No. 24-1982

In The

Supreme Court of the United States

October Term 2024

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 RESPONDENT

Team 030

Counsel for Respondent

January 31, 2025

QUESTIONS PRESENTED

1. Did the State of Delmont violate the Montdel United's First Amendment right to free exercise of religion when it transferred the land where the group practiced its religion for a mining operation that will render the land unvisitable?
2. Did the State of Delmont violate the Montdel United's First Amendment right to free speech when it transferred the land where the group performed supplicatory prayer as part of a religious ritual?

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CONSTITUTIONAL AND STATUTORY PROVISIONS APPENDIX

First Amendment of the United States Constitution

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.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifteenth Circuit has been reported at *Montdel United v. State of Delmont and Delmont Nat. Res. Agency*, 2024 WL 98765 (15th Cir. 2024) and reprinted in the Record on Appeal ("Record") at 33-45. The district court's order has been reprinted in the Record at 1-32.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifteenth Circuit issued its opinion on November 11, 2024, and a petition for a Writ of Certiorari was timely filed. This Court granted certiorari on January 5, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The State of Delmont is home to the vast and resourceful Painted Bluffs State Park. R. at 4. The State of Delmont has had access to this land since its creation in 1855 and officially acquired the land through eminent domain in 1930. R. at 3-4. The park includes beautiful rock formations and mineral-rich geology, including the Red Rock formation, which contains the largest lithium deposit ever discovered in North America. R. at 7. Therefore, the State of Delmont has decided to transfer one fourth of the park, including Red Rock, to the Delmont Mining Company. R. at 7. The State of Delmont has pledged to become carbon-neutral within fifty years, and they plan to do so by mining lithium from the transferred area. R. at 1. The transfer was authorized by the Delmont Natural Resources Agency (the "DNRA") under the Energy and Conservation Independence Act (the "ECIA"), which allows Delmont to transfer land to private mining companies for the purpose of extracting valuable minerals. R. at 2, 6. Delmont's overarching purpose for this transfer is to

promote economic development and environmental sustainability for the benefit of Delmont citizens. R. at 2.

The process of transferring land under the ECIA begins with an independent appraisal of the land subject to transfer, along with environmental and economic impact studies. R. at 6. The relevant area of Painted Bluffs State Park to be transferred was appraised, to be exchanged for a tract of land of equal value as a replacement for the loss of value in the Park. R. at 8. Further, environmental and economic impact studies were conducted, which found that the transfer would have a positive economic impact on the area of Delmont in which the park is located. R. at 7. These studies also found that the transfer and subsequent mining operations would have no significant impact on local fauna and flora. R. at 8. It also found that the remaining areas of Painted Bluffs State Park could eventually be reclaimed after an estimated twenty years—although the mining operation would destroy Red Rock and transform it into an unvisitable quarry. *Id*. While the DNRA did explore alternative mining operations that could preserve Red Rock, they found that there would be no feasible alternatives for at least twenty years and, regardless. R. at 8-9. In light of the strong policy considerations of the ECIA for economic development and environmental protection, the DNRA made the decision to approve the transfer of the relevant portion of Painted Bluffs State Park to the Delmont Mining Company. R. at 6, 9. However, one group vehemently opposes the transfer of this land: Montdel United. R. at 1.

The Montdel are an indigenous Native American people who have historical roots in the State of Delmont dating back to 400 A.D. R. at 2. Painted Bluffs State Park, more specifically Red Rock, holds cultural and religious significance to the Montdel. R. at 3. For centuries, the Montdel people have routinely performed a sacred ritual four times a year at the base of Red Rock, where they sacrifice crops and make supplicatory prayer requests to their Creator. *Id*. The Montdel people

hold the belief that these rituals are necessary to their religion and, if they don't conduct these rituals, they will "incur the Creator's wrath." *Id*. Even so, these rituals have been neglected at times in their history, namely during the World Wars and the Great Depression. R. at 4. Although the population of the Montdel has severely declined over the years, Montdel descendants James and Martha Highcliffe began a movement in 1950 to reinstitute and formalize the Red Rock rituals again. R. at 5. The official name of these rituals was known as the "Montdel Observance," and those Montdel who practiced it were known as the "Old Observers." *Id.* The Montdel Observance gained such popularity that citizens of the State of Delmont began holding a festival near Red Rock to witness the Montdel people perform their ritual. R. at 6.

Once it became clear that the State of Delmont intended to transfer the land for mining, Montdel United—a public interest group supporting indigenous land rights claims—raised concerns over the State's decision, primarily due to the fact that the DNRA had withdrawn from two other land transfer agreements and had chosen Red Rock instead. R. at 9, 52. The DNRA stated that they withdrew from these other agreements due to environmental concerns, such as potential harm to endangered species and contamination of local drinking water, while the Red Rock transfer involved minimal environmental impacts. R. at 10. Discussions with the State broke down after Montdel United accused the DNRA of "effectively outlawing" the Observances and creating a public controversy in which other native groups began making similar claims for land rights. R. at 40, 53.

