No. 24-CV-1982

In the

Supreme Court of the United States

MONTDEL UNITED,

Petitioner,

v.

STATE OF DELMONT and
DELMONT NATURAL RESOURCES AGENCY,

Respondents.

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

BRIEF FOR RESPONDENTS

Team 020
Counsel for Respondents

QUESTIONS PRESENTED

I. Does the State of Delmont Energy and Conservation Independence Act ("EICA") and Respondents' subsequent transfer of Red Rock violate the First Amendment Free Exercise rights of Petitioner?

II. Does the EICA and subsequent transfer of Red Rock violate the First Amendment Free Speech rights of Petitioner?

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JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit reversed the judgment of the United States District Court for the Western District of Delmont in favor of Respondents, the State of Delmont and the Delmont Natural Resources Agency, on November 1, 2024. Petitioner, Montdel United, filed a petition for a writ of certiorari, which this Court granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution is relevant to this appeal and is reprinted in the Appendix.

STATEMENT OF THE CASE

In early 2022, the State of Delmont enacted the Energy and Conservation Independence Act (hereinafter "the ECIA"), which authorized the transfer of land to private mining companies to extract precious minerals. R. at 2. Under the ECIA, land transfers are to be managed and approved by the Delmont Natural Resources Agency (hereinafter "the DNRA"). R. at 6. The State enacted the ECIA to reduce its dependency on fossil fuels (taking steps towards the State's goal of being carbon-neutral within fifty years) and boost the State's economy. R. at 1, 6. Federal executive and legislative bodies recently endorsed the ECIA and enacted related legislation that mandates the use of sustainable energy in defense contracting. R. at 6-7.

In January 2023, the DNRA executed an agreement in collaboration with the governor of Delmont to transfer a portion of Painted Bluffs State Park, including the area known as Red Rock, to Delmont Mining Company. R. at 7, 9. The Painted Bluffs State Park region, particularly around the Red Rock area, is the largest known lithium deposit in North America. R. at 7. The Red Rock area constitutes a small portion of the approximately 100-square-mile remote wilderness that makes up Painted Bluffs State Park. R. at 2, 38. The State of Delmont acquired Red Rock and the surrounding area in 1930 and subsequently established Painted Bluffs State Park to preserve the area's natural beauty. R. at 4. At the opening ceremony of Painted Bluffs, then Governor of Delmont Rupert Ridgeway publicly acknowledged the historic significance of the Montdel people, an Indigenous Native American group with ties to the State of Delmont, but no assurances were ever given to the Montdel people regarding the land. R. at 2, 4.

Prior to approval of the transfer, the DNRA conducted environmental and economic impact studies. R. at 8. The DRNA's environmental impact study concluded that mining operations would transform Red Rock into a water-filled quarry, unsuitable for visitation or future reclamation. R. at 8, 48. The study found that the other sections of Pained Bluffs would experience minimal environmental impacts. R. at 8, 48. The DRNA considered alternate mining technologies but determined them to be unfeasible, as the technologies are not yet fully developed and may entail prohibitive costs. R. at 8-9, 49. The DNRA's economic impact study determined that mining would result in a significant boost to the local economy. R. at 9, 48. Residents of the counties where Painted Bluffs State Park is located approved of the transfer because the tourism industry has been insufficient for the economic needs of the community. R. at 7. In the past five years, the DNRA entered into three other land transfer agreements but ultimately withdrew from two of these agreements due to the substantial negative environmental impacts that were forecast to result from

mining these mineral deposits. R. at 9-10. Notably, these past agreements involved land with significantly smaller mineral deposits than of the deposits found at Red Rock. R. at 10.

Montdel United was formed in 2016 to oppose the transfer of Painted Bluffs for mining. R. at 7. Montdel United is a non-profit organization made up of descendants of the Montdel people. R. at 7. The Montdel people claim a specific tie to Painted Bluffs through a ritual they perform at Red Rock known as the "Montdel Observance." R. at 3, 5. The Montdel religion instructs that its ritual take place four times a year at Red Rock. R. at 3. The practice has occurred with varying attendance and consistency throughout the Montdel people's history, without interference by the State of Delmont. R. at 3-4. Over the years, the Montdel Observance has evolved into a festival-like event, including food, music, and merchandise. R. at 5-6. Attendees include not only the "Old Observers" who participate in the ritual, but also college students on spring break and festival goers. R. at 5. The festival and religious traditions were considered in the DNRA's transfer decision but ultimately were not significant concerns compared to the State's policy goals. R. at 49. The DNRA Secretary Alex Greenfield explained this to Montdel United leaders, including Priscilla Highcliffe, in a meeting that took place when the land transfer was announced. R. at 52-53. At this meeting, Secretary Greenfield explained that the State has been tolerant of the Montdel beliefs, "but the needs of all the people of this state have to come first[.]" R. at 53.

