**No. 24-CV-1982**

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# IN THE SUPREME COURT OF THE UNITED STATES

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**MONTDEL UNITED,**
*Petitioner,*

**v.**

**STATE OF DELMONT and**
**DELMONT NATURAL RESOURCES AGENCY,**
*Respondents.*

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

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# BRIEF FOR PETITIONER

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**SUBMITTED BY:**
**Team 019**
**Attorneys for Petitioner**

## QUESTIONS PRESENTED

1. Whether the State of Delmont's proposed transfer of Red Rock to a private mining company violates the First Amendment Free Exercise rights of Montel United when it resigns the sole "sacred site" of the Montdel people into a "water-filled quarry . . . too hazardous for visitation."
2. Whether the State of Delmont's proposed transfer of Red Rock to a private mining company violates the First Amendment Free Speech rights of Montel United when it completely closes a part of a state park used by the Montdel people for over 1,500 years for religious rituals

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**



**Constitutional Provisions**

**Secondary Sources**

## OPINIONS BELOW

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

## JURISDICTIONAL STATEMENT

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

## STANDARD OF REVIEW

As an interlocutory appeal of a denial of a preliminary junction, this Court reviews the lower court's legal rulings *de novo* and its ultimate conclusion for abuse of discretion. *McCreary Cty. v. ACLU*, 545 U.S. 844, 867 (2005).

## 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. Sixteen Centuries of the Montdel in Present-Day Delmont

The Montdel people are an indigenous group older than the State of Delmont itself. R. at 2–3. Cultural anthropologists trace the story of the Montdel as far back as 400 A.D., when the group first established roots in the land where Delmont is presently located. R. at 2. In the years since, the Montdel have had to contend with smallpox, influenza, warfare, a devastating crop blight, and the establishment of the State of Delmont. R. at 3. But despite population decline and sociopolitical change, the "profound and enduring" connection of the Montdel to the region remains. R. at 2.

The religious practices of the Montdel constitute a core part of that connection. R. at 2. The Montdel people have "long revered" Red Rock, an area located within Painted Bluff State Park, as a "sacred site." R. at 2. And for over 1,500 years, Red Rock has been "central" to their religious practices and cultural identity. R. at 3, 50. Virtually uninterrupted since before recorded history, the Montdel have gathered at Red Rock to perform crop sacrifices and other supplications carried out by village elders on behalf of their community during the fall and spring equinoxes and the summer and winter solstices. R. at 3.

These ceremonies occur at Red Rock not by choice but by necessity: the Montdel believe their Creator can "only be reached in group supplicatory prayer during these specific times through the collective efforts of the village elders." R. at 3. "Individual supplicatory prayer" or "personal requests for aid or forgiveness" are considered forbidden and these ceremonial practices at Red Rock provide their "sole . . . access" to their Creator. R. at 3. Any deviation from the rituals at Red Rock will "incur the Creator's wrath." R. at 3.

## II. Delmont "Promotes" Montdel Religious Practices

The homelands of the Montdel people formally became part of the State of Delmont in 1855. R. at 3. Yet, for the Montdel, little changed: they continued to observe their centuries-long religious traditions at Red Rock, and the State "neither impeded the Montdel's religious observances nor restricted access to Red Rock." R. at 4.

In fact, Delmont actively "promot[ed]" their observances. R. at 4. When the State preserved Red Rock as part of Painted Bluffs State Park in 1930, Governor Ridgeway remarked at the opening ceremony that the Montdel had been "part of the land for centuries before there was ever a thought of such a thing as Delmont or even America." R. at 4–5. Their "supplications to the Almighty" in the "natural beauty" of Painted Bluffs was "part of a legacy that the state proudly cherishe[d]" and one that the Governor Ridgeway wished to protect. R. at 4–5. Since the park's inception, Delmont has continuously utilized "references to the Montdel religious practices" in promoting the park. R. at 4.

In the 1950s, two Delmont residents with Montdel heritage set out to "regularize and formalize" their people's religious practices as the "Montdel Observance." R. at 5. After an involuntary break in the rituals during the World Wars and the Great Depression due to economic hardships and wartime obligations, the Montdel Observance brought back the traditional religious practices at Red Rock during the "traditionally designated times." R. at 5. Consistent with the group's practices over generations, the ten oldest members of the tribe once again started undertaking the pilgrimage, gathering prayers from the community, ascending Red Rock, and "performing crop sacrifices and supplications to the Creator over a twenty-four-hour period." R. 5. While the pilgrimage only involves tribal elders, the ritual is community-wide: as the

pilgrims ascend Red Rock, the remaining participants "engage in praise rituals and meditations at the base of Red Rock." R. at 5.