II. PROCEDURAL HISTORY

Montdel United filed suit in the United States District Court for the District of Delmont Western Division seeking a temporary restraining order and injunctive relief. R. at 10. At the outset, the temporary restraining order was denied, and the district court held a hearing regarding the

injunction. *Id*. Ultimately, the district court found that Montdel United was likely to succeed on the merits of both of their First Amendment claims. R. at 11, 32. It reasoned that, since Painted Bluffs State Park was a traditional public forum, the State of Delmont may only justify closing the forum if its actions are content-neutral and narrowly tailored to serve an important government interest. R. at 19. The district court primarily rested their analysis in whether the transfer was narrowly tailored and found that it was not. R. at 25. It reasoned that one mining project would not reverse climate change on its own and the transfer did not provide for other "ample alternative channels for communication." R. at 23-24. Furthermore, the district court found that the transfer of Red Rock violated the rights of the Montdel under the Free Exercise clause of the First Amendment. R. at 31. The court found that the State of Delmont did not have an interest compelling enough to justify the destruction of the Montdel Observance. *Id*. The court reasoned that it was unlikely for the mining of one site to cure the climate crisis and that the state's economic interests would be equally advanced by choosing one of the land agreements that they previously withdrew from. R. at 30-31. Ultimately, the district court granted the Montdel United's request for a preliminary injunction. R. at 32.

The State of Delmont appealed this decision to the United States Court of Appeals for the Fifteenth Circuit. R. at 33. The Court of Appeals reversed the lower court, finding that the transfer of Red Rock did not violate Montdel United's Free Speech or Free Exercise rights. R. at 45. By looking at the intent of the ECIA, the court reasoned that Red Rock was a non-public forum and the actions of Delmont need only be reasonable and content-neutral. R. at 40. The court found that the transfer was content-neutral since it applied to anyone wishing to visit Red Rock, regardless of their speech. *Id*. Further, the court found that it was reasonable for the State of Delmont to transfer Red Rock because the impact studies showed that the transfer would result in significant

economic benefits to the citizens of Delmont—none of which would have been denied to the Montdel. R. at 41. Regarding the Free Exercise claim, the court found that *Lyng v. Northwest Indian Cemetery Protective Ass'n* required Montdel United to show the State's action coerced the Montdel people into violating their religious beliefs. R. at 43. The court reasoned that the government actions resulted in incidental burdens on the Montdel people rather than a direct coercion, which does not trigger strict scrutiny under *Lyng*. R. at 44. The Court of Appeals for the Fifteenth Circuit ultimately decided in favor of the State of Delmont. Montdel United petitioned this Court for a writ of certiorari and this Court granted it. R. at 54.

SUMMARY OF THE ARGUMENT

The transfer of Red Rock did not violate the Montdel Tribe's First Amendment right to free exercise of religion. The First Amendment right to Free Exercise of religion is the right of the individual to practice their religion without government compulsion. But as this Court held in *Lyng*, nor does the First Amendment allow individuals to dictate to the government how to conduct its internal affairs which only "incidentally burden" religious practice. To trigger strict scrutiny under Free Exercise claims, a plaintiff must show that the government action coerced them into violating their religious beliefs. In *Employment Division v. Smith*, this Court held that Free Exercise rights are not violated when a law or action is generally applicable and neutral. These standards together demonstrate that an incidental burden of Free Exercise, even a heavy one, does not violate the First Amendment.

The State of Delmont did not coerce the Montdel United into violating their religious beliefs. Although they can no longer practice their religion at Red Rock, the State of Delmont is not denying the Montdel Tribe an equal share of benefits and privileges, nor are they discriminating against the group because of their religious beliefs. Additionally, the transfer of Red Rock is both

generally applicable and neutral because the transfer affects everyone wanting to visit Red Rock equally, whether they are practicing their religion or observing it's natural beauty. Therefore, the transfer of Red Rock did not violate the Montdel Tribe's First Amendment right to free exercise of religion.

The transfer of Red Rock did not violate the Montdel Tribe's First Amendment right to free speech. The Free Speech clause of the First Amendment does not permit the government to regulate the content of speech, though it may limit the available fora in which speech may be spoken. The appropriate analysis is primarily based on the type of forum the government is trying to regulate. A nonpublic forum is a type of property that is not open for public communication, either by design or tradition, requiring the court to consider the intent behind a forum's creation. When a certain forum has been determined to be nonpublic, the government may regulate speech within that forum so long as the regulation is content-neutral and reasonable.

Red Rock is a nonpublic forum because the State of Delmont did not open Red Rock with the intent that it be a place dedicated to the free expression of ideas. Rather, it was opened as a place where people can come to enjoy its natural beauty. The State's transfer of Red Rock closes a non-public forum in a manner that is both reasonable and content-neutral, even while it will sadly foreclose religious and secular speech alike. Therefore, the transfer of Red Rock did not violate the Montdel Tribe's First Amendment right to free speech.

ARGUMENT

I. THE STATE OF DELMONT DID NOT VIOLATE THE MONTDEL TRIBE'S FIRST AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION WHEN THEY TRANSFERRED RED ROCK FOR MINING.

