No. 24-CV-1982

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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 026
Counsel for Respondent
January 31, 2025

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QUESTIONS PRESENTED

I. Does the State of Delmont Energy and Conservation Independence Act ("ECIA") and subsequent transfer of Red Rock violate the First Amendment Free Exercise rights of Montdel United?

II. Does the State of Delmont Energy and Conservation Independence Act ("ECIA") and subsequent transfer of Red Rock violate the First Amendment Free Speech rights of Montdel United?

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The opinion of the United States District Court of Delmont, Western Division, is unpublished and may be found at *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (D. Delmont 2024) and it appears on pages 1-32 of the Record. The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found at *Delmont v. Montdel United*, C.A. No. 24-CV-1982 (15th Cir. 2024) and appears on pages 33-53 of the Record.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment in favor of the Respondents, State of Delmont and Delmont Natural Resources Agency, on November 1, 2024. R. at 33. Petitioner filed a timely writ of certiorari, which this Court granted on January 5, 2025. R. at 54-55. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution are relevant to this appeal and are reprinted in Appendix "A".

STATEMENT OF THE CASE

I. Statement of Facts

The Montdel people, an Indigenous Native American group, performed religious practices revolving around a ritual at Red Rock, located in Painted Bluffs State Park, a 100-square-mile expanse of forested highlands. R. at 2. Historical accounts indicate that the ceremonies at Red Rock have been conducted by the Montdel people during fall and spring equinoxes and summer and winter solstices. R. at 3. Beginning in the 1500's, the people of

Montdel engaged in ceremonial practices at Red Rock to prevent incurring wrath upon them. *Id.* In the nineteenth century, the Montdel population declined severely due to illnesses, warfare, and a crop blight. *Id.*

In 1855, Delmont was established as a state and the presence of rights of indigenous peoples were not addressed. R. at 4. The government did not enter into any treaties with the Montdel people. *Id.* The Montdel rituals were not practiced during the World Wars and the Great Depression. *Id.* In 1930, the area, now known as Painted Bluffs State Park, including the Red Rock site, was acquired by the State of Delmont through eminent domain. *Id.* The Montdel people have continued to perform their religious ceremonies at Red Rock. *Id*. Delmont has not impeded the Montdel people's religious observances, nor restricted access to Red Rock, or the Painted Bluffs area. *Id.* At the opening ceremony of the park, the State of Delmont's Governor, Rupert Ridgeway, even made an executive proclamation regarding the heritage of the Montdel people. *Id*.

In 1950, Delmont residents James and Martha Highcliffe, a couple whose families are assimilated but maintain their Montdel identities, sought to formalize the Red Rock practices as the "Montdel Observance." R. at 5. Since 1952, the "Montdel Observance" has been conducted as formal seasonal rituals. *Id*. Over the years, the Montdel Observance expanded to festival-like events, with vendors subject to state-issued music and food licenses. *Id.*

Delmont, the largest state in the Union, is known for its mineral-rich geology where mining makes up a significant portion of Delmont's economy. R. at 6. Geologists highlight that Painted Bluffs State Park has been recognized as an area that contains crucial lithium-bearing pegmatite deposits. *Id*. Furthermore, Delmont is home to substantial reserves of copper, iron, and other minerals. *Id.* Three years ago, the Delmont government enacted the Energy and

Conservation Independence Act ("ECIA") to promote the mining of minerals to reduce fossil fuel dependency, preserve nature, and boost the state's economy. *Id.* The ECIA authorized Delmont to enter into land transfer agreements with private mining companies to extract the valuable minerals. *Id.*

The land transfer agreements are managed by the Delmont Natural Resources Agency ("DNRA") and its authority is granted by the ECIA. *Id.* All land transfers must be independently appraised to ensure equivalent value, and each transfer is subject to both independent environmental impact studies and economic impact studies. *Id.* The ECIA has received significant endorsement from the federal executive and legislative bodies who enacted the Federal Natural Resources Defense Act (the "FNRDA"), which has similar goals to the ECIA. R. at 7. A geological study conducted twenty years ago, also revealed that the deposits in Painted Bluffs State Park, specifically around the Red Rock area, represent the largest lithium deposits ever discovered in North America. *Id.* As a result, mining companies have sought mining rights from Delmont to access these areas. *Id.*

In 2016, Priscilla Highcliffe, the daughter of James and Martha Highcliffe, established a non-profit organization named "Montdel United," whose mission is to oppose the transfer of Red Rock and protect the Montdel Observance's religious site and ritual practices. *Id.* Montdel United has organized protests in order to raise public awareness regarding the proposed land transfers. *Id.*

In January 2023, the DNRA executed an agreement, under the authority granted by the ECIA, to transfer one-fourth of Painted Bluffs State Park, including Red Rock, to Delmont Mining Company ("DMC"), a private corporation in Delmont. *Id.* The action was approved by

the residents of the two economically challenged, tourism dependent counties located around Painted Bluffs State Park, with hopes of increased job prospects. Greenfield Aff. 10.

