No. 24-CV-1982

In the

Supreme Court of the United States

March Term 2025

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 THE RESPONDENT

TEAM 24
Counsel for Respondent
January 31, 2025

QUESTIONS PRESENTED

I. Whether the Energy and Conservation Independence Act and subsequent transfer of Red Rock violate the First Amendment Free Speech rights of Montdel United where the transfer is to a private company for mining purposes, the geography of the land is challenging, Delmont never entered into any treaties or land preservation agreements with the Montdel people, and the transfer substantially boosts the local economy.

II. Whether the Energy and Conservation Independence Act and subsequent transfer of Red Rock violate the First Amendment Free Exercise rights of Montdel United where the ECIA is a valid law of general applicability and Montdel United was not coerced into violating their religious beliefs by Delmont and therefore did not implicate the First Amendment.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit had jurisdiction over the District Court for the District of Delmont, Western Division's decision pursuant to 28 USC § 1291 and entered final judgment on the matter in favor of Delmont on November 1, 2024. Petitioner filed a petition for a writ of certiorari, which this Court granted on January 5, 2025. R. 55. This Court has jurisdiction to review the Appellate Court's decision pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The State of Delmont was established in 1855. Seventy-five years later, Delmont acquired a 100-square-mile expanse of forested highlands presently known as Painted Bluffs State Park with the intent to preserve its natural beauty. R. 2, 4. At the opening ceremony, former Governor Ridgeway, by executive proclamation, publicly acknowledged the lasting heritage of an indigenous group known as the Montdel. R. 4. Once established, Painted Bluffs offered the public opportunities for camping, hiking, and fishing. R. 4.

Painted Bluffs attracts tourists, but the few counties relying primarily on tourism have struggled economically. R. 7. Mining, on the other hand, has become a significant portion of the

state's economy as a result of Delmont's mineral-rich geology. R. 5-7. In fact, Painted Bluffs was recognized as the largest lithium deposit ever discovered in North America, particularly around Red Rock — a barren area atop one of the highest bluffs and nestled against a cliff's edge. R. 7, 50.

Capitalizing on this mineral-rich geology, Delmont passed the Energy Conservation Independence Act (the "ECIA"), codifying Delmont's state-wide initiative to reduce fossil fuel emissions and stimulate the state's economy. R. 6. It was endorsed by the federal government after the recent passage of the Federal Natural Resources Defense Act (the "FNRDA") which mandated the use of sustainable energy in defense contracting to support a global goal to reduce fossil fuel emissions. R. 7. The ECIA authorizes the state of Delmont to enter into land transfer agreements with mining companies through the Delmont Natural Resources Agency (the "DNRA") and requires that all land transfers have an independent appraisal "to ensure equivalent value," an "environmental impact study," and an "economic impact study." R. 6. After, the DNRA has sixty days to decide if Delmont will proceed with the land transfer. R. 6.

In the past five years, the DNRA has entered into three land transfer agreements, all three of which were objected to by various groups. R. 9-10. Delmont withdrew from two of the land transfers due to evidence from environmental impact studies. R. 9-10. In these agreements with the mining companies, Granite International, Inc. and McBride Brine Mining, both land transfers involved areas with significantly fewer lithium deposits than Painted Bluffs. R. 9-10. Later, the DNRA completed the third land transfer agreement, despite strong objections from the State Teachers Association and the State Historical Society. R. 10.

Recently, the DNRA executed a transfer agreement giving one-fourth of Painted Bluffs, including the Red Rock area, to a private corporation based in Delmont — Delmont Mining

Company (“DMC”) — in exchange for land situated in a different part of the state. R. 7-8. After this transfer, the private area will be accessible only to DMC and its employees. R. 9.

The required environmental impact study revealed the broader environmental impact of the mining is expected to be relatively minimal, sparing local flora and fauna from severe impacts. R. 8. Furthermore, transferring this portion of Painted Bluffs allows DMC to extract the most minerals while keeping a majority of Painted Bluffs intact; plus, a majority of the transferred land, excluding red rock, may be reclaimed in approximately twenty years. R. 8, 47. The DNRA concluded that alternative mining technologies, which could be available in another twenty years, may significantly alter, rather than destroy Red Rock, but are not practical because they pose unknown environmental risks, and may require longer implementation timelines and prohibitive costs. R. 8-9, 49. Additionally, the economic impact study revealed that mining operations would provide a substantial economic boost to the local economy. R. 9.

