Bishop v. City of Springfield,* 724 F.3d 78, 92, 99 (1st Cir. 2013), where the First Circuit decided that the designation of historic district status was not generally applicable. The District Court relied on this case to hold single land transfers not generally applicable but mistakenly overlooked the exception from *Lukumi.*

The ECIA applies to public land across Delmont, and the transfer of Red Rock was decided with objective material. The transfer is therefore generally applicable, and a lack of religious animus (as is true for Delmont) means that resulting burdens on religion are incidental. *City of Boerne v. Flores,* 521 U.S. 507, 508 (1997). Per *Flores*, "[W]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been … burdened because of their religious beliefs." *Id. at* 535.

3. The Transfer of Red Rock Is Reasonable in Light of Legitimate Public Interest.

As such, the State of Delmont and the DNRA do not need to prove a compelling interest. Montdel United must prove that the transfer is not reasonable in light of a legitimate public interest, per the rational basis test. *Roy,* 476 U.S. at 708. Both the District Court and the Fifteenth Circuit acknowledged that climate change mitigation and economic betterment are important policies. (R. at 30, 32, 41- 42.) The District Court characterized the transfer as too speculative to aid in these goals, but the effects of mining Red Rock are not speculative because 1) mining would provide more jobs, and tourism has proven "insufficient for their economic needs," and 2) lithium ion batteries are alternatives to fossil fuels, making them more sustainable, "clean," sources of energy, and Red Rock's huge supply of lithium will increase production and use of these batteries. (R. at 6-7, 9.)

Moreover, the land transfer is reasonable because a federal mandate requires Delmont to use and develop ion batteries to be competitive for defense contracts, and Red Rock has a unique richness in lithium. (R. at 24.) The DNRA selected this particular tract of land for transfer because it will allow the mining company to extract the most minerals while keeping the majority of the park intact for the public, including the Montdel, Greenfield Aff. ¶ 10. Nor is Delmont permanently destroying large amounts of land to meet the government's policy goals, since all the land except Red Rock will be reclaimable after forty years. (R. at 48.) Ultimately, the ECIA should not be subject to strict scrutiny and instead should undergo the rational basis test, which it passes. Thus, the Fifteenth Circuit's finding for Respondents should be affirmed.

D. The Land Transfer Can Pass Strict Scrutiny because Delmont Has Compelling Government Interests and the Government Has Narrowly Tailored Its Policy.

1. Delmont Has Interests of the Highest Order.

If strict scrutiny does apply, Delmont and the DNRA can satisfy it. To do so, the government must show "interests of the highest order" and narrowly tailor its actions to satisfy those interests. *Lukumi,* 508 U.S. at 546. The government's environmental, economic, and defense interests, as previously detailed, are compelling for their importance to the future of its counties, state, and country. Especially when combined, these policies satisfy the District Court's demanding test asking "whether it is a compelling state interest to transfer Red Rock even with the existential burden on the religious exercise of the Montdel Observance." (R. at 30.)

2. The ECIA and Transfer of Red Rock Are Narrowly Tailored.

In addition to having compelling interest, the government has narrowly tailored its policies. In not reaching this conclusion, the District Court overlooked the careful strategy that Delmont employed in making the land transfer. For example, the Secretary of the DNRA confirmed that if Delmont chose any other section of Painted Bluffs State Park to transfer, more of the state park would have to be closed off from the public—including the Montdel—to extract a comparable amount of minerals, Greenfield Aff. ¶ 10. Moreover, Montdel United President Priscilla Highcliffe testified that the Montdel people conduct "rituals in the hills, cliffs, and forests now known as Painted Bluff State Park," Highcliffe Aff. ¶ 6. If the Montdel exercise their religion throughout the publicly owned land, Delmont would be hard-pressed to respond to the federal mandate and climate crisis, when doing so is in the best interest of *all* Delmont citizens.

Delmont also made its decision with the knowledge that it does not have inexhaustible public land, and it is neither practical nor prudent for the state to meet the Montdel's demands when *Lyng* warned of "*de facto* beneficial ownership … of public property" in these exact circumstances. 485 U.S. at 453. Similarly, to cease the state's environmental, economic, and defense initiatives to preserve one religious ritual that takes place four days a year would set a

precedent that too greatly impairs the government's capacity to govern. (R. at 51.) *See Roy*, 476 U.S. 693. Finally, as mentioned, there are no mining technologies in existence today that would be less destructive, and such technologies may never exist or become accessible to Delmont. (R. at 8-9.) As a result, because of the "urgency" of the climate crisis, Delmont cannot risk waiting for uncertain technological advances, Greenfield Aff. ¶ 16. The fact that Red Rock is uniquely rich in lithium and is situated at the heart of an economically challenged area suggests that to *not* mine Red Rock would be a disservice to the public. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2391 (2020) (Alito, J., concurring).

The District Court also missed the government's narrow tailoring because the court mischaracterized the transfer's effect on the Montdel people's religious traditions. Highcliffe said that her parents "reignited" the ritual observances in 1952, and the number of observers and onlookers had been small for over a century before then, as "the size and frequency of the Observance [varied] throughout the centuries," Highcliffe Aff. ¶ 4. The ritual was not practiced at all during the Great Depression or World War II, as the Montdel accommodated national crises, Highcliffe Aff. ¶ 11. While Petitioners try to paint a picture of a widely, consistently, and faithfully practiced religious ritual at Red Rock, the facts demonstrate that the Observance is an exercise that can and has responded to the needs of the time and the interest of the people at large. Suggesting that the Montdel make such adjustments now in response to a climate crisis and suffering economy is not a burden that should fail strict scrutiny.

CONCLUSION

For these reasons, the State of Delmont and Delmont Natural Resources Agency respectfully request that the Court affirm the decision of the Fifteenth Circuit and deny the injunctive relief sought by Montdel United.

APPENDIX

U.S. Constitution Amendment 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.

U.S. Constitution Amendment XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE

As required by Official Rule III, Counsel of Record certifies the following:

1. The work product contained in all copies of the team's brief is the work product of only the team members.
2. The team has complied fully with its law school's honor code; and
3. The team has complied with all Rules of the Competition.

s/

Team Number 16

Counsel for Respondent