Environmental impact studies indicate that the Red Rock area would be destroyed, however, the impact would be minimal as the surrounding environment would not suffer severely. *Id.* Other sections of Painted Bluffs State Park can be reclaimed after the ore is depleted in approximately twenty years from now. *Id.* The mining operation would have participants of the equinox festivals relocate a mere five miles down the riverbanks, still able to continue their traditions. *Id.* Alternative mining technology may mitigate the damage to Red Rock but would still result in significant alteration. *Id.* That mining technology will not be expectedly feasible for at least twenty years, with uncertainty on potential economic and environmental risks. *Id.*

The land transfer was approved by the DNRA because it advanced the state's commitment to reducing their fossil fuel use via lithium-ion batteries and becoming carbon-neutral within 50 years. R. at 9. The DNRA found that waiting for alternative mining technologies, which are not viable for twenty-years, was not practical. *Id.* The economic impact study revealed that the mining operations would result in a substantial economic boost to the local economy. *Id.* The DNRA also determined that after having conversations with the Governor of Delmont, that the land is owned by the State and Delmont can best determine the use for the land. *Id.* DMC plans to commence the mining process immediately. *Id.*

Over the past five years, the DNRA has entered into two land transfer agreements with two mining companies, but these were withdrawn because of significant environmental impacts to the land. *Id.* Additionally, the economic impact studies of those agreements revealed that those mineral deposits were significantly smaller than the lithium deposits at Painted Bluffs. R. at 10. Further, the DNRA did not rescind a transfer agreement for a large iron deposit in the past with

one of the mining companies. *Id.* Once the sale is final, Red Rock, can only be accessed by DMC employees, who will begin the mining process. *Id.*

II. Procedural History

Montdel United sought a temporary restraining order and injunctive relief in the lower court after the DNRA approved the Painted Bluffs State Park transfer. *Id.* The temporary restraining order was denied; however, the District Court granted the preliminary injunction in favor of Montdel United. R. at 32. The Fifteenth Circuit Court of Appeals reversed the judgment of the District Court, denying the preliminary injunction. R. at 45. Montdel United filed a Petition for Writ of Certiorari, which this Court granted. R. at 54-55.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fifteenth Circuit's decision and deny preliminary injunction. This is in line with this Court's precedent in *Lyng*, holding that governmental land transfers, which have an incidental impact on the exercise of religion, are permissible so long as the transfer is not coercive in nature. *Lyng* must be upheld in order to respect the government's ability to make decisions regarding their property and provide proper deference to the legislature. Should this Court decide to overturn settled and well-reasoned precedent, the transfer of Red Rock should nonetheless proceed because Delmont has compelling state interests in economic development and sustainability.

The State of Delmont, never having intended to provision Red Rock with public forum status, revoked permission for all future public use and preserved it for its exclusive intended use. This Court has long stated that the government has this right, as it is implicit in the government's inherent right to control its own property. Red Rock is a nonpublic forum because Delmont's stated purpose for acquiring Red Rock was preservation. Furthermore, Delmont's

action in this case, which is permanent and affected all equally, was undeniably viewpoint-neutral and reasonable.

ARGUMENT

Preliminary injunctions are an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The test for whether preliminary injunctive relief should be granted is four-part. Fed. R. Civ. P. 65. The Plaintiff must make a clear showing that "(1) he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Because the three additional factors were not at issue at the Fifteenth Circuit, we discuss only the likelihood of success on the merits.

I. THE FIFTEENTH CIRCUIT PROPERLY HELD THAT THE STATE OF DELMONT DID NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I; U.S. Const. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In order to set forth a claim under the Free Exercise Clause, a plaintiff must assert, prima facie, that the government has burdened the exercise of the claimant's sincerely held religious beliefs. *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 716-18 (1981). However, not all burdens upon religious liberty are in violation of the Constitution. *Lyng v. Northwest Indian Cemetery Protection*, 485 U.S. 439, 452 (1988). The government does not impose a burden on religious exercise when it uses or disposes of its own property - even when individuals utilize that property for religious purposes. *Id*. Delmont's transfer of Red Rock is constitutionally permissible under *Lyng*, and this precedent must be

upheld. 485 U.S. at 439. Should this Court deviate from long standing precedent, the transfer is still constitutional due to the State of Delmont's compelling state interests.

A. *Lyng v. Northwest Indian Cemetery* is directly on point and mirrors Delmont's transfer of Red Rock.

In *Lyng*, this Court considered a challenge brought by a Native American organization against government plans to permit timber harvesting in, and construction of a road through the Chimney Rock area. 485 U.S. at 442-443. The area in question had traditionally been used for religious practices by the members of three local Native American tribes. *Id.* To prevent construction, the plaintiffs asserted a Free Exercise claim against the plan in federal court, where they obtained a preliminary injunction. *Id*. Ultimately, the Supreme Court reversed this decision and denied the preliminary injunction. *Id*.