After the DNRA's final decision on the land transfer, Montdel United sought a temporary restraining order and injunctive relief in the United States District Court for the Western District of Delmont to stop the transfer on free speech and free exercise grounds. R. at 10. The district court denied the restraining order, and a hearing was held regarding the preliminary injunction. R. at 10. Montdel United argued that the land transfer prevented the Montdel people from practicing their religion and claimed that this violated its First Amendment right to free exercise of religion.

R. at 26. It further argued that the land transfer closed a traditional public forum in violation of its First Amendment right to free expression. R. at 10-11.

The district court ruled in favor of Montdel United, holding that its free speech and free exercise claims were likely to succeed and merited injunctive relief. R. at 25, 31-32. The district court considered the Red Rock area to be a traditional public forum and concluded that the transfer violated the Montdel people's free expression rights because it did not satisfy the time, place, and manner test. R. at 17, 25. The court also found that the transfer was not generally applicable and did not pass the strict scrutiny test, thus violating the Montdel people's free exercise rights. R. at 26. The State of Delmont and the DNRA appealed this decision to the United States Court of Appeals for the Fifteenth Circuit. R. at 33. The Fifteenth Circuit reversed the district court's decision, finding that the court erred in granting the injunction because Red Rock was not a traditional public forum and that the transfer did not constitute coercion to violate the Montdel people's religious beliefs. R. at 35, 42-43. This Court then granted Montdel United's petition for a writ of certiorari. R. at 54-55.

SUMMARY OF THE ARGUMENT

The Fifteenth Circuit correctly concluded that the ECIA and subsequent land transfer did not violate Petitioner's First Amendment Free Exercise and Free Speech rights. While the Free Exercise Clause affords individuals protection from certain government intrusion, it does not permit an individual to dictate a government entity's internal procedures. Petitioner's free exercise rights were not violated because a violation of the Free Exercise Clause requires coercion. Respondents did not coerce Petitioner into forgoing its religious beliefs and thus there was no free exercise violation. But even if coercion is not required to prove a free exercise violation, Petitioner's rights were not violated because the ECIA is a neutral and generally applicable law,

which only incidentally burdened Petitioner's religious practice. The ECIA is neutral and generally applicable because it applies equally to the Montdel people and other non-religious groups. Respondents' land transfer prevents all groups, whether they are religious or not, from accessing the Red Rock area. Furthermore, the ECIA's object is not to target religious groups, as is required for a law to be non-neutral. Finally, Petitioner has failed to allege any official statements hostile to the Montdel religious practices that would provide grounds to show a free exercise violation.

Additionally, the ECIA and the subsequent land transfer did not violate Petitioner's First Amendment right to free expression. The First Amendment is not absolute and does not prevent Respondents from taking reasonable steps to manage state property in the public's best interest. Respondents' ability to manage their property is at its peak when the property is a nonpublic forum. Painted Bluffs is a nonpublic forum because its primary purpose is not to aid in expressive activities and Respondents have not intentionally opened it as a forum for expressive activity. Given the nonpublic forum classification, the ECIA and land transfer are constitutional because they are unrelated to the content of the speech expressed at Painted Bluffs and serve Respondents' reasonable interests. Even if Painted Bluffs is found to be a public forum, the ECIA and transfer do not violate Petitioner's rights. The ECIA and land transfer are not time, place, or manner restrictions on speech, so the applicable test is whether those actions are reasonable and content neutral. Moreover, even under the time, place, and manner test, Respondents' actions are permissible because they are justified without reference to the content of the regulated speech, are narrowly tailored to serve significant government interests, and leave ample alternative channels for communication.

ARGUMENT

I. THE ECIA AND SUBSEQUENT LAND TRANSFER DO NOT VIOLATE PETITIONER'S FREE EXERCISE RIGHTS.

While the ECIA and subsequent transfer of Red Rock impact Petitioner's religious practices, Respondents do not violate Petitioner's free exercise rights. "The Free Exercise Clause affords an individual protection from certain forms of government intrusion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Bowen v. Roy*, 476 U.S. 693, 700 (1986). Thus, Respondents, as government entities, have the right to regulate energy production and Petitioner is not excused from following a valid law that has a mere incidental effect on their religious exercise. *See Emp. Div., Dept. of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878-79 (1990) ("We have 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.").

The First Amendment's Free Exercise Clause states: "Congress shall make no law . . . prohibiting the free exercise of religion." U.S. Const. amend. I. This clause, made applicable to the states by incorporation through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), pronounces the right to believe and practice whatever religious doctrine one desires. *Smith*, 494 U.S. at 877. If a plaintiff claims that their free exercise rights are violated, he carries the burden to demonstrate that infringement. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). A plaintiff may show that their free exercise rights have been violated if a government entity has burdened their sincere religious practices pursuant to a policy that is not neutral or generally applicable. *Id.* A plaintiff may also show a free exercise violation by showing that "official expressions of hostility" to religion accompany laws or policies that burden religious exercise. *Id.* at n. 1 (citing *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617

(2018)). If a plaintiff carries these burdens, the defendant must show its actions were nonetheless "justified and tailored consistent with the demands of [this Court's] caselaw." *Bremerton*, 597 U.S. at 524. According to this Court's caselaw, strict scrutiny applies to a government action that burdens religious exercise and is not neutral and generally applicable. *See Fulton v. City of Phila.*, 593 U.S. 522, 540-41 (2021) (finding that the City's action was not neutral or generally applicable and then applying strict scrutiny to see if the government policy can survive).