The Montdel people, an Indigenous Native American group, object to the land transfer because a large part of their religious practice in Delmont has consistently revolved around rituals at Red Rock. R. 2-3. Since Painted Bluffs' establishment, the Delmont government has not restricted or interfered with the Montdel people’s use of Painted Bluffs. R. 4. Yet, Delmont has never addressed the rights of indigenous peoples, nor has it entered into any treaties or land preservation agreements with the Montdel. R. 3-4. In fact, Painted Bluffs was largely ignored until its acquisition by Delmont because the French, whose land was formally recognized, never claimed the area due to its challenging geography. R. 3-4. Since the 1950s, the Red Rock rituals have been formalized as the “Montdel Observance” where members of the Montdel people gather during the equinoxes and solstices. R. 5. Delmont later included the Montdel Observance in their advertising campaigns for Painted Bluffs. R. 52. These gatherings have evolved over the

years into a festival-like event where attendees include tourists, vendors, college students, and more. R. 5-6. Delmont's Governor has expressed frustration with the ongoing cleanup after the festivals, but the Montdel people do not participate in the festival activities. R. 6, 47.

In 2016, "Montdel United" was created as a non-profit organization that focused on preserving sites of religious significance to the Montdel people. R. 7. *See also* R. 52. Montdel United objected to the destruction of Red Rock due to its religious significance in their rituals. R. 7. *See also* R. 50-52. In January 2023, Montdel United met with Alex Greenfield, Secretary of the DNRA, to object to the transfer of Red Rock during this meeting, Secretary Greenfield said that "they had tolerated these rituals for a long time." R. 53.

After the DNRA announced their decision to proceed with the land transfer, Montdel United brought a motion for preliminary injunction and a temporary restraining order to the United States District Court for the District of Delmont, Western Division. R. 10. The District Court denied Montdel United's request for a temporary restraining order but proceeded to examine whether their claims would prevail on the merits to determine whether a preliminary injunction should be granted. R. 10. The District Court granted Montdel United's motion for preliminary injunction on March 1, 2024, and the State of Delmont and the DNRA appealed to the United States Court of Appeals for the Fifteenth Circuit. R. 32-33. On November 1, 2024, the Fifteenth Circuit reversed the order of the District Court in favor of Delmont determining that Montdel United did not prove they would succeed on the merits of their claims. R. 45. Montdel United filed a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifteenth Circuit. R. 54. This Court granted certiorari on January 5, 2025. R. 55.

SUMMARY OF THE ARGUMENT

The ECIA and subsequent transfer of Red Rock do not violate the First Amendment Free Speech or Exercise rights of Montdel United.

I. Free Speech

The ECIA and subsequent transfer of Red Rock do not violate the First Amendment Speech rights of Montdel United because (1) Delmont is free to permanently close Painted Bluffs regardless of its forum, (2) Painted Bluffs is not a traditional public forum, (3) Painted Bluffs is not a designated public forum, and (4) Painted Bluffs' sale passes Constitutional muster as a nonpublic forum.

First, the government may permanently close its own property regardless of forum without heightened judicial review when it acts as a proprietor rather than a lawmaker. Here, Delmont acts as a proprietor by ousting itself from the land through a transfer of ownership and changing the purpose of the land from preservation of beauty to mining, which makes changes in the characteristics of the forum imminent. Delmont's actions as a proprietor are reasonable and viewpoint neutral — the test this Court ought to adopt.

Second, assuming — for the sake of argument — that forum analysis is required, Painted Bluffs is not a traditional public forum because the location is not comparable to that of municipal parks, the purpose of Painted Bluffs is the preservation of natural beauty, and there is a lack of historic use; none of these factors signal a devotion to assembly and debate. Third, Painted Bluffs is not a designated public forum because, among other things, Delmont never entered into a treaty or land preservation agreement with the Montdel.

Fourth, under both nonpublic forum analysis and the proposed test for permanent closure of any forum, the transfer is reasonable because mining this area to comply with the FNDRA

means sparing a greater number of other areas with significantly smaller deposits. The ECIA is also viewpoint neutral because it does not mention any target properties, and the transfer is viewpoint neutral because it ousts everyone from the property, including the government.

II. Free Exercise

The ECIA is a valid neutral law of general applicability because it has no discretionary mechanism and does not target a religious group or practice and therefore only incidentally affects the religious practices of Montdel United. Where a government's actions do not coerce a group to violate their religious convictions, the government is not required to justify their actions with a compelling interest justification. Further, this Court should follow *Lyng* because the destruction of government-owned land of religious significance, Red Rock, does not implicate the Constitution where there is no coercion in the law to violate a religious belief. This court should affirm the Fifteenth Circuit's holding because the ECIA is a valid law of general applicability and Delmont's government action did not coerce Montdel United to violate their religious practices. Therefore, strict scrutiny is not available because Montdel United's Free Exercise claim does not rise to the level of constitutional protection.

ARGUMENT

I. THE ENERGY AND CONSERVATION INDEPENDENCE ACT AND SUBSEQUENT TRANSFER OF RED ROCK DO NOT VIOLATE THE FIRST AMENDMENT FREE SPEECH RIGHTS OF MONTDEL UNITED

The first issue on appeal is whether the ECIA and subsequent transfer of Red Rock violates the First Amendment Free Speech Rights of Montdel United.

