No. 24-CV-1982

IN THE

SUPREME COURT OF THE UNITED STATES

MONTDEL UNITED,

Petitioner,

v.

STATE OF DELMONT and

DELMONT NATURAL RESOURCE AGENCY

Respondent,

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

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BRIEF FOR THE PETITIONER

Team 029

Counsel for the Petitioner

January 31, 2025

QUESTION PRESENTED

1. Does the State of Delmont Energy and Conservation Independence Act ("ECIA") and Respondents' subsequent transfer of Red Rock violate the First Amendment Free Exercise rights of Petitioner?
2. Does the ECIA and subsequent transfer of Red Rock violate the First Amendment Free Speech rights of Petitioner?

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The Fifteenth Circuit's decision is reported at *Montdel United v. State of Delmont and Delmont Natural Resource Agency*, No. 24-CV-1982 (15th Cir. 2024). R. at 33-45. The District Court's decision is reported at *Montdel United v. State of Delmont and Delmont Natural Resource Agency*, No. 24-CV-1982 (W.D. Dist. of Delmont 2024). R. at 1-32.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter in favor of Delmont. R. at 45. Montdel United timely filed a petition for *writ of certiorari,* which this Court granted. R. at 55. This Court now has jurisdiction pursuant to 28. U.S.C. § 1254(1).

STANDARD OF REVIEW

This case is an interlocutory appeal of a preliminary injunction. 28 U.S.C. § 1292(a)(1). When reviewing the grant or denial of a preliminary injunction, this Court reviews the "District Court's legal rulings *de novo*, and its ultimate conclusion for abuse of discretion." *McCreary Cty. v. ACLU*, 545 U.S. 844, 867 (2005). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Here, the only issue is whether Montdel United is likely to succeed on the merits of its Free Speech and Free Exercise claims. Thus, the three equitable factors are not at issue.

STATEMENT OF THE CASE

I. Factual Background

The Montdel are Indigenous Native Americans who have used the hills, cliffs, and forests in Painted Bluff State Park for over 1,500 years. R. at 50. Their most important religious ritual occurs at Red Rock, a barren area atop one of the park's highest bluffs. R. at 50. The Montdel people believe their Creator made Red Rock for the purpose of hearing communal supplications. R. at 50-51. These rituals have become known as the "Montdel Observance." R. at 51. The Montdel believe only their elders may request aid and only at Red Rock during the solstices and equinoxes. R. at 51. Their religion prohibits individual supplicatory prayer. R. at 51. Failure to perform the ritual is a transgression against the Creator and may result in the loss of elder status within the Montdel tribe. R. at 51.

The State of Delmont was established in 1855. R. at 3. While the rituals did not occur during World Wars and the Great Depression due to economic hardships and other challenges, the Montdel have continuously performed their ritual at Red Rock since before Delmont was formed. R. at 4. In 1930, Painted Bluffs was acquired by the State via eminent domain. R. at 4. The Park offers public opportunities for camping, hiking, and fishing along Delmont River. R. at 4. Since the Park's establishment, the Montdel have continued to perform their religious ceremonies at Red Rock, independent of the state Park Service. R. at 4. Delmont has never prevented the Montdel's religious observances or restricted their access to Red Rock or Painted Bluffs areas. R. at 4. At the park's opening ceremony, then Delmont Governor Rupert Ridgeway stated that the Montdel people have been "part of the land for centuries before there was ever a thought of such a thing as Delmont or even America." R. at 4.

In 1950, James and Martha Highcliffe formalized the Montdel's ritual at Red Rock. R. at 5. Since 1952, the "Montdel Observance" has been conducted as a formal ritual, continuing the traditions of the historic practices. R. at 5. Participants in the Montdel Observance ritual are known as the "Old Observers." R. at 5. Over time, the equinox rituals have evolved into festival-like events that occur during the spring and fall equinoxes and are attended by seasonal festival goers. R. at 5. In response to the increasing popularity of these gatherings, Delmont began issuing vendor licenses for food, music, and merchandise through the park services for the past twenty years. R. at 6. The Montdel have never raised objections to the festival activities taking place concurrently with Montdel Observance. R. at 6.

Three years ago, Delmont enacted the Energy and Conservation Independence Act. (ECIA). This legislation authorizes Delmont to enter land transfer agreements with private mining companies for the extraction of valuable minerals. R. at 6. The transfers are managed by the Delmont Natural Resources Agency, (DNRA) which operates under the authority granted by the ECIA. R. at 6. Private mining companies began seeking rights to these deposits from Delmont 20 years ago because of a geological study that revealed the deposits in Painted Bluffs State Park, particularly around the Red Rock area, contain lithium deposits. R. at 7. Due to the mining companies' persistence to secure rights to Painted Bluffs, Priscilla Highcliffe, a non-profit organization named "Montdel United" was established to protect Red Rock in 2016. R. at 7. This organization is composed of descendants of the Montdel and the Old Observers. R. at 7.

