No. 24-CV-1982

IN THE

SUPREME COURT OF THE UNITED STATES

MONTDEL UNITED

Petitioner,

v.

STATE OF DELMONT and
DELMONT NATURAL RESOURCES AGENCY

Respondents.

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

BRIEF FOR THE PETITIONER

Team [11]
Counsel for the Petitioner

January 31, 2025

SEIGENTHALER-SUTHERLAND CUP NATIONAL FIRST AMENDMENT MOOT COURT COMPETITION

QUESTIONS PRESENTED

1. Does the ECIA and subsequent transfer of Red Rock violate the First Amendment Free Exercise rights of Montdel United?

2. Does the ECIA and subsequent transfer of Red Rock violate the First Amendment Free Speech rights of Montdel United?

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The opinion written by the United States District Court for the District of Delmont, Western Division, is unreported but may be found as *Montdel United v. State of Delmont*, No. 24-CV-1982 (D. Dm 2024) (R. at 1–32). The United States Court of Appeals for the Fifteenth Circuit's opinion is likewise unreported but may be found at *Montdel United v. State of Delmont*, No. 24-CV-1982 (15th Cir. 2024) (R. at 33–45).

JURISDICTIONAL STATEMENT

This is a direct appeal from a final judgment of the United States Court of Appeals for the Fifteenth Circuit after the Circuit Court reversed the decision of the United States District Court for the District of Delmont, Western Division, to grant the Petitioner's request for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65. The District Court had proper jurisdiction under 42 U.S.C § 1983 and 28 U.S.C § 1331. The Circuit Court possessed proper jurisdiction to hear the appeal from the District Court under 28 U.S.C § 1292. The Fifteenth Circuit reversed the District Court's grant of preliminary injunction and in turn denied the request. Petitioner timely appealed to the United States Supreme Court, which granted certiorari under 28 U.S.C § 1254.

STATEMENT OF THE CASE

Cold, steel claws wrench and pry through hallowed ground, filling the surrounding mountains with the eerie sound of mechanical death, gears moving unfeeling as they shift through lose gravel. The man in the hard hat coughs; the air clogged with dust and debris as if to protest being awoken from a long hibernation. For the man, it's just another Tuesday. For the Observers looking on from afar, it is the final death throe in over three centuries of attempted eradication. A mother tries to comfort a young child but turns away, unable to face her child knowing she would

never be able to pass down the rituals and traditions of her people, her religion, embodied in over a millennium of worship because the Man in the Hard Hat had severed their connection to God and destroyed their last remaining identity as a Nation.

This is what is at stake in this case. A future, lurching forward with breakneck speed, that only this Court can stop. This case is fundamentally about protecting a religious and ethnic minority from the stranglehold of Corporate Greed. Because it was for such a time as this that the Founding generation ratified the First Amendment, the Petitioner supplicates the Court to save it from extinction, as Queen Esther supplicated King Xerxes to save her people from Haman.

I. History and Religion

This story begins a long, long time ago, but in a land very much at home for the Montdel. The story takes place in Painted Bluffs State Park, located in the State of Delmont—a state, named upside-down, as if to taunt the Montdel and remind them that their world had been turned upside-down. (R. at 1). The Montdel people are an Indigenous Native American group that cultural anthropologists have traced in the area as far back as 400 A.D. (R. at 2). Painted Bluffs State Park is the home of Red Rock, a monolith where the Montdel people perform rituals and crop sacrifices. (R. at 3). According to Montdel oral histories, these rituals have gone uninterrupted since before recorded history, save for extraordinary circumstances. (R. at 3). It is through Red Rock, and only Red Rock, that the Montdel communicate with their Creator (R. at 3).

As with many indigenous groups, the Montdel suffered greatly as Manifest Destiny unfolded, ultimately resulting in their dispersal among other tribes. (R. at 3). Their one remaining identity after centuries of persecution, the occasion on which to remember their past and hope for a future, is to gather together at Red Rock to practice the rites of their forefathers and pray to their Creator. (R. at 5).

