No. 24-CV-1982

IN THE

SUPREME COURT OF THE UNITED STATES

MONTDEL UNITED,
Petitioner,

v.

STATE OF DELMONT and
DELMONT NATURAL RESOURCES AGENCY,
Respondent.

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

BRIEF FOR PETITIONER

Team 23
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the government violates the Free Exercise Clause of the First Amendment when, in applying a state law, it allows exemptions for secular purposes, but not religious ones and state actors have made comments that are hostile to religion?

2. Whether the government's decision to transfer public land to a private company violates the Free Speech Clause of the First Amendment when that land is part of a public park and is traditionally used for expressive activity, and the transfer effectively closes the land to all public speech and destroys a sacred site that is the singular location for members of a particular religion to pray?

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The opinion of the Fifteenth Circuit (R. 33–45) denying Montdel United's motion for a preliminary injunction is unpublished and may be found at *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (15th Cir. 2024). The opinion of the District Court (R. 1-32) granting Montdel United's motion for a preliminary injunction is unpublished and may be found at *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (W.D. Del. 2024).

STANDARD OF REVIEW

On an appeal from a preliminary injunction, this Court will "review the District Court's legal rulings *de novo*, and its ultimate conclusion for abuse of discretion." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 867 (2005). See also *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 664 (2004).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause, Free Exercise Clause, and the Establishment Clause of the First Amendment of the United States Constitution are at the center of this case. A Delmont state law, the Energy Conservation and Independence Act (ECIA), is also implicated in the case.

STATEMENT OF JURISDICTION

28 U.S.C. § 1254(1) authorizes this Court to hear appeals of the decisions of the Circuit Courts of Appeal. The Court of Appeals for the Fifteenth Circuit had jurisdiction over the appeal of the district court's decision pursuant to 28 U.S.C. § 1291. The district court's jurisdiction over the case rested on 28 U.S.C. § 1331 because the case involves a federal constitutional question.

STATEMENT OF CASE

I. Factual Background

The Montdel are a Native American tribe with deep social and spiritual connections to the "region presently identified as the State of Delmont." R. at 2. In fact, the Montdel people's presence in the area dates back to 400 A.D. *Id.* The Montdel conduct their most sacred religious rituals in the area currently known as Painted Bluffs State Park. *Id.* Red Rock, "a prominent landmark within the park," is the sacred site at the center of these rituals. *Id.* Red Rock is the only place on Earth where the Montdel can connect with their Creator through prayer. R. at 3; 26 ("the Montdel people believe that their Creator can only be reached in group supplicatory prayer during these specific times through the collective efforts of the village elders, who together form a unified voice capable of reaching the creator."). This prayer ritual is especially important because individual supplicatory prayer – the way that members of other religions, like Christians for example, connect with their Creator – is "explicitly prohibit[ed]" by the Montdel religion. *Id.* at 3.

Even after Delmont became a state in 1855, the Montdel elders continued the prayer ceremony multiple times each year, with the only pauses in the tradition occurring due to superseding emergencies during the World Wars and the Great Depression. R. at 4. The State not only allows this ritual to occur, but it also economically benefits from the equinox festival tradition that has grown up around the ritual. R. at 6. For the past twenty years, Delmont has encouraged public visitation at Red Rock by issuing "vendors' licenses for food, music, and merchandise through the Park Service." *Id.*

Now, the State wants to trade away Red Rock to a private mining company that plans to destroy the sacred site to mine for lithium. R. at 8 ("the environmental impact studies conducted by the [State] indicate that the mining operations . . . will result in the destruction of Red Rock and

its surrounding areas."). *Id.* After rebuffing two previous trade offers at alternative sites, the Delmont Natural Resources Agency (DNRA) decided to "transfer one-fourth of Painted Bluffs State Park, including the Red Rock area, to Delmont Mining Company." R. at 7. This transfer would take place in pursuance of the goals of the Energy and Conservation Independence Act (ECIA) of 2022. R. at 6. The State asserts that the land transfer effectuates the compelling government goals of boosting the local economy and combating climate change through exploration of alternative energy sources. R. at 9. The Montdel assert that this destruction of their most sacred site violates two core constitutional rights, those of free exercise of religion and the freedom of speech. Petitioner Montdel United, "a non-profit organization composed of the Montdel and Old Observers," now seeks a preliminary injunction to stop the land transfer.

II. Procedural History

"After the DNRA announced its final decision, Montdel United sought a temporary restraining order" in the District Court for the District of Delmont Western Division. R. at 10. The district court denied the temporary restraining order and scheduled a hearing to determine whether a preliminary injunction should be granted. *Id.* Following the hearing, the district court issued an opinion finding that Montdel United was likely to succeed on its free exercise and free speech claims. R. at 11–32.