In January 2023, the DNRA agreed to transfer one-fourth of Painted Bluffs State Park, including the Red Rock area, to the Delmont Mining Company. (DMC). R. at 7. In accordance with the ECIA, the DNRA commenced both an environmental impact study (EIS) and an economic impact study. R. at 8. The DNRA approved the land transfer because of the state's

commitment to reducing fossil fuel usage, alternative methods are not practical, and a possible economic boost to the local economy. R. at 9. Following the transfer, the area will be accessible only to DMC and its employees. R. at 9.

The EIS found that the mining operations by DMC will result in the complete destruction of Red Rock and its surrounding area. R. at 8. Red Rock would become a water field quarry subject to rock shearing and erosion, making it too dangerous to visit. R. at 8. The area cannot be salvaged once the mining is complete. R. at 8. Alternative mining technologies could be used to avoid complete destruction of Red Rock, but they are not expected to be viable for at least 20 years. R. at 8-9.

Over the past five years, the DNRA has entered and subsequently withdrawn from land transfer agreements with two mining companies. R. at 9. The first agreement was canceled after the environmental impact study (EIS) revealed that the extraction process would destroy the habitat of two endangered species. R. at 10. The second withdrawn agreement was canceled when the environmental impact study (EIS) indicated a roughly thirty-five percent risk of water contamination affecting an aquifer that supplies reserve water to the unincorporated town of Grove Flats, which had a population of fifty. R. at 10. However, the DNRA did not resend a transfer agreement even with the objections that it would lead to the destruction of an early mining camp museum. R. at 10.

II. Procedural History

Montdel United brought this action against the State of Delmont and the DNRA after the DNRA announced its plan to sell a section of Painted Bluffs containing Red Rock, in the United States District Court for the District of Delmont Western Division seeking a temporary

restraining order and an injunction to block the transfer. R. at 10. Delmont has voluntarily waived its sovereign immunity, and the parties stipulated that Montdel United has standing to bring suit. R. at 11. The District Court granted a preliminary injunction to Montdel United finding they were likely to succeed on the merits of their Free Speech and Free Exercise claims. R. at 25, 32. The District Court also found Montdel United will suffer irreparable harm without an injunction blocking the transfer, the balance of the equities favors them, and no compelling disservices to the public are created by granting the injunction. R. at 31-32. Delmont appealed to the United States Court of Appeal for the Fifteenth Circuit. R at 33. The Fifteenth Circuit reversed the grant, finding that Montdel United was unlikely to succeed on the merits of its Free Speech or Free Exercise claim. R. at 33. Montdel United timely petitioned for a *writ of certiorari* to this Court, which was granted. R. at 54-55.

SUMMARY OF ARGUMENT

Montdel United is entitled to a reversal of the Fifteenth Circuit's judgment because the court erred in holding that Respondent's transfer of Red Rock does not violate the Free Express Clause. The Fifteenth Circuit further erred in relying solely on the decision from *Lyng.* The Fifteenth Circuit should have applied the test from *Smith* to determine whether Respondent's action satisfies the appropriate scrutiny. The *Smith* test is governing the Free Exercise test, not *Lyng*. Thus, to avoid strict scrutiny Respondents must show that their government action is neutral and generally applicable. Since Respondents do not satisfy the *Smith* test because their action is not generally applicable strict scrutiny must be applied. Respondents must show that they have a compelling government interest that is narrowly tailored. *Lyng* is not an exception to the *Smith* test. Thus, for *Lyng* to be discussed *Smith* must be satisfied first.

Montdel United is likely to succeed on the merits of a Free Speech claim because the section of Painted Bluffs National Park containing Red Rock is a traditional public forum and the sale and closure is content based and does not satisfy strict scrutiny. Even if the sale and closure is not content based, it cannot survive as a time, place, and manner restriction. Red Rock is a traditional public forum because it has been held by the state and has a long tradition of use for expressive purpose. The sale and closure of Red Rock is content based because destruction of a long standing sacred religious site is inherently content based, the section of Painted Bluffs chosen shows that the state is targeting expression, and complete closure of a traditional public forum to all expression is impermissible under the First Amendment. The sale and closure of Red Rock is not narrowly tailored to serve Delmont's interests because Delmont can serve its interests with less restrictive means. Further, the sale and closure of Red Rock is not a valid time place and manner restriction because it does not leave open adequate alternative channels because the Montdel have no adequate alternative to Red Rock.

ARGUMENT

I. The Fifteenth Circuit incorrectly reversed the District Court's decision to grant preliminary injunctive because Respondents transfer of Red Rock violate Montdel United Free Exercise right.

The Fifteenth Circuit erred in holding that Respondents are not violating Montdel United's First Amendment Free Exercise right because the government is not coercing them to act contrary to their religion. The Respondent's transfer of part of Painted Bluffs State Park which includes Red Rock, to DMC violates Montdel United's Free Exercise right because the transfer will cause Red Rock to be completely destroyed leaving Montdel United nowhere to practice their religion. R. at 8. The land transfer is also not generally applicable, and

Respondents do not have a compelling government interest that is narrowly tailored to outweigh the burden on Montdel United's constitutional right.