This Court acknowledged that the project at issue in *Lyng* would likely have "devastating effects on traditional Indian religious practices." 485 U.S. at 451. However, the Free Exercise Clause 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." *Id*. at 450. It follows then that while the Free Exercise Clause prohibits, "certain forms of governmental compulsion," it does not give "an individual a right to dictate the conduct of the Government." *Lyng*, 485 U.S. at 448 citing *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that "internal" use of a Social Security number did not implicate the Free Exercise Clause despite significant interference with the plaintiffs' religious beliefs). Where the governmental infringement is incidental and not coercive, the essential ingredient of "prohibiting" the free exercise of religion is absent, and the Free Exercise Clause is not violated. *Id*. at 451.

Lyng instructs that, a disposition of government property is not subject to the Free Exercise Clause when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," and does not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. at 441-449. The State of Delmont sympathizes with Petitioner and the impact that this transfer will have on their practices. Even still the precedent is clear. *Lyng*'s application is identical to the case at issue and is not meaningfully distinguished. Accordingly, Petitioner's claim fails on the merits.

i. As in Lyng, the State of Delmont's transfer of Red Rock has no tendency to coerce Petitioner from acting contrary to their religious beliefs.

Petitioner claims, the transfer of Red Rock substantially interferes with their religious practices, but under *Lyng*, this does not amount to coercion. In *Lyng*, this Court recognized that the projects at issue "could have devastating effects on traditional Indian religious practices," and that "the G-O road will virtually destroy the Indians' ability to practice their religion." 485 U.S. at 451. Despite the complete destruction of the religious site, this Court would not subject the *Lyng* plaintiffs, "to a different constitutional analysis." *Id*. at 449-50. Rather, this Court explicitly rejected the idea that the Free Exercise Clause requires the kind of "religious servitude" of Government land which, the *Lyng* plaintiffs sought, and Petitioner now seeks. *Id*. at 452-53.

Similarly, in *Apache Stronghold v. United States*, the 9th Circuit denied the preliminary injunction to prevent the transfer of the Oak Flat area in Arizona to a mining company; even though plaintiffs asserted this was "the only area" with these unique features, and "crucial" to Western Apache religious life. 95 F.4th 608 (9th Cir. 2024). The 9th Circuit, basing their decision on *Lyng*, held that the Government's actions with respect to "publicly owned land" had "no tendency to coerce" plaintiffs "into acting contrary to their religious beliefs." *Id*. citing *Lyng*, 485 U.S. at 449-50.

The facts here are analogous to both *Lyng* and *Apache Stronghold*. The transfer of Red Rock undoubtedly threatens the religious practice of Petitioner, but it involves the transfer of government owned land, as in *Lyng*. 485 U.S. at 453 (holding that "the diminution of the Government's property rights … would in this case be far from trivial"). Delmont acquired Red Rock, and its surrounding land, through the constitutional grant of eminent domain power. Since its acquisition, Delmont has exercised complete control over Red Rock, issuing licenses to various vendors that contribute to the Montdel Observance ritual.

Petitioner's religious beliefs and Delmont's interference is indistinguishable from *Lyng*. Petitioner seeks, not freedom from governmental action "prohibiting the free exercise" of their religion, but rather a "religious servitude" that would uniquely confer on them "de facto beneficial ownership of [a] rather spacious tract of public property." *Lyng*, 485 U.S. at 452-53. Under the precedent of *Lyng*, this is neither coercive nor a violation of the Free Exercise Clause.

ii. The challenged transfer of Red Rock does not discriminate, penalize, nor deny Petitioner an equal share of the rights, benefits, and privileges enjoyed by other citizens.

As in *Lyng*, there is no evidence of underlying discrimination or unequal treatment toward Petitioner. Petitioner claims that the transfer is discriminatory due to a few exceptions made in the past. This is inaccurate. The two previously rescinded land transfer agreements were rescinded because the transfer would frustrate the entire purpose of the ECIA. Delmont decided not to move forward with either agreement due to the egregious potential impacts on the surrounding environment. Additionally, the mineral deposits involved in these other land transfer agreements were significantly smaller. It is therefore incorrect to assert that any discrimination underlies Delmont's decision to move forward with the transfer of Red Rock.

Nor does the transfer of Red Rock penalize Petitioner. Petitioner argues that the level of governmental interference here is distinguishable from that in *Lyng*. In *Lyng* the land transfer did

not destroy any of the "sites where specific rituals take place." *Id.* at 454. Petitioner contends that the transfer of Red Rock could destroy the entire site, thus enacting a penalty. *Id.* This distinction is irrelevant. *Lyng*'s holding is not limited to cases involving minor or "subjective" interferences. This Court rejected a test distinguishing between the types of government interference, expressly holding that there was no permissible basis to say that "one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other." *Id.* at 449-50. As such, the transfer of Red Rock does not represent a penalty.

iii. Lyng v. Northwest Indian Cemetery is not distinguishable on the basis of neutral or generally applicability.