On appeal, the Court of Appeals for the Fifteenth Circuit reversed the district court's holding and denied the preliminary injunction. R. at 45. The circuit court held that Red Rock did not constitute a traditional public forum and therefore it was "unnecessary to address whether the State's actions would constitute a permissible time, place, and manner restriction." R. at 35. The court of appeals did not hold that the State's action violated the Montdel's free speech rights. R. at 41. Similarly, in addressing the Montdel's free exercise claim, the court of appeals held that

because the State was "not coercing any violation of religious beliefs," there was no free exercise violation. R. at 43. The court of appeals held that a showing of coercion was a necessary prerequisite to "invoke First Amendment Scrutiny." *Id.* Following the decision of the court of appeals, Montdel United filed a petition for writ of certiorari in this Court.

SUMMARY OF ARGUMENT

This Court should hold that the district court did not abuse its discretion when it granted Delmont United a preliminary injunction. *See* R. at 32; *see also McCreary Cnty.,* 545 U.S. at 867. The State of Delmont's decision to transfer the land in Painted Bluffs State Park that contains the Delmont tribe's most sacred religious site violates both the Free Speech and Free Exercise Clauses of the First Amendment. U.S. CONST. amend. I.

The State violates the Free Exercise Clause because the DNRA's application is not neutral or generally applicable, which contravenes this Court's rule set forth in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878 (1990). The DNRA granted multiple exemptions to the ECIA, rendering it not generally applicable. Additionally, there is evidence in the record that state officials were not neutral in their application of the law. This is similar to the facts in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 584 U.S. 617, 618–19 (2018), in which the Commissioners' dismissive comments toward religion impacted the First Amendment's guarantee of neutrality. Finally, this case requires the Court to consider whether plaintiffs asserting free exercise violations must provide an initial showing of coercion or substantial burden on their religious practices. The Court should address the current circuit split on this issue and hold that *Smith* superseded any need to show coercion or substantial burden.

The State also infringes on the Montdel's right to free speech by depriving them of the only gathering space conducive to their religious prayer and supplications. First, as part of a public park,

Red Rock is a traditional public forum where government restriction on speech is heavily circumscribed. The State's decision to transfer this land amounts to closure of a public forum, which is presumptively unconstitutional and so it triggers the highest level of scrutiny – a bar that the government is unable to meet, given that a) it enforces the land exchange in a viewpoint discriminatory manner and b) its stated interests for the land exchange are neither compelling nor narrowly tailored. Even if this Court finds that strict scrutiny does not apply, closure of the forum still amounts to a time, place, and manner restriction in its most extreme form. Under that analytical framework, the land exchange is still unconstitutional because it fails to leave open any alternative channel of communication for the Montdel, whose religious speech is effectively prohibited by the State's closure of Red Rock.

ARGUMENT

I. The land transfer that will lead to the destruction of the Montdel religion's most sacred site violates the Free Exercise Clause of the Constitution.

Existing case law muddles the threshold standard for a free exercise violation. Some cases require an initial showing of coercion, while others require plaintiffs to prove that contested state action places a "substantial burden" on their ability to practice their religion. *See Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) ("it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (government action that makes it "more difficult to practice certain religions but which ha[s] no tendency to coerce individuals into acting contrary to their religious beliefs . . . does not and cannot imply that the government [is required] to bring forward a compelling justification."); *contra Firewalker-Fields v. Lee,* 58 F.4th 104, 114 (4th Cir. 2023) (requiring a threshold showing of

substantial burden on religious practices); *see also Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 98, 101 (1st Cir. 2013) (same).

Some cases, including the decisions below in this case, employ a mixed substantial-burden-as-coercion standard. *See* R. at 26 (district court opinion engaging in substantial burden analysis); *contra* R. at 43 (circuit court opinion focusing its analysis on coercion). This confusing split only hinders plaintiffs' ability to vindicate their rights to freely exercise their religious beliefs.

To provide clarity, this Court should hold that the Constitution requires neither coercion nor a substantial burden; instead, a free exercise violation occurs when a law burdens the free exercise of religion because it is not neutral or generally applicable. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) ("Should a plaintiff make a showing that . . . a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable' . . . this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny."). However, even if the coercion or substantial burden standards are required to trigger strict scrutiny, the detrimental effect of destroying Red Rock satisfies both standards.

A. The State's ECIA land transfer is unconstitutional because it has the effect of prohibiting the Montdel tribe from practicing their religion.

Free Exercise violations are often predicated upon a showing of "the coercive effect of the enactment as it operates against [a person] in the practice of his religion." *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). This Court should hold that *no* showing of coercion is required to establish a violation. However, if the Court does find that coercion is required to establish a First Amendment violation, it should adopt a broad construction of the term "coercion" and hold that approach is the most consistent with the purposes of the First Amendment. Justice Brennan advanced this theory in his dissent in *Lyng*, 485 U.S. at 466 (Brennan, J. dissenting) ("religious freedom is threatened no less by governmental action that makes the

practice of one's chosen faith impossible than by governmental programs that pressure one to engage in conduct inconsistent with religious beliefs.").