The First Amendment's "Free Exercise clause" declares that "Congress shall make no law respecting an establishment of Religion or *prohibiting* the free exercise thereof" and has been incorporated through the Fourteenth Amendment to apply to the states. U.S. Const. Amend. I. (Emphasis added); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Here, Red Rock's transfer prevents the Montdel from practicing their religion. R. at 26. Another prong that has to be shown in the Free Exercise analysis is that the transfer places a substantial burden on the practice of Montdel United's religion. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 883 (1990). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. Of Indiana Employment Security Div.,* 450 U.S. 707, 714 (1981). This Court laid out in *Fulton*, that a state or government substantially burdens the religious exercise if they put a person to the choice between violating their religion or not practicing their religion at all. *Fulton v. City of Philadelphia, Pennsylvania,* 593 U.S. 522, 532 (2021).

Here, once Red Rock is transferred to DMC the site will only be accessible by them. R. at 9. Not having access to Red Rock will not be temporary but permanent because Red Rock will be completely destroyed once mining starts and is completed. R. at 8. Montdel United is put to the choice of violating their religion or not practicing their religion at all. The fact that individual prayer exists is not a remedy to the problem because their religion explicitly prohibits individual prayer. R. at 3. Thus, the transfer of Red Rock is substantially burdening Montdel United's Free Exercise right.

The Fifteenth Circuit incorrectly relied solely on the *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988), decision without applying the Free Exercise test from *Smith*. The *Smith* test has been applied to every First Amendment Free Exercise claim since the case was decided. *See, e.g. Church of Lukumi Babalu Aye, Inc v. City of Hialeah.,* 508 U.S. 520 (1993); *Fulton,* 593 U.S. at 522. The *Smith* test should be applied first then depending on whether the government satisfies that test decides whether to apply *Lyng*. The decision from *Lyng* is no exception to the *Smith* test. *Smith*, 494 U.S. at 885 n.2.

A. The *Smith* test is the first step in a Free Exercise application.

The Fifteenth Circuit erred in not applying *Smith* because the *Smith* test must be applied to determine the likelihood of success of Montel United's Free Exercise claim. The *Smith* test is applied to every Free Exercise case. To determine if a claimant's Free Exercise right is being violated requires the court to determine if the law is neutral and generally applicable. This Court has not stated that the *Lyng* decision can be applied by itself. Thus, the first step in analyzing Montdel United's First Amendment Free Exercise claim is to apply the governing test from *Smith*. The District Court of Delmont Western Division correctly applied the *Smith* test first. R. at 26-29.

This Court in *Smith* held that the compelling government interest test from *Sherbert v. Verner*, 374 U.S. 398 (1963), should not be applied to all Free Exercise claims anymore. *Smith*, 494 U.S. at 885. *Smith* limited *Sherbert*'s holding to unemployment cases. *Id. Smith* went on to hold that laws that are neutral and generally applicable need not satisfy strict scrutiny even if they incidentally burden religious exercise. *Smith*, 494 U.S. at 879. In order to show that a law or government action fails the *Smith* test the claimant has to show that it was either not neutral or not generally applicable. *Fulton*, 593 U.S. at 553. But to satisfy the *Smith* test requires the law to

be both neutral and generally applicable. *Id.* This Court in *Church of Lukumi Babalu Aye,* applied the *Smith* test and started with whether a law is neutral. 508 U.S. at 53. A law is not neutral if it discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. *Id.* at 542. The ECIA and the transfer of Red Rock are neutral because they do not target religious expression on its face. The ECIA just authorizes the state to enter into land transfer agreements with private mining companies to extract valuable materials. R. at 6.

The dispute here lies in whether the ECIA and transfer are generally applicable. A law is not generally applicable if it applies only to one piece of land. *See, e.g*., *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 92, 98 (1st Cir. 2013). A law is also not generally applicable when it prohibits religious conduct while making secular exceptions in similar circumstances. *Lukumi*, 508 U.S. at 542. A generally applicable law applies to all forms of conduct, not just one form. *Id.* In *Lukumi*, a city ordinance banned animal sacrifice with the stated purpose of protecting public health but allowed for exceptions like slaughterhouses. *Id.* at 527. The Santeria religion requires animal sacrifice to express their religion. *Id.* The court held that the city ordinance was facially neutral because it did not target religion directly. *Id.* at 531-538. The court also found the ordinance was not generally applicable because it did not regulate similar dangerous things like restaurant garbage disposal, and the carcasses killed by hunters which could also impact public health. *Id.* at 527, 546

Lukumi is analogous to the present case because Respondents have not applied the ECIA in a generally applicable manner. The ECIA does not limit the kinds of transfers DNRA can approve. R. at 6. Three years after the enactment of the ECIA the DNRA has entered, but subsequently withdrawn land transfer agreements with two mining companies. R. at 9. The first

land transfer agreement was ultimately canceled after the EIS revealed that the extraction process would destroy the habits of two endangered species. R. at 9. The second land transfer agreement was withdrawn when the EIS indicated a roughly 35% risk of water, contamination affecting an aquifer that supplies reserve water to the unincorporated town of Grove Flats, which has a population of fifty. R. at 10. These two withdrawals show that the Respondents withdrew from other land transfer agreements due to secular objections just like in *Lukumi*.