A. Because Respondents did not coerce Petitioner, Respondents' burden on Petitioner's religious exercise is not heavy enough to constitute a violation of Petitioner's free exercise rights.

Respondents did not violate Petitioner's free exercise rights. The text of the First Amendment prevents a state from "prohibiting the free exercise" of an individual or group's religious beliefs. U.S. Const. amend. I. In accordance with this constitutional right, it is not enough for a challenged government action to merely interfere or even *significantly* interfere with a person's religious beliefs and practices. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (finding that there was no Free Exercise Clause violation in *Bowen v. Roy* and *Lyng* even when "the challenged Government action would interfere *significantly* with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." (emphasis added)). A government entity may burden religious practice enough to violate the First Amendment in two ways: (1) if the government action coerces the practicing individual to violate their religious beliefs; or (2) if the government action penalizes religious activity by denying any person "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* (finding the government actions in *Bowen v. Roy* and *Lyng* did not violate the Free Exercise Clause because neither of these two conditions were met). Neither condition is present in this case.

To be coercive, the government action must have a tendency to pressure a person into acting contrary to their religious beliefs, *id.*, which is not found here between the ECIA and

Petitioner. Indirect coercion, not just outright prohibitions, can violate the Free Exercise Clause. *Trinity Lutheran Church of Colom., Inc. v. Comer*, 582 U.S. 449, 463 (2017) (quoting *Lyng*, 485 U.S. at 450). A government action that forces individuals to choose between a government benefit and following their religious beliefs is coercive. *See Trinity Lutheran*, 582 U.S. at 463 (finding that while the government action did not criminalize the way a church worshiped, the action was nonetheless coercive because it forced a church to disavow its beliefs in order to receive a benefit); *Loffman v. California Dept. of Educ.*, 119 F.4th 1147, 1168 (9th Cir. 2024) (citing *Lyng* and finding that a government action was coercive when it forced parents to choose between special education benefits available through public school enrollment, but unavailable through education in an Orthodox Jewish setting). Here, there are no benefits that Petitioner was unable to receive due to its religious practice. Thus, coercion is not present. The Montdel are not being forced to abandon their religious practices; they are merely being asked to follow an otherwise valid law.[1]

Furthermore, the ECIA does not deny Petitioner an equal share in the rights, benefits, and privileges enjoyed by other citizens. As previously stated, no government benefit is being granted to a group in the ECIA; but on a broader point: the ECIA and subsequent transfer of the Red Rock area prevents any private persons from visiting the area. R. at 8. Red Rock will be completely transformed into a quarry to meet the economic needs of the surrounding Delmont counties and pursue a fossil-fuel-reducing agenda. R. at 48-49. The ECIA in no way "penalized religious activity" by denying the Montdel something that other non-Montdel groups had access to. As this Court stated in *Lyng*: "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious

[1] Regarding the validity of the ECIA, *see infra* Section I.B.1.

objector's spiritual development." *Lyng*, 485 U.S. at 451. Petitioner merely invoking the Free Exercise Clause is not enough to sufficiently allege a violation of its rights.

B. Even if Petitioner's religious exercise was burdened, the ECIA does not violate Petitioner's free exercise rights because its burden on Petitioner's religion was a mere incidental effect of a neutral and generally applicable law.

While the lack of coercion here prevents Petitioner from claiming a free exercise violation, even if *Lyng* does not apply and Petitioner's religious exercise was burdened heavily enough to invoke the Free Exercise Clause, the ECIA does not violate Petitioner's rights because it is a neutral and generally applicable law. The right of free exercise does not relieve an individual of the obligation to follow valid and neutral laws of general applicability, like the ECIA here.[2] *See Smith*, 494 U.S. at 879 (listing numerous examples of this Court upholding a law that incidentally affected religious activity). If a law incidentally burdens religious practice, the government entity does not need to justify its law with a compelling interest so long as the law is neutral and generally applicable. *Church of Lukumi v. City of Hialeah*, 508 U.S. 520, 531 (1993). The neutral and generally applicable requirements, while separate, are interrelated. *Id.* If a law is deemed not neutral, it will likely not be generally applicable, and vice versa. *Id.* If a law fails to satisfy this test, strict scrutiny applies, and the law must be justified by a compelling government interest and narrowly tailored to advance that interest. *Id.*

[2] According to this Court, "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . ." *Id.* As will be further described in this brief, Petitioner's free speech rights were also not violated; thus this is not one of the hybrid situations that this Court mentions.

