No. 2024-CV-1982

IN THE
Supreme Court of the United States

MONTDEL UNITED,

Petitioner,

v.

STATE OF DELMONT AND
DELMONT NATURAL RESOURCES AGENCY,

Respondent.

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

Brief for the Petitioner

TEAM 27
Counsel for Petitioner
January 31, 2025

QUESTIONS PRESENTED

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

II. Whether the ECIA and subsequent land 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The opinion of the United States District Court for the District of Delmont, Western Division, is unpublished and may be found in *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (D. Delmont Mar. 1, 2024). R. at 1–32. The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found in *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (15th Cir. Nov. 1, 2024). R. at 33–45.

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 45. Petitioner then timely filed a writ of certiorari, which this Court granted. R. at 55. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Montdel people have lived and worshiped in the area, now known as Painted Bluffs State Park, for over 1,600 years. R. at 2. During this time, the Montdel people have performed rituals at Red Rock, a sacred location within the park, where they sacrifice crops and the village elders lead prayers for the winter and summer solstices and the fall and spring equinoxes. R. at 3. The Montdel people believe that failure to continue their religious traditions at Red Rock will provoke their Creator's wrath. R. at 3.

Delmont became a state in 1855, though the State Park remained separated until Delmont acquired it through eminent domain in 1930. R. at 3-4. After Delmont acquired Painted Bluffs, the rituals continued without state interference and were even referenced in promotions for the park. R. at 3-4. Further, at the opening ceremony for the park, the Governor of Delmont publicly

announced that the Montdel people had been a part of the land for centuries and that their rituals in Painted Bluffs are "part of a legacy that the state proudly cherishes." R. at 4-5.

In 1950, James and Martha Highcliffe, a couple of Montdel heritage, started an initiative to formalize the Red Rock rituals as the "Montdel Observance." R. at 5. They also restarted formal pilgrimages to Red Rock at the four designated times each year. R. at 5. Since 1952, the Montdel Observance has included the traditional rituals of the Montdel people which involve the ten oldest members ascending Red Rock, making crop sacrifices, and praying to the Creator, while the others praise and meditate at the base of Red Rock. R. at 5. The participants in the Montdel Observance are known as the "Old Observers," sixty percent of whom are of Montdel heritage. R. at 5.

Separate from the Montdel Observance, the spring and fall equinox rituals have begun to coincide with equinox festivals in the Park, though the Old Observers do not participate in the festival activities. R. at 5-6. These festivals have boosted tourism in Delmont as they attract spring breakers and other festival attendees. R. at 5. The State of Delmont has even played a part in the festivals by issuing vendor licenses for the past twenty years. R. at 6. In addition to the tourism industry, Delmont also houses valuable reserves of copper, iron, nickel, and other minerals in areas outside of Painted Bluffs State Park, including the Delmont Mountain Range and Delmont Flats Desert. R. at 6-7.

In 2021, Delmont enacted the Energy and Conservation Independence Act (the "ECIA") which authorizes the state to enter agreements for the transfer of land to private mining companies for the extraction of lithium, nickel, iron, and copper. R. at 6. The goals of the ECIA are to improve Delmont's economy and reduce the state's dependence on fossil fuels. R. at 6.

In January 2023, the Delmont Natural Resources Agency (DNRA) agreed to transfer one-fourth of Painted Bluffs State Park, including the Red Rock area, to Delmont Mining Company, pursuant to the ECIA. R. at 7. As required by ECIA, the DNRA conducted an environmental and economic impact study, indicating that the lithium mining would result in the physical destruction of Red Rock, making reclamation and visitation infeasible and dangerous. R. at 8. Though the other environmental impacts would be minimal, the equinox festivals could no longer take place at Red Rock. R. at 8. In spite of potentially less destructive technologies, the land transfer agreement was confirmed due to uncertainties about the impact of the new technologies and the timeline for when they may become available. R. at 8-9. After the impact studies, the DNRA stated their approval of the transfer due to the reduction in fossil fuel dependence in alignment with FNRDA, the impracticality of waiting for alternative technologies, the economic benefit of mining, and the fact that the state owns the land and therefore is not required to adhere to Montdel traditions. R. at 9. Alex Greenfield, Secretary of DNRA, also emphasized that the department considered the governor's comments describing the religious festivals as a "nuisance" when deciding to enter the land transfer agreement. R. at 47, 49. However, the DNRA had previously withdrawn from two transfers because of the impact they would impose on secular groups or interests. R. at 9-10. The first transfer was cancelled due to its impact on endangered species habitats, and the second was cancelled due to a thirty-five percent risk of contaminating an aquifer that provides water to a town of fifty people. R. at 9-10.