The First Amendment ensures "Congress shall make no law . . . abridging the freedom of speech, or of the press," U.S. CONST. amend. I., and the due process clause of the Fourteenth Amendment extends this prohibition to the States and their respective legislatures, *see Gitlow v.*

New York, 268 U.S. 652, 666 (1925).[1]

The First Amendment "does not guarantee access to property simply because it is owned or controlled by the government." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981). When freedom of speech rights intersect with the government's interest as a property owner, the access afforded to the public and the government's ability to restrict that access depends "on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Several categories of forum have been recognized, but there exists a great deal of disagreement and confusion among the federal courts regarding the number or name of these forums, even in this Court. *Compare Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215-16 (2015) (identifying four distinct categories of forum: traditional public forum, designated public forum, limited public forum, and nonpublic forum), *with Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (identifying only three categories and conflating "limited public forums" with "nonpublic forums" by applying the same level of judicial scrutiny to both), *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 341-42 (2d Cir. 2010) (identifying four distinct categories), *and Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011) (identifying three categories and omitting the nonpublic forum).

In creating forum analysis, this Court initially recognized three forums: traditional public, designated public, and any property that doesn't fall into those two forums. *See Perry*, 460 U.S. at 46. Whether this third forum is called a nonpublic forum, a limited public forum, or both, is not an important distinction given that both limited and nonpublic forums have been scrutinized

[1] The Montdel people's speech is concededly protected speech and is not being challenged here. *See Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *Kennedy v. Bremerton Ind. School Dist.*, 597 U.S. 507, 523-24 (2022) ("That the First Amendment doubly protects religious speech is no accident.").

the same. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("Access to a nonpublic forum . . . can be restricted as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."); *Martinez*, 561 U.S. at 679 n.11 (establishing limited public forums "may impose restrictions on speech that are reasonable and viewpoint-neutral").[2] The distinction between nonpublic and public forums — both designated and traditional — is important, however, because the level of review is much stricter under public forums. *See Perry*, 460 U.S. at 45-6; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

As more fully elaborated below, the ECIA and subsequent transfer of Red Rock do not violate the First Amendment Speech rights of Montdel United because (1) Delmont is free to permanently close Painted Bluffs regardless of its forum, (2) Painted Bluffs is not a traditional public forum, (3) Painted Bluffs is not a designated public forum, and (4) Painted Bluffs' sale passes Constitutional muster as a nonpublic forum.

A. Delmont is free to permanently close Painted Bluffs regardless of its forum

The government may permanently close its own property without heightened judicial review when it acts "as a proprietor . . . rather than . . . a lawmaker." *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). The government acts as a proprietor when "selling the property, changing its physical character, or changing its principal use." Id. at 699 (Kennedy, J., concurring); *see Hawkins v. City & Cty. of Denver*, 170 F.3d 1281, 1287-88 (10th Cir. 1999) (finding a galleria constructed on what used to be a public street is not a traditional public forum where the "physical characteristics and function of the former public street" have been sufficiently altered).

[2] From this point on, both forums will be collectively referred to as nonpublic forums.

Notably, the government may not change the physical character or principal use of a traditional public forum by statement alone. *See U.S. Postal Serv.*, 453 U.S. at 133 (1981) ("Congress . . . may not by its own ipse dixit destroy 'the public forum' status of streets and parks which have historically been public forums.").[3] The government, however, is free to close designated forums to all speech by statement alone because it was never required to open the forum in the first place. *See Sons of Confederate Veterans, Va. Div. v. City of Lexington*, 722 F.3d 224, 231-32 (4th Cir. 2013).

This Court ought to adopt the following level of review for the government's permanent closure of property: it must be reasonable and viewpoint neutral. S*ee Krishna Consciousness*, 505 U.S. at 678 (implying some lower level of review where the government is "acting as a proprietor"); *Satanic Temple v. City of Belle Plaine*, 80 F.4th 864, 868 (8th Cir. 2023) (applying this test to closure of a designated public forum). While some circuit courts have suggested designated public forums may be closed whenever the government wants, *see Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004); *City of Lexington*, 722 F.3d at 232, some level of the review seems necessary in *all* forums because there is a danger of the government permanently closing a property to the public any time it disagrees with the speech being expressed there.

Here, Delmont is free to permanently close Painted Bluffs regardless of its forum. Specifically, Delmont and the DNRA are acting as proprietors by selling a portion of Painted Bluffs to a private mining company rather than simply relying on legislation — like the ECIA — to declare its closure without any change in ownership. *See United States v. Grace*, 461 U.S. 171, 180 (1983) (finding an impermissible destruction of the forum where the government relied on legislation to declare a public sidewalk as part of the Supreme Court building, but did not change

[3] IPSE DIXIT, Black's Law Dictionary (12th ed. 2024) (ipse dixit, Latin for "he, himself, said it," means "something asserted but not proved").

the sidewalk's characteristics or primary use). The transfer changes the forum because it also ousts Delmont from the property. *See Krishna Consciousness*, 505 U.S. at 700 (Kennedy, J., concurring) (finding government must bear burden to "change the property's forums status").