Respondents' inconsistent approval of the different land transfer agreements makes their action not generally applicable. Neither the Governor of Delmont nor DNRA seemed to think about withdrawing the Red Rock transfer agreement. R. at 48-49. Instead, they chose to focus on ownership rights and economic and environmental benefits. R. at 53. Respondents mention another land transfer agreement in which there were serious objections, and they still transferred the land. R. at 10. That land agreement is different, however, from the present and the withdrawn agreements because the risked injury was the possible closure of an early mining Camp Museum. R. at 10. The closure of a museum is not equivalent to completely eradicating a religion, eradicating the existence of endangered species, or water contamination. Thus, the land transfers are not generally applicable. The *Smith* test is not satisfied which means strict scrutiny must be applied.

B. The Fifteenth Circuit erred in relying solely on the *Lyng* case because it is inapplicable.

The *Lyng* case is inapplicable because the Respondents failed the *Smith* test. *Lyng* is not a standalone case outside of the *Smith* test. *Lyng* was decided two years before *Smith* where the controlling test was the compelling government interest test from *Sherbert. Lyng.* 485 U.S. at 444-445. As mentioned earlier *Smith* replaced the compelling government interest test. *Smith*,

494 U.S at 874. The Fifteenth Circuit incorrectly applied *Lyng* only. Instead, the Fifteenth Circuit should have found *Lyng* inapplicable and distinguishable. This Court did not overrule *Lyng* when it created the *Smith* test because it found the case to satisfy the test. This Court has not addressed which test governs after the *Smith* decision was issued. The dispute lies in whether *Lyng* can be applied solely or if Smith is needed.

To start *Lyng* is not distinguishable from *Smith*. The majority opinion in *Smith* written by Justice Scalia rejected Justice O'Connor's attempt at distinguishing *Lyng* and *Roy* from *Smith*. *Smith,* 494 U.S. at 885 n.2. Justice O'Connor wrote in her concurrence that *Smith* was distinguishable from *Lyng* because *Lyng* was a case about the government's conduct of its own internal affairs. *Id.* at 900. (O'Connor, J. concurring). Justice O'Connor went on to state that the Free Exercise clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government which she cites from Justice Douglas's concurrence from *Sherbert*. *Id.* Justice Scalia counters that in *Sherbert* Justice Douglas voted with the majority that the government cannot prohibit an individual's freedom of action through criminal laws but also run the program in a way that harms an individual's religious interest. *Id.* at 885 n.2. Justice Scalia further states that it does not make common sense that the government should have to tailor its health and safety laws to confirm to the diversity of religious beliefs but should not have to tailor its management of public lands, *Lyng*, or welfare programs, *Bowen v. Roy,* 476 U.S. 693 (1986). *Id.*

The government action in *Lyng* satisfies the *Smith* test. In *Lyng*, the Forest Service decided to construct a road through the Six Rivers National Forest. *Lyng,* 485 U.S. at 442. To complete the 75-mile road linking two California towns the Forest Service had to build through parts of Chimney Rock, which has been historically used for Native American religious ceremonies. *Id.*

The Forest Service used its impact statement to evaluate the best possible route to lay the road that would cause less harm to the Native Americans. *Id.* The selected route avoided archaeological sites and was removed as far as possible from the sites used by Native Americans. *Id.* The Native Americans did not have just one sacralized area but multiple throughout the forest. *Id.* This Court held that government programs that make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious belief do not violate the Free Exercise clause. *Id.* at 450. This Court found that the Native American could still practice their religion with the addition of the road. *Id.*

The Fifteenth Circuit held that the government action at issue in *Lyng* is not generally applicable thus the *Smith* test is inapplicable. R. at 44. The Fifteenth Circuit states that the Forest Service in *Lyng* intentionally selected that particular strip of land for the road and went ahead with the plan, even after being made aware of the tribe's opposition and the likelihood of religious devastation. R. at 44. This reading of *Lyng* simplifies and overlooks the important facts of the case. The Forest Service had already started the 75-mile project to create a road linking two California towns. *Lyng,* 485 U.S. at 442. Nothing in the *Lyng* case suggests that the Forest Service rejected other plans to build the road through other parts of town because of serious objections. The Forest Service Road was not being built only through the Chimney Rock area but in other areas as well. This makes their government action generally applicable because they did not create secular exceptions in similar circumstances like the present case.