The Free Exercise clause of the First Amendment states that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. Although a violation of the First Amendment would normally trigger strict scrutiny, this Court has qualified this by two important exceptions. This Court has held that the First Amendment does not empower individuals to exact concessions or require alterations of the internal affairs of government which incidentally affect their Free Exercise rights or spiritual development. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1987). Nor is the First Amendment violated where a generally applicable and neutral law incidentally burdens religious activity. *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990). The First Amendment offers many protections of religious freedom, but it does not equip individuals with a license in the name of religion to disregard or countermand lawful government actions and requirements.

In *Lyng*, this Court required that a plaintiff demonstrate a coercive effect of a law before Free Exercise rights were implicated. *Lyng*, 485 U.S. at 451 (noting that "prohibit" in the Free Exercise clause refers to "what the government cannot do," meaning coercing religious action or abstinence). In *Smith*, this Court built upon *Lyng*'s insight in holding "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith* at 878. The petitioner here cannot meet the threshold inquiry of establishing a coercive object or effect in the proposed transfer that is not incidental to the purpose of the Act or transfer itself, and *Lyng* requires

dismissal. Nor can the petitioner demonstrate that this law is not neutral or generally applicable under *Smith*, which also defeats petitioner's Free Exercise claim.

A. Under *Lyng*, the State of Delmont Did Not Coerce the Montdel Tribe into Violating Their Religious Beliefs by Approving this Land Transfer.

This Court's holding in *Lyng* controls this case, requiring that the plaintiff prove a coercive object or effect of a law in order for strict scrutiny to apply. *Lyng*, 485 U.S. at 450–51. In *Lyng*, this Court held that California was not prohibited from building a road through and harvesting timber in a tract of state-owned land which it sought to develop. *Lyng*, 485 U.S. at 441–42. The Court reasoned that the law which enabled the development, over the protests of the plaintiff Native American association whose traditional practices were jeopardized, did not coerce any religious action or abstention, and therefore the Free Exercise clause did not apply. *Id.* at 449. The law did not coerce the respondents who lived and worshipped in the state park area and its burdens, though severe, were incidental to the purpose of the law. *Id.* at 450–51.

1. The law and transfer do not have the object of coercing violations of Free Exercise rights.

The object of the law must first be inquired into. *Id.* at 462, 465 (the purpose need not be a compelling interest). The Conservation Independence Act and the land transfer to which petitioners object has no object of discriminating against religion generally or the Montdel specifically. As in *Lyng*, the transfer of land itself does not violate any Free Exercise rights. Nor does it target by its language only Red Rock as the sole parcel of land to be transacted, but rather mineral deposits generally. Red Rock, owned by Delmont, happens to hold the very minerals sought and is "the largest [deposit] to be discovered in North America." R. at 47. It is unavailing that the practices of the Montdel are uniquely tied to the geography and land itself—the same was

true in *Lyng*, *id.* at 451 ("intimately and inextricably bound up with the unique features of Chimney Rock") and *Apache Stronghold*, 95 F.4th at 615 (Oak flat has "unique features," is "the only area," and "crucial to . . . religious life").

While even a "tendency to coerce" in the object of the law would trigger strict scrutiny, there must be real coercion in the form of forcing a person to take actions violating their beliefs. *Lyng*, 485 U.S. at 450. But here, like in *Lyng*, the State did not coerce the Montdel into violating their religion by action or inaction, nor did it deny the Montdel the benefits of the proposed legislation. *See Apache Stronghold v. United States*, 95 F.4th 608, 626 (9th Cir. 2024) (coercion under *Lyng* means discrimination, penalties, and denial of equal share of benefits and privileges). Instead, the Montdel argue that the burden placed on them is so heavy that it amounts to coercion—a rationale this Court rejected in fashioning the coercion test. *Lyng*, 485 U.S. at 447.

Petitioner cannot prevail even under the district court's understanding of *Apache Stronghold*'s substantial burden test as a supplement for coercion. Here, the district court asserted without a rationale "it is clear that government actions like this prevent religious exercise," ostensibly referring to the heaviness of burden placed on the Montdel by the land transfer rather than the transfer itself. But this misses the point entirely: the character of the government action must be coercive, not merely burdensome. Nowhere did the State "'put[] [the Montdel] to the choice' between violating the tenets against individual supplicatory prayer or ceasing religious expression altogether" by its transfer. R. at 27 (quoting *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 532 (2021)). Even if the court had proffered a rationale for this construal, the Ninth Circuit in *Apache Stronghold* disclaims this result: "under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise when it has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' does not

'discriminate' against religious adherents, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Apache Stronghold*, 95 F.4th at 614 (quoting *Lyng*, 485 U.S. at 449-50, 453).

The Montdel have not been coerced by the ECIA under *Lyng* even though this transfer here will likely lead to the total destruction of Red Rock without the ability to keep the area safe for access or preserve sites of historic importance. *See Apache Stronghold*, 95 F.4th at 615. Even so, Delmont has made what accommodations it can, allowing the Montdel to relocate to a site down the river and not denying their access to the park more than necessary for safety reasons. R. at 7 (allowing the observances to take place in the park further along the river for safety concerns). Moreover, there would be nothing in this transfer that would prohibit the Montdel from accessing the land in the future—only Red Rock itself is unlikely to be reclaimed. R. at 8, *see Apache Stronghold*, 95 F.4th at 618 (no differential access to the location that was safely feasible).