Moreover, while the characteristics of the property are currently the same, the sale for the purpose of mining necessitates a major inevitable change in those characteristics, and nobody can seriously argue that private mining grounds are compatible with public use, let alone speech. *See ACLU v. City of Las Vegas*, 13 F. Supp. 2d 1064, 1075 (D. Nev. 1998) (finding municipalities are not prevented from "transforming the physical character and use of . . . streets to such an extent as to change the property's constitutional forum status from traditional public fora to nonpublic fora").

Furthermore, Delmont is acting as a proprietor, rather than a lawmaker, by changing the principal use of the forum to mining through the sale and transfer of ownership. *See Hale v. Dep't of Energy*, 806 F.2d 910, 195-16 (9th Cir. 1986) (finding portion of road did not fit the traditional public forum definition where it had been "withdrawn from public use for the purpose of conducting nuclear testing"). Even if Delmont had not transferred ownership of the property, deciding instead to mine the area in a joint venture with DMC, the decision to mine the area changes the land's principal purpose.

Montdel United may attempt to rely on *Seattle Mideast Awareness Campaign v. King County* to argue Painted Bluffs is a traditional public forum that the government may never close. 781 F.3d 489 (9th Cir. 2015). There, the Ninth Circuit held a city bus advertisement program was a nonpublic forum. *Id.* In dicta, the court found the principal distinction between traditional and designated public forums was that governments may not "close" traditional public forums to expressive activity altogether. *Id.* at 496.

Insofar as Montdel United may rely on *King County* to argue that this Court should find governments — including Delmont — are never allowed to close a traditional public forum, such an argument is incorrect. By prohibiting all closures of traditional public forums, including those closures that occur because the government is acting as proprietor and not as lawmaker, this Court would effectively strip Delmont of its ownership over Painted Bluffs, leaving the government a mere stick from its proverbial bundle of property rights. *See Krishna Consciousness*, 505 U.S. at 700 (Kennedy, J., concurring) ("no one has understood the public forum doctrine to require" the government be "prohibited from closing a park, or eliminating a street or sidewalk"); *see also Adderley v. Florida*, 385 U.S. 39, 48 (1996) ("The . . . Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.").

Moreover, *King County* cites *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), as authority for its distinction between designated and traditional public forums, but *King County* conflates prohibition by legislation and forum closure by the government acting as a proprietor. *See Krishna Consciousness*, 505 U.S. at 700 (Kennedy, J., concurring) ("The difference is that when property is a protected public forum the state may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status."). Specifically, *Perry* never mentions "closure," and when it espouses that "government may not prohibit all communicative activity," it does so in the context of "regulation," not government action of selling, changing principal use, or changing characteristics of the forum. 460 U.S. at 45. Consequently, Delmont's actions as a proprietor do not prohibit it from closing the forum. The general prohibition espoused in *Perry* would only apply if the ECIA itself had a content

restriction on the Painted Bluffs territory transferred, which it does not.

Accordingly, Delmont is free to permanently close Painted Bluffs regardless of its forum.

B. Painted Bluffs is not a traditional public forum

Assuming, arguendo, that forum analysis is required, government property is identified as a traditional public forum when it has been traditionally "devoted to assembly and debate." *Perry*, 460 U.S. at 45. While streets and parks may presumptively be traditional public forums, *see Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939), a fact-specific inquiry about the characteristics of the street or park at issue is still required, *see Boardley v. U.S. Dept. of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010); *see also United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality) (implying a fact specific inquiry where "the sidewalk leading to the entry of the post office is not the traditional public forum referred to in *Perry*"). The following factors should be assessed in determining if the government property at issue has been traditionally devoted to assembly and debate: location,[4] purpose,[5] and historic use or lack thereof.[6]

Here, Painted Bluffs is not a traditional public forum. Despite the "State Park" moniker, a fact-specific inquiry into Painted Bluffs beyond its title shows this property is not a traditional public forum. *See Boardley*, 615 F.3d at 514 ("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.'"). Initially, Painted Bluffs' location is not comparable to

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[4] *See United States v. Grace*, 461 U.S. at 179 (1983) (distinguishing sidewalks outside the Supreme Court and sidewalks "located" in an enclosed military reservation focusing on separation from other public forums); *Krishna Consciousness*, 505 U.S. at 679-82 (evaluating physical separation of the forum at issue from acknowledged public forums).

[5] *See Krishna Consciousness*, 505 U.S. at 674; *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100-01 (9th Cir. 2003) (emphasizing "actual use and purposes of the property" as a factor).