II. History Repeats

Delmont "boasts substantial reserves of copper, iron, nickel, and other minerals" throughout the state. (R. at 6). Thus, it became only a matter of time when officials would learn that Red Rock also contained valuable minerals. (R. at 7). To help facilitate the exploitation of natural resources in the state, Delmont passed the Energy Conservation Independence Act (the "ECIA"), which authorized the state to make land transfers to private mining companies. (R. at 6).

At various times, Delmont has considered signing over rights to other state properties but ultimately decided against doing so for environmental reasons. First, they considered transferring land in the Delmont Mountains, but cancelled the agreement upon learning the mining would destroy the habitat of two endangered species. (R. at 9). Delmont cancelled a second agreement upon learning that there was a thirty-five percent risk of local water contamination. (R. 9–10).

Regardless, in January 2023, Delmont signed over the rights to Red Rock to the Delmont Mining Company, a private corporation. (R. at 47). The Mining Company admitted that its operations would "lead to the total destruction of Red Rock and its surrounding area." (R. at 48). Moreover, "there will be no possibility of reclamation in the Red Rock area." (R. at 48). Rather than consider the Montdel's pleas, a state official cuttingly dismissed them: "We've Tolerated these rituals for a long time . . . ." (R. at 53). Despite cancelling agreements at the risk of contaminating physical springs, Delmont refuses to do the same when it would not just contaminate, but destroy, the Montdels' sole spiritual spring.

SUMMARY OF ARGUMENT

This Court should reverse the Fifteenth Circuit and reinstate the District Court's decision. First, this Court should find that the ECIA and subsequent transfer of Red Rock violate Montdel United's First Amendment Free Exercise rights. The ECIA-authorized transfer of Red Rock constitutes an impermissible prohibition of Montdel United's free exercise of religion. As such, First Amendment protections apply. *Lyng*'s reasoning does not control and does not preclude the application of First Amendment protections. Montdel United has not only faced having their holy site destroyed but they, as it stands currently, have been forced to act contrary to their faith. Laws that burden religion which are not neutral and generally applicable must satisfy strict scrutiny. The transfer here was not generally applicable because it concerned one piece of land, a portion of Painted Bluffs State Park, and religious objections were treated differently than secular ones. The transfer was not neutral because its operation was to destroy Red Rock and Respondents knew this would force Montdel United to act contrary to their faith. The transfer does not satisfy strict scrutiny because Respondents have no compelling government interest and did not show narrowed tailoring to achieve any purported interest.

Next, Respondents violated Petitioner's Free Speech rights under the First Amendment. This case should fall under the traditional public forum analysis, for Petitioner's activities at Red Rock are in the spirit of what the doctrine protects. Furthermore, as a traditional public forum, the Court should utilize the "time, place, and manner" test to determine that Petitioner is likely to succeed on the merits of its Free Speech claim.

ARGUMENT

I. THE ECIA AND ENSUING LAND TRANSFER OF RED ROCK VIOLATE MONTDEL UNITED'S FREE EXERCISE RIGHTS PROTECTED UNDER THE FIRST AMENDMENT.

This case involves an issue of whether state law and a land transfer authorized by state law violates the Free Exercise Clause of the First Amendment of the Constitution of the United States. The ECIA authorized the State of Delmont and Delmont Natural Resources Agency (DNRA) (collectively, the Respondents) to enter into land transfer agreements with private mining companies, including an agreement with Delmont Mining Company to transfer the land of the religious Red Rock site in violation of Montdel United's free exercise rights. The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. Jurists throughout the nation, including those who have served on this Court, have recognized the Constitution's commitment to protecting religious exercise and the importance of such protection. *See e.g.*, *McCreary Cnty. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 881 (2005) (O'Connor, J., concurring) (noting that "[t]he First Amendment expresses our Nation's fundamental commitment to religious liberty by…protecting the free exercise of religion"). Indeed, religious freedom, including the free exercise of religion, is a fundamental attribute of our constitutional republic. *Gray v. Gulf, Mobile & Ohio. R.R. Co.*, 429 F.2d 1064, 1072 (5th Cir. 1970) (noting that "[t]he First Amendment commands us to be vigilant in protecting the free exercise of religion").