2. Any "prohibitive" or "coercive" effect is incidental and therefore does not invoke the Free Exercise clause under *Lyng*.

Where a governmental action burdens religious free exercise only incidentally, not according to the object of the law, but as a side-effect or byproduct, this does not amount to coercion. To label a burden as "incidental" in effect does not mean trivial or de minimis in its impact, but that the effect is not the object of the law itself. *Lyng*, 485 U.S. at 450 ("incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" are not a prohibition under the Free Exercise clause). If the burden is incidental to the object of the law, its relative heaviness alone does not create a Free Exercise right. *Id.* at 448–49.

There is no dispute that the Montdel rituals will be severely affected by the proposed land transfer. But as this Court stated in *Lyng*, even an extreme burden does not amount to coercion.

Lyng, 485 U.S. at 449 (even though "significant interference" with religious exercise would result, the plaintiffs were not "coerced by the Government's action into violating their religious beliefs"); *see* R. at 44. The transfer purports to convey title to the land for purposes of mining, which Delmont via the DNRA alone has the right to do—and this cannot be construed as coercion per se without more. R. at 6, 47; *see Apache Stronghold*, 95 F.4th at 614 (applying *Lyng*'s coercion standard to a land transfer for mining). While community input is considered, the petitioner does not have a legal right to a "religious servitude" on the land. *Lyng*, 485 U.S. at 452. Even a severe or total disruption of religious observances that is incidental to the intended effect or purpose of the law does not trigger strict scrutiny. *Id.* at 448. Because of the incidental character of the burden on the Montdel from the ECIA or the transfer of Red Rock, *Lyng* prevents the application of strict scrutiny.

3. Sound policy rationales and common sense support the *Lyng* coercion standard.

The policy reasons for this holding on Free Exercise rights are as valid today as they were in *Lyng*. The First Amendment protection is reciprocal: the government may not compel religious observance, nor can plaintiffs compel the government to act in a way that is agreeable to them. *Id.* at 448, *see also Bowen v. Roy*, 476 U. S. 693, 699–700 (1986). Holding otherwise would guarantee religious favoritism, religious servitudes on government land, and crippling burdens on government action. Moreover, courts would be entangled in adjudicating which religious claims were significant (and which were not), elevating some religious rights above others, which would potentially trigger the Establishment Clause prohibitions. *Lyng*, 485 U.S. at 457. As the Fifteenth Circuit noted, the district court presented no rationale for distinguishing and dismissing *Lyng*, which not only applies but controls this case, requiring reversal. *See* R. at 43.

Common sense dictates that a coercion standard should apply before any general applicability test: if a law is not coercive, it will not matter whether it is neutral and generally applicable because the First Amendment has not yet been cognizably violated. *See Fulton*, 593 U.S. at 532 (declining to analyze petitioner's claim under *Smith* because the law was impermissibly coercive). The district court not only erred in dismissing *Lyng* and *Smith*, it inverted their relationship: *Lyng*'s coercion standard applies before assessing general applicability and neutrality under *Smith*. R. at 29; *see also Smith*, 494 U.S. at 879 (incorporating the standard from *United States v. Lee*, 455 U.S. 252, 258–61 (1982)). As the Fifteenth Circuit correctly noted, without coercion the First Amendment is not implicated under *Lyng*. *See* R. at 44-45 (the Fifteenth Circuit held for the respondent under *Lyng* before reaching *Smith*); *see also Apache Stronghold*, 95 F.4th at 626 (when "the essential ingredient of 'prohibiting' the free exercise of religion is absent, and the Free Exercise Clause is not violated."). *Lyng* coercion must be defeated before *Smith*, and only defeating both tests will strict scrutiny apply.

B. The Transfer of Red Rock and the Law Authorizing it are Both Generally Applicable and Neutral, Making Strict Scrutiny Inapplicable.

In approving the land transfer, the DNRA acted under a "valid and neutral law of general applicability," and *Smith* requires dismissal of petitioner's Free Exercise claim. 494 U.S. at 878–79 (quoting *Lee*, 455 U.S. at 263, n.3 (Stevens, J., concurring)). Just as an individual may not require the government to alter its conduct, so under a "general law not aimed at the promotion or restriction of religious beliefs" the individual has no recourse under Free Exercise to compel a different result. *Smith*, 494 U.S. at 879.

Smith's requirement of general applicability and neutrality are two distinct prongs which must be disproven before strict scrutiny will apply. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (the prongs are interrelated and often interdependent, but

distinct in analysis). The Red Rock transfer is generally applicable and neutral—although this has a different meaning than "content-neutral" with respect to the Free Speech claim. *But see* R. at 21, 45 (district court found the transfer to be content-neutral, Fifteenth Circuit did not reach the issue).

1. Both the ECIA and the transfer of Red Rock by the DNRA were neutral in every respect, despite the adverse effect on the Montdel.