[6] *See Krishna Consciousness*, 505 U.S. at 679-82 (evaluating lack of historic use); *Boardley*, 615 F.3d at 515 (noting history and tradition as a factor).

that of municipal parks located within city limits and typically found in urban environments. In particular, the 100-square-mile expanse of forested highlands is too large and too separated from other traditional public areas to be thought of as a place traditionally devoted to assembly and debate. *Cf. Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 290, 293 (1984) (finding the public forum standard of review for content-neutral time, place, and manner regulations appropriate when the parks at issue were in the "heart of Washington, D.C." and no bigger than a "7-acre square" or a "two mile" stretch of land). Additionally, French settlers never claimed the area that is now Painted Bluffs because of its challenging geography, a fact that hardly makes the area devoted to assembly and debate.

Moreover, the purpose behind acquiring Painted Bluffs was to preserve its natural beauty, not dedicate the area to the free exchange of ideas. *See Boardley*, 615 F.3d at 615 ("The dispositive question is . . . what purpose it serves, either by tradition or specific designation.") Even after it was established as a state park and opened generally to the public, its purpose has been to preserve the park's beauty for the public to appreciate it through activities like camping, hiking, and fishing — not assembly and debate. *See Grace*, 461 U.S. at 177 ("Although whether the property has been 'generally opened to the public' is a factor to consider in determining whether the government has opened its property to the use of people for communicative purposes, it is not determinative.").

Finally, there is a lack of historic use at Painted Bluffs for speech activity. In particular, the festivals are of recent creation. Moreover, the Montdel people perform their supplication ritual only four times a year, and only at Red Rock. The other 361 days, Painted Bluffs is used by hikers, bikers, fishers, and the like for their respective activities, which are often done individually where speech is not necessary. This minimal use for communication does not

support a finding of historic use.

Notably, Red Rock, itself, is not conducive to assembly and debate because its location is atop one of the highest bluffs nestled against a cliff's edge and surrounded by nonpublic forum, its purpose is preservation of its natural beauty, and its historic use is limited to four days a year.

C. Painted Bluffs is not a designated public forum

Next in the forum analysis, government property is identified as a designated public forum when the property "has not traditionally been regarded as a public forum," *see Minn. Voters All. v. Mansky*, 585 U.S. 1 (2018), and the government intentionally makes that property "generally available to a class of speakers," *see Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (internal citations and quotations omitted). The government intentionally makes the property generally available to a class of speakers when, on balance, "the policy and practice of the government" and "the nature of the property and its compatibility with expressive activity" reflect such an intent. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. at 215-16.

Here, Painted Bluffs is not a designated public forum. Specifically, the policy and practice of Delmont lack an intent to make the property generally available to the Montdel people for several reasons. First, when the state was established, Delmont did not acknowledge the indigenous people's presence or rights on the land, nor did it subsequently enter into any treaties or land preservation agreements with the Montdel people.

Second, the government capitalizing on its acquiescence to the Montdel people's presence in the area by advertisement is not the same as intentionally opening a nontraditional forum for the purpose of public discourse. *See Cornelius*, 473 U.S. at 802 (a nonpublic forum is not created "by inaction or by permitting limited discourse"). Likewise, the former Governor's executive

proclamation was simply a statement recognizing that Delmont was not always the owner of the land, not an invitation to open that forum up generally to the Montdel people for speech activity.

Third, the Montdel people have performed their religious ceremonies independent of the State Park Service since Painted Bluffs' establishment. *See Greer v. Spock*, 424 U.S. 828, 836 (1976) (warning lower courts that "whenever members of the public are permitted freely to visit a place owned or operated by the Government," it does not mean that place becomes a "public forum for purposes of the First Amendment") (internal quotations omitted).

Moreover, the nature of Painted Bluffs and its incompatibility with expressive activity lack an intent to make the property generally available to the Montdel people. As mentioned previously, the area is a 100-square-mile highland forest with challenging geography that even the French settlers failed to subdue. These conditions do not create an environment suited for speech activity, and the fact that some activity occurs there does not reflect an intent on behalf of Delmont. *See Cornelius*, 473 U.S. at 805 (finding expressive activity occurring in the forum "does not imply that the forum thereby becomes a public forum for First Amendment purposes"). Additionally, there is at least some incompatibility with the forum's purpose of preserving its natural beauty and the consequence of large crowds. In particular, the Governor's remarks about the cleanup required after a festival necessarily implies that event attendees are creating trash, which is counter to the forum's purpose. *Id.* at 804 ("In cases where the principal function of the property would be disrupted by expressive activity, the court is particularly reluctant to hold that the government intended to designate a public forum.").