Seven years prior to the land transfer agreement with Delmont Mining Company, Priscilla Highcliffe established Montdel United, a non-profit organization, with the mission of opposing the transfer of Painted Bluffs and protecting the Montdel Observance's religious practices, including the Red Rock ritual site and other sacred sites. R. at 7. Montdel United is

composed of the Old Observers and Montdel descendants. R. at 7. After the DNRA entered into the land transfer agreement with Delmont Mining Company, Montdel United sought a temporary restraining order and an injunction, claiming that the transfer was in violation of Montdel United's free speech and free exercise rights under the First Amendment. R. at 10.

The United States District Court for the District of Delmont, Western Division granted Montdel United's motion for a preliminary injunction, finding that the State of Delmont had violated the free speech and free exercise rights of Montdel United. R. at 25, 32. Delmont appealed to the United States Court of Appeals for the Fifteenth Circuit which reversed the district court's order and held that Delmont had not violated the free speech or free exercise rights of Montdel United. R. 33, 45. Lastly, Montdel United filed a petition for a writ of certiorari, which this court granted. R. at 54-55.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Fifteenth Circuit Court because Delmont violated the free exercise rights of the Montdel people by executing the land transfer agreement for Painted Bluffs State Park. Under the Free Exercise Clause, Delmont must satisfy strict scrutiny unless the burden on religious exercise is the result of a valid and neutral law of general applicability. The land transfer is subject to strict scrutiny for four reasons. First, the land transfer only applies to one piece of land, and therefore is not generally applicable. Second, the government's action treats secular activity more favorably by withdrawing similar contracts for secular, environmental purposes. Third, the land transfer is not generally applicable because it involves an individualized government assessment. Lastly, the government action is not neutral because the record indicates hostility towards the Montdel religious practices by the governor, who had a major decision-making role in the transfer agreement. The land transfer fails strict

scrutiny because the government cannot assert a compelling interest and the destruction of Red Rock is not the least restrictive means to accomplish its interests especially when there are alternative areas for mining and developing technologies which could preserve Red Rock. The Fifteenth Circuit and Delmont's reliance on Lyng is wrong because Lyng did not concern the physical destruction of sacred land and expressly said if such physical destruction did take place, the case would be different. That government's ownership of the land in question does not change the outcome as the Montdel tribe has accessed this land for sixteen centuries and the government is still required to make religious accommodations on their land.

Furthermore, this court should reverse the Fifteenth Circuit's decision because Delmont's land transfer agreement also violates the free speech rights of Montdel United. The Montdel Observances constitute both pure speech, in the form of prayer, as well as expressive conduct. The Red Rock site where the Montdel rituals take place is a public forum since there is a historical record of expression on the land and compatibility with public assembly and expression. Specifically, the Montdel Observance has been taking place there for centuries, and the government has both recognized this legacy and contributed permits for the coinciding equinox festivals which involve a host of expressive activities on their own. The land transfer is subject to strict scrutiny because Red Rock is a traditional public forum and the action will result in its complete destruction, thus disproportionately burdening the speech of the Montdel people. Delmont fails strict scrutiny since its proffered interests are broadly formulated and it ignores available alternatives which would not burden Montdel's speech.

ARGUMENT

I. THE LAND TRANSFER TO DELMONT MINING COMPANY VIOLATES THE FREE EXERCISE RIGHTS OF MONTDEL UNITED

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and is incorporated against the states through the Fourteenth Amendment. U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Strict scrutiny applies unless the government action is both neutral and generally applicable. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990); *Fulton v. City of Phila.*, 593 U.S. 522, 536 (2021).

A. The land transfer and destruction of Red Rock is not generally applicable and therefore is subject to strict scrutiny since it only applies to one piece of land.

A government action is not generally applicable if it only applies to one piece of land. *See, e.g.*, *Roman Cath. Bishop v. City of Springfield*, 724 F.3d 78, 92, 98 (1st Cir. 2013) (holding the law "designed to apply only to the Church" not generally applicable under Smith because its "purpose" was to address "particular properties"); *cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983) ("[S]pecial tax that applies only to certain publications [was not] generally applicable."). The Fifteenth Circuit even acknowledges that the law in *Lyng* was not generally applicable because it "selected a particular strip of land for their road" after objections warning of the potential "religious devastation." *Montdel United v. Delmont*, C.A. No. 24-CV-1982 (15th Cir. 2024). Here, the land transfer agreement is not generally applicable because it only applies to Painted Bluffs State Park. Just as the ordinance in *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78 (1st Cir. 2013), was designed only to apply to the church, the land transfer agreement in this case was designed only to apply to Painted Bluffs State Park even though several other areas across the state hold valuable minerals as well, including the Delmont Mountain Range and Delmont Flats Desert. Since the government action was made to only apply to the state park, it is not generally applicable, and therefore must be subject to strict scrutiny.