Yet again, the State of Delmont continued to the Montdel religious practices—so much so that the State created a festival alongside them. R. at 5–6. Coinciding with the pilgrimages during the two equinoxes, members of the Delmont community began gathering nearby in Painted Bluffs State Park to try to "catch a glimpse of the ritual," which slowly gave rise to a "range of activities" from stargazing and singing to speeches by environmentalists and naturalists. R. at 6, 52. And in "response to the increasing popularity of these gatherings," the State of Delmont started issuing vendors licenses for food, music, and merchandise. R. at 6.

### III. Delmont is Done "Tolerat[ing]" the Montdel's Rituals

But in January 2023, the State avowed that it was done "tolerat[ing] these rituals." R. at 53. Two years prior, Delmont enacted the Energy and Conservation Independence Act (ECIA) to "promote the mining of lithium, nickel, iron, and copper" within the State's borders. R. at 6. The legislation authorized the State to enter into land transfer agreements with private mining companies for the extraction of these minerals. R. at 6.

Pursuant to the ECIA, the State entered into two different land transfer agreements for separate mining separate sites—before subsequently withdrawing from both. R. at 9. While both sites would have "furthered the [same] substantial interests it asserts in this case," Delmont withdrew from the first after opposition from The Nature Conservancy over the plight of two endangered species. R. at 9–10. The State then withdrew from its second agreement after receiving complaints from a nearby, unincorporated town with fifty residents. R. at 10.

Red Rock was the next site in the State's crosshairs. R. at 7. In 2023, Delmont entered an agreement to transfer one-fourth of Painted Bluffs State Park, including the Red Rock area, to a

private mining company. R. at 7. Although the State claims that the lithium located in Red Rock will help it advance several interests, the mining process will result in the complete "destruction of Red Rock and its surrounding area." R. at 8. Specifically, the transfer will forever "transform" Red Rock into a "water-filled quarry . . . subject to rock shearing and erosion . . . [and] too hazardous for visitation." R. at 8. After the mining, any reclamation of Red Rock "would be unfeasible." R. at 8. While there was space to relocate the Montdel Observance located five miles down the river, the transfer would eradicate the Montdel Observance from Red Rock and its "sacred site[s]" there forever. R. at 8. And in making this decision, Delmont chose not to wait for the development of alternative mining technologies that would have reduced the impact on Red Rock. R. at 8.

The proposed transfer has been "vigorously opposed" by Montdel United, an advocacy organization founded by two individuals with Montdel heritage to "safeguard the Montdel Observance's religious site and ritual practices." The group met with the Secretary of the State's Natural Resources Agency and "made it clear" that Red Rocks was of "sacred importance" and that the transfer would "effectively outlaw [their] religion." R. at 53. The Secretary replied, "Look, the [S]tate has been very patient with the Montdel. We've [t]olerated these rituals for a long time, but the needs of all the people of this state have to come first and we have to do what we think is best with state-owned property." R. at 53. And so the State pressed on. R. at 53.

## IV. Procedural Posture

In 2024, Montdel United sued Delmont in the United States District Court for the District of Delmont seeking a temporary restraining order and injunctive relief for violations of its First Amendment rights under the Free Speech and Free Exercise Clauses. R. at 10. The temporary

restraining order was denied, and a hearing was scheduled to determine whether a preliminary injunction should be granted. R. at 10

The District Court agreed with Montdel United and granted the injunction. R. at 32. In its inquiry, the District Court held that Montdel United was likely to succeed on both its free speech and free exercise claims. R. at 31. As to the free speech claim, the District Court held that Delmont's actions were an unconstitutional time, place, and manner restriction of a traditional public forum. R. at 25. Even though Red Rock was not a prototypical municipal park, the District Court nonetheless held that Red Rock has "immemorially been held in trust for the use of the public and, time out of mind, [and has] been used for purposes of assembly." R. at 23. Because a "park is a park," Red Rock is a traditional public forum. R. at 13.

Consistent with that status, the District Court determined that the proposed closure of Red Rock should be subject to intermediate scrutiny "as would . . . any other regulation of a traditional public forum." R. 20. Whereas designated public forums can be opened and closed by the government with ease, the District Court held that applying that "same level of scrutiny" to closures of traditional public forums would abolish them as a "distinct legal category." R. at 19.

Applying intermediate scrutiny, the District Court concluded that the regulation was not narrowly tailored and did not leave open "ample alternative channels of communication" for Montdel United. R. at 24–25. As such, the proposed closure likely violated Montdel United's free speech rights. R. at 25.

As to the free exercise claim, the District Court found that the closure was not generally applicable and thus subject to strict scrutiny under *Smith*. R. at 29. Because the State did not "provide[ ] a compelling state interest in extirpating the religious exercise of an ancient faith," the court held that Montdel United was likely to succeed on its free exercise claim, too. R at 31.

The Court of Appeals for the Fifteenth Circuit reversed on both issues. R. at 45. As to the speech claim, the Fifteenth Circuit found that Red Rock was a "reasonable" restriction of a nonpublic forum that the government has greater latitude to regulate. R. at 41. And as to the free exercise claim, the Fifteenth Circuit stated that the "First Amendment does not apply" because of this Court's decision in *Lyng*. R. at 43.