Petitioner further argues that *Lyng* is distinguishable because the land transfer in *Lyng* was neutral and generally applicable, unlike the transfer at issue here. Petitioner misreads *Lyng*. The statutory transfer in *Lyng* was neither neutral nor generally applicable because it contained an express exemption for the "narrow strip of land" that exactly coincided with the proposed route. 485 U.S. at 444. The relevant provisions of the statute at issue in *Lyng* involved legislative action directed at "one 'particular property.'" *Id*. This would not fit this Court's current understanding of a case involving a neutral and generally applicable law. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 542 (1993) (emphasizing that "categories of selection" in legislative drafting "are of paramount concern when a law has the incidental effect of burdening religious practice"). The holding of *Lyng* therefore does not rest on the premise that the laws at issue were neutral and generally applicable and is thus indistinguishable.

B. *Lyng v. Northwest Indian Cemetery* must be upheld to encourage judicial restraint and allow for legislative freedom.

This Court's reasoning in *Lyng* is sound. The government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities - from social welfare programs to foreign aid to conservation projects - may be

considered essential to the spiritual well-being of some citizens. Others may find the same activities deeply offensive, and perhaps incompatible with their own spiritual fulfillment. But, to quote Justice Learned Hand, "we must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life." *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953). The Constitution does not, and courts cannot, reconcile these various competing demands, even those rooted in sincere religious belief, that inevitably arise in a society such as ours.

Reconciliation of these demands, to the extent that it is feasible, is a job for the legislatures. Though difficulties arise when "leaving accommodation to the political process," this "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Employment Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 890 (1990) ("Smith"). For the plaintiffs in *Lyng*, the legislature was the better avenue. Two years after *Lyng* was decided, Congress passed the Smith River National Recreation Area Act of 1990, and the road was not built.[1] It follows, that Congress is much better equipped to handle these kinds of questions.

Perhaps most importantly, overruling *Lyng* would completely upend federal land management. Numerous land transfers, as substantiated by the lower courts, would be impacted.[2]

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[1] Smith River Nat'l Recreation Area Act, 16 U.S.C. § 460bbb (1990).

[2] *Prater v. City of Burnside, Ky.*, 289 F.3d 417, 427-29 (6th Cir. 2002) (rejecting a free-exercise challenge to the development of a roadway separating two church lots); *Taylor v. City of Gary, Indiana*, 233 F. App'x 561, 562 (7th Cir. 2007) (rejecting a free-exercise challenge to the demolition of a former church on public land, as plaintiff had no "right to demand that the City provide him with municipally-owned property as a place of worship."); *Lockhart v. Kenops*, 927 F.2d 1028, 1036 (8th Cir. 1991) (holding that a Forest Service land exchange did not violate the Free Exercise Clause despite harm to "Indian religious practices.")

The government would be subject to scrutiny for any land-management decision that impacts religious exercise. The result would be extraordinary. As such, *Lyng* must be upheld.

C. Should *Lyng* be overruled, the transfer of Red Rock must still proceed due to the State of Delmont's narrowly tailored and compelling environmental and economic interests.

Under this Court's precedents, a plaintiff carries the burden of proving that a government entity has burdened his sincere religious practice by enacting a policy that is not "neutral" or "generally applicable." *Smith*, 494 U.S. at 879-881. If a plaintiff demonstrates that a governmental policy is not neutral or generally applicable, then the governmental regulation must satisfy "strict scrutiny." *Lukumi*, 508 U.S. at 546. To survive strict scrutiny, the government must establish its decision was justified by a compelling state interest and is narrowly tailored in pursuit of that interest. *Id*.

The State of Delmont has met its burden under strict scrutiny. Delmont has compelling state interests in the transfer of Red Rock, both economically and environmentally. Furthermore, the transfer of Red Rock constitutes the least restrictive means of achieving that interest.

i. Delmont has extraordinary compelling sustainability and economic interests.

A government policy can survive strict scrutiny only if it advances "interests of the highest order." *Lukumi*, 508 U.S. at 544. Mere speculative assertions are not satisfactory under strict scrutiny. *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021). In *Fulton*, this Court rejected the asserted governmental interests because the government offered "only speculation that it might be sued over CSS's certification practices." *Id*. Here, Delmont's asserted interests are not speculative, but rather of the highest order.