The *Lyng* majority endorsed a narrow interpretation of what constitutes coercive action. *Id.* at 450–51. Immediately after proclaiming that this Court has "repeatedly held that *indirect* coercion or penalties on the free exercise of religion, *not just outright prohibitions*, are subject to scrutiny under the First Amendment," the Court pared back the breadth of that statement, emphasizing that "this does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* (emphasis added).

That interpretation instructs that a law is unconstitutionally coercive if it compels individuals to "act[] contrary to their religious beliefs." *Id.* In his dissent, however, Justice Brennan emphasized that the Court "never suggested that such coercive compulsion exhausted the range of religious burdens recognized under the Free Exercise Clause." *Id.* He urged the Court to adopt a broader interpretation of coercion that focuses on a law's impact. *Id.* at 468. In fact, Justice Brennan went so far as to argue that the majority's limited interpretation of coercion "narrow[s] the reach and promise of the Free Exercise Clause itself." *Id.* at 472.

Here, instead of focusing on the fact that the law does not *compel* the Montdel to act contrary to their religious beliefs, the Court should hold that the law is coercive because it *prohibits* them from practicing their religion entirely. *See* R. at 44 (acknowledging that the state's "plan to transfer public land . . . would undoubtedly destroy the [Montdel's] ability to practice their religion."). While it is true that the First Amendment does not protect against the "incidental effects of government programs, which may make it more difficult to practice certain religions but which

have no tendency to coerce individuals into acting contrary to their religious beliefs," the state's destruction of Red Rock rises above the level of a mere "incidental effect" that "makes it more difficult to practice certain religions." *Lyng,* 485 U.S. at 450. Without access to Red Rock, the Montdel cannot practice their religion. *See* R. at 51.

The *Lyng* majority emphasized that "prohibit" is the "crucial word in the constitutional text" that evinces government coercion. 485 U.S. at 451. Here, the state's actions effectively prohibit the Montdel from religious worship, so the law coerces the Montdel into abandoning their religion. *See* R. at 44. Red Rock is the Montdel tribe's "only site for sacrifice and supplication on the planet." R. at 26. The Montdel can only commune with their Creator through the "unified voice" of the Montdel elders because their religion prohibits individual supplicatory prayer, so the "sole[]" way that the Montdel "maintain access to their Creator" is "achieved through these ceremonial practices at Red Rock. R. at 3. This tradition "has been central to the [Montdel] religious practices and cultural identity for centuries." *Id.* Accordingly, this Court should re-examine the coercion standard applied in *Lyng,* and hold that destruction of Red Rock does "prohibit[] the free exercise of religion." *See* U.S. CONST. amend. I.

B. The Constitution does not require that the Montdel tribe must prove that the destruction of Red Rock places a "substantial" burden on their ability to practice their religion to trigger strict scrutiny.

This Court should interpret *Smith* as eliminating the substantial burden requirement. *See Kravtiz v. Purcell*, 87 F.4th 111, 120 (2d Cir. 2023). The circuit courts are currently split on this issue. *Compare Kravitz*, 87 F.4th at 125 ("We now join those circuits that have held that a [plaintiff] does not need to establish a substantial burden in order to prevail on a free exercise claim.") and *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) ("there is no substantial burden requirement when government discriminates against religious conduct") and *Hartmann v. Stone*, 68 F.3d 973, 978, 979 nn. 3–4 (6th Cir. 1995) ("[Plaintiffs] need

not demonstrate a substantial burden" when "regulations are not neutral and generally applicable") with *Firewalker-Fields v. Lee*, 58 F.4th 104, 114 n.2 (4th Cir. 2023) (acknowledging that the Fourth Circuit still applies a "substantial burden" test, but calling that practice into question in light of *Smith*) and *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 98, 101 (1st Cir. 2013) (free exercise claim fails for lack of "substantial burden" even though the law was not 'a neutral law of general applicability.'") and *Williams v. Hansen*, 5 F.4th 1129, 1133 (10th Cir. 2021) ("To state a valid constitutional claim, a prisoner must allege facts showing that officials substantially burdened a sincerely held religious belief.") and *Mbonyunkiza v. Beasley*, 956 F.3d 1048, 1053-1054 (8th Cir. 2020) (same) and *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) (same).

The substantial burden requirement was a relic of an earlier case, *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* did not "expressly create a substantial burden requirement," but "subsequent decisions identified the requirement as part of the *Sherbert* framework." *Kravitz*, 87 F.4th 111 at 120. *Smith* 1) declined to extend *Sherbert,* narrowing its reach to cases involving unemployment benefits, and 2) adopted a different test that requires the application of strict scrutiny when a law is not "'neutral' and 'generally applicable," even if the law *incidentally* burdened religious exercise." *Id.* (quoting *Smith*, 494 U.S. at 872) (emphasis added).

When courts draw lines between substantial and insubstantial burdens on religion, they begin to wade in the waters of a role that this Court has expressed it is wary of playing – the role of judicial arbiter of what is and is not a central belief of a particular religion. *See Smith,* 494 U.S. at 886–87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to

determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.").