Montdel United appeals and prays for relief. R. at 55. On January 5, 2025, this Court granted certiorari.

## SUMMARY OF THE ARGUMENT

What's left of the First Amendment? The Fifteenth Circuit sanctions the complete "destruction" of Red Rock—the sole "sacred site" of the Montdel people that has been on the land that is today the State of Delmont since well "before there was ever a thought of such a thing as . . . America." "[S]piritual freedom is the root of political liberty," and the Founders once saw it as their "duty" to defend both. Thomas Paine, 1 THE WRITINGS OF THOMAS PAINE 57–58 (Moncure Daniel Conway ed., G.P. Putnam's Sons 1894) (1775). Where Delmont seeks to "effectively outlaw" Montdel religious practices in Red Rock and circumvent the group's religious and political freedom, this Court must affirm the judgement of the District Court and enjoin its sale.

If the First Amendment stands for anything, it must mean that the government cannot stifle speech merely because it is done "tolerat[ing]" it. Expressive religious activity in a public park receives "overlapping protection" from the Free Speech and Free Exercise Clause. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). When a group has used one particular park for centuries for their religious rituals, the Government cannot sell out their rights to particular political and economic interests of the day.

"The First Amendment is often inconvenient . . . [but] [i]nconvenience does not absolve the government of its obligation to tolerate speech." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring). This Court must hold Delmont to that obligation. Montdel United respectfully requests this Court reinstate the District Court's preliminary injunction and remind Delmont that the First Amendment is an unbending requirement, not a flexible suggestion.

## ARGUMENT

### I. The proposed transfer of Red Rock to a private mining company is an unconstitutional "prohibition" on Montdel United's free exercise of religion, as it sentences the only site important to the religious practices of the Montdel people to complete "destruction."

The Free Exercise Clause forbids the Government from "prohibiting the free exercise" of religion. U.S. Const. amend. I. "The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious . . . views." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 514 (2022). Neither "indirect coercion" nor "outright prohibitions" on the free exercise of religion is tolerated by the First Amendment. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

Native religious practices do not sidestep the First Amendment's protections. "[F]undamental difference[s]" with Western religions animate a pervasive misunderstanding of Native religious practices, including the use and importance of "sacred sites." Celeste Wilson, Note, *Native Americans and Free Exercise Claims: A Pattern of Inconsistent Application of First Amendment Rights and Insufficient Legislation for Natives Seeking Freedom in Religious Practice*, 2015 CRITICAL STUD. J 1, 4 (2015); *see also Lyng*, 485 U.S. at 454–55 ("[It is] the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise th[eir] traditional religions, including . . . access to

[sacred] sites.") (quoting the American Indian Religious Freedom Act, 42 U.S.C. § 1996)). But "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div*., 450 U.S. 707, 714 (1981). The First Amendment protects Native and non-Native religions alike.

As a threshold matter, the sweeping protections of the Free Exercise Clause are triggered when the government burdens an individual or group's "sincere religious practice" or belief. *See Bremerton*, 597 U.S. at 525. While the First Amendment may permit "incidental interference" with spiritual activities, the government may not "coerce individuals into acting contrary to their religious beliefs" without a compelling justification. *Lyng*, 485 U.S. at 440, 450. When the government puts religious claimants "to the choice" between violating their faith or ceasing the religious activity altogether, the government has burdened their religious exercise. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2021).

While the Free Exercise Clause gives the government some leeway to pursue "neutral and generally applicable" laws that "incidentally burden religion," *id.* at 533, government actions which "treat[ ] *any* comparable secular [objection] more favorably than religious [objections]" will trigger strict scrutiny, *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). Laws which "target[ ] religious conduct for distinctive treatment or advance[ ] legitimate governmental interests only against conduct with a religious motivation" are neither neutral nor generally applicable and will survive strict scrutiny "only in rare cases." *Church of Lukumi Babalu, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Bremerton*, 597 U.S. at 526.

Here, Montdel United's free exercise was burdened by Delmont's actions that were anything but generally applicable. At a minimum, Delmont's motivations behind transferring

Red Rock plainly reveal that the State—at a minimum—impermissibly "favor[ed]" secular objections over religious ones. At worst, they show an invidious "target[ing]" of religious conduct.

The Fifteenth Circuit's attempt to shield Delmont's actions from heightened judicial scrutiny through *Lyng* is unavailing. *Lyng* forbids the exact type of "prohibition" on religious exercise that Delmont imposes here. Because Delmont "advances legitimate governmental interests only against conduct with a religious motivation," the proposed closure triggers and subsequently fails strict scrutiny.

### A. The District Court correctly held that the proposed closure of Red Rock was not "generally applicable" because Delmont treated "secular [objections]" more "favorably" than "religious [objections]" throughout the mine site selection process.