B. The land transfer is not generally applicable because it treats secular activities more favorably than the religious activities of Montdel United.

A law is not generally applicable if it prohibits religious conduct while making secular exceptions in similar circumstances or if it treats comparable secular activity more favorably than religious activity. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017) (holding the law was not generally applicable when it offered secular organizations reimbursement grants for purchasing recycled playground surfaces while disqualifying religious groups from the benefits); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (holding the law prohibiting animal sacrifice was not generally applicable since it drew exemptions for secular activities involving the killing of animals such as food-related slaughter).

In *Tandon v. Newsom*, 593 U.S. 61, 63 (2021), the court held that COVID-19 restrictions were not generally applicable because it treated secular activity more favorably by exempting hair salons, movie theaters, retail stores, and other establishments, but not at-home worship. Similarly, the land transfer decision in this case is not generally applicable because it draws exceptions for secular purposes, but not religious purposes, thus treating secular activity more favorably than religious activity. Here, Delmont previously made exceptions and withdrew from land transfer agreements for the secular purposes of preventing the destruction of animal habitats and avoiding the thirty-five percent risk of water contamination to a town of fifty people, but now refuses to make an exception for religious purposes, specifically the Montdel people's commitment to the Red Rock rituals. Choosing to withdraw from a previous agreement for threat to animals, but refusing to withdraw from the agreement for threat to the ability of *humans* to practice their religion in the only place they can do so demonstrates a lack of general applicability, triggering strict scrutiny.

C. The land transfer is not generally applicable because it involves an individualized government assessment.

Government action "is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 593 U.S. at 533 (citing *Smith*, 494 U.S. at 884); *see also Roman Catholic Bishop*, 724 F.3d at 98.

Strict scrutiny applies to the land transfer agreement since it was made through a policy which grants the government discretion to make individualized assessments. The government's assessments under ECIA are individualized as demonstrated by its prior decisions to withdraw from transfer agreements due to the particular circumstances affecting the individual properties such as threats of contamination to a particular water source or destruction of particular habitats. In *Roman Catholic Bishop*, the city ordinance triggered strict scrutiny because it gave the government discretion to apply historic district requirements to whichever population they wanted by simply creating historic districts. 724 F.3d at 98. Similarly, the land transfer here triggers strict scrutiny because it gives the government complete discretion to transfer any land it wants to.

D. The land transfer is not neutral because Delmont's governor showed hostility towards Montdel United's religion.

Plaintiffs "may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise; in cases like that [courts] 'set aside' such policies without further inquiry." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 639 (2018)). The Free Exercise Clause forbids even "subtle departures from neutrality." *Lukumi*, 508 U.S. at 534.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617, 636 (2018), the Court held that a commissioner's statement that a religious objector's invocation of religious liberty was "despicable" cast doubt on the neutrality of the commission's adjudication and strict scrutiny therefore applied. And in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993), the Court held the ordinance was not neutral because its language targeted religious conduct by including the words "ritual" and "sacrifice." Here, in conversations discussing the impact of the land transfer on Montdel, the governor of Delmont expressed hostility towards the tribe's religious practices–stating that their practices are a "nuisance" and expressing frustration at the maintenance required for the tribe's activities. And the affidavit of Delmont Secretary Alex Greenfield proves that the "nuisance" remark carried significant weight in the land transfer decision since the department named it as one of only four factors in the land transfer decision.

In *Spivack v. City of Philadelphia*, 109 F.4th 158, 170 (3d Cir. 2024), the court determined that the District Attorney's comments calling exemptions to COVID vaccine regulations "unscientific" could show a lack of neutrality and emphasized that these comments merit greater scrutiny because the District Attorney had a decision-making role in the process of issuing the vaccine mandate. Similarly, the Delmont governor's comments trigger strict scrutiny due to his all-encompassing power over the land transfer decision.

E. The land transfer fails strict scrutiny because Delmont's broadly formulated interests are not compelling and the state does not employ the least restrictive means to achieve its interests.

Since the land transfer is not neutral or generally applicable, the government action is subject to strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The government must prove it has a compelling interest and that the action taken was narrowly tailored to achieve that interest. *Lukumi*, 508 U.S. at 486.

In determining whether the government has a compelling interest, rather than rely on "broadly formulated interests," courts must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 593 U.S. at 541 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006)). The government must demonstrate "it would commit one of the 'gravest abuses' of its responsibilities if it did not" destroy Red Rock. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 696 (2020) (Alito, J., concurring).

