No. 24-CV-1982

In the Supreme Court of the United States

MONTDEL UNITED,
Petitioner,

v.

STATE OF DELMONT and
DELMONT NATURAL RESOURCES AGENCY,
Respondent

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

BRIEF FOR Respondents,
STATE OF DELMONT AND DELMONT NATURAL RESOURCES AGENCY

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State of Delmont and
Delmont Natural Resources Agency

Statement of Issues Presented

1. Does the transfer of Red Rock to a private mining corporation, as authorized by the State of Delmont Energy and Conservation Independence Act ("ECIA"), violate the Free Exercise rights of the Petitioner?
2. Does the ECIA and the subsequent transfer of Red Rock violate the Petitioner's Free Speech rights under the First Amendment?

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Constitutional Provisions

United States Constitution, First Amendment
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 of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment, § 1
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Jurisdictional Statement

Federal District Courts have original jurisdiction over all civil disputes arising under the Constitution of the United States. 28 U.S.C. § 1331. The parties have stipulated that there are no issues of standing, and the State of Delmont has waived sovereign immunity. R. at 11. The State of Delmont and Delmont National Resources Agency are located in the Fifteenth Judicial Circuit of the United States.

The Plaintiff sued the State of Delmont and Delmont Natural Resources Agency in the United States District Court for the District of Delmont, Western Division, which granted Montdel United's request and issued a preliminary injunction. R. at 32. Delmont and the Delmont Natural Resources Agency timely filed their interlocutory appeal in the United States Court of Appeals for the Fifteenth Circuit. *See* 28 U.S.C. § 1292(a)(1). The Court of Appeals reversed the decision of the District Court, denying the preliminary injunction. R. at 33. Plaintiff petitioned this Court to hear their interlocutory appeal, and this Court granted *certiorari*. R. at 55.

Standard of Review

The Plaintiff must make a four-part showing for the Court to grant a preliminary injunction. FED. R. CIV. P. 65. To show cause for a preliminary injunction, the Plaintiff must establish that they are "likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). If the Petitioner fails to meet this burden, the Court should deny the preliminary injunction. *See id.* The standard of review on interlocutory appeal is to "review the District Court's legal rulings *de novo*, and its ultimate conclusion for abuse of discretion." *McCreary Cty. v. Am. C.L. Union*, 545 U.S. 844, 867 (2005).

Statement of the Case

The Delmont legislature enacted the Energy and Conservation Independence Act ("ECIA") in 2022 to facilitate the mining of precious minerals by empowering the State of Delmont to enter into agreements with private mining companies for the transfer of government-owned land. R. at 2. Such land transfers will help the State of Delmont to become carbon-neutral and thus align with federal mandates to reduce fossil fuel consumption, all while providing much needed revitalization to the local economy. R. at 1. This case concerns the transfer of Painted Bluffs State Park, which "is known for its valuable lithium-bearing pegmatite deposits, along with other significant mineral resources." R. at 1–2. The State of Delmont has initiated the transfer of mining rights for Painted Bluffs State Park to Delmont Mining Company in furtherance of its economic and sustainability policy objectives. R. at 1. A large part of the park, including the prominent landmark Red Rock, has been designated for transfer. R. at 2.

Petitioner Montdel United protests the transfer and subsequent mining activities at Painted Bluffs State Park because "[t]he Montdel people have long revered and utilized Red Rock, a prominent landmark within the park, as a sacred site." *Id.* Montdel rituals at Red Rock have taken place since "before recorded history," and such rituals typically involve crop sacrifices and other supplications by the Montdel elders during the fall and spring equinoxes and summer and winter solstices. R. at 3. The Montdel people believe that these practices at Red Rock are their sole means of communication with their Creator and are ineffective at any other location. *Id.* While the Montdel people have maintained the practice of traveling to Red Rock at these designated times throughout the State's history, there were times during which the rituals did not occur—the Montdel people did not perform the rituals at Red Rock during the World Wars or the Great Depression "due to economic hardships, wartime obligations and other challenges." R. at 4. The

ritual at Red Rock, dubbed the "Montdel Observance," has been conducted consistently as a formal ritual since 1952. R. at 5.