The Free Exercise clause guards against the "unequal treatment" of religious concerns over secular concerns. *See Lukimi*, 508 U.S. at 542. Government action is not generally applicable with respect to religion when it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Bremerton*, 597 U.S. at 526. When the government "selective[ly]" decides that the interests it seeks to advance are "worthy of being pursued only against conduct with a religious motivation," that action is inherently suspect and will be sustained only in "rare cases." *Lukimi*, 508 U.S. at 542–43, 546.

Yet, in accommodating secular objections to two alternative land transfer agreements that would have advanced Delmont's "asserted interests in a similar way" while casting aside Montdel United's religious objections to the closure of Red Rock, Delmont did just that: it "selective[ly]" and impermissibly "burden[ed] . . . conduct motivated by religious beliefs."

*Lukimi* is instructive. In *Lukimi*, a Santeria church announced plans to establish a house of workshop in Hialeah, Florida. 508 U.S. at 525–26. As part of the Santeria faith, congregants

perform animal sacrifices on special occasions, including at birth, marriage, death, and as a cure for the sick. *Id*. at 525. Soon after the church's announcement, the city council passed several ordinances outlawing animal killing when done as part of a "ritual," claiming the ordinances were necessary to protect public health and prevent cruelty to animals. *Id.* at 524, 43. "Ritual" was defined in such a way, though, that criminalized animal killing only when done for religious purposes. *Id*. at 536. The law permitted the same conduct for secular reasons. *Id*.

This Court unanimously found the ordinances "well below the minimum standard necessary" under the Free Exercise Clause. *Id*. at 543. Restricting animal killing for comparable religious and secular reasons advanced the state's interests just the same. *Id.* at 544–45. Yet, Hialeah "pursue[d] . . . [its] interests only against conduct motivated by religious belief." *Id*. at 545. "This precise evil is exactly what the requirement of general applicability is designed to prevent." *Id*. at 545–46; *see Tandon v. Newsom*, 593 U.S. 61, 62 (2021) ("[G]overnment regulations are not . . . generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise.").

By shunning Montdel United's religious objections when selecting mine sites while accommodating secular objections, Delmont impermissibly decides its interests are "worthy of being pursued only against conduct with a religious motivation." As the District Court pointed out, the two withdrawn mining agreements "furthered the [same] substantial interests" that Delmont asserts in proposing to close Red Rock. And when those agreements faced secular opposition, Delmont caved. But when Montdel United intervened to protect its *only* site of worship from complete "destruction" from the Red Rock transfer, religious objections "took a back seat." This is the exact kind of secular "favora[tism]" that the Free Exercise Clause forbids.

### B. In holding the Free Exercise Clause "does not apply" to Delmont's proposed closure of the Montdel's sole religious site, the Fifteenth Circuit extend both *Lyng* and the First Amendment well beyond their breaking points.

At the threshold inquiry, the Fifteenth Circuit made a detour. No matter that Delmont's actions will likely "result in fundamental harm to the practice of the Montdel Observance," the Fifteenth Circuit says. Instead, the First Amendment apparently "does not apply" in the first place, since the Government did not "coerc[e] any violation of religious beliefs." Only a fundamental misreading of *Lyng* and misunderstanding of the First Amendment could have gotten the Fifteenth Circuit to its conclusion. These mistakes must be corrected.

The story of *Lyng* is one of religious accommodation. In *Lyng*, the government sought to build a timber road through a portion of a National Forest that was used for religious purposes by members of three American Indian tribes in California. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441–42 (1988). Some members protested the plans, and argued that the government's actions ran afoul of the Free Exercise Clause. *Id.* at 443, 451 (noting tribal opposition was "far from unanimous").

And sensitive to the tribe's religious objections, the government took "numerous steps . . . to minimize the impact" of the road on their "religious activities." *Id*. at 454. For example, the government would not "disturb[ ] . . . sites where specific rituals take place." *Id.* And the Forest Service chose the "farthest removed" route in order to reduce the audible and visual impact of the road on the religious practices. *Id*. In fact, the Court found it "difficult to see how the Government could have been more solicitous" of religious freedom, "except for abandoning its project entirely." *Id.*

Because the Government's actions did not "coerce individuals into acting contrary to their religious beliefs"—but merely made it "more difficult" to practice those beliefs—the Court

upheld the planned construction. *Id*. at 450. And because tribal members were not put to the choice between violating their faith and obeying the law, there was no legally cognizable burden on free exercise. *See id.*

But *Lyng* itself was clear on its limited reach. Whereas *Lyng* dealt only with government action that made it "more difficult" for individuals to practice religious beliefs, the majority noted that "a law *prohibiting* the Indian respondents from visiting the [religious site] would raise a different set of constitutional questions." *Id*. at 450, 453 (emphasis added). As this Court has "repeatedly held," either "indirect coercion" or an "outright prohibition" would suffice to subject the government action to strict scrutiny. *Id*. at 450. Thus, nothing in *Lyng* "should be read to encourage governmental insensitivity to the religious needs of any citizen." *Id.* at 453.

