No. 24-CV-1982

In the
SUPREME COURT OF THE UNITED STATES
October Term 2025

MONTDEL UNITED

Petitioners,

v.

STATE OF DELMONT and
DELMONT NATURAL RESOURCES AGENCY

Respondent.

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

BRIEF FOR THE RESPONDENT

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Counsel for the Respondent

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1. Did the State of Delmont's ECIA and the sale of portions of the Painted Bluffs State Park violate Montdel United's right to Free Exercise when Delmont lawfully transferred Red Rock to Delmont Mining Company?

2. Did the State of Delmont's ECIA and the sale of portions of the Painted Bluffs State Park for mining purposes infringe on the Free Speech rights of Montdel United when Delmont lawfully transferred Red Rock to Delmont Mining Company?

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IV. **Introduction**

The Painted Bluffs State Park in the state of Delmont has historically been used for recreational activity and religious practice. However, in light of recent issues and needs at the local, state, and federal levels, certain park areas are required for a different use. Red Rock, a rock formation located in the park, possesses a unique geography that makes it a cultural and religious center for the Montdel people. However, that cultural significance was largely abandoned for the first half of the 20th century.

In recent years, Delmont has found that Red Rock possesses the largest lithium deposits in the nation, making it an attractive location for mining operations. Mining presents an opportunity for Delmont to revitalize local economies, combat the climate crisis by promoting the use of lithium for batteries, and comply with a federal mandate. To further these goals, the Delmont approved the sale of the area for a mining operation.

Montdel United objects to the sale of Red Rock on Constitutional grounds. However, the sale's impact on Montdel speech or religious practice is purely incidental. It is not the goal of Delmont to prevent Montdel's expression. Delmont has a history of allowing and supporting the Montdel in their practices in the Painted Bluffs, a history that Delmont will continue by allowing them to continue their practices mere miles away from Red Rock. However, public policy dictates that Red Rock must be sold for mining purposes.

V. **Statement of Jurisdiction**

The Fifteenth Circuit of the United States Court of Appeals entered judgment for the Respondents. R. at 45. Petitioner filed a writ of certiorari, which this Court granted. *Id* at 55. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1).

VI. Statement of the Case

A. Statement of Facts

1. History of the Montdel People

Historians trace the history of the Montdel people on the land that is now the state of Delmont to around 400 AD. R. at 2. The Montdel were recognized for their complex religious and social practices, particularly those taking place on the land now part of Painted Bluffs State Park. *Id*. The Red Rock, located on this land, has historically played a significant role in the religion and culture of the Montdel people. *Id*. Red Rock was home to religious rituals, including crop sacrifices around equinoxes and solstices. *Id* at 3. The Montdel believed these practices were the only way to communicate with their "Creator," and that failure to engage in these ceremonies would draw his wrath. *Id*.

Montdel culture experienced a decline in the mid to late 19th century. R. at 3. Poor relations with other tribes, disease, and crop scarcity led to a rapid population decline. *Id*. Only a few thousand Montdel people remained after a few decades. *Id*. By the end of the century, the Montdel had dispersed, intermarried and assimilated with other tribes. *Id*. As a result, the Montdel ceased to exist as a distinct people. *Id*.

2. Modern Montdel People

Montdel peoples still traveled to the Red Rock on an inconsistent and sporadic basis throughout the late 19th century to about the mid-20th century, with economic downturns and world wars limiting visitations. *R.* at 4. At times, the Montdel people still used the land for religious and cultural observances but was eventually abandoned until 1950. *Id*.

Montdel culture underwent a resurgence in 1950 due to the efforts of James and Martha Highcliffe. R. at 5. The Highcliffe's were Delmont citizens who had assimilated to other tribes

but still retained a degree of Montdel heritage. *Id*. They appealed to individuals of other tribes whose families had previous ties to the Montdel and the Native American community to formalize the "Montdel Observance." *Id*. The Montdel Observance included formal pilgrimages to Red Rock, which began in 1952. *Id*. This practice involved the ten oldest members of the tribe, referred to as “Old Observers,” climbing Red Rock and performing crop sacrifices and supplications for twenty-four hours while other participants engaged in prayer rituals and meditations at the bottom. *Id*.

In response to growing efforts to sell Red Rock and the area around it for lithium mining, the daughter of James and Martha Highcliffe, Pricilla, established Montdel United. Highcliffe Aff. ¶ 13. This is a non-profit organization devoted to preventing any transfer of Painted Bluffs land to protect Montdel and the Old Observer's religious observations. *Id*. The organization has furthered these objectives in recent years by raising public awareness and staging protests of potential land transfers. R. at 7.