1. The ECIA is a valid exercise of state power.

As an initial matter, passing a law like the ECIA is well within the State of Delmont's constitutional authority because states have the undoubted power to promote health, safety, and general welfare. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). Under this power, even religious-based activity is subject to regulation. *See, e.g., Gillette v. United States*, 401 U.S. 437 (1971) (finding that a selective service act provision that excludes certain conscientious objectors from obtaining selective service exemptions does not violate the Free Exercise Clause); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (finding that a law that prevents businesses from being open on Sundays does not violate the free exercise of an Orthodox Jewish community whose holy day is on Saturday); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (finding that child labor laws still apply in the case of a Jehovah Witness woman convicted for putting her nine-year-old niece to work but claiming that it was in her freedom of religion to encourage her niece to "preach the gospel"). Thus, the State of Delmont's ability to regulate energy production falls within the State's power to promote the health, safety, and general welfare because aiming for carbon neutrality relates to the general welfare. *See* Jing M. Chen, *Carbon Neutrality: Towards a Sustainable Future*, 2 The Innovation 3 (2021) (showing some of the benefits of going carbon-neutral are an increase in air quality, ecological recovery, and landscape beautification).

2. The ECIA is neutral.

If the object of a law is to infringe upon or restrict the practices of a religious group the law, unlike the ECIA, is not neutral. *Lukumi*, 508 U.S. at 533. Of course, a law that directly targets religious beliefs is also not permissible. *Id.* There are numerous ways to determine if the object of a law is to restrict the practices of a religious group, the first being an examination of the text. *Id.* In *Lukumi*, a Santeria church that practiced ritual animal sacrifice sued the City of Hialeah, Florida,

over an ordinance that prohibited such practice. *Id.* at 527-28. This Court found that the ordinance in question may be viewed as discriminatory on its face because of its direct reference to religious practices (like including the words "ritual" and "sacrifice") without a secular meaning. *Id.* at 533-34. The textual evidence in *Lukumi* was not dispositive, however, and this Court found that the effect of the ordinance was stronger evidence of its object. *Id.* at 334-35. While an adverse impact does not always mean that a law impermissibly targets a religious group, in *Lukumi*, the only conduct subject to the city ordinance in question was the conduct of a specific religious group, the Santeria church. *Id.* By using both the text and the effect of the ordinance, it was evident that the object of the laws was to restrict the Santeria church members from engaging in animal sacrifice, thereby impermissibly targeting their religious exercise. *Id.*

Neither the text nor the effects of the ECIA suggest that the ECIA is a non-neutral law that impermissibly targets Petitioner. The record does not indicate that the ECIA's text contained references to the religious practice of Petitioner on Red Rock. And while the ECIA does adversely impact Petitioner's religious practice on Red Rock, this Court explained that adverse impact does not necessarily demonstrate impermissible targeting. *Id.* at 535. In *Lukumi*, the laws not only adversely impacted the Santeria church, but the impact also rose to the level of "religious gerrymandering." *Id.* Here, Respondents had unambiguous goals in the land transfer of Painted Bluffs State Park: (1) to promote a mining operation that creates a sustainable energy source and reduces the use of fossil fuels, R. at 7-8; and (2) to revive the economy of the counties surrounding the Painted Bluffs State Park through new mining-job opportunities, as tourism is insufficient for the State's economic needs, R. at 7. The festival at the Park and the Montdel religious traditions were not a significant enough concern when placed against these policy goals. R. at 49.

3. The ECIA is generally applicable.

A law like the ECIA is generally applicable when it treats similar conduct similarly, without regard to whether the conduct is religiously motivated. *We the Patriots of the United States v. Conn. Office of Early Childhood Dev.*, 76 F. 4th 130, 145 (2d Cir. 2023). A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions. *Fulton*, 593 U.S. at 533. A law also lacks general applicability if it prohibits religious conduct while allowing secular conduct that undermines the government's asserted goals in a similar way. *Id.* at 534. That is why, in 2020, this Court denied an application for injunctive relief against a California order that placed blatant restrictions on religious worship due to the COVID-19 pandemic because similar or more severe restrictions applied to secular gatherings. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring). In that case, both secular and religious groups were treated equally. *Id.* Here, the ECIA also treats all groups equally. Because of the land transfer from the State to Delmont Mining Company, the Park and Red Rock will be private land. R. at 7. Thus, religious actors like Petitioner and non-religious actors like the many tourists that frequented the area are no longer able to access the Painted Bluffs State Park region where the land transfer took place. The ECIA also contains no provisions regarding exemptions for secular groups.

The ECIA is different from laws that this Court found were not generally applicable. *See, e.g., Fulton*, 593 U.S. at 536 (finding that the inclusion of a formal system of entirely discretionary exceptions makes the provision in question not generally applicable). On the other hand, the ECIA is similar to laws that this Court found were generally applicable. *See, e.g., Smith*, 494 U.S. at 878 (finding that a law that prohibited peyote use was generally applicable because its impact on religion was a mere incidental effect of the object of the statute and the statute was otherwise

valid). Like the employees in *Smith* who wanted an exemption for a neutral and generally applicable law that prohibited them from taking peyote, the ECIA prohibits Petitioner from practicing its rituals on Red Rock due to the land transfer. However, that fact alone is not enough to violate the Free Exercise Clause.