The State of Delmont originally acquired the region with an eye toward preservation and has referenced the Montdel religious practices at Red Rock to promote the park. R. at 4. In fact, "in response to the increasing popularity of these gatherings, the State of Delmont has issued vendors' licenses for food, music, and merchandise through the Park Service." R. at 5. Although the Montdel Observers do not participate in these subsidiary festival activities, they have not objected to their occurrence alongside the Montdel Observance. R. at 6. The Governor of Delmont has expressed frustration with the ongoing cleanup after these festivities, but there is no indication that the Delmont government harbors any hostility to the ritual observers themselves. R. at 47. Petitioner Montdel United is comprised of descendants of the Montdel and the Old Observers. R. at 7. The organization's mission is to oppose the transfer of Painted Bluffs and protect places of religious significance from development. *Id.*

Three years ago, the State of Delmont began an initiative to promote the mining of precious metals to reduce reliance on fossil fuels and revitalize Delmont's economy. R. at 6. This "transformative agenda" paralleled the policy objectives of a sustainability-minded federal government, which had recently enacted the Federal Natural Resources Defense Act ("FNRDA") "mandating the use of sustainable energy resources in defense contracting as part of a global effort to mitigate fossil fuel extraction." R. at 6–7. Moreover, because mining constitutes a significant sector of Delmont's economy, enabling more mining activity was meant to provide economic revitalization for downtrodden communities within Delmont. R. at 6.

Pursuant to the ECIA, in January 2023, the Delmont Natural Resources Agency agreed to transfer one-fourth of Painted Bluffs State Park, including the Red Rock area, to Delmont Mining

Company ("DMC"). R. at 7. The transfer is enthusiastically supported by "the residents of the two economically challenged counties in which Painted Bluffs State Park is located. These counties have depended primarily on tourism, which has proven insufficient for their economic needs." *Id.* An environmental study into the land transfer noted that the subsequent mining operation would result in the destruction of Red Rock, but that the broader environmental impact is expected to be minimal. R. at 8. The study also explored "alternative mining technologies that might mitigate the damage to Red Rock," but they found that the technologies would not be available for at least another twenty years and "may entail prohibitive costs and extended timeframes for implementation." R. at 8–9.

Due to the hazards posed by mining activity, "[f]ollowing the transfer, the area will be accessible only to DMC and its employees, as it will be privately owned by DMC." R. at 9. Practically speaking, the mining operation would simply require celebrants to relocate the equinox festivities to a location about five miles down the riverbanks. R. at 8.

Summary of the Argument

The Court of Appeals was correct to deny the preliminary injunction preventing the State of Delmont from transferring a portion of Painted Bluffs State Park to Delmont Mining Company under the Energy and Conservation Independence Act. These regulations did not violate the Petitioner's Free Exercise rights because they are neutral and generally applicable and thus must only constitute a reasonable means to achieve government objectives. *Bowen v. Roy*, 476 U.S. 693, 707–08 (1986). Because the land transfer agreement is a reasonable mechanism for achieving the government aims of sustainability and economic development, this Court should hold it permissible regarding the Free Exercise Clause.

Nor does the ECIA and ensuing land transfer run afoul of the Free Speech Clause. Painted Bluffs State Park is not a traditional public forum for expressive activity but a limited public forum in which the State has allowed expressive activity surrounding the Montdel Observance. R. at 6. The proposed land transfer thus constitutes a permissible "time, place, and manner" restriction for the purposes of speech regulation. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Because the restriction is content neutral, narrowly tailored, and leaves open other channels for communication of the speech at issue (namely, five miles downstream from the current site), the land transfer satisfies the demands of the Free Speech Clause. *Id.* Furthermore, encouraging the government to allow expressive activity on its lands without penalizing it for such allowances by prohibiting land transfer down the line is sound public policy. In fact, the Respondent posits that the State of Delmont and the Delmont Natural Resources Agency should prevail even if the Court opts to apply strict scrutiny. As such, the Respondent respectfully requests that this Court affirm the Fifteenth Circuit's denial of the preliminary injunction.