3. Modern Delmont

The State of Delmont was established in 1855. R. at 3. Settlers never claimed Red Rock after Delmont's establishment due to its rugged geography, and it remained an important cultural point for the Montdel people. *Id* at 4. Painted Bluffs State Park was acquired by Delmont in 1930 through eminent domain. *Id*. Delmont desired to preserve the land's natural beauty, particularly its rock formations. *Id*. Delmont allowed the park to be used for camping, hiking, fishing, and, eventually, festivals. *Id*.

The Montdel “Old Observers” would also meet at various times at the park throughout the year. R. at 5. The equinox rituals grew into festivals held twice a year, the fall and spring equinoxes. *Id*. As much as forty percent of the attendees at this festival in recent years have not

been of Montdel heritage, but rather college students or mere festival attendees. *Id* at 6. These festivals include food, music and merchandise. *Id*. Attendees engaged in dancing, stargazing, singing, craft making, art displaying, and listening to speeches by environmentalists and naturalists. *Id*. Neither the Old Observers nor the Montdel people have ever rejected these activities during their observances. *Id*. Delmont paid deference to, and even highlighted, the land's role in Montdel culture. *Id* at 4-5.

4. Rise of the ECIA and Red Rock's Unique Value

Delmont is among the most mineral-rich states in the country due to its unique geography. R. at 4. This includes massive lithium-bearing pegmatite deposits under the Painted Bluffs State Park, the largest in North America. *Id* at 7. In recent years, Delmont has sought to capitalize on its natural mineral deposits to reduce dependency on fossil fuels and promote the state's economy. Greenfield Aff. ¶7. It passed the Energy and Conservation Independence Act (the "ECIA") to facilitate these objectives. R. at 6. The ECIA would allow the transfer of lands to private mining companies to extract minerals, facilitated by the Delmont Natural Resources Agency (the "DNRA"). *Id*. Federal lawmaking bodies have endorsed the ECIA in light of the Federal Natural Resources Defense Act (the "FNRDA"), which mandates sustainable energy in defense contracting. *Id* at 7.

The ECIA has a variety of requirements for potential land sales and transfers. R. at 6. First, any land transfer must be "independently appraised to ensure equivalent value." *Id*. Additionally, each transfer is subject to two independent impact studies: one environmental and one economic. *Id*. Finally, after completing these studies, the DNRA has a sixty-day window to approve or deny the transfer. *Id*.

5. Effects of Establishing Mining at Red Rock

Before the present land transfer, Delmont attempted two other land sales for mining purposes. R. at 9. The first, a sale to Granite International, Inc., included lands in the Delmont Mountains suitable for nickel mining. *Id*. This was rejected after an environmental study revealed that the mining process would destroy the habitats of the Delmont Wildcat and the Blue-Winged Swift, both of which are endangered species. *Id* at 10. The second, a sale to McBride Brine Mining, Inc., was canceled after an environmental study showed that it carried a 35% risk of contaminating the water supply of a small town. *Id*. One case in which a transfer was approved was a sale to Granite International, Inc., over objections that it jeopardized a small early mining camp museum. *Id.*

The benefits of the current sale include a massive lithium deposit in Painted Bluffs that will offer a significant yield. R. at 10. Additionally, the environmental impact is minimal, as the study shows no risk of serious impact to flora, fauna, or human communities aside from the destruction of Red Rock. *Id.* at 8. The area has the potential to be reclaimed as soon as twenty years from now. *Id*. Any alternative mining method relies on speculation and is likely to significantly damage Red Rock and prolong any mining progress by another twenty years. *Id.* at 9. These alternative methods would also be substantially more expensive. *Id*. For these reasons, the DNRA approved the land transfer. *Id.*

As a result of the transfer, Red Rock would be rendered unsafe for use and ultimately destroy the formation, but during mining, Montdel would only need to relocate their equinox ritual 5 miles down the stream. Greenfield Aff. ¶ 13. Further, the area may be able to be reclaimed in as few as twenty years. *Id*.

B. Procedural History

Montdel United sought a temporary restraining order and injunctive relief from the United States District Court for the District of Delmont. R. at 10. The Court denied the temporary restraining order and granted the preliminary injunction. *Id*. On appeal, the Fifteenth Circuit reversed the decision of the District Court and denied the preliminary injunction. R. at 45. Montdel United now appeals the Fifteenth Circuit's decision to the Supreme Court of the United States.