Here, Delmont's asserted interests of combating climate change and promoting the economy are not compelling because they are both broadly formulated. Instead of assessing whether the land transfer is compelling in general, the relevant question is whether the transfer of Red Rock is compelling in light of the burden it places on the particular religious activities of the Montdel people. Delmont has not and cannot show that "it would commit one of the 'gravest abuses' of its responsibilities" if it did not transfer Red Rock, especially when selling the land would destroy the natural landscape and jeopardize the state's tourism industry. Delmont withdrew prior contracts because its interest in mining could not overcome concerns about water pollution and danger to animals. Delmont's proffered interests cannot possibly be compelling in light of the complete obliteration of Montdel's essential sacred site when these same interests were not important enough to outweigh lesser concerns for animal habitats and a low risk of water pollution.

Even if Delmont satisfies compelling interest, it must also prove that it employed the least restrictive means available in achieving its interests. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). "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 540. *See also Burwell v. Hobby Lobby*, 573 U.S. 682, 728 (2014).

Far from proving least restrictive means, Delmont itself has demonstrated that it has alternative means that would not burden religion. The DNRA's environmental impact study reported that there are alternative technologies currently being developed that can extract the mineral deposits *while preserving the sacred site*. Delmont can also permit mining in other mineral-rich areas (such as the Delmont Mountain Range and Flats Desert) that have no connection to religion. Delmont withdrew two other contracts in the past five years because of possible water pollution and concerns about animal habitats. Either of these contracts would have served the state's interests in boosting the economy and combating climate change and neither option would burden religion in any way. Since Delmont ignores these less restrictive means, it fails strict scrutiny.

F. The Government's Land Transfer and Resulting Physical Destruction Constitute a Coercive Prohibition of Religion, and the Free Exercise Clause Therefore Applies.

The Fifteenth Circuit did not reach this strict scrutiny analysis because it held that, under *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 451-53 (1988), Montdel's religious exercise had not been coercively prohibited in a way that would trigger the Free Exercise Clause in the first place. But that is incorrect because *Lyng* is distinguishable.

1. *Lyng* did not involve the physical destruction of a sacred site.

In *Lyng*, the U.S. Forest Service planned to construct a road through a region containing Native religious sites. *Id.* at 448. Crucially, "no sites where specific rituals take place were to be disturbed," and religious land would not be destroyed. *Id.* at 449, 454. The Court held that since the road construction was on government land, there was no government coercion that prohibited free exercise. *Id.* at 449. The First Amendment, therefore, did not apply at all. *Id.* at 456, 458.

The Fifteenth Circuit held that *Lyng* controls the instant case and did not reach the strict scrutiny analysis, but it is wrong. This case stands in stark contrast to *Lyng* because the land transfer will result in the complete physical obliteration of Red Rock–unlike the sacred sites in *Lyng*. In fact, *Lyng* made clear that if the challenged action had involved such physical destruction, the outcome would have been different. *Id.* at 453 (noting that if the government action "prohibit[ed] the Indian respondents from visiting [the sacred site, it] would raise a different set of constitutional questions").

The *Lyng* Court also acknowledged that the Forest Service was quite "solicitous" toward Native religious practices. *Id.* at 454. Though the Court recognized that construction would incidentally disrupt some religious practice, the government chose a pathway that was "the farthest removed" from religious sites and provided a "protective zone" around them, guaranteeing that areas where sacred rituals took place would be left untouched. *Id.* at 454, 443. In this case, however, Delmont took no action to minimize the impact on the Montdel Observance. In fact, Delmont identified less harmful extraction technologies and still chose not to use them. Montdel's sacred site, therefore, will not be left "undisturbed"–it will be utterly demolished.

Unlike the road renovation in *Lyng*, the land transfer of Red Rock coercively prohibits Montdel's religious exercise by permanently destroying the only land on which they can worship. Montdel sincerely believes that their Creator can only be accessed through group supplicatory prayer at Red Rock. Not only does the exercise of their faith depend on the existence of Red Rock, but individual prayer separate from group rituals, like those exercised at the site, is outlawed by the Montdel faith. The complete destruction of Red Rock prohibits religious exercise.

The Fifteenth Circuit, therefore, failed to recognize a crucial distinction *Lyng* itself made: *Lyng* only applies when the land is left intact and some tribal access remains, but if physical obliteration results, a different outcome is warranted. And lower courts have recognized this crucial distinction. For example, in *Comanche Nation v. United States*, No. CIV-08-849, 2008 WL 4426621, at *1 (W.D. Okla. Sept. 23, 2008), the U.S. Army planned to destroy a Native religious site to construct a warehouse on federal land. *Id.* at *17. The Native tribe sued, arguing that the warehouse would make its "traditional religious practices" impossible. *Id.* The court sided with the tribe, holding that its religion was substantially burdened because the government "inhibit[ed]" or "den[ied]" religious activities. *Id.* at *3. The court held that the government's physical destruction of the sacred site "amply demonstrate[d]" a "substantial burden on traditional religious practices." *Id.* at *17.