There is a federal law that adopted a substantial burden requirement, the Religious Freedom Restoration Act (RFRA), but that law "no longer applies to state governments." *Kravitz*, 87 F.4th at 121, n.6 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)). Here, Delmont has not enacted a state RFRA, so the Court should apply the *Smith* neutral and generally applicable test to determine whether strict scrutiny applies. *See* R. at 26, n.1.

II. This application of the ECIA is not neutral or generally applicable, so heightened scrutiny applies.

Smith held that when a law is neutral and generally applicable, even if it burdens religious practices, it does not trigger strict scrutiny. 494 U.S. 872. However, in the decades since *Smith* was decided, this Court has significantly pared back its reach. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."); *Fulton v. City of Philadelphia*, 595 U.S. 522, 533 (2021) ("A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'") (quoting *Smith,* 494 U.S. at 884).

This positive evolution in the case law encourages religious freedom and protects the liberties enshrined in the First Amendment. In this case, the State's application of the ECIA is not only not neutral or generally applicable, it is explicitly hostile toward the Montdel people's free exercise of their religion. *See Masterpiece Cakeshop*, 584 U.S. 618–19 ("The government . . . cannot impose regulations that are hostile to the religious beliefs of affected citizens.").

A. The State's decision to transfer the Red Rock area was hostile toward the Montdel religious beliefs and it therefore fails *Smith*'s test.

The right to free exercise is a principle of "fundamental nonpersecution" that implicates the "Nation's essential commitment to religious freedom." *Lukumi,* 508 U.S. at 524. The State's application of the law in this case is neither neutral nor generally applicable. This Court held in *Smith* that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton*, 595 U.S. at 533 (quoting *Smith,* 494 U.S. at 878–82). The government's application of a law is not neutral when "it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." *Id.*

i. The State has granted individualized exemptions to the ECIA, thus rendering the law not generally applicable.

Here, there is a formal mechanism in place for individualized exceptions, which renders the law not generally applicable. *Smith,* 494 U.S. at 884 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.") (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). In fact, refusal to extend the exemption to cases of religious hardship "suggests a discriminatory intent." *Roy,* 476 U.S. at 708.

The State, through the DNRA, picks and chooses which projects to greenlight because the statute gives the agency discretion over which private companies it enters into mining agreements with. *See* R. at 6. Using this discretion, "over the past five years . . . DNRA has entered into, but subsequently withdrawn, land transfer agreements with two mining companies." *Id.* The DNRA

granted these "individualized exceptions" because one project would "destroy the habitat of two endangered species," and the other posed a risk of water contamination to a nearby town. R. at 9–10.

Not only were these "individualized exemptions," but they were granted for purely secular reasons, and "a law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton,* 593 U.S. at 534 (quoting *Lukumi,* 508 U.S. at 542–546). Because it allows for exemptions and because the State granted exemptions for secular reasons while denying the Montdel's religious request for an exemption, this law is not generally applicable.

ii. The State's hostile remarks toward the Montdel religion demonstrate that it did not apply the ECIA in a neutral manner.

As this Court's free exercise doctrine makes clear, "the government . . . cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop,* 584 U.S. at 638 (quoting *Lukumi,* 508 U.S. at 534).

The facts in this case are strikingly similar to the facts in *Masterpiece Cakeshop. See* 584 U.S. 634–39. In that case, an allegedly neutral government body, the Colorado Civil Rights Commission, made light of a baker's sincere religious objections to baking wedding cakes for same-sex couples. *Id.* This Court held that when the Commissioners made "inappropriate and dismissive comments showing lack of due consideration for [the baker's] free exercise rights and the dilemma he faced," those "official expressions of hostility to religion in some of the commissioners' comments . . . [were] inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.* at 635; 639–40. This Court

emphasized that the plaintiff in that case was "entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection." *Id.* at 640.

Like the baker in *Masterpiece Cakeshop,* the Montdel did not receive the neutral treatment that the First Amendment requires. *See* R. at 48, 49, 53. Both the Governor of Delmont and DNRA Secretary Greenfield expressed that their patience with the Montdel had worn thin. Greenfield Aff. At 47 ¶ 9. As Secretary Greenfield admitted, the Governor even described the equinox festivals as "a nuisance and express[ed] his frustration with the ongoing cleanup after festival activities." *Id.* He also assured Secretary Greenfield that "Montdel traditions were not a significant concern." Greenfield Aff. at 49 ¶ 16. Because these "dismissive comments" show "lack of due consideration" for the Montdel's free exercise concerns, and because the "Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion," the application of the law is not neutral, and the Court must apply strict scrutiny. *Masterpiece Cakeshop,* 584 U.S. at 638 (quoting *Lukumi,* 508 U.S. at 534).

B. The land transfer fails strict scrutiny because it does not further a compelling government interest and it is not narrowly tailored.