Argument

In pertinent part, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. Amend. I. The rights enshrined in the First Amendment have been incorporated against the states by the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

I. THE ECIA AND LAND TRANSFER AGREEMENT DO NOT VIOLATE THE MONTDEL'S FREE EXERCISE RIGHTS BECAUSE THEY ARE NEUTRAL AND GENERALLY APPLICABLE AND ARE REASONABLE MEANS TO ACHIEVE GOVERNMENT OBJECTIVES.

This Court has established that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of

burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also Employment Div. v. Smith*, 494 U.S. 872, 878–82 (1990) (holding that neutral laws of general applicability that incidentally burden religious exercise are not subject to strict scrutiny). A law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. Philadelphia*, 593 U.S. 522, 534 (2021). A law that burdens religious practice is only subject to strict scrutiny if it fails to satisfy the requirements of neutrality and general applicability. *Church of Lukumi Babalu Aye*, 508 U.S. at 531–32. "Neutrality and general applicability are interrelated. . . ." *Id.* at 531. The parties have stipulated that the State of Delmont does not have a state Religious Freedom Restoration Act. R. at 11. Because the federal Religious Freedom Restoration Act does not bind the states, the Petitioners' claims are purely constitutional without statutory basis. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

Where the government pursues secular goals of a law "only with respect to conduct motivated by religious beliefs," the law is not generally applicable. *Church of Lukumi Babalu Aye*, 508 U.S. at 524. Likewise, "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 534. In *Church of Lukumi Babalu Aye*, the Court held that city ordinances prohibiting animal sacrifice were neither facially neutral nor generally applicable for the purposes of the Free Exercise Clause. *Id.* at 532. That case involved the Santeria religion, which practices animal sacrifice. *Id.* at 524. Upon learning that a Santeria church was to be built in Hialeah, the city council passed several ordinances "addressing the issue of religious animal sacrifice." *Id.* at 527–28. While ostensibly the ordinances were meant to prevent animal cruelty and promote public sanitation, the "significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its

practice of animal sacrifice" made it clear that their primary objective was to prevent this practice. *Id.* at 541. The Court held that these ordinances were unconstitutional because their "careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. Finding this singular treatment of religious killings to be neither neutral nor generally applicable, the Court ultimately held that the ordinances were also not sufficiently narrowly tailored to survive strict scrutiny. *Id.* at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

In contrast, in *Bowen v. Roy*, the Court held that a law that was neutral and generally applicable did not run afoul of the Free Exercise Clause: "Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Roy*, 476 U.S. at 707–08. In *Roy*, Native American plaintiffs challenged a statutory requirement that applicants for food stamps provide a Social Security number, alleging that the government's use of a Social Security number for their two-year-old daughter would violate their religious beliefs. *Id.* at 695. The Court in *Roy* distinguished between "government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs" and "governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Id.* at 706. The Court rejected the plaintiffs' Free Exercise arguments, finding dispositive that "[t]he requirement that applicants

provide a Social Security number is facially neutral and applies to all applicants for the benefits involved." *Id.* at 708.

Likewise, in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, the Court held that it was constitutional for the Forest Service to build a road through publicly owned land that was used by Native Americans for religious purposes. 485 U.S. 439, 442–43 (1988). Native Americans had used this public land for religious practice for centuries, and they believed that the rituals would be ineffective if conducted at another location or if the traditional land was subject to too much disturbance of its natural state. *Id.* at 451. Notwithstanding these beliefs, the Court held that the religious rights of Native Americans "do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453 (emphasis in original). The Court even went so far as to note that "such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." *Id.* While the government is encouraged to be solicitous of individuals' religious needs, it remains the government's prerogative to determine how its land is best utilized to serve the public interest. *Id.* at 453–54.