Other lower court opinions demonstrate this "physical destruction" distinction.[1] In *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), Native Americans challenged the government's plan to use wastewater to manufacture artificial snow for skiing on a sacred mountain. *Id.* at 1062-63. In ruling against the Natives, the Court stressed that the snow would have no physical impact on the sacred mountain and no places of worship would become inaccessible. *Id.* at 1063. Since the plaintiffs could continue engaging in religious worship, the snow only affected the tribe's "subjective spiritual experience." *Id.* Not so here. By contrast, Montdel's claim is not about "subjective spiritual experience." It is about the physical destruction of religious land they have accessed for sixteen centuries–resulting in the permanent erasure of their religion.

[1] *See also Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1210-11 (9th Cir. 2008) (upholding minor government construction to a power plant that *still permitted* tribal access to sacred falls); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 89 (D.D.C. 2017) (distinguishing a government action rendering a lake "ritually [im]pure" from actions that would destroy the sacred site).

2. Delmont's asserted ownership of Red Rock does not change the result.

Even under *Lyng*, the Free Exercise Clause prevents Delmont from selectively subjecting a religious site to complete physical destruction. The government's claim of ownership of this land does not change this obvious conclusion, as that assertion is itself questionable. The Montdel tribe has peacefully exercised its religion on this land since 400 A.D. Throughout this history, the Montdel tribe and the Delmont government have shared in the control, ownership, and management of this region. Unlike land which is strictly U.S.-owned and entirely closed to the public, the tribal land is a shared region to which the Montdel tribe has a historical claim based on over sixteen centuries of religious access and use. The Free Exercise Clause requires Delmont to protect Montdel's free exercise interests not despite–but because of–the long historical tradition of access to this land and Montdel's historical relationship with Delmont.

When the government can control religious practices—whether in prisons, the military, or on government-owned land—religious individuals cannot practice their faith unless the government makes accommodations.[2] In these situations, given this "baseline" distinction, denial of "access" can burden religion. *Lozano v. Collier*, 98 F.4th 614, 628-29 (5th Cir. 2024) (Oldham, J., concurring). Understanding this distinction, courts, including this Court, have repeatedly upheld religious liberty protections in cases involving government land.[3]

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[2] *See, e.g.*, *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 226 n.10 (1963) (acknowledging in the Free Exercise context that military service creates a situation "where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths").

[3] *Holt v. Hobbs*, 574 U.S. 352, 362, 369 (2015) (holding that a state prison's grooming policy substantially burdened the religious exercise of a Muslim inmate); *Singh v. McHugh*, 185 F. Supp. 3d 201 (D.D.C. 2016) (holding the U.S. Army must allow a Sikh individual to join its ROTC program with his articles of faith intact); *see also Comanche Nation*, 2008 WL 4426621, at *1 (holding that destroying a Native sacred site to construct a military training center on federal land substantially burdened the religious practices of the tribe).

3. If the Court disagrees that *Lyng* is distinguishable, *Lyng* should be overruled.

If Delmont and the Fifteenth Circuit are correct about *Lyng*—and *Lyng* means the Free Exercise Clause becomes inapplicable when a state selectively chooses to destroy a sacred site, ending a tribe's religious practice forever—this Court should revisit *Lyng*. In recent cases, this Court has clarified that the original meaning of "prohibit" in the Free Exercise Clause is "forbidding or hindering unrestrained religious practices or worship." *Fulton*, 593 U.S. at 567 (Alito, J., concurring). To the extent that *Lyng* conflicts with this original understanding and adds an a-textual "coercion" requirement to the Free Exercise Clause, it should be overruled. Under the plain and ordinary meaning of the Free Exercise Clause, the land transfer "prohibits" Montdel's religious exercise because it not only "hinders" religion, but permanently destroys the only site where Montdel religious exercise can occur.

II. THE LAND TRANSFER VIOLATES MONTDEL UNITED'S FREE SPEECH RIGHTS

The Free Speech Clause of the First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech," and is applicable to the States through the Fourteenth Amendment. U.S. Const. amend. I; *Gitlow*, 268 U.S. at 666. This Court should reverse the Fifteenth Circuit because the land transfer violates Montdel United's right to free speech.