When a law incidentally burdens free exercise rights and is not neutral and generally applicable, it is subject to the highest level of constitutional scrutiny. *See Lukumi,* 508 U.S. at 546. That law must "advance 'interests of the highest order' and must 'be narrowly tailored in pursuit of those interests.'" *Id.* (quoting *McDaniel v. Paty,* 435 U.S. 618, 626 (1978)). The compelling interest test that "[this Court] appl[ies] once a law fails to meet the Smith requirements is [that] . . . a law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi,* 508 U.S. at 546 (quoting *Smith,* 494 U.S. at 888). Delmont's choice to transfer a

sacred Native American religious site to a private mining company does not overcome this high bar.

The compelling interests that the government asserts (combatting the climate crisis, complying with federal law, and boosting the local economy) do not match up with that rule of law. Because the DNRA has administered the law by issuing a series of exemptions, its application has not been generally applicable. *See Fulton,* 593 U.S. at 533; *see also* R. at 30. The DNRA granted exemptions for non-religious reasons, while it now denies an exemption for religious purposes. R. at 29. Consistent with the holding in *Fulton* that the City of Philadelphia's similarly uneven application of the law did not satisfy strict scrutiny, the Court should hold that strict scrutiny is not satisfied here. 595 U.S. at 542.

Additionally, as the district court emphasized below, "in order to establish that it has a compelling interest sufficient to override the government would have to show that it would commit one of the 'gravest abuses' of its responsibilities if it did not transfer Red Rock." R. at 30 (quoting *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 591 U.S. 657, 696 (2020) (Alito, J., concurring)). The destruction of Red Rock, which "has been a known religious location for the Montdel since before recorded history," would in and of itself be one of the gravest abuses of the government's responsibilities. *Id.*

The application of the law is also not narrowly tailored to achieve the Government's asserted interests. Painted Bluffs may be "more mineral-rich than other areas," but that does not justify the destruction of a sacred religious site when, after the mining operation ceases, the region will be "too hazardous for visitation, and "it is anticipated that reclamation of this area by any practical means would be unfeasible." R. at 8, 29. As the "largest state in the Union," surely Delmont has alternative lithium deposits that it can mine. R. at 5. Especially considering that the

DNRA withdrew agreements for secular reasons, the state's choice to sell Red Rock could be achieved, perhaps, by mining other, less sacred tracts of land. The mining operation may keep most of the park intact, but it is not the entire park that is at issue here – it is the Red Rock formation that has been sacred to the Montdel people for thousands of years. *See* R. at 47.

III. Red Rock is a traditional public forum because it is a public park with a decades-long tradition of use for assembly and expression.

In addition to violating the Montdel's right to free exercise, the State's actions also infringe upon their right to free speech, particularly because the land exchange serves to prohibit the Montdel from speaking at an established public forum. At the threshold, this Court should hold that Red Rock and its surrounding area is a traditional public forum because it has been regularly used as a meeting place for speech and expression at least since the state park's inception in 1930. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

It is well established that the Montdel's prayer is speech protected by the First Amendment's Free Speech Clause. *See Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). This speech enjoys the highest level of protection from government interference because it takes place in a public park, a location with a tradition of public speech and assembly which runs so deep that this Court will find that a traditional public forum exists "wherever the title . . . of parks may rest." *Hague v. Comm. for Indus. Organization*, 307 U.S. 496, 515 (1939). Delmont's treatment of Red Rock substantiates that the site has been historically used and advertised as a place for expressive activity, which further solidifies the park's status as a traditional public forum. *See Perry*, 460 U.S. at 45. Moreover, even if this Court finds that Red Rock is not a traditional public forum, the state's intentional use of the property for expression directs that it is, at the very least, a designated public forum where the government's ability to

restrict speech is still heavily circumscribed. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985).

A. The Montdel's prayers at Red Rock are protected speech under the First Amendment's Free Speech Clause.

The Montdel's religious worship at Red Rock fits squarely within the universe of expressive activity protected by the Free Speech Clause. It is well established that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev.*, 515 U.S. at 760. Accordingly, the Montdel's religious expression at Red Rock is protected by speech.

B. Red Rock is plainly a public forum because it is part of a public park.

This Court should find that the Red Rock area is a traditional public forum because it is a public park with a long-established use for assembly and expression. *U.S v. Grace*, 461 U.S. 171, 177 (1983); *Perry*, 460 U.S. at 45. Traditional public fora include locations such as "streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry*, 460 U.S. at 45 (quoting *Hague*, 307 U.S. at 515). It is well-settled that public parks are "quintessential public forums" for First Amendment purposes. *Perry*, 460 U.S. at 45. Indeed, "public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, *without more*, to be "public forums." *Grace*, 461 U.S. at 177 (emphasis added).

Courts below have treated state parks as identical to the quintessential "city park" when conducting a forum analysis. *See, e.g., Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1522-23 (S.D. Fla.1992); *Leydon v. Town of Greenwich*, 257 Conn. 318, 342-343 (2001). In *Naturist Society, Inc. v. Fillyaw*, the Eleventh Circuit held that a state beach in Florida was, for First

Amendment purposes, indistinguishable from a quintessential city park because the public engaged in similar activities at both locations. 958 F.2d at 1523. The unique features of a beach did not deter the court, which adopted a holistic approach to forum analysis and looked beyond the immediate shoreline to the presence of an adjacent parking lot and walkways – all areas used for expressive conduct. *Id.* Accordingly, the Eleventh Circuit classified the entirety of the state park as a traditional public forum. *Id.* at 1523.