VII. Summary of Argument

Delmont would not violate the First Amendment by transferring Red Rock to Delmont Mining Company under the ECIA. First, the land transfer of Red Rock is a law with only incidental effect on the Montdel people's free exercise of their religion. As discussed below in *Lyng*, incidental, non-coercive laws are only required to pass rational basis. Further, the transfer of Red Rock passes the *Smith* Test because it is a valid, neutral, and generally applicable law. The law was created to further environmental concerns and stimulate the economy. The transfer does not explicitly target the Montdel people and does not force them to abandon their religion; the law only asks them to change their practices slightly.

Second, Montdel United further claims that the sale is an impermissible restriction on their free speech. They assert that the area is a traditional public forum, so Delmont cannot simply close it. However, this is not the case. Red Rock is not a traditional public forum for two reasons. First, it is a remote wilderness area rather than a public park. Second, it is not the kind of area traditionally protected as a public forum because of the limited and sporadic nature of the speech in question. Additionally, even if it was a traditional public forum, Delmont would be allowed to close it as part of a transformation of the land. Alternatively, if the closure was

considered a time, place, and manner restriction on a traditional public forum, it would be permissible because it is content neutral, is narrowly tailored to serve significant government interests, and affords Montdel United alternative channels to communicate its message.

VIII. Standard of Review

This case comes on appeal as an interlocutory appeal of a preliminary injunction. 28 U.S.C. 1292(a)(1). Therefore, the lower Court's finding is reviewed de novo. *McCreary Cty. V. ACLU*, 545 U.S. 656, 666 (2004).

IX. Argument

A. The Fifteenth Circuit of Appeals correctly denied the injunction when it held that the State of Delmont did not violate Montdel United's right to free exercise.

Regarding Montdel United's free exercise claim, the Fifteenth Circuit of Appeals correctly denied Montdel's injunction when they claimed Delmont violated their right to free exercise when they transferred Red Rock through the ECIA. "Congress shall make no law… prohibiting the free exercise [of religion]." U.S. Const. amend. I. This Court has differentiated between laws generally applicable that do not target religion and laws that intentionally target a religion. This Court routinely holds that the right to free exercise does not "relieve an individual of the obligation to comply with a valid and neutral law" that is generally applicable. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), *see also U.S. v. Lee*, 455 U.S. 252, 263 (1982) (J. Stevens, Concur) (there is no constitutionally required exemption on religious grounds from a valid law that is entirely neutral, that has general application) If a law is neutral and generally applicable then it does not need to be justified by strict scrutiny, only requiring passing rational basis. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). However, even if the ECIA and the transfer of Red Rock are held not to be neutral or generally

applicable, this act and the transfer should not be subject to a strict scrutiny analysis because the law is not coercing Montdel United into violating their religious belief. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). The Court of Appeals correctly denied Montdel's injunction when they claimed Delmont violated their right to free exercise.

1. The land transfer is a valid and neutral law that is generally applicable and only has an incidental effect on Montdel United's right to free exercise.

First, the land transfer is a valid and neutral law that is generally applicable. Both neutral and generally applicable laws do not violate the First Amendment free exercise clause. *See Employment Div.,* 494 U.S. at 879. "Neutrality and general applicability are interrelated, … failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of Lukumi Babalu Aye,* 508 U.S. at 531.

a) The land transfer is a valid neutral law with incident effect.

Regarding neutrality, the land transfer is a valid and neutral law that only has an incidental effect on Montdel United's free exercise right. "At a minimum, the protections of the free exercise clause pertains if the law … discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532. Laws enacted within a state's power are valid despite its indirect burden on religious observance. *See Braunfeld v. Brown,* 366 U.S. 599, 607 (1961). Laws that have the object to restrict practices because of their religious motivation are not neutral laws. *See Employment Div.,* 494 U.S. at 878, *see also Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (a law that would allow some religions to preach but would not allow an unpopular religion from preaching is not neutral and violates the first amendment)

Neutral laws cannot be facially discriminatory. *Church of Lukumi Babalu Aye,* 508 U.S. at 533. If the law mentions a religious practice, then it is not neutral. *Id.* Here, the law, on its face, facilitates mining metals to reduce dependency on fossil fuels by transferring Red Rock. R. at 6. The law does not mention any religion or religious practice by name. Thus, the land transfer is not facially discriminatory.