The transfer of Red Rock furthers a significant environmental interest. Delmont is committed to becoming carbon-neutral within the next 50 years. Three years ago, the Delmont government enacted the ECIA to promote the mining of minerals to reduce fossil fuel

dependency. The ECIA is aligned with recent federal mandates and received significant endorsement from federal legislatures. Red Rock has long been recognized for its lithium-bearing pegmatite deposits, which are considered incredibly valuable. Twenty years ago, the DNRA confirmed, via a geological study, that these invaluable deposits were located in Painted Bluffs State Park. The deposits found in the Red Rock area are the largest lithium deposits ever discovered in North America. Lithium batteries represent a significant step towards Delmont's sustainability goals.

Furthermore, Delmont has significant economic interests because mining represents a significant portion of the State's economy. This was strongly considered when Delmont enacted the ECIA. An economic impact study revealed that the mining operations would result in substantial economic benefits for the local economy through job creation. The neighboring counties surrounding Painted Bluffs State Park support the transfer of Red Rock because the current economic situation is dire. To achieve both of Delmont's stated goals, Red Rock's lithium deposits are the golden ticket.

ii. Delmont's transfer of Red Rock is narrowly tailored as there are no possible alternatives.

A government policy can survive strict scrutiny only if it is narrowly tailored to achieve their asserted interests. *Lukumi,* 508 U.S. at 546. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton,* 593 U.S. at 541.

Here, less restrictive alternatives are impossible. The DNRA explored alternatives to the transfer of Red Rock, but these alternatives are not feasible. For one, these alternatives do not exist. These other technologies are currently being developed, but are not expected to become feasible for at least another twenty years. Even still, it is unknown how much the technology may

cost or when Delmont may be able to utilize them. Even if these alternative mining technologies are created, they would still cause a significant alteration to the area. The DNRA did their due diligence to consider alternatives, but ultimately Delmont is unable to achieve its goals without the transfer of Red Rock.

II. THE FIFTEENTH CIRCUIT PROPERLY HELD THAT THE STATE OF DELMONT DID NOT INFRINGE UPON PETITIONER'S RIGHT TO FREE SPEECH

The Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law... abridging the freedom of speech." U.S. Const., amend. I.; U.S. Const. amend. XIV; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). Although freedom of speech is granted constitutional protection, individuals do not have the first amendment right to speak on any subject whenever and wherever they choose. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961). "To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Because Red Rock is a remote rock formation within a 100-square-mile national park that had been acquired for purposes of preservation, it has not been held out by Delmont for expressive activities. Therefore, it is a nonpublic forum, and as such, the government must only show that the sale and closure is reasonable and viewpoint neutral.

A. Red Rock is a nonpublic forum since it was not traditionally open to the public for expressive activity, nor did the government dedicate the property to expression.

"The First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). The extent to which the government can regulate speech on its own property

depends on the nature of the forum and thus requires forum analysis. *Cornelius v. NAACP Legal Def & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1981).

Under the public forum doctrine, the government's power to control speech depends on the characterization of the property. *Id.* In forum analysis, this Court divides government property into three general categories: (1) traditional public fora, (2) designated public fora, and (3) non-public fora. *Id.* Traditional public fora are the quintessential public spaces devoted to assembly and debate. *Perry*, 460 U.S. at 45. Distinctly, designated public fora are otherwise private spaces opened by the government for expressive activity. *Id.* Both traditional and designated public fora are subject to reasonable time, place, and manner restrictions. *Id*. Within public fora, a content-based restriction is analyzed under strict scrutiny. *Id*.

Finally, nonpublic fora are public property which are neither by tradition nor designation a forum for public communication. *Greer v. Spock*, 424 U.S. 828, 836 (1976). Such property is governed by different standards. *Id.* Delmont has the right to preserve the property under its control for its lawfully dedicated purpose.[3] In a nonpublic forum, the government may regulate speech, as long as it is reasonable and not aimed at suppressing the viewpoint of the expressive activity. *Perry*, 460 U.S. at 46.

Red Rock is not a traditional public forum because Delmont did not acquire it to hold out a space for the general public to engage in expressive activities. Red Rock is not a designated public forum because there is no evidence establishing that Delmont intended to open a forum for expressive activity. Therefore, Red Rock is a nonpublic forum.

[3] *Perry*, 460 U.S. at 46; *Greenburgh*, 453 U.S. at 114; *Greer*, 424 U.S. at 836. *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

i. Since Delmont acquired Red Rock for the purpose of preservation, it is not a traditional public forum.

Petitioner argues that Red Rock's status as a traditional public forum arises automatically since Red Rock is contained within a park. However, the protections of the First Amendment do not rise or fall depending on the characterization ascribed to a forum by the government. *Boardley v. U.S. Dept. of Interior*, 615 F.3d 508, 514 (D.C. Cir. 2010). Mount Rushmore does not become a public forum merely by being labeled a "national park" any more than it would be converted into a nonpublic forum if it were called a "museum." *Id.* at 515. Likewise, Red Rock's status as a nonpublic forum does not change regardless of whether the government designates it a park or a conservatory.