The inquiry into whether Red Rock is a traditional public forum should begin and end with the fact that Painted Bluffs is a state *park*, a type of location that meets public forum criteria on its face. *Grace*, 461 U.S. at 177. A closer look at the uses of Red Rock bolsters this characterization. Red Rock boasts many of the hallmarks of the quintessential city park. R. at 4. The Eleventh Circuit's holistic approach appropriately instructs that the dominant factor for forum analysis is *use* of the park rather than its physical characteristics. *Naturist Society, Inc.*, 958 F.2d at 1522. *See also U.S. v. Kokinda*, 497 U.S. 720, 727 (1990). Moreover, the unique structure of Red Rock does not disqualify it from being categorized as a public forum – rather, its special characteristics are precisely what draw members of the Montdel and the broader community to use it as a significant gathering place.

Boardley v. U.S. Department of the Interior does not require a contrary result. 615 F.3d 508 (D.C. Cir. 2010). There, the D.C. Circuit court presumed that areas such as a "vast wilderness preserve . . . which never have been dedicated to free expression and public assembly" would be classified as nonpublic fora. *Id.* at 515. The State's argument that Red Rock is a nonpublic forum erroneously emphasizes the court's reference to the "vast wilderness" when the dispositive inquiry is whether the government held open the park for public discourse. The *Boardley* court noted that "the mere physical characteristics of the property cannot dictate forum analysis." *Id.* (quoting

Kokinda, 497 U.S. at 727). It is the actual use of the government property, rather than its geographics, that is dispositive in determining whether a public forum exists.

Here, the record clearly establishes that Red Rock is hardly comparable to the isolated, generally untrodden area contemplated by the *Boardley* court. Instead, Red Rock is regularly used as a site for gatherings which attract thousands of visitors every year. R. at 15. The holding in *Boardley* thus *reinforces* a finding that Red Rock is a public forum.

C. The State of Delmont has held Red Rock in trust for public expression for nearly a century.

The Fifteenth Circuit incorrectly characterized Delmont's attitude towards the Montdel's religious practices as "acquiescence" when in reality the state expressly *encouraged* their use of Red Rock for expressive activity. R. at 37. In locations such as parks "which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry*, 460 U.S. at 45.

Delmont has held Red Rock in trust for public use and assembly since the inception of Painted Bluffs State Park in 1930, though the history of the Montdel gathering at the site to worship dates back five centuries. R. at 2, 4. The state embraced the Montdel's use of the land from the moment of the park's establishment, with the Governor publicly acknowledging at the Painted Bluffs opening ceremony that "[the Montdel's] supplications to the Almighty in the Painted Bluffs are part of a legacy that the state proudly cherishes." R. at 5. This relationship persisted unaltered for more than ninety years, as the Montdel continued to enjoy free and open access to Red Rock for religious worship without any state restrictions or interference.

The State has utilized references to the Montdel's religious gatherings in promoting the park, which is open for public outdoor activities similar to that of the quintessential public park. R. at 4. Delmont has even expanded and capitalized upon the Montdel's assembly by hosting

equinox festivals concurrent with the Red Rock pilgrimage. *Id.* at 5. It is thus well established that there is a long tradition of the Red Rock site being devoted to speech and assembly in a manner analogous to the quintessential public park, demonstrating that it is a traditional public forum.

D. Even if this Court finds that Red Rock is not a traditional public forum, it is a designated public forum because the State demonstrated intent to open the park to speech activities.

Even if this Court should find that Red Rock is not a traditional public forum, the state's historic practice of opening the area to speech instructs that the park is a designated public forum. *See Perry*, 460 U.S. at 45. "In addition to traditional public fora, a public forum may be created by the government designation of a place . . . for use by the public at large for assembly and speech . . . " *Cornelius,* 473 U.S. at 802. This occurs when the state has intentionally opened property "for use by the public as a place for expressive activity" *Perry*, 460 U.S. at 45. When conducting a forum analysis, this Court has considered factors such as the policy and practice of the government, the nature of the property, and the compatibility of the property with expressive activity to discern the government's intent. *Cornelius*, 473 U.S. at 802.