This case is distinct from *Church of Lukumi Babalu Aye* because the ECIA and the effects of the land transfer to DMC are both facially neutral and generally applicable. Unlike the ordinances at issue in *Church of Lukumi Babalu Aye*, which explicitly prohibited animal "sacrifice," the land transfer of the Red Rock area to the DMC is independent of the Montdel Observance. *Church of Lukumi Babalu Aye*, 508 U.S. at 527–28. More specifically, whereas the city council in Hialeah explicitly intended to prevent the Santeria from practicing religious animal sacrifice in their community, Montdel religious practices had no influence on the passage of the ECIA. *Id.* Unlike the Hialeah city council, Delmont did not pass the ECIA with the thinly veiled purpose of limiting the Montdel's religious practice. Rather, the Delmont legislature passed the

ECIA with the goals of strengthening Delmont's compliance with federal sustainability objectives and revitalizing Delmont's economy through the mining of precious metals. R. at 1. Neither of these motivations for passing the Act mask an insidious desire to thwart the practice of the Montdel Observance. In fact, the fact that the State of Delmont allowed and encouraged the Montdel Observance to continue for centuries prior to the law's enactment distinguishes Delmont from the Hialeah city council, who tailored their ordinances to "pursue[] the city's governmental interests only against conduct motivated by religious belief." R. at 4–6; *Church of Lukumi Babalu Aye*, 508 U.S. at 545. Even the Governor's indifference to the Montdel's practices is a far cry from the outright "hostility" described among Hialeah city council members in *Church of Lukumi Babalu Aye*. *Id.* at 541; R. at 47. Moreover, the transfer to DMC would effectively close off the land to every member of the public who is not a DMC employee, regardless of their religious beliefs or practices, which renders this situation clearly distinct from the ordinances in *Church of Lukumi Babalu Aye* that were carefully crafted to prohibit only religious conduct.

In this way, the ECIA and the land transfer agreement are more similar to the statutory requirement at issue in *Roy*, which indicated no "intent to discriminate." *Roy*, 476 U.S. at 707. Like the statute in *Roy*, the ECIA is "facially neutral" because the sale of land to a mining company precludes *all* other members of the public from using the land, regardless of whether they seek to do so for religious purposes. *Id.* at 708; R. at 9. Likewise, under the categories delineated in *Roy*, the ECIA is more akin to a "government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs" than "governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Id.* at 706. While the Petitioner will likely dispute this characterization, the State of Delmont in this situation does not simply criminalize the

Montdel Observance or compel the Old Observers to cease the practice altogether; rather the effect of the mining agreement would be to move the Observance downstream about five miles. R. at 8.

Furthermore, like the Social Security requirement at issue in *Roy*, the ECIA and subsequent land transfer agreement with the DMC constitute a "reasonable means of promoting a legitimate public interest." *Roy*, 476 U.S. at 708. The ECIA directly furthers the government's dual aims of pursuing more sustainable energy sources and revitalizing the local economy by allowing the mining companies to extract precious metals from (initially) public lands. Residents of the "economically challenged counties in which Painted Bluffs Park is located" are ardent supporters of the land transfer. R. at 7. The potential for the agreement to draw much-needed income to the economically downtrodden members of the adjacent community provides a compelling public interest in favor of the land transfer. As such, the agreement in this case should be upheld according to the Court's rationale in *Roy*.