D. Painted Bluffs' sale passes Constitutional muster as a nonpublic forum

Where, as here, the property is not a traditional or designated public forum, it falls into the nonpublic forum category. *See Mansky*, 585 U.S. 1 (2018) (citation omitted); *Boardley*, 615

F.3d at 514 ("A nonpublic forum is by contradistinction public property which is not by tradition or designation a forum for public communication.") (citation omitted). Any challenged regulation of a nonpublic forum is constitutional when it is reasonable and viewpoint neutral. *Krishna Consciousness*, 505 U.S. at 678-79. Reasonableness is assessed in light of the purpose of the forum and all surrounding circumstances, *Cornelius*, 473 U.S. at 916-17, and does not need to be the "most reasonable or the only reasonable limitation," *Krishna Consciousness*, 505 U.S. at 683.[7]

Here, Painted Bluffs' sale passes Constitutional muster as a nonpublic forum. Specifically, the transfer is reasonable in light of the forum's purpose of preserving the state's natural beauty because the sale of one-quarter of Painted Bluffs for mining allows the other three-quarters of the forested area to be preserved with relatively minimal impact and avoids any suffering to local flora or fauna. *See Mansky*, 585 U.S. at 1 ("the government may reserve . . . a [nonpublic] forum for its intended purposes . . . as long as the regulation is reasonable"). Mining this area, one of the largest lithium deposits in North America, to comply with the FNDRA means that other areas with significantly smaller deposits, such as the Granite International or McBride mining sites, need not be mined. In other words, a small sacrifice will allow the government to preserve the natural beauty of the rest of this park and other government lands that have a lesser degree of lithium deposits. *See Forbes*, 523 U.S. at 682 (emphasizing the restriction must be reasonable in light of the "purpose of the property").

Moreover, the other considerations for making the transfer of land — the likely boost to the struggling local economy, reducing reliance on fossil fuels, and unavailability of alternative mining technologies — are more than sensible reasons for the government to sell its own

[7] Given that the permanent forum closure test suggested above in Subsection A also asks if the ECIA and subsequent transfer is reasonable and viewpoint neutral, it will be analyzed here.

property, even if doing so will incidentally affect speech activity. *See id.* at 16 (the government need only "be able to articulate some sensible basis") (citation omitted).

Finally, the transfer is viewpoint neutral because ECIA, itself, is devoid of any specific properties identified for transfer, so it could not possibly be targeting any speech in particular. Furthermore, the current application of ECIA, which has the effect of completely closing the forum to everyone, including the government, is not targeted at any one person or group. As explained above, Delmont also has more than one important reason for transferring the land, and all of those are unrelated to ulterior motives any one individual at the DNRA may have had or any speech activity that may be taking place in Painted Bluffs. *See Cornelius*, 473 U.S. at 578-79 ("Access to a nonpublic forum . . . can be restricted as long as the restrictions are . . . not an effort to suppress expression *merely* because public officials oppose the speaker's view.") (citation and internal quotations omitted) (emphasis added).[8]

[8] While it is true Secretary Greenfield had an inappropriate outburst during his meeting with Montdel United, during which he said the government has "tolerated" the Montdel rituals for a long time, this single outburst by one individual does not determine the entire DNRA had an illicit purpose behind the transfer. *See United States v. Obrien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a [facially neutral] statute is not necessarily what motivates scores of others to enact [or apply] it, and" courts will not strike legislation "which Congress had the undoubted power to enact and [could reenact] in its exact form if the same or another legislator made a 'wiser' speech about it."). Moreover, insofar as Montdel United argues the comments made by the Governor are evidence of viewpoint discrimination, such an argument is incorrect. The governor speaks negatively of the festivals, not the rituals, only because they cause the need for cleanup — a consequence of the festivals that is not compatible with the forum's purpose of preserving its beauty.

II. THE ENERGY AND CONSERVATION INDEPENDENCE ACT AND SUBSEQUENT TRANSFER OF RED ROCK DO NOT VIOLATE THE FIRST AMENDMENT FREE EXERCISE RIGHTS OF MONTDEL UNITED

The second issue on appeal is whether the ECIA and subsequent transfer of Red Rock violates the First Amendment Free Exercise Rights of Montdel United.

The United States Court of Appeals for the Fifteenth Circuit's denial of preliminary injunction should be affirmed because the Delmont government did not violate the First Amendment Free Exercise rights of Montdel United. In relevant part, the Free Exercise Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. § 1, cl. 1. The Free Exercise Clause protects individuals from government intervention in the free exercise of religion. The First Amendment Free Exercise Clause seeks to protect citizens in their effort to express and believe in whatever religious doctrine they choose and prohibits government coercion against their beliefs and punishment or discrimination based on religious convictions. *Emp. Div. v. Smith,* 494 U.S. 872, 877 (1990); *see also Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

Strict scrutiny often applies to free exercise challenges, however, the Free Exercise Clause and thus strict scrutiny does not apply to incidental effects of neutral, generally applicable government action. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988); *see also Smith*, 494 U.S. at 878-82. In *Employment Division of Oregon v. Smith*, this Court laid out the rule that the First Amendment Free Exercise Clause cannot and does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Smith*, 494 U.S. at 879 (1990); *see also U.S. v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in judgment). The Free Exercise Clause "affords an individual protection from certain

forms of governmental compulsion but does not afford an individual a right to dictate the conduct of the Government." *Bowen v. Roy*, 476 U.S. 693 (1986).