Delmont's actions raise exactly the "different set of constitutional questions" that *Lyng* sidestepped. The Montdel religious beliefs maintain a "sacred obligation" to engage in group prayer at Red Rock and failure to do so is a "transgression against the Creator." In closing Red Rock, Delmont thus puts the observers "to the choice": violate their faith by praying at a different site or cease their religious practices all together. The First Amendment does not countenance that choice. Therefore, *Lyng* demands Delmont's actions face strict scrutiny.

### C. The proposed destruction of Red Rock cannot withstand strict scrutiny because Delmont could have achieved its interests in a manner that "does not burden religion."

"Strict scrutiny leaves few survivors." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting). A government policy can withstand strict scrutiny only if it advances "interests of the highest order and is "narrowly tailored to achieve those interests." *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). "Put another way, so long as

the government can achieve its interests in a manner that does not burden religion, it must do so." *Id*.

Even if Delmont's purported interests are compelling, the history of its mine selection process makes clear they could have been achieved through means far less burdensome on religious exercise. Both previously withdrawn mining agreements would have "furthered the substantial interests [Delmont] asserts in this case," and neither was objected to on religious exercise grounds. Because Delmont can "achieve its interests in a manner" that does not eradicate the Montdel's religious practices, "it must do so."

## II. The planned permanent destruction of Red Rock is an unconstitutional obliteration of a traditional public forum that has been used "for purposes of assembly" for longer than the existence of the State of Delmont.

The Speech Clause of the First Amendment requires the government to "make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Where the Free Exercise clause protects religious exercises, the Speech Clause provides "overlapping protection" when those religious activities are expressive. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). This design is "no accident": the framers were wary of governmental attempts to regulate both religion and speech with one swing of the sword. *See id*. at 524.

But these protections have not stopped states like Delmont from at least trying in the years since. *See Capitol Square Rev. & Advisory Bd. v. Pinette*, 55 U.S. 753, 760 (1995) ("[I]n Anglo-American history, . . . government suppression of speech has so commonly been directed *precisely* at religious speech . . . .").

Although the Speech Clause provides varying protection depending on the "character of the property at issue," its power waxes most strongly in the context of the streets and the parks. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). Unique among other

locations available for speech, the streets and the parks have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Because of their "ancient" association with free expression, these areas lie at the core of the First Amendment. *See id*.

In these "quintessential" public forums, the ability of the state to regulate expressive activity is "sharply circumscribed." *Perry*, 460 U.S. at 45. Although the government may enforce reasonable time, place, and manner regulations in these traditional public forums, the restrictions must be content-neutral, be narrowly tailored to serve a significant government interest, and leave open ample channels of communication. *Id*. But the government may not "prohibit all communicative activity." *Id*.

In approving the sale of Red Rock, a site central to the religious practices and cultural identity of an "ancient" indigenous group older than the United States itself, to a private mining company that intends to make the site into a "water-filled quarry . . . too hazardous for visitation," the State of Delmont thrusts onto a traditional public forum the most severe time, place, and manner restriction possible: closure of the forum to *all* communicative activity. Although nominally content-neutral, the closure is both over- and under-inclusive and strands Montdel United without a meaningful alternative for their traditions. As such, the planned transfer violates Montdel United's First Amendment Free Speech rights.

### A. The District Court correctly found that Red Rock is a traditional public forum that has been utilized by the indigenous Montdel people since "time immemorial," as well as by the broader Delmont community "for purposes of assembly" for over seventy years.

"Public places historically associated with the free exercise of expressive activities, such as . . . parks, are considered, without more, to be public forums." *United States v. Grace*, 461 U.S. 171, 177 (1983). Normally, the determination that a particular area is a "park" simply ends

the forum inquiry there; no "particularized inquiry" into the "precise nature" of the particular park is necessary. *See Frisby v. Schultz*, 487 U.S. 474, 480–81 (1988); *see United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000) ("[T]he government concedes that [all national parks] are traditional public fora."). This is not some "accidental invocation of a cliché" that a park is the prototypical public forum. *Frisby*, 487 U.S. at 480–81. Rather, this classification affirms that parks, regardless of its particular number of trees or blades of grass, have "immemorially been held in trust for use of the public." *See Boardley v. Dept. of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010). As the District Court put succinctly: "a park is a park."

Where the status of a particular park is contested, the government bears the burden to show that its use is so "overwhelmingly specialized" to rebut this presumption and justify stripping it of its public forum status. *See Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992). Otherwise, any park is presumptively a "traditional public forum . . . [that] occupies a special position in terms of First Amendment protection." *See Grace*, 461 U.S. at 180.