The ECIA is a neutral and generally applicable law that has, at most, an incidental effect on Petitioner's religious practices. Thus, Respondents have not violated Petitioner's free exercise rights. As this Court stated in *Reynolds v. United States* when discussing whether an individual can excuse themselves from a valid law because of their religious beliefs: "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." 98 U.S. 145, 167 (1878).

C. Petitioner has failed to show Respondents made "official expressions of hostility" to religion that accompany laws or policies burdening religious exercise.

Respondents have not made any official expressions of hostility toward religion that would enable Petitioner to claim a Free Exercise Clause violation under this theory. If a government entity makes hostile remarks about a religious group, the Free Exercise Clause may be violated. *Masterpiece Cakeshop*, 584 U.S. at 639. The presence of hostile remarks is inconsistent with the guarantee that the government will apply laws in a neutral manner towards religion. *Id.* at 640.

Here, the record does not contain any statement that this Court would consider an official expression of hostility. The closest evidence that Petitioner may present is DNRA Secretary Greenfield's statement to the Montdel people during a meeting regarding the land transfer and mining of Red Rock. R. at 53. After the President of Montdel United, Priscilla Highcliffe, objected to the land transfer, Secretary Greenfield responded: "Look, the state has been very patient with the Montdel. We've tolerated 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 best with state-owned property." R. at 53. But this statement shows no hostility towards the Montdel people, especially when compared with the statements made by a Colorado Civil Rights Commissioner in *Masterpiece Cakeshop* that this Court deemed to be hostile. *Compare* R. at 53, *with Masterpiece Cakeshop*, 584 U.S. at 635 ("[R]eligion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . . And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."). Furthermore, former Delmont Governor Rupert Ridgeway stated that the Montdel religious tradition was "part of a legacy this state proudly cherishes" when the State acquired Painted Bluffs. R. at 5. Whether these statements are "official" statements is irrelevant because the record is void of any hostile statements towards the Montdel religious tradition.

II. RESPONDENTS' REASONABLE AND NEUTRAL DECISIONS TO ENACT THE ECIA AND TRANSFER RED ROCK DO NOT VIOLATE PETITIONER'S RIGHT TO FREE EXPRESSION.

The Fifteenth Circuit correctly held that the ECIA and the subsequent transfer of a portion of Painted Bluffs State Park did not violate Petitioner's right to free expression under the First Amendment. While the First Amendment protects Petitioner's right to speak, it "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). Moreover, Respondents, in their role as property owners, have the power to manage the property under their control. *Greer v. Spock*, 424 U.S. 828, 836 (1976). The First Amendment limits this right of control when a government manages its property unreasonably or regulates its use to suppress speech. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). Because the ECIA and

the decision to transfer a portion of Painted Bluffs are reasonable and unrelated to suppressing speech, they do not violate Petitioner's right to free expression.

This Court's free expression jurisprudence analyzes limitations on speech on government property by categorizing the property as a public or nonpublic forum. *Id.* at 44. Painted Bluffs State Park, including the portion that contains Red Rock, qualifies as a nonpublic forum based on its non-expressive purpose and Respondents' passive approach toward speech in the forum. As government actions that limit speech in a nonpublic forum, the ECIA and the land transfer are permissible because they are reasonable and not an attempt to suppress viewpoints. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). However, even if this Court were to categorize Painted Bluffs as a public forum, the applicable test would still be reasonableness and viewpoint neutrality because Respondents are not restricting speech but rather transferring ownership of state property. Moreover, even if this Court determines that the ECIA and transfer are restrictions on the time, place, or manner of speech, Respondents' actions survive because they are justified without reference to the content of the regulated speech, are narrowly tailored to serve significant government interests, and leave ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

A. Painted Bluffs State Park is a nonpublic forum because its purpose is not expressive and the State has not intentionally opened it up as a forum for public discourse.

Respondents are entitled to transfer the land within Painted Bluffs State Park because it constitutes a nonpublic forum. Respondents can control their nonpublic forum property like a private property owner if their actions are reasonable and viewpoint-neutral. *Perry Educ. Ass'n*, 460 U.S. at 45. A public forum is government property that serves an expressive purpose "either by tradition or specific designation." *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010). Government property is a traditional public forum if it has "immemorially been held

in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion). Alternatively, government property is a designated public forum if "the State has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n*, 460 U.S. at 45. Painted Bluffs State Park does not fall into either of these categories.

First, the Park is not a traditional public forum. Whether a particular piece of government property constitutes a traditional public forum depends on the purpose of that forum and is not determined solely by "[t]he mere physical characteristics of the property." *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion). Thus, the Park cannot be considered a traditional public forum by default simply because it is a park.