The ECIA and subsequent land transfer of Red Rock violate Montdel United's First Amendment Free Exercise rights for three main reasons: (1) the ECIA-authorized transfer of Red Rock clearly prohibits Montdel United's free exercise of religious beliefs thus ensuring First

Amendment protections apply; (2) the transfer of Red Rock is not neutral or generally applicable, meaning strict scrutiny must apply; and (3) the transfer fails to satisfy a demanding strict scrutiny analysis. For these reasons, this Court should *reverse* the circuit court's ruling and hold that the ECIA and subsequent transfer of Red Rock are unconstitutional violations of Montdel United's Free Exercise rights under the First Amendment.

A. First Amendment protections apply here because the ECIA-authorized transfer of Red Rock *prohibits* Montdel United's free exercise of religion.

Religious beliefs are protected by the Constitution, and the Free Exercise Clause of the First Amendment, "by its terms, gives special protection to the [free] exercise of religion." *Thomas v. Rev. Bd.*, 450 U.S. 707, 713 (1981). The state can burden a party's free religious exercise by putting the party to a choice: comport with the law or adhere to the tenets of your faith. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2021). The government must manage its property such that it *does not* offend the Constitution. *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980).

The ECIA and the ensuing state-approved transfer of Painted Bluffs State Park, including the area of Red Rock, constitutes an impermissible prohibition of the free exercise of religion. Specifically, these actions inexplicably violate the sacred free exercise rights of Montdel United and the Montdel people as a whole. The circuit court incorrectly found, and the Respondents argue, that the actions here do not amount to a "prohibition" as understood under the Free Exercise Clause. As correctly noted by the district court, however, the destruction of Red Rock does obviously seem like a prohibition of free exercise "at first blush" and arguments to the contrary are uncompelling and without merit. (*See* R. at 26). Indeed, this Court should not complicate the matter and view the situation plainly. Destroying a sacred religious site and the only acceptable

location for prayer, sacrifice, and supplication for the Montdel is exactly what it looks like: a prohibition of the free exercise of religion for Montdel United.

To that end, the circuit court also incorrectly reasoned that to rule in favor of Montdel United would be to allow religious groups and tribes to circumvent validly enacted legislation and "sacraliz[e] the world" with impunity. (R. at 44). The facts here, however, clearly demonstrate that the Montdel have conducted religious observances at Red Rock for at least a millennia and desire, as mandated by their faith, to only conduct their group supplicatory rituals at Red Rock. (R. at 2–4, 7, 10). Rather than incorrectly view Montdel United's position as an attempt to sacralize and evade the ECIA, this Court should find that in attempting to force through the land transfer of Red Rock, the Respondents have presented Montdel with the unimaginable choice of violating their faith or ceasing to practice it as they have for ages.

In *Fulton v. City of Philadelphia*, the city ceased referring children to a Catholic foster care agency because the agency would not certify same-sex couples as foster parents due to the agency's religiously held beliefs about marriage. 593 U.S. at 526–27. In doing so, the city would not renew its contract with the Catholic agency unless the agency agreed to certify same-sex couples in contrast to its religious beliefs. *Id.* at 527. This Court in *Fulton*, held that the city's refusal to contract with the Catholic agency unless the agency certified same-sex foster couples constituted a violation of the Free Exercise Clause. *Id.* at 542–43. As part of its analysis, the *Fulton* Court reasoned that the city's actions put the Catholic agency in the position of having to choose between "curtailing its mission or approving relationships inconsistent with its beliefs." *Id.* at 532. Forcing the Catholic agency into this choice, the Court reasoned, amounted to a clear and constitutionally impermissible burden of free exercise. *Id.* at 532, 542–43.

Like in *Fulton*, the facts here demonstrate that through the transfer agreement of Red Rock, Respondents have put Montdel United to the choice of violating core beliefs of their faith or terminating their religious practice as a whole. While the facts here are not entirely similar in their subject matter to those in *Fulton*, the underlying impermissible conduct is cut from the same cloth. Indeed, the Court has also recognized impermissible choices involving religion in other contexts, such as having to choose between adhering to religion or receiving public benefits. *See generally Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464 (2020). To be sure, the Montdel believe that only groups of their elders may ask for help from "the Creator" and that this can only be done at Red Rock. (R. at 2–3, 51). Additionally, the actions at issue here would render this form of elder group worship at Red Rock unfeasible, if not impossible. (R. at 8). This serves as a prime example of the impermissible choice that this Court has recognized as burdensome.