Further, the free exercise clause goes beyond just facially discriminatory laws. *Church of Lukumi Babalu Aye,* 508 U.S. at 534. "Covert suppression of particular religious beliefs" violates the First Amendment. *Bowen v. Roy*, 476 U.S. 693, 703 (1986). The *Church of Lukumi Babalu Aye* shows covert suppression where residents of the City of Hialeah expressed concerns that the church's practices go against public morals, peace, or safety when the church sacrifices animals. *Church of Lukumi Babalu Aye,* 508 U.S. at 526. The city council of Hialeah then passed an ordinance banning animal sacrifices. *Id.* This Court subsequently found that this was a violation of the First Amendment.

Contrary to *Church of Lukumi Babalu Aye*, Delmont did not transfer Red Rock to target Montdel United. The transfer was created to promote renewable energy and reinvigorate the economy. R. at 6. Further, Red Rock represents the largest lithium deposit ever discovered in North America. R. at 7. Thus, transferring Red Rock is necessary because of the size of this lithium deposit and important goal of becoming carbon neutral. The present land transfer case must follow the reasoning of the *Church of Lukumi Babalu Aye* because there is no evidence that Delmont conducted the transfer to target Montdel United; this Court must not find that Delmont transferred Red Rock to target Montdel United.

Thus, the objective of the land transfer is to promote mining and the economy and is so neutral.

b) The land transfer is a generally applicable law with incident effect.

Next, moving to generally applicable law, the land transfer is generally applicable. Laws that affect religious practices must be generally applicable *Employment Div.*, 494 U.S. at 879. The free exercise clause is necessary to protect religious observers from unequal treatment. *Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136, 148 (1987) (J. Stevens, Concurring) "The principle that government … cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the free exercise clause." *Church of Lukumi Babalu Aye,* 508 U.S. at 543.

Church of Lukumi Babalu Aye illustrates this point. The Hialeah city ordinance bans the unnecessary or cruel killing of any animal. *Id.* at 526. The law offered exceptions for hunting, fishing, and extermination of pests. *Id.* at 543. The Court held that the law was not generally applicable and so unconstitutional. *Id.* at 545. To explain further, a state that "expressly requires [a church] to renounce its religious character" would violate the Constitution. *Trinity Lutheran Church of Columbia, Inc., v.* Comer, 582 U.S. 449, 466 (2017).

Here, the land transfer affects all people equally because the transfer takes the land from the general public to extract valuable minerals. R. at 6. Further, the transfer mandates that the land has an independent environmental impact study and independent economic impact study before the transfer will proceed. *Id*. This differs from the *Church of Lukumi Babalu Aye* because the transfer treats everyone equally regardless of religious affiliation. In contrast, *the Church of Lukumi Babalu Aye* created a law that intentionally disallowed the church from doing their practices.

Additionally, differing from *Trinity Lutheran Church of Columbia, Inc.,* the transfer does not require Montdel United to abandon its religious affiliation. Montdel United will be able to

reclaim much of the land after mining has finished. R. at 8. Montdel United will also be able to practice their beliefs during the mining; they would only be required to move their practices five miles down the riverbank. *Id.*

Thus, this Court should follow its reasoning in *Church of Lukumi Babalu Aye* and *Trinity Lutheran Church of Columbia, Inc.* and hold that this law is generally applicable.

To conclude, for the reasons stated above, the land transfer is a valid and neutral law that is generally applicable and so passes the *Smith* test.

2. The land transfer does not coerce the Montdel United into violating their religious belief.

Second, the land transfer does not coerce Montdel United into violating their religious beliefs and must be held constitutional. *Lyng v. Northwest Indian Cemetery Protective Ass'n* held to violate the First Amendment; laws must coerce individuals into acting contrary to their religious belief. *Lyng*, 485 U.S. at 449.

In *Lyng*, the United States Forest Service was completing a road between two towns in California. *Id.* at 442. The road was going to go through the Chimney Rock area; that area held religious significance to the local Indian tribes. *Id.* The Forest Service commissioned a study that found that the available routes would cause severe irreparable damage to the sacred sites. *Id.* These holy sites are integral and necessary part of the belief system of the native tribes. *Id.*

This Court held that incidental effects that make it harder to practice religion do not trigger strict scrutiny unless there is coercion by the government. *Id.* at 450. This Court further said that "whatever rights the Indians may have to the use of the area,… those rights do not divest the government of its right to use what is, after all, its land. *Id.* at 453. The government should attempt to accommodate the religious practice. *Id.* at 454. But "Government [is not

required] to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy,* 476 U.S. 693, 699 (1986). This Court found that even if the road would destroy the Indian's ability to practice their religion, it would not matter because "the constitution … does not provide a principle that could justify upholding [Lyng's] claim." *Lyng,* 485 U.S. at 451-452.