The Park is not a traditional public forum because it lacks the key element of a traditional public forum: its purpose is not to further the public's expressive interest. *Cornelius*, 473 U.S. at 800; *Greer*, 424 U.S. at 838 (noting that "the business of a military installation . . . [is] to train soldiers, not to provide a public forum"); *Kokinda*, 497 U.S. at 727-28 (plurality opinion) (finding that a sidewalk leading to a post office was not a traditional public forum because "[t]he postal sidewalk was constructed solely to assist postal patrons . . . not to facilitate the daily commerce and life of the neighborhood or city"). Here, the Park was "acquired by the state with the intent to preserve its natural beauty." R. at 4. Moreover, while traditional public forums are often "a necessary conduit in the daily affairs of a locality's citizens," *Heffron*, 452 U.S. at 651; *Kokinda*, 497 U.S. at 727-28 (plurality opinion), the Park is "a large, expansive, and remote wilderness area." R. at 38. The Park's geography distinguishes it from streets or parks within cities, which naturally play a role in the daily affairs of a region's citizens. R. at 2,4; *State v. Ball*, 796 A.2d 542, 549-50

(2002). Although the Park is visited a few times a year for the Montdel rituals, this occasional usage does not establish a principal purpose of facilitating the free exchange of ideas as is characteristic of traditional public forums. R. at 5; *Cornelius*, 473 U.S. at 800.

Second, the Park has not become a public forum by specific designation. A public forum is created by specific designation when the government makes an affirmative choice to open a nontraditional forum for public discourse. *Cornelius*, 473 U.S. at 802; *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 206 (2003) (plurality opinion). In determining whether the government has created a designated public forum, this Court considers the policies and practices of the government, as well as the nature of the property and its compatibility with expressive activity. *Cornelius*, 473 U.S. at 802.

Respondents' policies and practices towards expressive activity at the Park can be categorized as passive acquiescence and do not demonstrate the broad intent necessary to create a public forum by designation. R. at 9; *Ball*, 796 A.2d at 550-51 (finding that although a state forest implemented a permit system for some expressive activities, this was not persuasive evidence of the State's intent to create a public forum); *Cornelius*, 473 U.S. at 805 (finding the government did not create a public forum when it created a charity drive aimed at federal employees, although expressive activity occurs in the context of the forum). When the Park opened, Delmont Governor Rupert Ridgeway acknowledged the heritage of the Montdel people. R. at 4. However, he did not indicate that the State intended for the Park to serve as a venue for expressive activity. R. at 4.

Respondents' actions are insufficient to amount to an affirmative choice to open the Park for use as a public forum. Although Respondents have not impeded the expressive activity at the Park, this Court has determined, "[t]he government does not create a public forum by inaction or by permitting limited discourse." R. at 4-5; *Cornelius*, 473 U.S. at 802; *Hawkins v. City & Cnty.*

of Denver, 170 F.3d 1281, 1288 (10th Cir. 1999). Respondents have not actively accommodated the Montdel Rituals or formally adopted policies promoting general open access to the Park for public discourse. R. at 4-5. This differs substantially from a municipal theater that accepts applications for stage-use or a university with a policy of accommodating meetings. *Se. Promotions v. Conrad*, 420 U.S. 546, 555 (1975); *Widmar v. Vincent*, 454 U.S. 263, 265, 273 (1981). Since the Park is not a public forum by designation or tradition, it is, by default, a nonpublic forum.

B. Because the Park is a nonpublic forum, Respondents' reasonable and viewpoint-neutral actions do not violate Petitioner's right to free expression.

Respondents may transfer the portion of the Park containing Red Rock because the Park is a nonpublic forum. The transfer is a reasonable way to pursue Respondents' interest, and the transfer is not intended to suppress viewpoints. *Perry Educ. Ass'n,* 460 U.S. at 46. As this is a nonpublic forum, Respondents do not have a "constitutional obligation *per se* to let any organization use the [forum]." *Id.* at 48 (quoting *Conn. State Fed'n of Tchrs. v. Bd. of Ed. Members*, 538 F.2d 471, 481 (2d Cir. 1976)). This Court has declined to apply the elaborate time, place, and manner analysis used to assess restrictions on traditional public forums when the government property is found to be a nonpublic forum. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992); *Cornelius*, 473 U.S. at 806. Instead, the proper inquiry is whether the government action "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46; *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 (1984).

The land transfer is reasonable because it directly advances several of Respondents' goals and demonstrates a thorough decision-making process. In a nonpublic forum, "[t]he Government's

decision to restrict access . . . need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Similarly, the restriction must "not be arbitrary, capricious, or invidious." *Lehman v. Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality opinion). In evaluating the reasonableness of restricting access to a nonpublic forum, this Court considers "the purpose of the forum and all the surrounding circumstances." *Cornelius* 473 U.S. at 809.

The circumstances surrounding the land transfer demonstrate that the decision is reasonable and well-considered. Respondents have committed to reducing fossil fuel use in line with a federally mandated objective, and this commitment would be significantly advanced through this land transfer. R. at 9. The transfer is also projected to substantially boost the local economy, which has been struggling economically, and residents of the counties where the Park is located have expressed their approval of the transfer. R. at 7, 9. Additionally, Respondents did not approve the land transfer hastily or arbitrarily. They conducted economic and environmental impact studies and consulted with the governor before approving the transfer. R. at 9.