When a particular park has been "traditionally open to the public for expressive activity," the presumption is nearly impossible to overcome. *See United States v. Kokinda*, 497 U.S. 720, 726 (1990); *see Boardley*, 615 F.3d at 515 ("[T]he dispositive question is the purpose the forum serves, either by tradition of specific designation."). For example, in *Naturist Soc., Inc. v. Fillyaw*, the Eleventh Circuit considered whether a small beach state park was a traditional public forum. 958 F.2d 1515, 1522 (11th Cir. 1992). In *Fillyaw*, the Eleventh Circuit reviewed a district court determination that the lower court "believed . . . [was] obvious": the area was not "really" a park, but rather a beach. As a result, the district court believed the beach could only be a nonpublic forum. *Id.*

But primary physical characteristics do not determine forum status. *See Kokinda*, 497 U.S. at 727. Instead, the Eleventh Circuit in *Fillyaw* analyzed the function of the beach and its use by the public and held that the small beach state park could not be "adequately distinguish[ed]" from a prototypical municipal park. 958 F.2d at 1522. Just like at a municipal park, the public may also "play games, rest, and enjoy the surroundings" at the beach state park. *Id.* And the fact that the beach has certain "beach characteristics" that Central Park may lack is not a justification for a different forum classification under the First Amendment. *See id.*; *see also United States v. Grace*, 461 U.S. 171, 179 (1983) (concluding sidewalks immediately outside the Supreme Court were public forums because they were "indistinguishable" in function from the prototypical sidewalk).

Only when the government had dedicated a park to a use "inconsistent with conventional public assembly" can that inconsistency strip a park of its presumed public forum status. *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992). For this reason, a postal sidewalk located "entirely on Postal Service property" that was constructed "solely to provide for the passage of individuals engaged in postal business" was held to be a nonpublic forum. *United States v. Kokinda*, 497 U.S. 720, 723 (1990). The postal sidewalk, unlike the nearby municipal sidewalk that was a "public passageway," was not "traditionally open to expressive activity." *Id.* at 727.

Nor was a state fairground that was constructed and deconstructed annually and only open for twelve days a year considered a traditional public forum. *Heffron v. Int'l Soc. For Krishna Consciousness*, 452 U.S. 640, 651 (1981). Whereas a street is "continually open" and a "necessary conduit in the daily affairs of a locality's citizens," the fairground was something entirely distinct: a "temporary" construction by the state for the limited purpose of "exhibiting . .

. the agricultural, stock-breeding, horticultural, . . . and other products and resources of the state." *Id*. at 643, 651; *see Greer v. Spock*, 424 U.S. 828, 838 (1976) (finding military bases are not public forums because their purpose is to "train soldiers, not to provide a public forum [for expression]."); *see also Adderley v. Florida*, 385 U.S. 39, 47 (1966) (finding the areas outside jails but "part of the jail grounds" were not public forums because their purpose is "reserved for jail uses").

The function and use of Red Rock plainly establish its status as a traditional public forum. Far from a "temporary" construction of the State for a "sole purpose," Red Rock predates the State itself. In fact, the only way in which Red Rock can be "adequately distinguish[ed]" from a prototypical park is in its *longer* tradition of use: whereas use of municipal parks are only as old as the municipality itself, the Montdel people have used Red Rock virtually "uninterrupted since before recorded history" for expressive religious activities. And since at least 1952, thousands of members Delmont community—with State encouragement—have gathered at Red Rock to "play games, rest, and enjoy the surroundings" and celebrate Montdel culture. Unlike postal sidewalks, state fairgrounds, or military bases, Red Rock has been "traditionally open to expressive activity" from the very beginning.

The Fifteenth Circuit correctly concluded that forum status is determined by the "purpose [the forum] serves"—but then veered well off course. Sometimes, a park is just a park, and the government falls well short of its burden here to prove otherwise. It is impossible to see how the Fifteenth Circuit thought that Red Rock is "inconsistent with conventional public assembly" when it has been used "consistent[ly]" for that exact purpose since well before "there was ever a thought of such a thing as Delmont."

### B. The District Court correctly held that the proposed closure of Red Rock is an unconstitutional time, place, and manner restriction of a traditional public forum.

The government cannot "by its own *ipse dixit* destroy the public forum status of streets and parks which have historically been public forums." *USPS v. Council Greenburgh Civic Ass'ns,* 453 U.S. 114, 133 (1981) (internal quotations omitted). "Traditional public forum property occupies a special position in terms of First Amendment protection." *United States v. Grace*, 461 U.S. 171, 180 (1983). Consistent with this "historically recognized character," the destruction of a public forum is "at least presumptively impermissible." *Id*. at 180; *see Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir. 1993) (expressing "grave doubts" about a city's ability to "withdraw" a city park from its status as a traditional public forum").