The DNRA's action was neutral because it neither discriminated against the Montdel because of its religious beliefs nor did it treat them disparately to other groups, religious or secular. This Court has held that discrimination is the key factor in disproving neutrality, which can be as simple as facial discrimination or discriminatory intent. *Lukumi*, 508 U.S. at 533, 534. However, the *Lukumi* Court noted that the defendant did not reach *Smith*'s standard for neutrality because it had a discriminatory object. While neither court below squarely addressed the neutrality prong as in *Lukumi*, the record shows no facial discrimination and both courts below rejected the assertions of animus as motivating the DNRA's action. *See* R. at 21, 28, 41.

Proceeding as the Court did in *Lukumi*, the effect of the law is put to the test. *Lukumi*, 508 U.S. at 535 ("the effect of a law in its real operation is strong evidence of its object" although "adverse impact will not always lead to a finding of impermissible targeting."). The *Lukumi* Court posited that there could be a "real" operation of the law in effect that differs from its object, where no facial or intentional discrimination is present. *Id.* Petitioner insists that the Montdel have been discriminated against by the effect of the law, in that the State withdrew from two transactions that were purportedly secular. R. at 28–29 (cancelling transactions to save permanent human settlement and animal habitats). Petitioner also points to certain insensitive remarks made by political officials as evidence of discrimination, which neither court below found was any basis for a claim of animus against the Montdel in this transfer. R. at 21, 41–42.

But here, the "real" operation of the law is identical to its purported object: to lead to transfers of state land to mining companies. R. at 2, 47 (the purpose of the ECIA is to promote mining of valuable minerals). It is happenstance that only two transactions have been approved and not rescinded by the State: presumably many more have been and will be sought for approval. R. at 47. Moreover, the sparse available data cuts directly against the petitioner's argument. Although the State has rescinded two transfers, *see* R. at 28–29, the allegation that the failure to rescind the Red Rock transfer constitutes religious discrimination lacks legal and factual support. Crucially, of the two transfers thus far approved (and not rescinded), one affected secular interests, while the present transfer incidentally affected some religious interests. R. at 29.

The transfer of Red Rock, whether taken alone or as part of the data set of only four total contemplated land transfers under the ECIA, do not amount to the overwhelming evidence in *Lukumi* that there was a "real" operation any different than the intended object. *See Lukumi* 508 U.S. at 538–39 (noting factors such as gratuitous restrictions and singling out groups for discriminatory treatment as the "real effect" of a law's operation). If the DNRA had immediately transferred Red Rock alone, and never considered another transfer of land for mining, this might raise the specter of pretense and discrimination. However, after five years and two rescinded transfers, it is more than reasonable that the State did not rescind this agreement, particularly when it is so rich in minerals. R. at 47 (Red Rock's mineral deposits are the largest in the nation).

2. The ECIA and the Red Rock transfer were generally applicable because they did not impermissibly target religious exercise in approving transfers.

Like neutrality, general applicability under *Smith* is presumed unless disproven by clear and intentional lack of uniformity in implementation, such as a scheme of exemptions. These exemptions "'invite' the government to consider the particular reasons for a person's conduct."

Fulton, 593 U.S. at 533 (quoting *Smith*, 494 U.S., at 884). "A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534. Under *Fulton*, when the government inquires into the motivation for identical individual conduct undermining the government's purpose in the law, and treats religious conduct unfavorably compared to nearly identical secular conduct, the law fails general applicability. *Id.*

The ECIA does not violate the *Fulton* standard for general applicability because it does not contain any express or de facto exemptions at all. Moreover, the relevant meaning of exemption applies only to nonconforming *conduct* undermining the purpose of the law, and no such exemption applies to the Red Rock transfer. Rather, the State at its own discretion has transferred Red Rock and has generally applied the prohibition of access to all citizens alike. The State's right to rescind a transfer of government land under a validly enacted law is not an exemption under *Fulton*.

Nor did the State, simply by withdrawing from land transfers in the past, create a de facto system of exemptions. Such an exemption would operate as a private right to veto a transfer, yet by what mechanism it can only be guessed—could the Delmont Wildcat and the Blue-Winged Swift have plausibly held and exercised this personal right. Pointing to the unwillingness of the State to rescind the Red Rock transfer rather illustrates the point that there were no exemptions.

3. The finding of general applicability is not disturbed solely because a land transfer applies to "a single tract."

Having established the general applicability of the ECIA, it would be absurd if an individual transfer violated that finding. The district court below stated on the basis of *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 92, 98 (1st Cir. 2013) that transfers of a single parcel of land are not generally applicable. R. at 28 ("the land transfer only refers to . . . Red Rock,

so it cannot be maintained that it is generally applicable."). But in *Bishop*, the court found that *Smith* was inapplicable to the operation of the city's zoning law. *Bishop*, 724 F.3d at 98. The court looked to the burden caused by the effect of the zoning of the parcel on which the church stood, not the religious character or use. *Id.* at 98–99. The question is not whether a transaction of a single parcel is general in application, but whether the law authorizing the transfer could be applied anywhere without discrimination regardless of the burden imposed. The *Bishop* court did not find that even a very selective zoning of a church constituted religious discrimination, despite a high potential burden. *Id.* at 101 ("the mere fact that a [zoning ordinance] applies only to a house of worship does not in itself constitute a targeting of religion that offends the First Amendment.").