Factually, the case at bar is strikingly similar to *Lyng*. Both cases concern the right of the State to repurpose its land in a way that significantly burdens Native American religious practice. However, like the Forest Service in *Lyng*, Delmont was responsive to the religious practices necessitating use of the land. In fact, the Delmont Natural Resources Agency researched potential alternatives that could avoid the destruction of Red Rock and found them to be too costly and time consuming, and thus inadequate to further the government's objectives. R. at 8–9. Delmont's attempt to prevent the destruction of Red Rock indicates that this case is quite distinct from the targeted ordinances at issue in *Church of Lukumi Babalu Aye* and brings this case much closer to the factual context of *Lyng*. Additionally, in the same way that the Court in *Lyng* held that the Government cannot be expected to defer to the religious practices of private citizens in deciding how to use *the Government's* land, the Court should not require this outcome in this case. *Lyng*,

485 U.S. at 453. To do so would allow "*de facto* beneficial ownership of some rather spacious tracts of public property," so long as the property is utilized for religious purposes. *Id.* Here, like in *Lyng*, the challenged law is neutral and generally applicable, rendering that outcome even less justifiable. Because this case also involves the repurposing of government land that incidentally burdens the Montdels' religious practice, the Court should follow its holding in *Lyng* and find the ECIA and the ensuing land transfer agreement constitutional with regard to the Free Exercise Clause.

II. THE ECIA AND LAND TRANSFER AGREEMENT DO NOT VIOLATE PETITIONER'S FREE SPEECH RIGHTS BECAUSE THE PARK IS A LIMITED PUBLIC FORUM SUBJECT TO GOVERNMENT REGULATION THAT SATISFIES REASONABLE SCRUTINY.

To determine when the government may limit the use of its property to its intended purpose, the Court typically employs a forum analysis. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985). "Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Id.* This Court has identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Restrictions of speech in traditionally public fora and "on property that the Government has expressly dedicated to speech activity" are analyzed under strict scrutiny. *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990). "But regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness." *Id.* at 727. The Supreme Court has yet to clarify which level of scrutiny is warranted to justify the closure of a traditional public forum. R. at 17. Nor do Respondents posit that the Court must do so in this case, as it is Delmont's position that the park is a designated public forum that can be redesignated at the State's discretion.

A. Incidental speech restrictions are permissible because Red Rock is not a traditional public forum.

Traditional public fora are not simply publicly owned areas in which communication could or might take place but must have traditionally "been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. Indus. Org.*, 307 U.S. 496, 515 (1939). In *Hague*, the Committee for Industrial Organization, which had been designated a communist organization, sued to enjoin a city ordinance that prevented them from meeting or disseminating their beliefs in public places. *Id.* at 501–03. The court held the ordinance unconstitutional because it could "be made the instrument of arbitrary suppression of free expression of views on national affairs . . . ." *Id.* at 516. In fact, the Court in *Hague* found that "the parks of Jersey City are [not] dedicated to any general purpose other than the recreation of the public and . . . there is competent proof that the municipal authorities have granted permits to various persons other than the respondents to speak at meetings in the streets of the city." *Id.* at 505–06.

In contrast, when speech restrictions serve "reasonable legislative objectives advanced by the [government] in a proprietary capacity," such restrictions do not run afoul of First Amendment free speech rights. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974). *See also Kokinda*, 497 U.S. at 725 (holding that government action is subject to a lower level of scrutiny where it is acting as a proprietor). Restrictions in this context simply cannot be "arbitrary, capricious, or invidious." *Lehman*, 418 U.S. at 303. In *Lehman*, the Court held that a city prohibition of political advertisements on public transit was such a restriction. *Id.* at 303 ("[A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles."). In so holding, the majority weighed the nature of the forum against the government's interests in imposing the restriction. *Id.* at 302–03. Ultimately the Court in *Lehman* concluded that "minimiz[ing] chances of abuse, the appearance of favoritism, and the risk of

imposing upon a captive audience" were sufficiently reasonable objectives to justify the government's restriction. *Id.* at 304. Even the dissent did not take issue with the nature of the restrictions but objected to the city's "discriminating among forum users solely on the basis of message content." *Id.* at 310 (Brennan, J., dissenting).