In contrast with traditional public forums, the Supreme Court has recognized another category—designated public forums—where government property has not "traditionally been regarded as a public forum [but] is intentionally opened up for that purpose." *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 679 n.11 (2010). Although the limited extent of permissible speech restrictions in traditional public forums and dedicated public forums remain the same, their manner of creation is not. *See id*. Nor is their manner of destruction. "The principal difference between traditional and designated public fora is that the government may close a designated public forum whenever it chooses, but it may not close a traditional public forum to expressive activity altogether." *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 493 (9th Cir. 2015).

This Court has never definitively addressed the appropriate level of scrutiny applicable to the closure of a traditional public forum. But respect for both this Court's precedent and lower court decisions counsels that the closure of a traditional public forum is a type of a time, place,

and manner restriction that should be evaluated under intermediate scrutiny. *See Menotti v. Seattle*, 409 F.3d 1113, 1130 (9th Cir. 2005) (holding that a temporary closure of twenty-five blocks of a city was constitutional, because the closure was content neutral and narrowly tailored to serve a significant government interest).

As the District Court pointed out in this case, "to hold that a traditional public forum may be closed by sale or transformation deserves the same level of scrutiny as a designated public forum would be in effect to abolish the former as a distinct legal category."

So, where a government seeks to close a traditional public forum through content-neutral means, it still must satisfy the requirements set out for any other time, place, and manner restrictions. Therefore, the action must be (1) narrowly tailored to serve a compelling government interest, and (2) leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Delmont's proposed closure of Red Rock is neither.

**1. The closure of Red Rock is not narrowly tailored because Delmont "burden[s] substantially more speech than is necessary" to achieve its asserted interests.**

The government cannot suppress speech for "mere convenience." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Even when, as here, the proposed action is content-neutral, the action must still be narrowly tailored to serve a significant governmental interest. *Id*. "[B]y demanding a close fit between ends and means, th[is] tailoring requirement prevents the government from too readily sacrific[ing] speech for efficiency." *Id*. (internal quotations omitted).

While the government need not choose the "least intrusive" means available, the proposed action cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 798–99. Nor can the government "regulate

expression in such a manner that a substantial portion of the burden of speech does not serve to advance its goals." *Id*. at 799. Unless the government can demonstrate that any "alternative means that burden substantially less speech would fail to achieve the government's interests," the government action is unconstitutional. *McCullen*, 573 U.S. at 467.

Where narrow tailoring must "refer . . . to the standards of Versace," Delmont stitches together its ends and means to off-brand standards. *See Hill v. Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting). For one, the proposed action is grossly underinclusive. Even if its stated reasons for transferring Red Rock are legitimate, the State of Delmont had previously entered into not one but two other land transfer agreements for alternative mining sites. But, as the District Court pointed out, the State withdrew from those agreements—not because those sites would have failed to "further[ ] the substantial interests it asserts in this case," but rather due to concerns related to two species and a nearby unincorporated town.

In selecting its third back-up location, Delmont "sacrificed" the speech rights of Montdel United for causes "more important to the [S]tate than the expressive activity at Red Rock." The First Amendment does not permit this "convenien[t]" trade-off. Because the previous sites would have both "achieve[d] the government's interests" and "burden[ed] substantially less speech," the proposed transfer of Red Rock is unconstitutional.

For another, the proposed transfer is overinclusive. Delmont's agreement with a private company ensures the complete "destruction" of Red Rock. The record provides no indication, however, why the *entire* area must be sentences to become nothing more than a "water-filled quarry . . . too hazardous for visitation"—especially when alternative technologies are under development that "could reduce the impact." While those technologies are not yet feasible, the

State of Delmont—yet again—"sacrifices" a 500-year tradition of expressive religious tradition for the sake of "efficiency."

Finally, "a substantial portion of the burden of speech" from flooding Red Rock does not "serve to advance [the] goals" of Delmont. Take just one: tackling addressing climate change. As the District Court pointed out, any single mining project—*especially* one that transform a state park into an environmental wasteland—is "unlikely . . . to be decisive in the global effort to slow the warming of the planet." *See Massachusetts v. E.P.A.*, 549 U.S. 497, 545 (2007) (Roberts, J., dissenting) (calling the connection between a single proposed government action and global warming "far too speculative"). And "much the same could be said" with respect to Delmont's two other stated interests which would have been served just as well by the previous sites.

Poor tailoring "raise[s] doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring . . . particular speaker[s] or viewpoint[s]." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011). Where Delmont has avowed that it is done "tolerat[ing] these rituals" of the Montdel, these doubts linger.

**2. The closure of Red Rock will leave Montdel United without a single "ample alternative" to carry out their centuries-old religious ceremonies.**

Even if the proposed action is narrowly tailored, the proposed transfer of Red Rock shuts the door on any "ample alternative channels of communication" for Montdel United. *See Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). This inquiry requires examining the importance of the location of the speech to its meaning, *see City of Ladue v. Gilleo*, 512 U.S. 43, 54–58 (1994), and whether the regulation has any effect on the quality or content of the expression, *Ward*, 491 U.S. at 802.