The decisive question is not what the forum is labeled, but rather what its purpose is, either by tradition or specific designation. *Perry*, 460 U.S. at 45. What makes a park a traditional public forum is not its grass and trees, but the fact that it has "immemorially been held in trust for the use of the public and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.*

The intended purpose of a forum supersedes importance of physical attributes of the property in forum analysis. *United States v. Kokinda*, 497 U.S. 720, 727 (1990). In *Kokinda*, this Court analyzed whether a portion of the public sidewalk leading to a Post Office constituted a traditional public forum. *Id.* at 720. Despite this Court's precedent of generally recognizing public sidewalks as traditional public fora, a plurality of this Court in *Kokinda* held that the sidewalk on Postal Service property was a nonpublic forum. *Id.* There, this Court noted that the sidewalk at issue "did not have the characteristics of public sidewalks traditionally open to expressive activity" because it was "constructed solely to provide for the passage of individuals engaged in postal business." *Id.* at 727. Even though the sidewalk was completely open to any

member of the public, the *purpose* of the sidewalk was to lead from the parking lot to the post office, not "to facilitate the daily commerce and life of the neighborhood or city." *Id.* at 728.

Here, Delmont's intended purpose for acquiring Red Rock was preservation of its natural resources, since geologists have long recognized that the Painted Bluffs State Park area contains lithium-bearing pegmatite deposits. Petitioner argues that since traditional park activities such as camping, hiking, and fishing are open to the public in Painted Bluffs State Park, that its purpose is that of a traditional public forum. However, the relevant forum for our purposes is not Painted Bluffs State Park, but rather the site in which Red Rock resides. *See Perry*, 460 U.S. at 44 (in cases in which access is sought to a limited physical portion of the government property, the court should tailor its approach to the parameters of the specific forum sought within the government property).

Petitioner further argues that Red Rock is a traditional public forum because it has open access to the public. However, "publicly owned property is not transformed into a public forum merely because the public is permitted to freely enter and leave the grounds at practically all times." *Greer*, 424 U.S. at 836. Furthermore, the remote nature of Red Rock's location indicates that speakers had limited access to the forum, which weighs against traditional public forum status. *GreenBurgh*, 453 U.S. at 114. In *GreenBurgh*, the court analyzed whether nonprofit organizations could be prosecuted for putting pamphlets in the letter boxes of private homes. *Id.* The organizations argued that a letter box should be treated as a public forum because it is a traditional means for public communication. *Id.* at 129. However, this Court found that since the government had reserved the letter boxes for delivery of an exclusive amount of expression, they were not a traditional public forum. *Id.*

Red Rock is contained within a roughly 100-square-mile expanse of forested highlands. Like the mailboxes in *Greenburgh,* specific characteristics of the forum cause a smaller class of speakers to have access to it. Here, the remoteness of Red Rock, alongside its unique topography, makes it incredibly difficult for members of the public to access the forum in order to engage in expressive activity. This limited access is indicative that Red Rock is not a traditional public forum.

Parks, streets, and sidewalks that are traditional public fora are accessible to the attention of the public. *Thunderhawk v. County of Morton*, 483 F.Supp.3d 684, 712 (8th Cir. 2022). In *Thunderhawk,* an indigenous advocacy group, filed suit alleging that the government's closure of distant rural roads violated their constitutional rights. *Id.* There, the district court held that the group pled sufficient facts to show that roads were a traditional public forum since the speaker's access to the forum "brings inconveniences to the public, disruption to everyday life, and attention to the cause of the protestors." *Id.* at 718.

Red Rock's remote nature is incompatible with expression accessible to the attention of the general public. There is no history of its use by the general public to engage in expressive activity. This is likely due to the remote nature of Red Rock, which is contained within a 100-square-mile park. Therefore, unlike the group in *Thunderhawk,* closure of the forum will not deprive Petitioner of the opportunity to garner the attention of the general public, which is the expression that the forum doctrine sets out to protect.

Petitioner also contend that the Montdel people's history at Red Rock indicates that it is a traditional public forum. However, temporary annual events that draw large crowds do not evidence a "long tradition of devotion to assembly and debate." *Heffron v. International Society for Krishna Consciousness, Inc*, 101 S.Ct. 2559 (1981). This Court in *Heffron* distinguished

between fairgrounds and city streets when holding that the sidewalk contained within a fairground is not a traditional public forum. *Id.* This Court reasoned that a street is continually open, uncongested, and a necessary conduit in the daily lives of others or where people may enjoy the open air with others in a relaxed environment. *Id.* Distinctly, this Court found that the fairgrounds were a temporary annual event with a large number of attendees who came for a short period of time to experience entertainment. *Id.*

Both *Heffron* and *ThunderHawk* embrace the driving policy behind the development of the traditional public forum doctrine. Like the activity in *Heffron*, the Montdel observance is a temporary annual event that draws large attendance for a short period of time. As it did in *Heffron*, this Court should also find that this sporadic activity does not constitute the sort of expression that indicates that the forum has access to the general public going about their daily activities.

ii. Red Rock is not a designated public forum because the policy and practice of Delmont's treatment of Red Rock establishes that the State did not intend to create a public forum.