Furthermore, the land transfer is viewpoint-neutral. Respondents' stated motivations for the transfer are entirely unrelated to the Montdel Observance. R. at 9. This transfer is a part of Respondents' years-long pursuit of opportunities to transfer land to mining companies to further its environmental, economic, and compliance goals. R. at 9. This Court has found restrictions on nonpublic forums to be impermissible viewpoint discrimination when the restriction permits or denies access to a forum based on the speaker's ideology, opinion, or perspective. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-32 (1995) (holding that withholding funding from a publication because it contained religious speech constituted impermissible viewpoint discrimination); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384,

394 (1993) (finding viewpoint discrimination where a school denied access to its property based on the religious nature of a group's speech); *cf. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010) (holding that denying funding from a student group that failed to comply with an inclusivity condition did not constitute viewpoint discrimination). Here, the transfer will not permit or deny access to the forum based on a speaker's viewpoints. R. at 9. Instead, it will uniformly deny all members of the public access to the forum as part of a general land management decision. R. at 9.

C. Even if the Park is a public forum, the ECIA and land transfer do not violate Petitioner's right to free expression.

If this Court were to find that the Park is a public forum, Respondents' actions are constitutional for two independent reasons. First, the reasonableness and content neutrality test should apply regardless of the forum classification when a forum is closed through a sale, transfer, or physical transformation because these actions are distinct from restrictions on speech. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring). Second, even if this Court declines to apply the reasonableness and content neutrality test, the ECIA and land transfer are permissible because they meet the time, place, and manner test: they are justified without reference to the content of speech, are narrowly tailored to serve the state's interests in economic revitalization and reduced fossil fuel consumption, and leave ample alternative avenues of communication open for Petitioner, who can relocate its rituals to another part of the Park. *Ward*, 491 U.S. at 791.

1. The ECIA and land transfer are not speech regulations.

If this Court were to find that the Park is a public forum, then as the Fifteenth Circuit Court stated, the appropriate standard of review is whether the closure of the forum is reasonable and viewpoint-neutral. *Montdel United v. State of Delmont*, R. at 42 n.2 (15th Cir. 2024). The time,

place, and manner test does not apply because altering a property's ownership or physical character fundamentally differs from regulating speech in a public forum. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. at 699-700 (Kennedy, J., concurring). Justice Kennedy, in his concurrence in *Lee*, noted that while a state retains authority to close a public forum by selling the property or changing its physical character, a state cannot assert broad control over speech on property that is a public forum. 505 U.S. at 699-700 (Kennedy, J., concurring); *see Boumediene v. Bush*, 553 U.S. 723, 765 (2008) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.").

The transfer of a portion of the Park is not a regulation that asserts control over expressive activity; rather, the transfer is an alteration of the property's ownership that incidentally closes the forum to expressive activity. This is a critical distinction because this Court's jurisprudence has exclusively applied the time, place, and manner test to regulations that restrict expression in public forums. *Ward*, 491 U.S. at 791; *Hill v. Colorado*, 530 U.S. 703, 719 (2000); *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). It would be an unprecedented expansion of the public forum doctrine to hold that sales and alterations of government property are contingent upon meeting a standard of review crafted for regulatory restrictions on speech. *Compare Lee*, 505 U.S. at 699-700 (Kennedy, J., concurring) (noting that "no one has understood the public forum doctrine to require" that governments "be prohibited from closing a park, or eliminating a street or sidewalk"), *with Montdel United v. State of Delmont*, R. at 20 (W.D. Delmont 2024) (applying the time, place, and manner test without citing any case in which a court has applied this test to the closure of a traditional public forum by sale or physical transformation); *see also* Joseph Blocher, *Government Property and Government Speech*, 52 Wm. & Mary L. Rev. 1413,1452 (2011) (noting that

emergence of the concept of the public forum did not alter the government's formal ownership rights).

Therefore, the transfer of the Park does not infringe on Petitioner's right to free expression, even if the Park is found to be a traditional public forum. As demonstrated in section II.B., the transfer is reasonable and viewpoint-neutral. This standard of review is appropriate because this Court has consistently utilized the test of reasonableness and viewpoint neutrality to evaluate state actions that reserve government property for private use. *Perry Educ. Ass'n*, 460 U.S. at 46 ("In addition to time, place, and manner regulations, the State may reserve the forum . . . as long as the regulation on speech is reasonable and not an effort to suppress expression . . . ."); *Minn. Voters All. v. Mansky*, 585 U.S. 1, 12 (2018); *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

2. The ECIA and land transfer satisfy the time, place, and manner test.

Even if this Court were to find that the Park is a traditional public forum and that the ECIA and land transfer constitute a restriction on the time, place, or manner of speech, Respondents' actions are nonetheless permissible because they meet each element of the time, place, and manner test. The ECIA and the transfer are justified without reference to the content of the Petitioner's speech. R. at 9. Moreover, they are narrowly tailored to serve significant government interests, as demonstrated by Respondents' consideration of alternative methods to achieve the same goals. R. at 8-10. Additionally, the transfer leaves ample alternative channels for information communication because most of the Park will be unaffected by the transfer. R. at 8.