Additionally, the circuit court here reasoned that the First Amendment does not apply because the actions here did not amount to a "prohibition" of free exercise as described in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). This Court should reject the circuit court's argument that *Lyng* controls because it does not, and even if it did, the actions here still constitute a prohibition of free exercise under *Lyng*.

In *Lyng*, this Court considered whether the Free Exercise Clause prohibits the government from allowing timber harvesting and the construction of a road through a forest that was traditionally used for religious observances of native tribes. *Id.* at 441–42. In holding that it did not, the *Lyng* Court reasoned that, "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 448 (quoting *Bowen v. Roy*, 476 U.S. 693,

699–700 (1986)). The *Lyng* Court also reasoned that "incidental effects . . . which have no tendency to coerce individuals into acting contrary to their religious beliefs" are not enough to rise to the level of a prohibition, even if the ability to practice religion is destroyed or diminished. *Id.* at 450. Despite this, Montdel United's situation can be distinguished from that in *Lyng*. As noted *supra*, the facts here are rich with information about the Montdel faith and religious practices. Both lower courts have recognized and understood that Montdel United's religious beliefs prohibit individual supplicatory prayer away from Red Rock. As such, Montdel United has not only faced the risk of having the ability to practice their religion destroyed but, unlike the affected tribe in *Lyng*, they have also been coerced to now act contrary to their faith. This type of indirect coercion is, even by *Lyng*'s reasoning, enough to invoke the First Amendment. *Id.* at 450–51; (R. at 43–44).

Ultimately, the facts of this case demonstrate that Respondents have unconstitutionally prohibited free exercise of religion by burdening the free exercise rights of Montdel United. As has been outlined, the prohibition is clear and in stark contrast to the decades in which the Montdel enjoyed the uninterrupted freedom to worship as they pleased at their holy site. Concerns of ignoring statutory law and case law precedent and of allowing religious groups to sacralize the world are without merit. Montdel United's adherence to the tenets of the their faith, as they have for ages, does not amount to a purpose to sacralize the world. It is merely the exercise of faith.

Even if Respondent's contention that there are some concerns of sacralizing at play is correct (it is not), this does not mean that the protections provided by the First Amendment are destroyed. What is at risk of being destroyed, along with Red Rock, is Montdel United's ability to freely adhere to the Montdel faith. Moreover, while *Lyng* should not be viewed as controlling, Montdel United has successfully demonstrated that the burden placed on it by Respondents constitutes a burden that rises to a prohibition of free exercise, even under *Lyng*. Beyond the

destruction of the Montdel holy site of Red Rock, Montdel United is asked to act contrary to the tenets of their faith. As such, this Court should reject the circuit court's reasoning and find that the First Amendment is applicable here to protect against a prohibition of free exercise.

B. The transfer of Red Rock is not neutral and generally applicable and, thus, must be subjected to a strict scrutiny analysis.

Laws that are neutral and generally applicable that incidentally burden the free exercise of religion are not subject to a strict scrutiny standard and must merely survive rational basis review. *Emp. Div., Dep't Hum. Res. v. Smith*, 494 U.S. 872, 878–82 (1990). However, *Smith*'s bright-line rule for religious exercise is avoided, and strict scrutiny analysis is applied, when a law is not neutral or generally applicable. *Fulton*, 593 U.S. at 533; *see also City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). As such, precedent from this Court provides the formula for analyzing laws that are not neutral or generally applicable. Simply put, these laws must satisfy strict scrutiny to survive, which is a significantly difficult endeavor. *City of Boerne*, 521 U.S. at 534.