The Government's intent "is the touchstone of forum analysis." *Make the Rd. by Walking Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004). After all, "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Perry*, 460 U.S. 37. In other words, the government must take purposeful action to create a public forum. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). The only evidence of Delmont's intent in acquiring Red Rock, indicates that it was to preserve its natural resources, which is wholly unrelated to an intent to create a space dedicated to free expression. As such, Red Rock is not a designated public forum.

Petitioner argues that their use of Red Rock for expressive activities was endorsed by Delmont's actions, and therefore, is a designated public forum. However, this assertion has no

basis in law. A designated public forum is not created simply by acquiescence, or allowance. *Perry*, 460 U.S. 37.

The test to determine whether the State intended to open a nontraditional public forum is to look at "the policy and practice of the government." *Perry*, 460 U.S. at 37; *Cornelius*, 473 U.S. at 788. A history of substantive government control over a speaker's access to the forum, indicates that the government did not intend to open a designated public forum. *Perry*, 460 U.S. at 47. In *Perry*, this Court held that an internal school mail system was not a designated public forum. *Id.* This Court's opinion rationalized that since the school had not by policy or by practice opened its mail system for indiscriminate use by the general public, a public forum had not been created. *Id.* This Court's decision turned on the fact that permission was required to use the system, and such permission was not granted to all who sought approval. *Id.*

Since acquiring Red Rock in 1930, Delmont has consistently exercised significant control over it. When the Montdel Observance reached a size that put Delmont on notice, the State began asserting control over the expressive activity. Delmont issued licenses for music, among other things, for those coming to the festival. These licenses served as the State's ability to place a prior restraint on activities within the forum. Since Delmont, like the school in *Perry*, exercised control by requiring permission for speakers to access the forum, no designated public forum was created.

iii. Red Rock is a nonpublic forum because expressive activity is inharmonious to Delmont's intended purpose for the area.

The "nonpublic forum, by definition, is not dedicated to general debate or the free exchange of ideas." *Cornelius*, 473 U.S. at 811. Red Rock is not a place that has "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," nor is it public

property designated for expressive activity. Therefore, the forum is automatically a nonpublic forum. *Perry*, 460 U.S. at 45; *Greenburgh*, 453 U.S. at 115.

Although there are a wide range of types of property that this Court has found to be a nonpublic forum, one characteristic has been assumed in all of this Court's cases that address this issue. A nonpublic forum exists when opening the forum to expressive conduct will interfere with the objective use and purpose to which the property has been dedicated.[4]

In the present case, conceding to the demand that Red Rock remain open for expressive activity would make Delmont's ability to utilize the property for its intended purposes impossible. Here, Delmont's intended purpose for the property is to preserve its natural resources for state use. Since Delmont has decided that the best way to preserve its natural resources in this case is to mine them, the forum is no longer compatible with general access to the public for expressive activities. Therefore, if Petitioner continued its expressive activity at Red Rock, it would be impossible for Delmont to use its property for its intended purpose.

Like airport concourses, subways, sidewalks on military bases, post office walkways, and the plazas surrounding this Court, all of which have been held to be nonpublic fora, Red Rock is a nonpublic forum because it was created for a particular purpose other than serving as an open speakers' forum.[5] Here, Red Rock was acquired for the purpose of preserving and utilizing natural resources. Therefore, like all other cases where the government's particular purpose was

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[4] *See, e.g., Forbes*, 523 U.S. at 680; *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681 (Kennedy, J., concurring); *Kokinda*, 497 U.S. at 728-29 (plurality opinion) (designation as nonpublic forum depends, in part, on purpose of property; solicitation disrupts purpose); *Cornelius*, 473 U.S. at 800, *Greenburgh*, 453 U.S. at 130 n.6; *Greer*, 424 U.S. at 838; *Adderley*, 385 U.S, at 47-48.

[5] *Lee*, 505 U.S. 672; *Am. Freedom Def. Initiative v. King Cnty. Wash.*, 577 U.S. 1202 (2016); *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 150 F.3d 695 (7th Cir. 2013); *Kokinda*, 497 U.S. at 730; *United States v. Grace*, 461 U.S. 171 (1983).

something other than creating an open speaker's forum, this Court must find that the forum here is nonpublic.

B. The closure of Red Rock is constitutionally permissible because it is reasonable and viewpoint neutral

Red Rock, as a nonpublic forum, is not subject to heightened First Amendment scrutiny. *See Miller v. City of Cincinnati*, 622 F.3d 524, 535 (6th Cir. 2009). As the Supreme Court has repeatedly stated, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the Government." *Greenburgh*, 453 U.S. at 114. This Court has recognized that the government may close a nonpublic forum at any time so long as the government acts neutral with respect to viewpoint and is reasonable. *Cornelius*, 473 U.S. at 806.

i. Delmont is not engaging in viewpoint discrimination because the closure of Red Rock will prohibit all speakers regardless of viewpoint.