The Fifteen Circuit also dismisses the fact that this Court considers *Lyng* a neutral and generally applicable case. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 450 (2017), *Lyng* was used as an example of when the court rejected a Free Exercise challenge, and the law in question was neutral and generally applicable. This Court also described *Smith* as

having been decided along the same lines as the decision in *Lyng*. *Id.*at 460. This Court again in *Fulton*, stated that *Smith* drew support from neutral and generally applicable standards from cases involving internal government affirms and cited to *Lyng.* 593 U.S. at 529.

Moreover, the law in *Apache Stronghold v. United States*, 101 F.4th 1036, 1045 (9th Cir. 2024) (en banc), was also not generally applicable. In *Apache*, Congress passed a statute that directed the federal government to transfer the Native American sacred area, Oak Flat, to a private mining company. *Id* at 1045-46. The Ninth Circuit failed to apply the *Smith* test just like the Fifteenth Circuit. The Ninth Circuit instead applied the *Lyng* decision only and found that the statute did not directly coerce the Native Americans into violating their religious beliefs. *Id.* at 1049-52. The court did not find the transfer agreement to prevent the Native Americans from practicing their religion even though the area would have to be restricted off for mining to take place. *Id.*

Since the Ninth Circuit did not apply *Smith* they overlooked the fact that the statute was not generally applicable because it did not apply to other land transfer agreements. *Id.* at 1045. Oak Flat, a sacred site was specifically targeted by the government. *Id.* Transferring the land for mining will prevent the Native Americans access to that site. *Id.* Just because the statute is not directly coercing them does not mean it is not indirectly so. The holding in *Lyng* cannot be applied to non-neutral and non-general applicable laws. This application creates an exemption to the *Smith* test which goes against this Court's precedent.

Lyng is also distinguishable because the Native American sacred areas were not completely destroyed by government action. Building the road through Chimney Rock virtually destroyed the Native Americans' ability to practice their religion. *Lyng*, 485 U.S. at 450. The Native Americans could still visit their sacred areas and perform their religious services, but they would

have to deal with the noise of the road being built. *Id.* Once the road was completed they would have to deal with the noise coming from usage of the road. *Id.* This would not physically prevent them from practicing their religion or acting contrary to their religious beliefs. *Id.* This is just an incidental burden on their religious exercise, which is allowed under the *Smith* test.

However, this is not the case in the present case. The transfer of Red Rock will physically destroy Montdel United's ability to practice their religion. R. at. 6. Once the land agreement is approved, Montdel United will not have access to Red Rock ever again. R. at 9. The land transfer causes more than an incidental burden on Montdel United's right to Free Exercise of religion. Through the land transfer, the government is forcing Montdel United to abandon their religion altogether. The government leaves no alternative option. While Respondents are not directly coercing Montdel United they are indirectly forcing them to act in a way that will violate their religious beliefs. *Lyng* did not hold that a law or government action had to directly coerce the claimant instead they focused on whether they had to act contrary to their religious beliefs. *Lyng* 485 U.S. at 450. The Montdel believe that they can only practice their religion at Red Rock, and they do not believe in individual prayer. R. at 3. Acting contrary to this they believe will upset their creator. R. at 3. This is clearly an indirect government action that is coercing Montdel United to act contrary to their religion. The government can only justify this coercion with a compelling interest.

C. Strict scrutiny has to be applied because Respondents fail the *Smith* test.

Strict scrutiny is "the most demanding test known to constitutional law." *City of Bourne v. Flores*, 521 U.S. 507, 534 (1997). For Respondents to prevail on strict scrutiny they must demonstrate "interest of the highest order" and narrowly tailor its policy to achieve those interests. *Lukumi*, 508 U.S. at 546. "[S]o long as the government can achieve its interest in a

manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 540. Respondents assert two compelling interests to justify the land transfer: the climate crisis created by fossil fuel emissions, and the federal defense act that requires sustainable energy in defense contracts. R. at 30. There is no need to determine whether fossil fuel emissions are a compelling government interest. Instead, the focus should be on the means chosen. R. at 30. As this Court explained in *Fulton*, "rather than rely on broadly formulated interest, courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." 593 U.S. at 541. The question then becomes not whether transferring lithium deposits is compelling in general but whether it is a compelling state interest to transfer Red Rock even with the existential burden on the religious exercise of the Montdel Observance. R. at.30. For Respondents to establish that they have a compelling interest sufficient to override Montdel's Free Exercise claim, the Government would have to show that it would Commit one of the "greatest abuses" of its responsibilities if it did not transfer Red Rock. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 591 U.S. 657, 682 (2020)(Alito, J., concurring).