Ultimately, the petitioner and the Old Observers will be unable to visit Red Rock after the transfer is completed. This action of the state, while falling heavily on the Montdel owing to the significance which their religion invests in Red Rock, is not coercive under *Lyng*. Nor is the law discriminatory or favoring secular activity over religious in violation of *Smith*. The Montdel's right of access to Red Rock is not different from any other citizen of Delmont—all are equally prohibited. If the burden falls harder on the Montdel than on other citizens of the State, the DNRA has done all it can to accommodate the religious observances while pursuing legitimate policy goals under the ECIA. The State of Delmont is under no obligation to rescind this transfer, and choosing not to do so, Montdel United cannot compel a different result under the First Amendment.

II. THE STATE OF DELMONT DID NOT VIOLATE THE MONTDEL UNITED'S FIRST AMENDMENT RIGHT TO FREE SPEECH WHEN IT TRANSFERRED RED ROCK FOR MINING.

Under the test the Supreme Court set forth in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, there are two steps in determining whether government regulation of speech in a particular place is constitutional. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

The first step is to establish the type of forum the regulated area is classified as. The second step is to identify the appropriate standard based on the type of forum. *Id.* The area at issue here, Painted Bluffs State Park, is a nonpublic forum that exists for the purpose of preserving the natural beauty of the land, not to facilitate expression. Thus, the appropriate standard requires that the restriction on speech is reasonable and content-neutral. *Id.* at 46. Because the State's transfer of Red Rock in the Painted Bluffs State Park satisfied these requirements, the State did not violate the Montdel Tribe's First Amendment right to free speech.

A. Red Rock is a Nonpublic Forum Because It Was Not Opened for the Purpose of Facilitating Expression.

When Free Speech rights are implicated by the closure of a government-owned space, the first step is to distinguish between public and nonpublic fora. Public refers to traditional public fora, designated public fora, or limited public fora. *Id.* at 45-46; *but see* Marc Rohr, *First Amendment Fora Revisited: How Many Categories Are There?*, 41 Nova L. Rev. 221, 228 (2017) (noting that various types of public fora under current precedent are somewhat nebulously defined). In contrast, a nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry Educators' Ass'n*, 460 U.S. at 46. The Court in *Perry Educators' Ass'n* held that the government's intent in creating the forum determined whether it was public from nonpublic. *Id.* Here, the State did not intend to facilitate expression when it opened Painted Bluffs State Park, but rather intended only to preserve nature. Therefore, Painted Bluffs State Park is a nonpublic forum, and the transfer does not violate the petitioner's Free Speech rights.

1. Neither Painted Bluffs State Park nor Red Rock constitutes a traditional public forum.

Traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate" and "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." *Id.* at 45. In that case, the Court considered whether giving one union exclusive access to an interschool mail delivery system but not a rival union constituted a violation of the First Amendment freedom of speech. *Id.* at 40-41. The Court held that the mail system was not a traditional public forum under this definition. *Id.* at 46.

Additionally, a traditional public forum is not created "whenever members of the public are permitted freely to visit a place owned or operated by the Government." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992). In that case, the petitioner solicited funds in a public airport terminal to support its religious movement. However, the airport authority had adopted a regulation prohibiting solicitation in its airport terminals, including the petitioner's religious solicitation. Petitioners argued that the airport terminals were transportation nodes that constitute traditional public fora. The Court disagreed. Unlike sidewalks and streets, airport terminals were not historically made available for the purpose of speech activity. The "principal purpose" was not "the free exchange of ideas." *Id.* at 679. This was true even though the public was free to come and go. Additionally, "the relevant unit for . . . inquiry [wa]s an airport, not 'transportation nodes' generally." *Id.* at 681. The Court reasoned that "[t]o blithely equate airports with other transportation centers, therefore, would be a mistake" because "[t]he differences among such facilities are unsurprising." *Id.* at 682.

Here, like the mail system in *Perry Educators' Ass'n* and airport terminal in *Krishna Consciousness*, Painted Bluffs State Park is not a traditional public forum. The State did not establish Painted Bluffs State Park for public assembly and discourse. Additionally, the fact that Painted Bluffs State Park was open to members of the public does not transform it into a traditional public forum. Like the airport terminal in *Lee*, the public was free to gather at the park and even

exchange ideas, but this alone does not create a traditional public forum. Painted Bluffs State Park cannot simply be categorized as a traditional public forum due to its name "park" either. The airport terminal in *Krishna Consciousness* was undeniably a transportation node, but the Court instead adopted a more narrow view of the forum in question. Similarly, Painted Bluffs State Park is not merely a park in the colloquial sense of the word; instead, it is a nature park established for the purposes of conservation and preservation. Thus, Painted Bluffs State Park falls outside the definition of a traditional public forum.