This case is distinguishable from *Hague* because the restriction at issue is significantly narrower and does not lend itself to arbitrary enforcement. The ordinances in *Hague* prohibited communist organizations from assembling in "public places." *Hague*, 307 U.S. at 505. Here, however, members of the public will only be constructively restricted from assembling in the one-fourth of Painted Bluffs State Park that will be designated for mining. R. at 7. Only this area of the park would be closed to all but employees of the DMC. R. at 9. For the same reasons, unlike in *Hague*, the ECIA and the land transfer agreement pose little risk for arbitrary enforcement. Whereas in *Hague* the parks and streets had no general purpose but public recreation and meeting places, the State of Delmont and the Delmont Natural Resources Agency have determined that the Red Rock portion of Painted Bluffs State Park would best serve the purpose of mining to promote sustainability and boost the local economy. R. at 6. As such, the land transfer itself would change the nature of the forum to disallow arbitrary enforcement and institute a prohibition that is only incidental to the government's primary objectives. The land is thus not a traditional public forum like those being gatekept in *Hague*.

Rather, the Red Rock portion of Painted Bluffs State Park constitutes a limited public forum similar to the public transit in question in *Lehman*. Because the State is acting in its "proprietary capacity," it is Delmont's prerogative to impose reasonable limitations on speech as long as such restrictions are not "arbitrary, capricious, or invidious." *Lehman*, 418 U.S. at 303–04. Because the land transfer would prevent *all* members of the public, aside from DMC employees, from

assembling at Red Rock, the transfer justified by the ECIA is not "arbitrary, capricious, or invidious." R. at 9. Furthermore, like in *Lehman*, the speech restriction created by the land transfer agreement is incidental to the pursuit of reasonable government interests—in this case, the unearthing of more sustainable materials and the economic revitalization of neighboring communities. R. at 6. Moreover, it is likely that even the dissenters in *Lehman* would distinguish this case on the basis that the restriction at issue here is not content based. *Lehman*, 418 U.S. at 310 (Brennan, J., dissenting). Because Delmont is acting in its proprietary capacity, pursuing reasonable governmental objectives, and not restricting speech in a manner that is arbitrary, capricious, or invidious, the ECIA and ensuing agreement should be held constitutional under the standards of *Lehman*.

B. Alternatively, the mining agreement is constitutionally permissible because it is a reasonable time, place, or manner restriction that is content neutral, narrowly tailored, and leaves open alternative channels for the protected speech at issue.

"Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark*, 468 U.S. at 293. In *Clark*, the Court ruled that a National Park Service regulation prohibiting camping in certain park areas did not run afoul of First Amendment rights when protestors wanted to camp in a prohibited area to raise awareness for the homeless. *Id.* at 289. The Court further reasoned that "restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 293. Because the government has a substantial interest in the preservation of park property, and "[t]hat interest is unrelated to suppression of expression," the Court held the prohibition on sleeping in national parks constitutional notwithstanding parks' general status as a public forum. *Id.* at 299. This is because

parks are subject to similar parameters as other public spaces, and citizens who visit parks "must abide by otherwise valid rules for their use, just as they must observe traffic laws, sanitation regulations, and laws to preserve the public peace. This is no more than a reaffirmation that reasonable time, place, or manner restrictions on expression are constitutionally acceptable." *Id.* at 298.

Here, the ECIA effectively places are "time, place, or manner restriction" upon those who would use Red Rock for expressive purposes. Namely, the transfer of the Red Rock area to the DMC would require Montdel observers and festival goers to change the place and manner of their ceremonies and festivities to about five miles downriver. R. at 8. Because the restriction is one of "time, place, or manner," it must therefore only be "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293. Here, the agreement is narrowly tailored because Delmont is only transferring about one-fourth of the Painted Bluffs State Park lands to DMC, and the transfer serves the significant government interests of sustainability and economic growth. R. at 1, 7. Because the Delmont Natural Resources Agency did order an environmental study on alternative technologies that could preserve Red Rock, it is evident that Delmont narrowly tailored their approach to these objectives in good faith. R. at 8–9.