A. Montdel's Red Rock rituals involve pure speech and expressive conduct.

The First Amendment Free Speech Clause protects both pure speech, which includes written and spoken words, and expressive conduct. *See Kaplan v. California*, 413 U.S. 115, 119 (1973) (stating that first amendment protection extends to "both oral utterance and the printed word," including pictures, films, paintings, drawings, and engravings); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (holding that sitting can communicate a message of protest, causing the action to fall within free speech protection). The free speech and free exercise clauses offer

overlapping protections when people or groups deliver prayers or engage in religious expressions, while offering distinct avenues to protect these individuals' expressive rights. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 514 (2022) (holding a football coach's act of kneeling to pray quietly after a football game on government property was protected by both the free exercise and free speech clause).

In this case, the Montdel Observance and coinciding festival events qualify as pure speech and expressive conduct, and therefore are protected by the Free Speech clause. Similar to the football coach and other participants joining to pray together on government property after a football game in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), the Montdel Observance involves group prayer on government land consisting of spoken words from village elders as well as crop offerings expressing a message of worship. Just as the act of prayer in *Kennedy* was protected by the free speech clause, the Montdel Observance and equinox rituals are protected by the free speech clause. In *Kaplan v. California*, 413 U.S. 115, 119 (1973), the court provided several examples of expression that is protected by the free speech clause including films, artworks, and oral utterances. Though the Old Observers do not participate in the festival activities, the coinciding equinox events also feature art displays, singing, and speeches from environmentalists which clearly qualify as "oral utterance" and expressive conduct.

B. Painted Bluffs State Park is a traditional public forum.

In acknowledging that the Government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966)), this Court has adopted a forum analysis as a means of determining when the Government's

interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Accordingly, the extent to which the Government can control access "depends on the nature of the relevant Forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

Traditional public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry*, 460 U.S. at 45. Public parks and streets are usually traditional public forums as "they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939). The most important "factor in determining whether property owned or controlled by the government is a public forum is how the locale is used." *Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 160 (3d Cir. 1982).

Beyond mere status as a public park, the area is a traditional public forum if it has a historical record of expressive activities taking place therein or is historically associated with the "free exercise of expressive activities." *Compare Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (holding that public parks used for speeches and other "transitory expressive acts" are traditional public forms), *United States v. Grace*, 461 U.S. 171, 179-80 (1983) (holding that the sidewalk surrounding the Supreme Court building is a traditional public forum because they are not distinct from regular sidewalks which have traditionally been held open to the public for expressive activities), *and ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 954 (D.C. Cir. 1995) (stating that the Park Service must concede that the National Mall, where the Krishna Society sought to solicit donations, and sell religious beads and audiotapes, is a traditional public

forum), *with Boardley v. U.S. Dep't of the Int.*, 615 F.3d 508, 515 (D.C. Cir. 2010) (finding that national parks cannot be confirmed as traditional public forums without a factual record of being held open for public discourse).

Even parks containing expansive natural areas are classified as traditional public forums when they are compatible with public assembly and expression. *Compare Leydon v. Town of Greenwich*, 777 A.2d 552, 570 (Conn. 2001) (holding the park at issue to be a traditional public forum since it "contains shelters, ponds, a marina, a parking lot, open fields, a nature preserve, walkways, trails, picnic areas with picnic tables, a library book drop and a beach") *with Boardley*, 615 F.3d at 515 (stating that "national parks . . . which never have been dedicated to free expression and public assembly, would be clearly incompatible with such use, and would therefore be classified as nonpublic forums").

While serving as a necessary conduit in the daily affairs of a locality's citizenship can support public forum status, it is not a necessary condition for an area to be considered a traditional public forum.[4]

Painted Bluffs State Park, including the Red Rock area, qualifies as a traditional public forum because it is a public park with a robust history of expressive activity taking place therein. Unlike in *Boardley v. United States Department of the Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010), where no record existed to show a historical association with expressive activity and

[4] *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 651, 655 (1981) (holding the Minnesota State Fair is a limited public forum distinct from public streets because it is not continuously open and only offers a *temporary* space for exhibitors to present their products or views); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 685 F.3d 1066, 1071 (D.C. Cir. 2012) (holding interior postal sidewalks are not public forums because they are distinct from ordinary sidewalks in that they are typically only used by customers and employees . . . to provide efficient access to the post office," as opposed to forums open to the free exchange of ideas); *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100-02 (9th Cir. 2003) (considering the availability or frequency of free public access as just one of several non-dispositive factors in determining that the pedestrian mall is a traditional public forum).