2. The State did not intend to open the Painted Bluffs State Park for public discourse.

Not only is Painted Bluffs State Park definitionally not a traditional public forum, but it also is not a public forum more generally because the purpose and intent behind the creation of the State Park was not public discourse. According to this Court in *Perry Educators' Ass'n*, "[T]he State may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46. The School Board had dedicated the mail system for communication with teachers and given one union access to the teachers' mailboxes as part of a labor contract. *Id.* at 40-41. The other union still had access to other school facilities through which it could communicate with teachers. *Id.* at 41. Other groups were also required to request permission to use the system to communicate with teachers. *Id.* at 47.

One of the main issues in *Perry Educators' Ass'n* was whether the interschool mail delivery system was a public or nonpublic forum. *Id.* The Court determined that the intended purpose included whatever activities constituted the "normal and intended function" of the property. *Id.* The Court held that the interschool mail delivery system was a nonpublic forum. *Id.* The Court

noted that the School Board did not hold the internal mail system "open to the general public." *Id.* at 47. The question was not whether the property was open to any communication; rather, the question was properly whether "government property is . . . *dedicated to open communication*." *Id.* at 53. The existence of some "selective access does not transform government property into a public forum." *Id.*

Here, the normal and intended function of Red Rock and the Painted Bluffs State Park was not public discourse. *Id.* at 47. Although some speech occurred incidental to the opening of the park to visitors, the park did not exist for the purpose of facilitating such speech. Instead, the park was renowned for its striking rock formations. R. at 4. The park existed to offer opportunities for camping, hiking, and fishing. R. at 4. The State's intent in establishing Painted Bluffs State Park was almost exclusively the preservation and conservation of nature, which is consistent with what the normal function of a State Park would be. Thus, like the School Board's control over the mail system in *Perry Educators' Ass'n*, the State had the authority to reserve the park for its sole, specific, and intended purpose of preservation and conservation.

This Court has reaffirmed *Perry Educators' Ass'n* in stating that, "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). In *Cornelius*, the NAACP and other legal defense and political advocacy organizations argued that the Combined Federal Campaign, a government charity drive, was a public forum. The government in that case sought to exclude the plaintiff organizations from the charity drive. The Court held that the CFC was not a public forum because the government had a contrary intent and the nature of the property was inconsistent with expressive activity. In deciding *Cornelius*, the Court "examined the nature of the property and its compatibility with

expressive activity to discern the government's intent." *Id.* This Court has also historically considered the government's "policy and practice" in examining the forum's intended use and thus determining whether it is a public or nonpublic forum. *Id.*

In examining the State's policy and practice, as well as the nature of the property and compatibility with expressive activity, it is apparent the State lacked an intent to open a nontraditional forum for public discourse. The State never granted permission to the Montdel or any other group for speech on the park premises or at Red Rock in particular. Even if the State allowed selective, limited discourse in the context of the Montdel Observance, that alone would be insufficient to establish a public forum. The State's mere tolerance of certain, limited expressive activities is not enough to transform a nonpublic forum into a public forum. Additionally, a nature preserve inherently has low compatibility with expressive activity, especially when compared to traditional public fora such as town squares, sidewalks, and streets. Painted Bluffs State Park specifically is "a roughly 100-square-mile expanse of forested highlands." R. at 2. As for policy and practice, the State has maintained Painted Bluffs State Park "with the intent to preserve its natural beauty" since its acquisition in 1930. R. at 4. It has never instituted a practice of allowing other groups to host events or other expressive activities in Painted Bluffs State Park. Lacking the requisite intent to create a public forum, Painted Bluffs State Park is a nonpublic forum.

3. Painted Bluffs State Park is a wilderness preserve that the State acquired with the intent to preserve its natural beauty.

Furthermore, in *Boardley v. United States DOI*, the D.C. Court of Appeals recognized that national park areas may contain wilderness areas that do not constitute public fora due to "the nature and traditional uses of the particular park involved." *Boardley v. United States DOI*, 615 F.3d 508, 515 (D.C. Cir. 2010). In that case, the Secretary of the Interior propagated two

regulations that prohibited "'[p]ublic assemblies, meetings, gatherings, demonstrations, parades and other public expressions of views' and '[t]he sale or distribution of [non-commercial] printed matter' within park areas" without a permit. *Id.* at 512. The court rejected the petitioner's argument that all national parks were categorically public fora. *Id*. at 514-15. "[M]any national parks include areas—even large areas, such as a vast wilderness preserve—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." Thus, the analysis is an extremely "fact-intensive question." *Id.* at 515.

Although *Perry Educators' Ass'n* did include parks as an example of places "immemorially . . . held in trust," Painted Bluffs State Park is incomparable to other "parks" such as the National Mall. *Id.* Instead, Painted Bluffs State Park is a wilderness preserve that must be analyzed according to its unique features and compatibility with speech. Here, unlike streets and sidewalks, Painted Bluffs State Park is designated for "camping, hiking, and fishing" and the preservation of natural beauty more generally. R. at 4. Only occasionally throughout each year does any group conduct limited expressive activities. This allowance by the State is mere inaction, or at most permitting limited expression, which under *Cornelius* does not rise to an intent to create a public forum. The Red Rock formation, although "renowned" and striking," is a merely natural feature of the "100-square-mile expanse of forested highlands" for a majority of the time each year. R. at 2, 4. The record supports only the finding that Painted Bluffs State Park is a nonpublic forum.