Here, our present facts are analogous to *Lyng*. First, the Red Rock is a state park that Delmont owns. R. at 6. This allows Delmont to follow the holding in *Lyng* that they may do with the land as they please. Additionally, like in *Lyng*, Delmont would be destroying Red Rock. However, this does not matter because, as this Court has said, there is no Constitutional protection in the incidental effects of a law. R. at 8. Further, following *Bowen*, Delmont does not need to change its internal affairs for religious beliefs. However, Delmont should attempt to accommodate Montdel United, and Delmont is doing so by offering alternatives such as moving their celebrations five miles down the river or reclaiming the land after mining has ended. R. at 8. As such, this Court should follow its precedent because the facts here mirror *Lyng*, and the effect is purely incidental and not coercive. Thus, to conclude, the land transfer does not coerce Montdel United into violating their religious beliefs, and so it must be held constitutional.

3. The land transfer passes both Rational Basis and Strict Scrutiny.

Third, the land transfer passes the muster of rational basis and strict scrutiny.

a) The land transfer passes Rational Basis.

First, the rational basis test requires that the law have a legitimate end, and the means rationally relate to the end. Most goals are legitimate. Here, the legitimate end is reducing fossil fuel dependency and reinvigorating the economy R. at 1. Next, the means rationally relate to the end because Delmont's land is transferring Red Rock to a mining company that will use the land

to mine minerals, reducing dependency on fossil fuels and reinvigorating the economy. *Id*. Thus, The land transfer passes Rational Basis.

b) The land transfer passes Strict Scrutiny.

Second, the strict scrutiny test states that the state must have a compelling end. A compelling end must be an "interest of the highest order." *Church of Lukumi Babalu Aye,* 508 U.S. at 547. Here, the state does have a compelling interest because the interest is to become carbon neutral. R. at 1. This is the highest order because if we fail to reduce dependence on fossil fuel, the human race will eventually cease to exist; anything to reach this end must be protected no matter how hard.

Next, the means must be the least restrictive alternative. This means the law is narrowly tailored to achieve that means. *Church of Lukumi Babalu Aye,* 508 U.S. at 533. Here, the state has narrowly tailored its action because it only destroys one area. Further, it does not affect the surrounding area, allowing Montdel United to practice their religion in the immediate area of the Red Rock; they are narrowly tailoring their plan to only affect one small area inside the greater Painted Bluff Park. Thus, the land transfer passes Strict Scrutiny.

B. Delmont has not infringed on Montdel United's speech because Red Rock is a nonpublic forum, or alternatively, the sale is a permissible time, place, and manner restriction.

The state of Delmont is not infringing on Montdel United's free speech rights because Red Rock is a nonpublic forum. Delmont may impose speech restrictions on a nonpublic forum so long as the restriction is reasonable and content neutral. Alternatively, if Red Rock were a traditional public forum, the sale of the land would still be permissible as an appropriate time,

place, and manner restriction because it is content neutral, narrowly tailored to serve a significant government interest, and allows Montdel alternative channels for communicating its message.

1. Red Rock is a nonpublic forum because it does not qualify as a traditional public forum or a designated public forum.

The nature of the forum determines the level of free speech protections within the forum. There are three categories of fora: traditional public fora, designated public fora, and nonpublic fora. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-679 (1992). Each of these categories arise in different manners and are afforded different levels of protections on speech. *Id.* It is not a traditional public forum because it is a remote wilderness area and because of the sporadic and limited nature of the speech in question. Additionally, Red Rock is not a designated public forum because the state did not intentionally open it for public discourse. This means that it can only be classified as a nonpublic forum.

a) Red Rock is not a traditional public forum because it is a remote wilderness area and because of the sporadic nature of expressive conduct.

Traditional public fora afford the highest degree of protection for speech. These areas include places such as streets and municipal parks that are generally "held in trust for the use of the public and… have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Traditional public fora are afforded a high degree of speech protection because they are meant to foster debate, discussion, and public discourse. *Id*. Red Rock does not fall into this category because it is a remote wilderness area and because of the irregular nature of the speech in question.

(1) The Red Rock is a remote wilderness rather than a park.