To start Respondents first interest regarding the climate crisis is an issue that impacts the whole world. Their second interest complying with the Federal Defense Act is not mandatory. The Federal Defense act is not being enforced to the State of Delmont. The State of Delmont passed the ECIA to align with the same goals. Through the ECIA Respondents want to mine Red Rock. R. at 6. Respondents assert that it is not practical for them to wait for alternative mining techniques that could help mitigate the damage to Red Rock. R. at 49. Respondents anticipate these new technologies will not become available for at least another twenty years and it is uncertain how much they will cost or if they will be worth the wait. R. at 49. However, the state of Delmont has already waited twenty years since the discovery of lithium below Red Rock. R.

at 7. If the stated interest, they assert has a time restriction on it they have not been acting accordingly. The climate crisis will not be solved by simply mining Red Rock. Not mining Red Rock will not cause the State of Delmont one of the greatest abuses of its responsibility because they have other ways to address their stated interest. The compelling government interests stated are not nearly tailored. Instead, mining Red Rock will cause one of the greatest abuses of Montdel United's religious exercise. The state of Delmont can enter into other land agreements that will help lower fossil fuel emissions or slow down climate control but Montdel United will not be able to find somewhere else to practice their religion.

Lastly, the Respondents fear that recognizing 'religious servitudes' would confer tribal members 'de facto' benefits of ownership of public property is unsupported. Montdel United is not asking for ownership rights to Red Rock. R. at 53. Allowing Montdel United to continue to access Red Rock by canceling the transfer, would not grant them ownership rights. The State of Delmont would still have ownership. The problem is not about who owns Red Rock, but instead not having access to. The government should have to consider religious beliefs in land, transfer agreements, just like they do for health and safety laws. *Smith*, 494 U.S. at 885 n.2.

Thus, without a compelling government interest that is narrowly tailored to outweigh extirpating the religious exercise of an ancient faith Montdel United is likely to succeed on the merits of its Free Exercise claim.

II. The State of Delmont would violate the Free Speech rights of Montdel United by closing the portion of Painted Bluffs State Park containing Red Rock.

This Court should reverse the Fifteenth Circuit's denial of a preliminary injunction to Montdel United because they are likely to succeed on the merits of their Free Speech claim. Closing Painted Bluffs State Park is unconstitutional under the First Amendment for three

reasons. First, Red Rock is a traditional public forum the closure and strict scrutiny applies because the closure of Painted Bluffs State Park is content based. Second, Delmont cannot satisfy strict scrutiny because their actions are not narrowly tailored to serve their interests. Third, closing Red Rock is still unconstitutional as a time, place, and manner restriction.

The Free Speech Clause of the First Amendment provides "Congress shall make no law… abridging the freedom of speech." U.S. Const. Amend. I. The First Amendment is incorporated against the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). As a state agency, the DNRA is a state actor and is subject to scrutiny under the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). The Free Exercise clause and the Free Speech clause work in tandem. *Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507, 523 (2022). Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. *Id.* The Montdel's religious ritual is protected by the First Amendment because it is expressive. For the following reasons, the sale and closure of the section of Painted Bluffs State Park containing Red Rock is unconstitutional under the First Amendment.

A. Red Rock is a Traditional Public Forum because it has been immemorially held in trust for the purpose of expression.

Under the First Amendment, the government need not permit all forms of speech on property it owns. *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). The extent the Government may limit access to a forum depends on the nature of the forum. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985). There are four types of public fora: traditional public forums, designated public forums, limited public forums, and non-forums. *Int'l Soc. For Krishna Consciousness*, 505 U.S. at 678-79; *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 48 (1983). Government entities are strictly limited in their ability

to regulate private speech in such "traditional public fora." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 800 (1985). Government regulation of speech in a traditional public forum is subject to strict scrutiny if the regulation is content-based, and intermediate scrutiny if it is content-neutral. *Price v. Garland*, 45 F.4th 1059, 1067 (D.C. Cir. 2022).

Parks and National Parks are typically considered traditional public forums. *See e.g. Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009); *United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000). "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.'" *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010) (quoting *Perry Educ. Ass'n,* 460 U.S. at 45). Courts also look at whether the park has "a traditional right of access ... comparable to that recognized for public streets and parks." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984). By contrast, a remote wilderness area within a park not dedicated to free expression and public assembly is a non-forum. *Boardley*, 615 F.3d at 515.

Red Rock is a site within a state park. Public places historically associated with the Free Exercise of expressive activities, such as …parks, are considered, without more, to be "public forums." *United States v. Grace*, 461 U.S. 171, 177 (1983). Here, Painted Bluffs State Park has been owned by Delmont since 1930. R. at 4. Red Rock is contained within Painted Bluffs State Park. Because Red Rock is a site within a state-owned park, it is a traditional public forum.