Delmont expressly dedicated Painted Bluffs State Park, specifically the Red Rock area, to speech activity by opening the park to the public, facilitating festivals, and inviting "thousands" of visitors to gather at the site each year. R. at 15. The nature of the property is not only conducive to these gatherings, but is essential to the speech of the Montdel, whose religion revolves around the natural rock formation. *Id.* at 2–3. It has been the policy and practice of the state to open Red Rock to speech since the park's inception nearly a century ago. *Id.* at 4. Accordingly, the Red Rock site is, at the very least, a designated public forum where the government's ability to regulate speech is still "subject to the same limitations as that governing a traditional public forum." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

IV. The State discriminated against the Montdel on the basis of viewpoint when enforcing the land exchange of Red Rock.

Regardless of whether this Court finds that Red Rock is a traditional or designated public forum, the land exchange was unconstitutional because it was a viewpoint discriminatory enforcement of the ECIA. See *Brown v. City of Pittsburgh*, 586 F.3d 263, 293 (3d Cir. 2009). Petitioners concede that the type of land exchange authorized by the ECIA is content neutral on its face because whatever government property is selected for the exchange will be closed off to all members of the public. Yet although a content neutral regulation is generally permissible "even if it has an incidental effect on some speakers as opposed to others," this Court has signaled that discriminatory enforcement of a facially neutral regulation may be a First Amendment violation. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See also Masterpiece Cakeshop,* 584 U.S. at 638. A viewpoint discriminatory enforcement challenge succeeds where the challenger shows "a pattern of unlawful favoritism." *Brown*, 586 F.3d at 293 (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002)).

The state demonstrated a pattern of treating the Montdel unfavorably when it repeatedly rejected other locations for the land exchange. *See* Section II (a)(i)–(ii), *supra*. Though the ECIA was only enacted three years ago, the state has already demonstrated a pattern of disfavored treatment toward the Montdel by failing to give their religious objections the same consideration as other arguments and referring to the equinox activities as a "nuisance." Greenfield Aff. at 47.

V. Even if this Court finds that the land exchange was viewpoint neutral, the State still fails to satisfy strict scrutiny because such action will destroy Red Rock's public forum status, which is presumptively impermissible.

In transferring the Red Rock area to a private mining company, the state is destroying the area's public forum status by completely closing it off to all expressive activity. "Traditional public forum property occupies a special position in terms of First Amendment protection . . .". *Grace*,

461 U.S. at 180. Accordingly, "[t]he right to use a public place for expressive activity may be restricted only for weighty reasons." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). Given that speech enjoys heightened protections in a public forum space, this Court has recognized that the government "may not by its own ipse dixit destroy the public forum status of streets and parks which have historically been public forums." *Grace*, 461 U.S. at 180 (quoting *U.S. Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981)).

Here, Delmont is committing the same grave error that this Court warned about in *Grace*. *See id.* Closing the public forum at Red Rock constitutes a complete prohibition on speech while failing to serve a compelling governmental interest. Requiring a more lenient standard of scrutiny would effectively erase the protections afforded to traditional public fora by allowing the government wide latitude to close spaces historically used for expressive activity.

A. The land exchange does not satisfy a strict scrutiny analysis because it is not narrowly tailored to a compelling government interest.

Even if this Court finds that the land exchange is both content and viewpoint neutral, it still violates free speech rights because it constitutes the closure of a traditional public forum – an action that is presumptively unconstitutional. *Grace*, 461 U.S. at 180. The state's actions must therefore survive strict scrutiny to be permissible, a burden that it fails to meet here. *See id.*

Although this Court has never directly determined which level of scrutiny applies to the sale or physical transformation of government property, it has previously recognized that in a quintessential public forum, "the government may not prohibit *all* communicative activity." *Perry*, 460 U.S. at 45 (emphasis added). Indeed, "the destruction of public forum status… is at least *presumptively impermissible.*" *Grace*, 461 U.S. at 180 (emphasis added). Courts below are similarly skeptical of the government's ability to strip property of its public forum status without providing appropriate justification. *See, e.g., Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th

Cir. 1993) ("In fact, we have grave doubts about the City's ability, should it so choose, to withdraw the Organ Pavilion from its status as a traditional public forum"). Accordingly, Delmont's closure of Red Rock to all expressive activity must meet the highest level of scrutiny by demonstrating that the action is narrowly tailored to serve a compelling state interest.

The state cannot meet that bar. First, Delmont fails to demonstrate that mining will actually result in economic gain to the surrounding community. The economic impact study indicated that "the transfer *could* result in substantial economic benefits" but that "there may be a decline in tourism due to mining activities." Greenfield Aff. at 48 ¶ 11(emphasis added). Tourism is the main source of the town's revenue, signaling that the mining at Red Rock may actually result in economic *harm.* R. at 7. Second, the environmental impact study concluded that the mining will result in "the total destruction of Red Rock." *Id*. The complete eradication of a natural landmark can hardly be construed as serving the state's environmental interest, particularly where the state acquired the park with the express purpose of preserving its natural beauty. R. at 4. Even if conceding that the mining will have a positive environmental effect, the record remains unclear regarding whether the benefits will be substantial enough to justify sacrificing the public's interest in exercising free speech at Red Rock, particularly where there are countless other environmental initiatives which would arguably achieve the same broad aim.

Third, the state's reliance on a federal mandate that broadly calls for "the use of sustainable energy resources in defense contracting" does not demonstrate a compelling interest to mine for lithium at Red Rock as opposed to alternative sites, particularly given the state's rich abundance of minerals. R. at 6, 7. The Secretary of the DNRA himself failed to identify the federal law among a list of proffered justifications for the land exchange, demonstrating that the federal mandate was hardly top of mind for the state actors arranging this deal. Greenfield Aff. at 49, ¶ 16.