Viewpoint discrimination occurs when the government seeks the "official suppression of ideas." *R.A.V*, 505 U.S. at 390. When the government allows speech conveying one point of view while prohibiting speech conveying the opposite, the government has engaged in viewpoint discrimination. *Id.* at 388. The government may not suppress speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). The test for viewpoint discrimination is whether "within the relevant subject category-the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J, concurring); *see also Cornelius*, 473 U.S. at 806. Thus, viewpoint discrimination is *not* the incidental suppression of certain viewpoints but rather, viewpoint discrimination occurs when it is the government's intent "to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic." *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65, 82 (5th Cir. 2004).

It is plain that the sale of Red Rock is viewpoint neutral. Once the sale is finalized and Red Rock is no longer government property, access will be closed to all individuals regardless of their reason for seeking access. Therefore, no particular viewpoint is being denied access to a forum that other viewpoints have access to.

There is no substantial evidence indicating that Delmont had any viewpoint-based motivation in their decision to sell Red Rock. Delmont has provided their motivations for selling Red Rock, and they are wholly unrelated to silencing the Montdel Observance. Rather, the government's sale is intended to combat climate change and promote economic activity.

ii. The sale of Red Rock is reasonable in light of Delmont's stated purpose.

Government speech restrictions in nonpublic fora must not only be viewpoint neutral, but also "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806. A restriction on speech in a nonpublic forum is "reasonable" when it is "consistent with the [government's] legitimate interest in 'preserving the property… for the use to which it is lawfully dedicated." *Greenburgh*, 453 U.S. at 129-130. The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. *Cornelius*, 473 U.S. at 809. Delmont's decision to sell Red Rock was reasonable in light of its stated purpose, and is therefore constitutionally sound.

"The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excess of anarchy." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Here, the state's stated goal of reversing climate change for the betterment of all Delmont residents, and all of humankind, is one that must be achieved in order to maintain public order.

In the present case, the closure of Red Rock is proper because the goals of economic development and environmental preservation are reasonable in light of Delmont's stated purpose

of acquiring Red Rock. The State's initiative aimed at reducing dependence on fossil fuels is harmonious with the State's preservation of the resources at Red Rock. Furthermore, the State's interest is substantial. The extraction of lithium at Red Rock will stimulate economic growth and generate employment opportunities in the State.

C. Even if this court were to find that Red Rock is a public forum, Respondent's still succeed because content neutral closure of a public forum is taken out of First Amendment's control when the government is closing the forum for utilitarian purposes.

This Court has never understood the forum doctrine to stand in the way of legitimate utilitarian government construction in parks, streets, or sidewalks. Extending petitioner's argument to its logical conclusion would mean that all decisions involving construction within the boundaries of any of the nation's many massive state parks must satisfy First Amendment compelling interest and narrowly tailored principles because they involve traditional public fora.

Under this court's jurisprudence, the government has the right not just to sell their own property, but to take even private property for the purpose of economic development, so long as it confers a "public use." *Kelo v. City of New Lond, Conn.*, 545 U.S. 469 (2005). In *Kelo,* this Court recognized that states must have the ability to control the property within their borders in order to provide for the benefit of all their citizens. *Id.* at 488. As this Court in *Kelo* declined to second- guess the government's considered judgments about the efficacy of its development plan and decision regarding which lands it needs to acquire in order to effectuate a project for economic development, this Court should likewise defer to Delmont. *Id.* at 489.

As the court said in *Berman v. Parker*, "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and

the need for a particular tract to complete the integrated plan rests on the discretion of the legislative branch." 348 U.S. 26, 35-36 (1954).

Therefore, regardless of whether this Court finds that Red Rock is a nonpublic forum, decisions regarding its sale are at the discretion of Delmont since the closure is content neutral and wholly unrelated to expression.

CONCLUSION

For the foregoing reasons, the Court should uphold the judgment of the Fifteenth Circuit and deny the preliminary injunction.

APPENDIX "A"

Constitutional Provisions

U.S. Const. amend. I

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

U.S. Const. amend XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y 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

We, Counsel for Respondent and Team 026, hereby certifies compliance with the requirements of Rule III.C.3 of the 2024-2025 Seigenthaler-Sutherland Moot Court Competition Official Rules in that:

I. The work product contained in all copies of our brief is in fact the work product of our team members;

II. This team has complied fully with our law school's governing honor code; and

III. Our team has complied with all the Competition Rules for the 2025 Seigenthaler-Sutherland Moot Court Competition.

Respectfully submitted,

Team 026

Counsel for Respondent

January 31, 2025