While it is true that most parks are traditional public fora, whether or not an area qualifies as a park for the purposes of the First Amendment requires a factual inquiry into the purpose of the area in question. *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010). Speech protection does not merely rise and fall simply because it is called a "park." This point is illustrated in *Boardley*, where the Court states that "Mount Rushmore does not become a public forum merely by being called a 'national park' any more than it would be transformed into a nonpublic forum if it were labeled a 'museum.'" *Id* at 514-515. Context is crucial in determining whether an area is a traditional public forum, not simply the given title of the area in question.

Case law provides examples of the kinds of parks considered traditional public forums. In *Leydon v. Town of Greenwich*, a park was deemed a traditional public forum because it included things such as shelters, ponds, a marina, a parking lot, open fields, a nature preserve, walkways, trails, picnic areas, a beach, and a library book drop. *Leydon v. Town of Greenwich*, 777 A.2d. 552, 570 (2001). In *Naturist Society, Inc. v. Fillyaw*, a state park beach with a parking lot, nature center, and walkways was considered a public forum. *Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir. 1992). Contrast these examples with *State v. Ball*, where the area in question was a remote wilderness area where individuals were allowed to go hunting. *State v. Ball*, 796 A.2d 542, 549 (2002). This area fell outside the traditional forum free speech protections because it was deliberately undeveloped and meant to remain undisturbed. *Id* at 287.

Red Rock is more akin to the area described in *Ball* than it is to the areas described in *Leydon* or *Naturist Society, Inc.* Red Rock does not have the traditional hallmarks of a municipal park that make it conducive to the free flow of ideas; it is a remote and largely undeveloped area

used for camping and hiking rather than for speech and debate. R. at 4. As such, it is unworthy of the speech protections associated with traditional public fora.

(2) The Red Rock is distinguishable from a municipal park because of the limited and sporadic nature of its expressive activity.

Red Rock is not a public forum because the expressive speech in question does not occur on a regular basis. It only occurs a few times a year and has been skipped over entirely through several periods in the past. R at 4-5. Such a sporadic and irregular communication of a message does not render Red Rock a "necessary conduit in the daily affairs of a locality's citizens…" akin to a city street or municipal park. *Heffron v. Int'l Soc. For Krishna Consciousness, Inc*., 452 U.S. 640, 651 (1981).

The distinction is established in *Heffron*, where the Court distinguished between a city street and a state fairground during a State Fair for purposes of speech protection. *Heffron*, 452 U.S. at 651. It rationalizes that considering the forum's unique features, "the significance of the government interest must be assessed in light of the characteristic nature and function of the forum involved." *Id* at 650-651. As such, the state had a different interest in facilitating the busy fairgrounds than a city street, and therefore, "any comparisons to public streets are necessarily inexact." *Id.*

The lower Court rejects this distinction as applied to the present case, claiming that Red Rock is part of a park continually held open to the public. R. at 15-16. However, this misses the point of the distinction. Aside from the aforementioned point that Red Rock is a remote wilderness area and not a park, the use of Red Rock for expressive purposes in such a limited manner makes it more akin to the State Fair in *Heffron* than to a city street, and therefore comparison of it to a "city street" or "municipal park" is inappropriate and inaccurate. *Heffron*,

452 U.S. at 651. An area used for expressive purposes only a few times a year cannot be considered a "necessary conduit in the daily affairs of a locality's citizens" any more than a State Fair held once a year. *Id*. Therefore, the Red Rock is not a traditional public forum.

b) Red Rock is not a designated public forum because Delmont did not intend to establish it as a forum for public discourse.

Red Rock is not a designated public forum because it did not take any affirmative steps or manifest intent to establish it as a public forum. The government must intentionally open a designated public forum for public discourse. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 803 (1985). A designated public forum *cannot* be created merely through "inaction or by permitting limited discourse." *Id*. To establish intent to create a forum, courts may look at related government policies. *Id* at 802. There is no underlying policy nor express intent on Delmont's part to establish Red Rock as a public forum. While the state allowed the celebrations at Red Rock, they never took any affirmative action or adopted any policies designed to support it. At most, they permitted "limited discourse" by allowing the celebrations, R. at 6, which *Cornelius* explicitly rejects as tantamount to designating a public forum. *Id* at 803. Therefore, Red Rock is not a designated public forum. As it is not a traditional or public forum, it must be considered a nonpublic forum for the purposes of First Amendment free speech protections.

2. Whether Red Rock is a nonpublic forum or a traditional public forum, the sale is permissible because it is reasonable and viewpoint neutral.