A regulation does not leave "ample alternatives" when it "completely foreclose[s] a venerable means of communication that is both unique and important." *City of Ladue* 512 U.S. at

54; *see Chabad of S. Ohio v. City of Cincinnati*, 233 F.Supp.2d 975, 986 (S.D. Ohio 2022). For example, in *Ladue*, this Court unanimously struck down a city ordinance that barred placing signs of any nature in the window of any home. *City of Ladue*, 512 U.S. at 45. Because of the unique nature of the home, displaying a sign from one's own residence often carries a message "quite distinct" from placing the same sign someplace else. *Id.* at 56. Simply put: there was not "adequate substitute" for the home and for "important medium of speech" that the city had cut off. *Id.; see also Chabad of S. Ohio*, 233 F.Supp.2d. at 986.

On the other hand, regulations that have "no effect on the quantity or content of th[e] expression" generate less First Amendment concern. *See Ward*, 491 U.S. at 802. In *Ward*, New York City required bands performing at a venue in Central Park to take measures to prevent concerts from being too loud. *Id.* at 787–89. Against a challenge, this Court upheld the requirement: while the limitations on volume may "reduce to some degree the potential audience for respondent's speech," the reduction had "no effect on the quantity of content of th[e] expression." *Id*. at 802. Because the guideline continued to "permit expressive activity" and was not an "attempt to ban any particular manner or type of expression," there was no showing that the remaining avenues of communication were "inadequate." *Id.* at 802.

Closing Red Rock leaves the Montdel without a single ample alternative to engage in and express their message. First, it is clear that the proposed closure of Red Rock significantly affects both the "quantity" *and* "content" of the expression and is a complete "ban . . . [on a] particular manner or type of expression." Second, just like for the residents of Ladue, there is no "adequate substitute" for Montdel's expressive religious activities outside of Red Rock.

For the Montdel, location is everything—their speech at Red Rock carries a message "quite distinct" from speech five miles down the river. In selling Red Rock, Delmont does not

just "completely foreclose a venerable means of communication that is both unique and important," it completely destroys the "sole" site where the Montdel believe they have "access to their Creator."

Delmont strands the Montdel without a single ample alternative to carry out their centuries-old traditions.

### C. In the alternative, the closure of Red Rock is not a reasonable restriction on a traditional public forum.

In a footnote, the Fifteenth Circuit relied on dicta of a concurring opinion to suggest that any closure of a traditional public forum must only be reasonable, viewpoint neutral, and not be "motivated by an animus toward the speaker's views." Even if this Court prefers this looser standard, the proposed destruction of Red Rock should be struck down as anything but reasonable.

The reasonableness of a restriction "must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Cornelius v. NAACP*, 473 U.S. 788, 809 (1985); *see also Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) ("[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation . . . in light of the characteristic nature and function of the particular forum involved.").

Whether a restriction is reasonable depends on if the regulation is consistent with the government's interest in preserving the forum "for the use to which it is lawfully dedicated." *See Perry*, 460 U.S. at 50. And even under this standard, there must be "substantial alternative channels that remain open" to the expressive activity after the restriction is imposed. *Id.* at 53.

Closing Red Rock both completely undercuts "the purpose of the forum" and, as discussed, leaves the Montdel with no "substantial alternative channels." Red Rock's purpose as a place of assembly and religious tradition predates the State of Delmont itself. When the state

eventually acquired the site as part of Painted Bluffs State Park, it did so "with the intent to preserve its natural beauty," not to mine for lithium. And inherent in Red Rock's natural beauty is "the lasting heritage of the Montdel people" that has both been "part of the land for centuries" and "part of a legacy that the state proudly cherishes."

Where the Fifteenth Circuit proposed a test of reasonableness, Delmont's actions do not even pass the laugh test. Turning Red Rock into a mine would destroy its natural beauty and end a centuries-old tradition. This destruction is completely inconsistent with the use to which it has been "lawfully dedicated" since "time immemorial." And where Delmont has stated it is done "tolerat[ing] these rituals" of the Montdel, this Court should scrutinize whether this closure is just a manifestation of an impermissible "animus" toward the speakers themselves that the First Amendment does not tolerate.

## CONCLUSION

For the foregoing reasons, Montdel United requests this Court reverse the Fifteenth Circuit denial of its motion for a preliminary injunction.

Respectfully Submitted,

/s/ Team 019

Team 019
Attorneys for Petitioner,
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## APPENDIX

**The First Amendment to the United States Constitution provides:**

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.

## CERTIFICATE

Team 019 Certification

This is to certify that the work product contained in all copies of Team 019's brief is in fact the work product of the team members and that Team 019 has complied fully with its law school's governing honor code. Team 019 has complied with all of the Competition Rules.

Respectfully Submitted,

Team 019