Red Rock has been historically used for the purpose of expression. To be a traditional public forum, a national park, like a typical municipal park, must be held open by the government for the purpose of public discourse. *Boardley*, 615 F.3d at 515. Here, Red Rock is

used for equinox festivals, which are expressive both for the Montdel's religious rituals and for the festivals that occur there. *See Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 570 (1995). The Montdel have used Red Rock for their equinox rituals for more than 1500 years. R. at 50. At the opening ceremony of the park, then Delmont governor Rupert Ridgeway stated that the Montdel's expressive ritual "are part of a legacy that the state proudly cherishes." R. at 4. Because Red Rock has a long history of use for expressive purposes, it should be considered a traditional public forum.

Even if Red Rock's physical characteristics do not exactly match a city park, it is still a traditional public forum because of its traditional expressive use by the Montdel. The physical characteristics of the property alone cannot dictate forum analysis. *United States v. Kokinda*, 497 U.S. 720, 727 (1990). In *Naturist Soc., Inc. v. Fillyaw*, the court held that a secluded and protected beach park was a traditional public forum because it was sufficiently like a city park. 958 F.2d 1515, 1522 (11th Cir. 1992). There, the court reasoned that the beach park was more than just a beach, it also contained parking lots, a nature center, and walkways. *Id.* at 1522. Here, while Red Rock is a barren area atop one of Painted Bluffs highest peaks, it also contains other features besides just Red Rock. Like the beach in *Fillyaw*, Painted Bluffs is open to the public for camping, hiking, and fishing along the Delmont River. R. at 4. Thus, Red Rock should be considered a traditional public forum.

Red Rock is continually held open for the purpose of expression. In *Heffron*, the court held that state fairgrounds were not a traditional public forum because, unlike a street that is continually open, often uncongested, and a necessary conduit in the daily affairs of citizens, the fairgrounds were merely a temporary event attracting great numbers of visitors who come to the event for a short period. *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640,

651(1981). Because of this, the court found that the state's interest in the flow of the crowd and safety was more pressing. *Id.* Red Rock is unlike the fairgrounds in *Heffron* because it is continually available for public use, even if the Montdel people do not constantly use it. *See Bays v. City of Fairborn*, 668 F.3d 814, 821 (6th Cir. 2012); *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005). Red Rock has always remained open for expressive use, and it should be considered a traditional public forum.

B. Closure of Red Rock should receive strict scrutiny because it is content based.

Traditional public forums occupy a special position in terms of First Amendment protection. *Grace*, 461 U.S. at 180 (1983). *See also ACLU of Nev. V. City of Las Vegas*, 333 F.3d 1092, 1105 (9th Cir. 2003). Congress may not by its own *ipse dixit* destroy the "public forum" status of streets and parks which have historically been public forums. *U. S. Postal Serv. V. Council of Greenburgh Civic Associations*, 453 U.S. 114, 133 (1981). Destruction of public forum status is at least presumptively impermissible. *Grace*, 461 U.S. at 180. While the government has the power to change the status of a forum, "when property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property and bear the attendant costs." *International Society of Krishna Consciousness,* 505 U.S. at 700 (Kennedy, J., concurring).

The sale and closure of Red Rock is content based. Government regulation of speech is content based if a law applies to speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). A facially content neutral law is considered content-based regulations of speech if the law is aimed at the suppression of expression. *Id.* at 164. Further, laws favoring some speakers over others demand strict scrutiny

when the legislature's speaker preference reflects a content preference. *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 658 (1994).

Destroying a religious site that has been used for over 1500 years is not content neutral. In *American Legion v. American Humanist Society*, the Court found that destroying a large cross that had stood for nearly a century under an Establishment Clause challenge "would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 66 (2019). The same can be said here. The state is aware of the Montdel's religious use of Red Rock and is choosing to close that section of the park over alternative locations. R. at 47. This cannot be considered a neutral action based on the historical use of Red Rock by the Montdel and the State's knowledge of it. Thus, the closure of Painted Bluffs State Park is content based.

The closure and sale of Red Rock is content based because it targets the part of Painted Bluffs where the most expressive activity occurs. *See Thomason v. Jernigan*, 770 F.Supp. 1195, 1201 (E.D.Mich.1991) (holding a law banning the public from a cul-de-sac providing access to a Planned Parenthood clinic that had been the site of anti-abortion protests for several years was content based because it was aimed at anti-abortion protests). While Delmont's sale to the DMC would certainly physically transform Red Rock, Delmont cannot strip Red Rock of its public forum status even by sale, physical transformation, or changing its principal use based on an improper purpose. *See Evans v. Newton,* 382 U.S. 296, 301 (1966) (holding transfer of a City Park made to avoid prohibitions against racial segregation by government was impermissible). The governor of Delmont described the equinox festivals as "nuisances." R. at 47. This shows that the closure and sale of Red Rock is content based because the legislature is expressing animus towards the Montdel's religious ritual. This means the sale and transfer of Red Rock is

content based and should receive strict scrutiny because it reflects Delmont's desire to stop the equinox festivals.