speech, in the present case, there is a record showing a rich history of expressive activity in Painted Bluffs State Park. When Delmont acquired ownership over the Painted Bluffs State Park, the governor at the time publicly acknowledged the Montdel people at the opening ceremony of the park, stating that they had been "part of the land for centuries" and "their supplications to the Almighty in the Painted Bluffs are part of a legacy that the state proudly cherishes." The Red Rock rituals referenced by the former Delmont governor have been practiced in the park for as long as the Montdel people have existed and long before the state acquired ownership of the land. Archaeologists trace Montdel presence in the park back to 400 A.D. and their religious practices were recorded by explorers in the 1500's— 300 years before Delmont even became a state. In *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009), the court explained that public parks which have been used for speeches and other "transitory expressive acts" are traditional public forms. Delmont similarly has held open the park specifically for the speeches, singing, dancing, prayer, and other expressive activities taking place at the equinox festivals for over twenty years. Despite the large natural areas contained in Painted Bluffs State Park, the park itself is compatible with public assembly and expression, and none of Boardley's non-public forum factors are present here.

In *Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. 2001), the court held that a park containing ponds, walkways, a parking lot, and picnic areas was a traditional public forum because it was compatible with traditional understandings of parks which are open for public expression. Similarly, Painted Bluffs State Park and the Red Rock area therein offer the public opportunities for fishing, camping, and hiking along the Delmont River in addition to the yearly equinox events which include large gatherings for the purpose of listening to speeches, singing, dancing, and other acts of public expression. The nature of Painted Bluffs State Park must be

compatible with public assembly and expression as it offers the same if not more amenities for public assembly as the park deemed a traditional public forum in *Leydon*. While *Boardley* cautions against deeming all parks traditional public forums, Painted Bluffs State Park evades the concerns set forth in *Boardley* since it has been dedicated to expression and public assembly and therefore is compatible with expressive uses by the public. The Delmont government itself has chosen to hold the park open for public access and has even assisted in providing permits to vendors at the equinox festivals. The former governor even announced the legacy of the Montdel rituals on the park land. These government actions show a history of dedication to public assembly and expression, making the park a traditional public forum.

In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court held that the state fair was a limited public forum because it only gave exhibitors a temporary space to present their products and views, whereas public streets serve as forums for free expression and necessary conduits in the daily lives of citizens. While the state fairgrounds in *Heffron* opened to exhibitors on only one specified date, Red Rock remains open to the Montdel people and the rest of the public for expression at any time. Painted Bluffs State Park is also distinct from the state fair in *Heffron* because the equinox rituals have been annual occurrences for centuries and for the Montdel people, are much more than a necessary condition of their daily lives, but rather one of the largest parts of their religion.

C. Strict Scrutiny applies since the government action involves the destruction of a traditional public forum and a disproportionate burden on the First Amendment activities of the Montdel people.

The destruction of the public forum status of streets and parks by the government's own "*ipse dixit*" is "at least presumptively impermissible." *United States v. Grace*, 461 U.S. 171, 180 (1983) (holding that the destruction of public forum status resulting from the prohibition of flags

and other advocacy-related displays on the sidewalks surrounding the Supreme Court was "at least presumptively impermissible"); *Denton v. City of El Paso*, 475 F. Supp. 3d 620, 631 (W.D. Tex. 2020) (stating that a "municipality cannot pass a law to render a traditionally public forum non-public"). This Court has applied strict scrutiny to government actions which "impose[d] a disproportionate burden upon those engaged in protected First Amendment activities." *Minneapolis Star & Tribune Co*. v. *Minn. Comm'r of Revenue*, 460 U.S. 575, 585-86 (1983) (striking down a tax imposed on the sale of newsprint and ink because it singled out newspaper companies to bear a disproportionate burden).

The government's action is subject to strict scrutiny because it goes beyond mere closure or destruction of the park's public forum status, but instead issues the complete destruction of the forum itself, and thus disproportionately burdens the First Amendment activities of the Montdel people. In *Minneapolis Star & Tribune Co*. v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), the Supreme Court applied strict scrutiny when the state imposed an ink and newsprint tax that disproportionately impacted newspaper companies. Here, the government's land transfer resulting in the destruction of Red Rock disproportionately burdens the First amendment activities of the Montdel people since Red Rock is the only place where their religion permits the observance of the equinox rituals. The fact that the Montdel people are not the only ones affected by the land transfer is immaterial. Just as the tax in *Minneapolis Star* was subject to strict scrutiny despite the effects it had on persons and companies outside of the newspaper business, the land transfer in this case is subject to strict scrutiny notwithstanding the impact that the destruction of Red Rock has on other park visitors.

D. The land transfer fails strict scrutiny because Delmont's interests are not compelling and the means chosen to achieve its interests are not narrowly tailored.

Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum or disproportionately burdened by a government action only when such action passes strict scrutiny, meaning it must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that interest. *See Perry*, 460 U.S. at 45. When applying strict scrutiny in the First Amendment context, courts must not rely on broadly formulated interests. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). As for narrow tailoring, a restriction on speech in a traditional public forum is not narrowly tailored unless the least restrictive means available are employed to achieve the state interest. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

Here, Delmont asserts the interests of promoting economic growth and combating the climate crisis. *See supra* Argument Section I.E (explaining that Delmont's interests are not compelling). Plainly put, the limited interests of economic growth and climate change proffered by the state are not compelling.

Even if Delmont had asserted a compelling interest, the land transfer is not a narrowly tailored means of achieving the interest because there are less restrictive means available. *See supra* ArgumentSection I.E (explaining the government's failure to employ the least restrictive means available). Since Delmont's land transfer agreement fails the strict scrutiny analysis at least on the tailoring prong, it violates the Montdel people's First Amendment right to free speech.

E. The government's action also fails the requirements of time, place, and manner restrictions.

If the Court disagrees that strict scrutiny applies, the land transfer action would still fail even if this Court applied the requirements for time, place, and manner restrictions. In a

traditional public forum, time, place, and manner restrictions must be "justified without reference to the content of the regulated speech," must be "narrowly

tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Narrow tailoring for time, place, manner regulations does not require the government to employ the least restrictive means available, but does prohibit the government from burdening "substantially more speech than is necessary" to achieve its interest or from implementing a speech restriction without at least considering less restrictive alternatives. *Ward*, 491 U.S. at 781; *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 369-370 (3d Cir. 2016) (holding an ordinance restricting speech outside of Planned Parenthood was not narrowly tailored under intermediate scrutiny and the government did not consider substantially less restrictive alternatives, thus the plaintiff's freedom of speech was violated).

Alternative channels of communication need not be perfect substitutes for the previously used forum, but must minimize the "effect on the quantity or content of th[e] expression." *Ward*, 491 U.S. at 802. Therefore, a restriction does not leave open ample alternative channels for communication when it involves a total ban on expressive activity in certain areas. *Lewis v. Colo. Rockies Baseball Club*, 941 P.2d 266, 278 (Colo. 1997) (holding that the total ban on vending in certain areas of the baseball stadium did not leave open ample alternative channels for communication). A regulation also fails to leave open ample alternative channels for communication when the restricted forum is so unique that the speakers have no comparable forum. *Chabad of S. Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975, 986 (S.D. Ohio 2002) (holding that ample alternative channels were not left open for the plaintiffs to display the

menorah because the restricted forum was so unique that there were no comparable channels for speech).

Here, regardless of whether Delmont's asserted interests in combating climate change or promoting economic growth are significant, the means chosen to achieve these interests are not narrowly tailored since the land transfer agreement burdens substantially more speech than is necessary to achieve Delmont's interests. As discussed, Delmont could achieve its interests in combating the climate crisis and promoting economic growth in several ways which do not restrict the speech of the Montdel people. Mining in other mineral-rich areas across the state or waiting to use technology that is capable of extracting lithium without completely destroying Red Rock are two alternatives which would have no impact on speech. By ignoring these alternatives and choosing a means that destroys the only forum where the Montdel Observance can take place, the government action burdens substantially more speech than is necessary to achieve its interests.

Even if the government action were narrowly tailored, it still fails the time, place, and manner test because it does not leave open ample opportunities for communication. Here, the land transfer not only burdens the quality and content of expression, but also would completely destroy Red Rock, rendering it an area entirely void of expressive activity. The destruction of the land constitutes a total ban on the expressive activities of the Montdel people since its expressive activities are inherently tied to the Red Rock location. Without access to Red Rock, it is unable to engage in the speech and expressive activities which are fundamental to their religion.

Like in *Chabad of South Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975 (S.D. Ohio 2002), where the court held that ample alternative channels were not left open for communication due to the unique and incomparable nature of the restricted forum, the same is

true in this case due to the unique nature of Red Rock as the sole location where the Montdel people can perform the prayers and rituals required by their religion. Without leaving open alternative channels for communication, the government fails to meet the requirements of time, place, and manner restrictions, and therefore violates the free speech rights of the Montdel people.

CONCLUSION

For the foregoing reasons, Delmont's land transfer agreement violates the Montdel people's First Amendment rights to free exercise and free speech. Therefore, the judgment of the Fifteenth Circuit Court of Appeals should be reversed.

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 accordance with Rule III.C.3 of the Official Rules of the 2025 Seigenthaler-Sutherland Moot Court Competition, we hereby submit this certificate of compliance to further certify that:

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

TEAM 027
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January 31, 2025