The circuit court presents *Lyng* as the be-all, end-all conclusory decision for this matter, but, in reality, *Lyng* does not control. (*See* R. at 43). Instead, the analysis should begin by looking to *Smith* and the cases that came in its aftermath. To that end, such an analysis should ultimately conclude that *Smith*'s standard does not control and that a strict scrutiny analysis must be satisfied because the land transfer of Red Rock is neither neutral nor generally applicable.

The "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 593 U.S. at 533; *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018) (noting that the Free Exercise clause bars even small departures from neutrality). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of

facial neutrality. The Free Exercise Clause protects against governmental hostility that is masked as well as overt. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). When considering neutrality, the operation of the law is considered and "the effect of [the] law in its real operation is strong evidence of its object." *Id.* at 535.

Here, the intended and anticipated effect of the ECIA-authorized land transfer of Red Rock was to significantly alter and/or destroy Red Rock for economic gain and to prohibit the Montdel's free exercise of religion at Red Rock in order to effectuate such a transfer. (*See* R. at 6, 8–9). Respondents are more than familiar with the Montdel Observance and, thus, in enacting the ECIA and authorizing the land transfer, knew that the conduct at issue here would harm Montdel United by destroying the ability to practice their faith in accordance with their beliefs. Regrettably, Respondents' have clear knowledge of Montdel United's religious practices and the irreparable harm destroying Red Rock would do to their faith—and yet they would proceed flippantly.

Specifically, representatives of the State of Delmont have previously praised and even promoted the Montdel Observance and the practices associated with it at Red Rock. (R. at 4–5). Moreover, in response to Montdel United's concerns about the destruction of Red Rock and the group's religious practices, the Delmont State Natural Resources Agency stated, "Look, the state has been very patient with the Montdel. We've Tolerated these rituals for a long time, but the needs of all the people of this state have to come first and we have to do what we think best with state-owned property." (R. at 53). Simply put, Respondents knew they were plotting to destroy the sole holy place for the Montdel people and proceeded non-neutrally by halting transfers for environmental reasons but not for the religious reasons.

There is no general applicability if a law only applies to a singular piece of land. *See Roman Cath. Bishop v. City of Springfield*, 724 F.3d 78, 92, 98 (1st Cir. 2013) (noting that an ordinance

was not generally applicable because it applied only to one property with the intended effect of only applying to specific properties). Also, a law is not generally applicable when it "prohibits religious conduct" but allows for secular exceptions or exemptions. *Lukumi*, 508 U.S. at 543; (R. at 28). Indeed, government policies that allow exemptions or exceptions only for secular reasons run contrary to the First Amendment. *See Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). Moreover, it has been recognized by other courts that this Court has expressed concern with the government "deciding that secular motivations are more important than religious motivations." *Id.*

In *Lukumi*, this Court held that a city ordinance banning animal sacrifice violated the free exercise rights of a religious church. *Lukumi*, 508 U.S. at 525–528, 547. This Court, in *Lukumi*, reasoned that the ordinance was not generally applicable because it prohibited conduct of religious motivation but did not apply to nonreligious conduct of a similar "danger" as religious animal sacrifice. *Id.* at 543–44. The transfer here applies to a singular portion of land, part of Painted Bluffs State Park, and, like *Lukumi*, the facts here demonstrate, and the district court noted, that religious conduct has been treated differently than non-religious conduct. (R. at 28). Specifically, religious objections to land transfers have been tossed to the side, while objections rooted in secular reasoning have been considered and even accepted. Respondents have withdrawn from land transfer agreements similar to that at issue here for environmental reasons yet have chosen to ignore a religious objection because they feel they have tolerated the Montdel, and their faith, long enough. (R. at 9–10, 28–29). It is this precise differential treatment of religion that this Court has found to demonstrate a lack of general applicability.

The concepts of "[n]eutrality and general applicability are interrelated, and…failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508

U.S. at 531. A law that does not meet either of these thresholds *must* undergo a strict scrutiny analysis, meaning the law must be justified by a compelling government interest and be narrowly tailored to achieve that interest. *Id.* at 531–32. While an application of notable precedent to the facts here demonstrates a lack of neutrality and general applicability, the circuit court itself acknowledged that it "assume[s] that [Respondents'] actions were not neutral and generally applicable." (R. at 45). We agree. The transfer of Red Rock is not neutral *nor* is it generally applicable. Further, as we have discussed *supra* in Part A, *Lyng* does not control nor does it preclude the necessary application of strict scrutiny.