Even if Red Rock is a traditional public forum, the sale is still permissible because it is a physical transformation of the land rather than a mere closure. Whether it is a transformation of a traditional public forum or a closure of a nonpublic forum, the result is the same: the sale must be viewpoint neutral and reasonable.

a) If Red Rock were a traditional public forum, the sale is permissible as an alteration to the land.

The facts of this case present a novel question as to the level of scrutiny to which the closure of a traditional public forum by sale is to be held. Justice Kennedy suggests that "the government always retains the authority to close a public forum by selling the property, changing its physical character, or changing its principal use." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699 (1992). (Kennedy, J., concurring). This quote mirrors the facts presented in this case. Assuming that the land is a traditional public forum, Delmont is attempting to sell the land to Delmont Mining Company, thereby changing its physical character to permit mining and changing its principal use to extraction of minerals. Greenfield Aff . ¶10. Under Justice Kennedy's view that the government may close a traditional public forum by sale or transfer, the sale must only be viewpoint neutral and reasonable. *Satanic Temple v. City of Belle Plaine*, 80 F.4th 864, 868 (8th Circ. 2023).

b) The sale of Red Rock is permissible because it is viewpoint neutral and reasonable.

The government may impose restrictions on speech in nonpublic fora if the restriction is viewpoint neutral and reasonable. *U.S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 114 (1981). Restrictions are viewpoint neutral when they "do not target specific speech based on [a] speaker's viewpoint." *Id* at 132. For example, in *Adderly v. State of Florida*, protestors at a prison were convicted for trespass. After appealing on free speech grounds, the convictions were upheld because their removal from prison grounds was not motivated by quashing or stifling the protestors' message but because their presence on jail grounds was not permitted by law. *Adderley v. Florida*, 385 U.S. 39 (1966).

Similarly, there is no evidence that Delmont is selling the land to suppress Montdel United's viewpoint. At most, Montdel United can point to alleged annoyance on the governor's part relating to clean-up after festivals. Highcliffe Aff. ¶10. This is no more evidence of the state's intent to suppress Montdel United's viewpoint than the sheriff's in *Adderly*; Montdel speech is not targeted simply because Delmont is restricting speech in an area that incidentally affects the festivals.

Further, the sale is reasonable because it furthers several policy objectives. First, the sale would boost both local economies. R. at 9. Additionally, it would align with the federal mandate and state priorities to move toward cleaner energy sources in light of the growing climate crisis. *Id*. A land sale that would further several substantial policy ends at such a minor expense can only be considered reasonable. Therefore, as the sale is both viewpoint neutral and reasonable, it is a permissible restriction on speech whether it is a nonpublic forum or a traditional public forum.

3. Alternatively, if Red Rock were a traditional public forum, the sale would be a permissible time, place, and manner restriction.

Should the Court find that Red Rock is a traditional public forum and is unpersuaded by Justice Kennedy's assertion about transformation of public fora, then the sale must pass the test laid out in *Ward v. Rock Against Racism* for permissible time, place, and manner restrictions. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). The restriction must be content neutral, narrowly tailored to serve a significant government interest and afford alternative channels to communicate the message. *Id.*

The sale is content neutral because it affects all speech the same way. The sale is narrowly tailored to serve three significant government interests: the climate crisis, economic

growth, and the federal mandate. Finally, the sale leaves open alternative channels to communicate its message because it leaves much of the park still available to Montdel United.

a) The sale of Red Rock is content neutral.

The sale is a content neutral law because all speech is affected the same way. A law is content neutral if it is "justified without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 771 (1976). Indeed, a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers and messages but not others." *Boardman v. Inslee*, 978 F.3d 1092, 1113 (9th Cir. 2020). The sale of Red Rock is plainly content neutral: once converted to a mining area, the land is unavailable to anyone for any speech purposes. Greenfield Aff. ¶ 12. The unique but purely incidental effect that the transfer has on Montdel United's speech is insufficient to show that the sale is discriminatory by content, as discussed in *Boardman*. 978 F.3d at 1113.

b) The sale of Red Rock is narrowly tailored and serves the three significant governmental interests.

The sale of Red Rock is narrowly tailored because it does not affect more of the area than needed. Narrow tailoring under this test does not require the least restrictive method, but only that it "promotes substantial government interest that would be achieved less effectively absent the regulation." *U.S. v. Albertini*, 472 U.S. 675, 689 (1985). The sale leaves about three quarters of Painted Bluffs State Park untouched. Greenfield Aff. ¶ 10. Additionally, it was the only option the state had for mining in the area that would not drastically impact the local flora and fauna or local communities. R. at 9-10. As the sale would only transfer enough of the land required for effective mining and have a minimal impact on local wildlife, the sale is narrowly tailored.