B. The Transfer of Red Rock for Mining is Both Reasonable and Content-Neutral.

When analyzing whether a regulation within a non-public forum is valid under the First Amendment, the court must look to whether the regulation is both reasonable and content-neutral. *Perry Educ. Ass'n*, 460 U.S. at 46. According to the Supreme Court, "the State may reserve [a

nonpublic forum] for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. 46 (quoting *United States Postal Service v. Council of Greenburgh Civic Assns*., 453 U.S. 114, 129 (1981). The Court in *Perry Educators' Association* reasoned that government owned property is not required to be open to the public solely on the basis of the First Amendment. *Id*. at 46; (quoting *United States Postal Service*, 453 U.S. 114). This proposition was further expounded upon in *Adderly*, with the Supreme Court stating, "[the] State, 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." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). The State of Delmont, who is the sole owner of Red Rock, is not required to bend to the will of Montdel United simply because they are not a private owner. The First Amendment requires only that their restrictions on the nonpublic forum be reasonable and content-neutral, which the State of Delmont has satisfied.

1. The State's transfer of Red Rock and the ECIA are both reasonable.

When looking to whether this transfer, under the authority of the ECIA, is reasonable, this Court is guided by the analysis it used in *United States v. Kokinda*. In *Kokinda*, this Court held that a government's restriction on a nonpublic forum "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *United States v. Kokinda*, 497 U.S. 720, 730 (1990); (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 808 (1985)). The restriction at issue in *Kokinda* forbade solicitation on postal premises. *Kokinda*, 497 U.S. at 723-24. Solicitors working for the National Democratic Party were arrested after they refused to leave the post office sidewalk. *Id*. This Court found that a restriction placed on this forum was reasonable in light of the intended purpose of the post office. *Id*. at 732. Even though the restriction in *Kokinda*

would allow for other kinds of disruptive speech other than solicitation, this Court found that the restriction was still reasonable. *Id*. at 733.

The transfer of Red Rock is reasonable in light of the economic benefit it will have for the State of Delmont. R. at 47. The DNRA conducted an economic impact study that found that the transfer of Red Rock would not only create numerous jobs for the citizens of Delmont, it would also stimulate the economy by directly benefiting the State of Delmont's mining industry. R. at 48. The purpose behind the transfer is to facilitate the mining of precious minerals, such as lithium, iron, nickel, and copper. This purpose directly aligns with the State of Delmont's objective to reduce dependence on fossil fuels. Federal mandates placed on defense contractors also require the State of Delmont to rely on other sources of energy other than fossil fuels. R. at 41 (the ECIA is a "reasonable goal of the state that aligns with federal mandates."). In pursuing this aim, the State's transfer of Red Rock need not be the only reasonable or most reasonable action, but merely reasonable. *See Kokinda*, 497 U.S. at 730. Unless this Court is prepared to state that the State of Delmont's interest in stimulating their economy and preventing climate change is not reasonable, this prong has clearly been met.

2. The transfer of Red Rock and the ECIA are content-neutral.

Both the ECIA and the transfer of Red Rock—and inadvertent restriction on speech—are content-neutral. For a government restriction on speech to be content-neutral, the restriction must be "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). First, the ECIA itself is clearly content-neutral. Nowhere in the record does it reflect that the ECIA contains any language that would indicate the DNRA would look into the interests of any affected party when considering whether to approve a land transfer. Further, the

transfer of Red Rock and inadvertent restriction on speech is also content-neutral. Due to the nature of the land transfer, nobody will be allowed to visit Red Rock, much less participate in the free expression of ideas. This is true regardless of the underlying message that the speaker intends to convey, whether they be members of Montdel United or ordinary festival goers.

The petitioner would like to point to comments made by the Governor of Delmont to show that the restriction is not content-neutral, *see* R. at 47, Greenfield Aff. at 9. But as the Fifteenth Circuit noted, "[w]hatever indifference or dislike for the festival the State may have harbored, it is not enough to show that the sale was motivated by an animus towards the content of the speech" of the Montel). R. at 40. Even if these remarks were relevant, they must be understood in the context of Governor's political ambitions to implement the ECIA, not as animus against the Montdel Observances. R. at 47, Greenfield Aff. at 7. The State of Delmont has other, more substantial reasons for proceeding with this transfer, including stimulating their mining industry, creating jobs for their citizens, and reducing their dependency on fossil fuels. The transfer of Red Rock under the ECIA is both reasonable and content-neutral.

CONCLUSION

The State of Delmont did not violate Montdel United's Free Exercise or Free Speech rights under the First Amendment. Therefore, this Court should affirm the judgment of the Court of Appeals for the Fifteenth Circuit.

Brief Certificate

Team 030 certifies the following statements:

The work product contained in all copies of Team 030's brief is in fact the work product of the members of Team 030;

Team 030 has complied fully with their law school's governing honor code; and

Team 030 has complied with all Competition Rules.

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