Moreover, even if this Court were to find that the land exchange does satisfy the state's interests in lithium extraction, it is still clear that the complete destruction of Red Rock is entirely overbroad. In *McCullen v. Coakley*, this Court held that a regulation prohibiting speech in designated zones around an abortion clinic was not narrowly tailored to its legitimate interests and "substantially burden[ed] the kind of speech in which petitioners wish[ed] to engage" because it deprived them of their primary methods of communication and ignored a variety of narrower approaches. 573 U.S. 464, 488, 490, 494 (2014). The land transfer in this case is similarly overbroad because it places a substantial burden on the Montdel's ability to pray while disregarding alternative options to serve its state interests. *See id.*

VI. Even if this Court does not apply strict scrutiny, the land exchange must still be prohibited because it is an unconstitutional time, place, and manner restriction.

Even if this Court deviates from the persuasive dicta in *Grace* and *Perry*, the land exchange should still be analyzed as a time, place, and manner restriction because it regulates the location of speech by completely denying the public's access to Red Rock. *See Ward*, 491 U.S. at 791. In public locations traditionally associated with free speech, the government may only enforce "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are 'justified without reference to the content of regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Here, the state fails to demonstrate that the land exchange is narrowly tailored to serve a substantial government interest because it fails to consider alternative options to closing the public forum. Moreover, the state's decision to close Red Rock leaves the Montdel without any alternative channel for their religious speech.

A. Closing a public forum is a restriction on the location of speech.

Where the government must meet a rigorous burden to justify even a partial restriction on speech in a public forum, it logically follows that a total restriction must face a similarly high hurdle. *See Ward*, 491 U.S. at 791.Yet, counterintuitively, the State urges this Court to adopt a standard that is much more lenient. In *Menotti v. City of Seattle*, the Ninth Circuit appropriately analyzed the government's emergency order to close certain public streets due to violent protests as a time, place, and manner restriction. 409 F.3d. 1113, 1124, 1131 (9th Cir. 2005). The court identified the street closure as a "regulation of the places where some speech may occur." *Id.* at 1129. The court held that the government may not close a public forum without doing so in a way that is content neutral, narrowly tailored to serve a significant governmental interest, and that leaaves ample alternative channels for communication. *Id.*

The state's complete and permanent closure of Red Rock to public speech warrants the same level of scrutiny. *See id.* at 1129. Although Justice Kennedy noted in his concurrence in *International Society for Krishna Consciousness v. Lee* that "the government always retains the authority to close a public forum, by transfer the property, changing its physical character, or changing its principal use," this power is not absolute. 505 U.S. 672, 699 (1992). Treating the land exchange as a time, place, and manner restriction recognizes that the government may only deny access to locations "immemorially held in the public's trust" where it has a significant, neutral, and narrowly tailored reason for doing so. *Perry*, 460 U.S. at 45.

B. The land exchange fails the time, place, and manner test.

Even assuming that the land exchange is content and viewpoint neutral, the land transfer is not narrowly tailored to serve a significant governmental interest because the state failed to adequately explore alternative sites for mineral extraction. As discussed above, this application of the ECIA is not narrowly tailored. *See* Section II (a)(i)-(ii), *supra*.

Moreover, the Respondent's closure of Red Rock also fails to "leave open ample alternative channels" for the Montdel's speech by destroying a sacred site which is essential to their ability to engage in religious worship. *Ward*, 491 U.S. at 791. Although some circuit courts have held the government need not provide a "perfect substitute" for the regulated expression, for the Montdel, no substitute exists at all. *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 101 (2d Cir. 2006). Destroying Red Rock does more than chill the Montdels' speech – it results in absolute suppression of a religious practice that threatens the continued existence of the Montdel culture.

The equinox rituals are essential to the identity of the Montdel people. The "most important of these rituals takes place at Red Rock." Highcliff Aff. at 50, ¶ 7. According to the Montdel tradition, it is the "sacred obligation" of the tribe's elders to make a pilgrimage to the top of Red Rock and engage in prayer. *Id.* at ¶ 9. The Montdel's speech is inextricably intertwined with the physical landscape of Red Rock. No alternative location is comparably hallowed or conducive to this essential tenet of the Montdel's religious practice.

CONCLUSION

For the foregoing reasons, Petitioner Montdel United is entitled to a reversal of the judgement of the Court of Appeals of the Fifteenth Circuit and a grant of the requested preliminary injunction.

Respectfully Submitted,
/s/ Team 23
Attorneys for Petitioner,
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APPENDIX

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

U.S. CONST. amend. I.

TEAM 23 CERTIFICATON

This certifies that the work product contained in all copies of this brief is the work product of the members of Team 23 only. Team 23 has complied fully with its law school honor code and with the Official Competition Rules.

Respectfully Submitted,
/s/ Team 23