The first interest served by the sale is confronting the climate crisis. The sale of Red Rock for mining purposes serves this interest because it increases the use of minerals required for lithium-ion batteries. R. at 9. The second interest served by the sale is a boost to the economy. *Id*. The economies in the two counties primarily affected by the sale largely rely on tourism, which has proven insufficient to serve their needs. R. at 7. The third interest served by the sale is compliance with the federal mandate under the Federal Natural Resources Defense Act, which requires defense contractors to use sustainable energy to mitigate fossil fuel extraction. *Id*. All three of these diverse interests are served by the transformation of Red Rock into a mining area. As the sale is also narrowly tailored to serve these interests, the final inquiry is whether Montdel United is afforded alternative channels to communicate its message.

c) The sale of Red Rock is permissible because it affords Montdel United alternative channels to communicate its message.

In providing alternative channels for communication, the government need not provide a perfect match or substitute for the areas lost. *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 101 (2d Cir. 2006). It need only "leave open sufficient alternative avenues of communication to minimize the 'effect on the quantity or content of th[e] expression." *Vincenty v. Bloomberg*, 476 F.3d 74, 88 (2d Cir. 2007) (citing *Ward*, 491 U.S. at 802). Delmont provides an alternative area for Montdel United to share its message a mere five miles away from the site of Red Rock. Greenfield Aff. ¶13. While an area five miles away from Red Rock is not a perfect substitute for Red Rock, *Vincenty* is clear that this is not what the law requires.

The distinction between a permissible alternative channel of communication is highlighted in the distinction between *U.S. v. Griefen*, 200 F.3d 1256, 1261 (9th Cir. 2000), and *Chabad of South Ohio v. City of Cincinnati*, 233 F.Supp. 2d. 975 (S.D. Ohio 2002). In *Griefen*,

anti-logging protestors challenged restriction on speech near a construction site in the Nez Pierce Forest. *Griefen*, 200 F.3d at 1260. The restriction was deemed permissible because it only affected the site itself and a small area around it for safety purposes; protesters were free to protest outside this small area. *Id* at 1261. Conversely, *Chabad* describes an impermissible restriction in which the City of Cincinnati held excuse use of Fountain Square, a downtown area often used by groups to communicate their messages broadly, for certain times of the year. *Chabad*, F.Supp, 2d. at 978. A Jewish group challenged the restriction after being denied use of the area to erect a menorah. *Id* at 979. The restriction was struck down after the Court determined that no other area in the city afforded the Jewish group a comparable ability to broadcast its message. *Id* at 986.

The sale of Red Rock is more similar to *Griefen* than *Chabad*. While Red Rock is uniquely significant to the Montdel, the sale only includes a quarter of the land of the State Park. R. at 7. As in the Nez Pierce Forest in *Griefen*, other areas of the park remain available to Montdel United, including an area only five miles from Red Rock. Greenfield Aff. ¶13.The area falls well within the parameters of an acceptable alternative channel for communication, as described in *Vincenty* and illustrated by *Griefen.* Montdel United is afforded suitable alternatives to communicate its message; therefore, the sale is permissible as a time, place, and manner restriction.

X. Conclusion

The ECIA and the subsequent transfer of Red Rock and the surrounding areas does not infringe on Montdel United's free speech or free exercise rights. First, regarding free exercise, the ECIA and transfer of the Red Rock pass the *Smith* test because the law and transfer is a valid, neutral law that has general applicability. Further, as held in *Lyng,* because the ECIA and transfer

do not coerce Montdel to abandon their religion, it is not required to meet Strict Scrutiny. As held in both *Smith* and *Lyng*, this law must be held on a rational basis. Second, regarding free speech, the land in question is a nonpublic forum, and the sale is viewpoint neutral and reasonable. Alternatively, if the land was a traditional public forum, the sale is a permissible time, place, and manner restriction. For the reasons above, we ask that this Court affirms the Fifteenth Circuit's decision and deny the injunction preventing Delmont from transferring the land to Delmont Mining Company.

Respectfully Submitted,

/S/ TEAM 022
Counsel for the Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Rule III(C)(3) of the Official Competition Rules of the Seigenthaler-Sutherland Moot Court Competition, we, Counsel for Respondent, certify that:

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

/s/ Team 022
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