C. The mining agreement is consistent with and in furtherance of strong public policy.

Not only does the mining agreement serve the dual purposes of sustainability and economic growth, but more broadly, to disallow the government the flexibility to recast its property to and from a public forum is "a disincentive for the Government to dedicate its property to any speech activities at all." *Kokinda*, 497 U.S. at 733. In *Kokinda*, the Court held that the United States Postal Service could constitutionally prohibit political volunteers from soliciting money and selling

books and newsletters on its property. *Id.* at 723. The Court noted that the Postal Service had allowed its sidewalks to be used for other types of expressive activity. However, this allowance did not automatically transform the sidewalk into a traditional public forum. "If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission." *Id.* at 733.

In this case, Delmont's facilitation of the festivities surrounding the Montdel Observance parallel the accommodation of some groups by the Post Office in *Kokinda*. To disincentivize the State to allow expressive activity on its land would be poor public policy, and such would be the result if the Court does not allow the government to recharacterize the nature of its land when it is necessary to further government objectives and public interest. *See Kokinda*, 497 U.S. at 733. As such, granting the government the flexibility to change the forum classification of its land at will is the soundest policy for encouraging the government as proprietor to allow expressive activity on public property. Had Delmont known that it would not be able to sell the land down the line, the State may never have wanted to encourage the Montdel Observance at all, let alone provide vendors' licenses for festival attendees. R. at 5. As such, it is consistent with common sense and public policy to hold that Painted Bluffs State Park is a limited public forum which may be broadened or further restricted at the State's discretion as proprietor.

D. Even if the Court chooses to apply strict scrutiny, the State of Delmont and the Delmont Natural Resources Agency would prevail.

Although Delmont and the Delmont Natural Resources Agency posit that Painted Bluffs State Park is not a traditional public forum, the Court has held that where the government creates a forum for the public and seeks to enforce speech restrictions within that forum, those restrictions are analyzed under strict scrutiny. *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981). Under this standard, the government must show that "its regulation is necessary to serve a compelling state

interest and that it is narrowly drawn to achieve that end." *Id.* at 269–70. In *Widmar*, a university excluded a religious student group from conducting its meetings in university facilities, although over one hundred other student groups were allowed to conduct meetings in university spaces. *Id.* at 274. The Court held that this restriction was unconstitutional: "Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards." *Id.* at 277.

The restriction in this case passes muster even under the strict scrutiny standard. The ECIA and the land transfer serve the compelling state interests of compliance with federal sustainability standards and revitalizing the local economy. R. at 6. Moreover, the regulation is "narrowly drawn" to achieve these ends. *Widmar*, 454 U.S. at 270. The regulation is narrow because the land transfer only pertains to one-fourth of the park, and the environmental evaluation investigated potential alternative means that could preserve Red Rock before determining that this restriction was the superior option. R. at 7. Moreover, the festivities around the Montdel Observance need only relocate five miles downstream. R. at 8. This case is also easily distinguishable from *Widmar* because unlike that university, Delmont is not seeking to exclude the Montdel Observers' expression based on its religious content. Rather, all who would use the park for purely expressive purposes will be excluded from the mining area for safety reasons—the content of the speech at issue has no bearing on the application of the restriction. Thus, the Respondent should prevail even if the Court chooses to analyze this case under strict scrutiny.

Conclusion

For the foregoing reasons, the Petitioner is unlikely to prevail on the merits of their claim, and the Respondent respectfully requests that this Court affirm the decision of the Fifteenth Circuit and deny the preliminary injunction.

Certification

We hereby certify that this brief is solely the work product of our team members and that this brief was written in full compliance with the Honor Code of Team 32's Law School.

We further certify that Team 32 has complied with all Competition Rules.

Members of Team 32 /s/

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Seigenthaler-Sutherland Moot Court Tournament