In 1990, this Court in *Smith*, rejected the use of strict scrutiny where a law is valid, neutral, and generally applicable. 494 U.S. at 879. Requiring strict scrutiny would allow all individuals to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* While religious freedom and exercise thereof is a vital tenant of the Constitution, it does not and cannot allow individuals to forgo legal requirements on the basis of religious belief where there is no coercion and the law is neutral and generally applicable. "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng*, 485 U.S. at 541 (citing *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

Montdel United's First Amendment Free Exercise claim fails because the ECIA is a neutral law of general applicability where it does not permit a mechanism for discretion. And even if Montdel United proves the ECIA is not generally applicable, the claim must fail because the Free Exercise Clause cannot be implicated where individuals have not been prohibited from religious practice nor coerced into violating their religious beliefs. The Appellate Court for the Fifteenth Circuit correctly concluded that Montdel United's claims would not succeed on the merits and thus denied their preliminary injunction because their claims do not rise to the level of strict scrutiny.

A. Delmont need not satisfy strict scrutiny because the "compelling government interest" standard cannot apply where the state law is a valid neutral law that is generally applicable

This Court in *Smith* stated the Supreme Court of the United States has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law

prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79. Where a law is neutral, generally applicable, and only incidentally burdens religious exercise, strict scrutiny does not apply. *Id.* at 878–882.

1. *The ECIA is neutral*

Government action is not neutral if it specifically targets a religious practice or its object prohibits the free exercise of religion. *Smith*, 494 U.S. at 878. The ECIA and Delmont's government action do not target religious practice nor is its object related to religious exercise. The ECIA provides authority and procedures for land transfers and has the sole purpose of limiting fossil fuel emissions and promoting the state economy through mining technologies.

2. *The ECIA is generally applicable*

A law is not generally applicable nor is it constitutional where it targets a specific religion or religious practice. *Smith*, 494 U.S. at 878; *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 543 (1993). Here, the ECIA was not intended to target the religious practices of any group. The ECIA was enacted to "reduce fossil fuel dependency and invigorate the state's economy." R. 6. Additionally, the ECIA complies with the federally mandated initiative to reduce fossil fuel emissions in defense contracting. The ECIA is neutral and generally applicable because there is no evidence to suggest the ECIA is discretionary in nature. This directly contrasts the facts of *Fulton v. City of Philadelphia* where *Smith* did not apply because the law at issue allowed a state commissioner to make exceptions to the law at their "sole-discretion" which rendered it not generally applicable because the law included a "mechanism for individualized exceptions." 593 U.S. 522, 523 (2021). In *Fulton*, the court applied strict scrutiny because the law was not generally applicable to all individuals. *Id.* at 540. The facts here can also be distinguished from *Roman Catholic Bishop v. City of Springfield*

where the City of Springfield was "vested with discretion to decide when to create a historic district" and specifically revolves around property owned by a religious organization. 724 F.3d 78, 92, 98 (1st Cir. 2013).[9] Here, there is no such discretionary mechanism for individuals and therefore *Smith* applies.

Valid and neutrally applicable laws must apply equally to all individuals, regardless of their religious beliefs. *Lukumi*, 508 U.S. at 543. The ECIA and the subsequent transfer of Red Rock impacts all individuals because Red Rock will no longer be accessible to the public as a whole. Here, the facts dramatically differ from the facts of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, where an ordinance had the intention of "protecting the public health and preventing cruelty to animals" but did not regulate similarly dangerous non-religious practices. 508 U.S. 520, 543 (1993). The ECIA was not specifically drafted nor intended to touch upon matters of public safety or animal protection. There is no indication in the record that the cancellation of transfer agreements by Delmont had anything to do with secular versus non-secular objections. Further, the DNRA even presented an example where a transfer agreement was not waived regardless of objections by the State Teachers Association and the State Historical Society.

3. *The ECIA only incidentally burdens Montdel United's religious practice*

This Court in *Smith* held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a law that incidentally" prohibits religious performance where the

[9] Montdel United makes an argument stating a law is not generally applicable if it only applies to one piece of land based on the holding of *Roman Catholic Bishop v. City of Springfield.* R. 28. Nonetheless, this assertion is a gross oversimplification because the First Circuit Court holding that the law in question was not generally applicable was based on the discretionary nature of the ordinance. *City of Springfield*, 724 F.3d at 98. The ordinance allowed the government to make decisions regarding the historical districting of one or more parcels of land; this analysis was not based on the fact that the property was one parcel of land. *Id.*

law is not directed at religious practice and "is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons." 494 U.S. at 872. The ECIA and subsequent transfer of Red Rock is not specifically directed to religious practice, is neutral and generally applicable, and therefore the incidental effects of the ECIA and transfer of Red Rock cannot relieve Montdel United of their legal obligation to adhere to state law. The "compelling government interest" standard cannot apply because granting preliminary injunction to Montdel United would create "a private right to ignore generally applicable laws." *Smith*, 494 U.S. at 885-86.