Closure of a traditional public forum that creates a "First Amendment Free Zone" should receive strict scrutiny. *Bd. Of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (holding a complete ban of expressive activity cannot be justified even in a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech); *See also First Unitarian Church of Salt Lake*, 308 F.3d at 1132 (holding the sale of portion of public street where City retained an easement was unconstitutional restriction on speech because City turned traditional public forum into "First Amendment Free Zone"). The government may not close a traditional public forum to expressive activity altogether. *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 496 (9th Cir. 2015). Here, because Delmont retains no right in Red Rock after the transfer, Delmont is creating a "First Amendment Free Zone" where no expressive activity can occur at Red Rock anymore. The transfer of Red should receive strict scrutiny because the government is closing a traditional public forum to expressive activity altogether.

The sale and transfer of Red Rock cannot survive strict scrutiny. To survive strict scrutiny, content-based restrictions on speech must be narrowly tailored to serve a compelling state interest. *Reed*, 576 U.S. at 171. A compelling state interest must be a state interest of the highest order. *Nat'l Pub. Radio, Inc. v. Klavans*, 560 F. Supp. 3d 916, 924 (D. Md. 2021). To be narrowly tailored, the government must prove that no less restrictive alternative would serve its purpose." *Central Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016). The closure and sale of Red Rock is not narrowly tailored to a compelling government interest.

Here, Delmont's asserted interests are adopting alternatives to fossil fuels amid an expanding climate crisis, boosting the state economy with lithium extraction, and compliance with a federal mandate demanding the use of sustainable energy in defense contracts. R. at 22-23. First, mining Red Rock to adopt alternatives for fossil fuels is fatally underinclusive because lithium batteries are not the only alternative to fossil fuels. Next, creating an economic boom is not directly served by closing Red Rock because they will be closing off a large tourist attraction, the equinox festivals, which will reduce economic prosperity. Finally, complying with a federal mandate could be achieved by closing a different part of Painted Bluffs or by the other land transfer agreements that Delmont entered and subsequently withdrew. The mandate also does not require the state to mine lithium, it just requires the state to develop lithium batteries. Even if Red Rock provides the most lithium rich deposit, Delmont does not need to mine lithium to comply with the federal mandate. *See McCullen v. Coakley*, 573 U.S. 464, 495 (2014). The sale and transfer of Red Rock cannot survive strict scrutiny and is unconstitutional under the First Amendment because it is not narrowly tailored to serve the asserted state interests.

C. Closure of Red Rock cannot survive intermediate scrutiny because it does not leave open ample alternative channels of communication and burdens speech more than necessary to further their interests.

Even if the closure and sale of Red Rock is content neutral, it is still invalid as a time, place, and manner restriction. The government may enact valid time, place, and manner restrictions in a traditional public forum. *Grace*, 461 U.S. at 177. These restrictions must be content-neutral, narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Id.* Here, the closure and sale of the part of Painted Bluffs State Park containing Red Rock is not valid under *Grace* because it does not leave

open ample alternative channels of communication, and it is not narrowly tailored to a significant government interest.

The sale and closure of Red Rock does not leave open ample alternative channels of communication. In *City of Ladue v. Gilleo*, the Court held that a regulation prohibiting homeowners from placing signs on their front lawns did not leave open ample alternative channels of communication because no adequate substitutes exist for the important medium of speech that the regulation closed off. 512 U.S. 43, 56 (1994). Similarly, no adequate alternative exists for the Montdel people's speech because the closure of Red Rock will prohibit them from accessing their sacred land and destroy it. No adequate alternative exists for the Montdel Observance because it is the only place they can communicate with their creator. As a result, the sale and closure of Red Rock is not a valid time, place, and manner restriction and is unconstitutional under the First Amendment.

The closure and sale of Red Rock is not narrowly tailored to a significant government interest. Under intermediate scrutiny the government must show that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. *McCullen*, 573 U.S. at 495. Delmont offers three interests the approved the sale and transfer of Red Rock is meant to serve: adopting alternatives to fossil fuels amid an expanding climate crisis demands the increased production and use of electric alternatives to gas powered automobiles; lithium extraction will be an economic boon for the state; the program is necessary to comply with a federal mandate, demanding the use of sustainable energy in defense contracts. As discussed previously, the sale and transfer of Red Rock is not narrowly tailored to serve any of these interests, even if they are significant.

CONCLUSION

In sum, this Court should reverse the Fifteenth Circuits' denial of a preliminary injunction to Montdel United because they are likely to succeed on the merits of their Free Speech and Free Exercise claims.

Respectfully Submitted,

Team 029

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Montdel United

APPENDIX

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.

Statutory Provisions

28 U.S.C. § 1254(1).

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

Certificate of Compliance

In compliance with Rule IV(C)(3) of the Official Rules for the 2024-2025 Siegenthaler-Sutherland Moot Court Competition, Counsel for Petitioner certifies that:

1. All work product contained in all copies of our brief is the work product of our team,

2. Our team has fully complied with our school's governing honor code, and

3. Our team has fully complied with all Rules of the Siegenthaler-Sutherland Moot Court Competition.