Beginning with content neutrality, the ECIA and transfer are not "based upon either the content or subject matter" of the speech expressed at the Park. *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980). A regulation of speech is impermissible when "the government has adopted a regulation of speech because of disagreement with the message it

conveys." *Ward*, 491 U.S. at 791. The ECIA and land transfer are permissible because they were based on Respondents' environmental, economic, and compliance objectives rather than due to disagreement with the content of the speech expressed at the Park. R. at 9; *Ward*, 491 U.S. at 791 (explaining that in determining content neutrality, "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

Moreover, Respondents' actions are content neutral because they apply evenhandedly to all speakers who wish to use the Red Rock portion of the Park for expressive activity. *Heffron*, 452 U.S. at 648-49. The ECIA and subsequent transfer bar all speakers, regardless of the content of their speech, from accessing the transferred portion of the Park. R. at 9. This Court has emphasized that an open forum cannot selectively exclude speakers based on content, as there is an "equality of status in the field of ideas." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). However, content neutrality does not prohibit the government from excluding all speakers from a forum equally. *Heffron*, 452 U.S. at 649, 655 (finding that a rule that prevented all people and organizations, except those renting a booth, from distributing written materials was a valid time, place, and manner restriction). Although Petitioner's speech may be disproportionately affected, this incidental impact does not establish that the ECIA and land transfer were adopted for any purpose other than advancing Respondents' neutral objectives. *Martinez*, 561 U.S. at 695-96.

Additionally, the ECIA and transfer are narrowly tailored to serve Respondents' significant interest in revitalizing the region's economy and reducing the state's reliance on fossil fuels. R. at 1. Narrow tailoring requires that Respondents "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests . . . ." *McCullen*, 573 U.S. at 467. Respondents have demonstrated a lack of viable alternative methods as effective as

this land transfer in achieving their interests through environmental and economic impact studies. R. at 8-10. The environmental impact study concluded that while alternative mining technologies for extracting lithium may be developed, those technologies are unlikely to be feasible for at least another twenty years and may include prohibitive costs, lengthy timelines, and unknown ecological and environmental risks. R. at 8-9; *United States v. Albertini*, 472 U.S. 675, 689 (1985) (noting that restrictions are not invalid "simply because there is an imaginable alternative that might be less burdensome on speech"). In addition, the economic impact study found that the transfer would substantially boost the local economy. R. at 9. These studies are sufficient to satisfy the means-ends nexus requirement of narrow tailoring. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51-52 (1986) (explaining that a city is not required by the First Amendment to conduct studies to support its restrictions on speech "so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that the city addresses.").

Respondents also considered other land transfers that would burden less speech before turning to the Park. R. at 10. However, these alternatives would be significantly less effective in achieving Respondents' goal of reducing Delmont's fossil fuel use, as none of the mineral deposits in the alternative locations were comparable to those in the Red Rock area, which represents the largest lithium deposit ever discovered in North America. R. at 7, 10. Mining these alternative mineral sources would have also resulted in extreme environmental consequences. R. at 10. The narrow tailoring requirement is satisfied because the ECIA and transfer "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation." *Albertini*, 472 U.S. at 689.

Furthermore, the ECIA and land transfer allow for ample alternative avenues of communication. If the ECIA and land transfer are a time, place, or manner restriction, they restrict

the *place* where Petitioner can engage in expressive activity. The ECIA and transfer are not overly burdensome in this regard as they only prevent Petitioner from speaking in one-fourth of the roughly 100-square-mile state park. R. at 2, 7. Those participating in the equinox festivals can continue their traditions by relocating five miles down the riverbanks. R. at 8. This Court's jurisprudence has found restrictions on speech permissible when they left only 5% of a city's land area open for a particular type of speech, a far more limiting restriction than the three-fourths of the Park left available for communication by this transfer. *Playtime Theatres*, 475 U.S. at 53. Although the portion of the Park being transferred is of special importance to Petitioner, the time, place, and manner test does not require equivalent or perfect alternative avenues for communication, only reasonable ones. *Ward*, 491 U.S. at 802; *Kovacs v.* Cooper, 336 U.S. 77, 88-89 (1949) (plurality opinion). Therefore, the ECIA and land transfer satisfy each element of the time, place, and manner test.

CONCLUSION

For the foregoing reasons, Respondents respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit and declare that the ECIA and the subsequent transfer of Red Rock do not violate the Petitioner's First Amendment Free Exercise and Free Speech rights.

Respectfully Submitted,

Team 20

Counsel for Respondents

APPENDIX

U.S. Const. amend. I.

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

CERTIFICATE OF COMPLIANCE

In compliance with Rule III(C)(3) of the Official Competition Rules governing the 2024-2025 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, we, Team 20, hereby certify that:

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

TEAM 020

Counsel for Respondents