B. Montdel United's assertion to distinguish this case from the holding in *Lyng* must fail where government action does not coerce, discriminate against, or penalize a group for their religious convictions

The Delmont government, the ECIA, and the DNRA did not prohibit Montdel United's free exercise of religion where they were not coerced into violating a religious belief nor were they penalized for religious practices and therefore the free exercise clause of the First Amendment is not implicated. This Court in *Lyng v. Northwest Indian Cemetery Protective Association* recognized that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." 485 U.S. at 450-51. However, the court in *Lyng* concluded that 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, do not require government to bring forward a compelling justification for its otherwise lawful actions." *Id.*

Lyng cannot be distinguished from the facts here because as in *Lyng*, there is no coercion by government action nor is there any government action that would penalize Montdel United " by denying any person an equal share of the rights, benefits, and privileges enjoyed by other

citizens." *Lyng*, 485 U.S. at 449. In *Lyng*, the United States Forest Service sought to construct a paved road through land in a National Park that was historically used and of religious significance to Native American tribes in northwestern California. *See id.* at 439. The court in *Lyng* acknowledged the possibility that the construction of the road would destroy the tribes' ability to practice their religion. Nevertheless, they concluded that "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims." *Id.* at 452. Similarly, here, Red Rock is part of Painted Bluffs, and we do not dispute that the mining activities of DMC would destroy this landmark that holds immense religious significance to Montdel United. However, as this Court held in *Lyng*, the destruction of government-owned land of religious significance does not implicate the Constitution where there is no coercion in the law to violate a religious belief. The ECIA has no tendency or implication to suggest coercion or penalty for a religious conviction.

The facts here are also analogous to the facts of *Apache Stronghold v. United States* in the Ninth Circuit where petitioner, Apache Stronghold, sought preliminary injunction of the land transfer of a site of spiritual significance to the Western Apache Indians based on the Free Exercise Clause. 101 F.4th 1036, 1043 (9th Cir. 2024). The Ninth Circuit held that their claim must fail, as it does here, because *Lyng* controls. *Id.* at 1061. Petitioners in *Apache Stronghold* also made the argument that *Lyng* should be distinguished from their case because *Lyng* did "not specifically address government action that *prevented* religious exercise." *Id.* at 1052. This fails because "*Lyng* explicitly rejected that broader notion of 'prohibiting' religious exercise." *Id.* at 1053. Here, the same argument fails, and *Lyng* controls because *Lyng* does address government action that prevents religious practice. *Lyng*, 485 U.S. at 448.

This Court in *Lyng* did not distinguish itself from *Bowen v. Roy,* which held that the Free

Exercise Clause does not relieve individuals of adhering to government regulation where a law only incidentally and indirectly affects their religious convictions. 476 U.S. 693, 694 (1986).

In *Lyng* this Court did not distinguish *Roy* because the Court "cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other" nor should they be distinguished here. 485 U.S. at 450. Here, the ECIA and the subsequent transfer of Red Rock is an incidental and indirect interference with Montdel United's religious practice because just as in *Lyng* and *Roy*, no individuals are coerced into violating their religious beliefs.

Lyng controls even in a case where a law is not a neutral law of general applicability because strict scrutiny does not apply where there is no coercion to violate a religious belief.[10] In *Lyng*, the Supreme Court defined the term "prohibit" in the Free Exercise Clause of the First Amendment as requiring coercion by government action or government action that penalized the free exercise of religion. 485 U.S. at 440. Here, Delmont's government action authorized by the ECIA does not coerce or penalize Montdel United for their religious convictions. The transfer of Red Rock to DMC and the destruction of Red Rock does not coerce Montdel United to violate their religious beliefs. In fact, there is no evidence of any government action that would force them to do anything. The First Amendment and thus strict scrutiny cannot be implicated because the Delmont government has made no law or action that would coerce an individual to betray their religion.

[10] Montdel United argues that *Lyng* does not control where a law is not neutral or generally applicable. R. 29. However, this Court in *Lyng* did not address general applicability because it was decided on the conclusion that the First Amendment is not implicated where an individual or group is not prohibited from exercising their religious belief. Prohibition, and thus implicating the First Amendment, would require Montdel United to be "coerced by the Government's action into violating their religious beliefs." 485 U.S. at 499.

CONCLUSION

For the foregoing reasons, Montdel United's petition should be denied, and the judgment of the Fifteenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,
Team 24
Counsel for Respondent

APPENDIX A

Constitutional Provisions

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the 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.

Statutory Provisions

28 U.S.C. § 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

CERTIFICATE OF COMPLIANCE

In compliance with Rule III(C)(3) of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition Official Competition Rules 2024-25, we certify that:

1. The work product contained in all copies of our team's brief is in fact the work product of our team members;
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Respectfully submitted,
Team 24
Counsel for Respondent