C. The transfer does not satisfy the strict scrutiny analysis needed to pass constitutional muster because the state lacks a compelling interest, and the law is not narrowly tailored to achieve any purported interest.

To survive a strict scrutiny analysis, a government policy that is non-neutral and lacks general applicability that burdens religious exercise must advance a compelling government interest "of the highest order" and be narrowly tailored to achieve that interest. *Lukumi*, 508 U.S. at 546 (noting that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny"); *Fulton*, 593 U.S. at 541. "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." *Lukumi*, 508 U.S. at 546 (emphasis added).

Respondents face a difficult and uphill battle to survive a strict scrutiny analysis. Indeed, demonstrating a compelling interest and a narrow tailoring to achieve that interest is "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. Here, this is a test that cannot be passed.

While a lack of either a compelling interest or narrow tailoring would demonstrate a failure to satisfy strict scrutiny, the transfer of Red Rock fails both aspects of this demanding standard. First, Respondents lack a compelling government interest. Montdel United concedes, and indeed the district court noted, that Respondents have interests here, including those rooted in stemming the impact of fossil fuels. (R. at 30). Indeed, this Court should invoke the reasoning of the district court, and this Court's own precedent, by assessing the interest's compelling nature (or lack thereof) in the context of transferring Red Rock. (R. at 30 (citing *Fulton*, 593 U.S. at 541)). Standing alone, Respondents' interests can reasonably be perceived as valid and legitimate, but it remains that they do not justify destroying Red Rock and forcing Montdel United to act contrary to their faith.

To succeed, Respondents must demonstrate that not proceeding with the ECIA-authorized transfer amounts to "the gravest abuses of [their] responsibilities." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 696 (2020) (Alito, J., concurring). In a sense, this Court has routinely impressed upon parties everywhere that demonstrating a compelling interest is hard to do because satisfying strict scrutiny is hard to do. The Court should not hesitate to once again do so here because Respondents cannot show an interest of the highest order that would be a derelict of their responsibilities should they not pursue it. To be sure, an interest may exist, but economic benefits and fossil fuel concerns are not enough to destroy a holy site and prohibit Montdel United's religious exercise. Finding otherwise would run afoul of this Court's precedent and the spirit of the First Amendment's protections.

Beyond the lack of a compelling interest, there is also a lack of a showing of narrow tailoring to achieve any purported compelling interest(s). Respondents have not demonstrated that they can achieve their interests via the least restrictive means without burdening religious exercise.

"[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so. *Fulton*, 593 U.S. at 541. Here, Respondents have burdened religion in that their actions have resulted in and "will . . . result in fundamental harm to the practice of the Montdel Observance." (R. at 45).

In *Lukumi*, a case already discussed at length, this Court reasoned that city ordinances were not narrowly tailored because the purported interests could have been achieved by alternative policies that imposed a lesser burden on religion. *Lukumi*, 508 U.S. at 546. Here, like in *Lukumi*, alternatives exist that could help Delmont achieve its interests. The facts demonstrate that the DNRA explored alternative mining methods and technology that would have lessened the impact on Montdel United's religious practices by not resulting in the destruction of Red Rock. (R. at 8.). Respondents chose not to select any alternative routes because it was simply "not practical" for them because they may have to wait as much as twenty years for them to be viable. (R. at 9).

It should be noted by this Court, however, that it is most certainly not practical for Montdel United and the Montdel people to have their holy site of Red Rock destroyed and, as a result, be required to violate their faith. This instance of impracticability must be given more weight. Moreover, the Montdel have been worshiping at Red Rock for before recorded history—far longer than twenty years—and until now, Respondents did not view leaving the area free from mining as impractical. Regardless, the existence of such alternative, less burdensome avenues demonstrate a lack of narrow tailoring. To that end, "the absence of narrow tailoring suffices" to show a failure to satisfy strict scrutiny. *Lukumi*, 508 U.S. at 546; *see also Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987). Because there is no compelling government interest and a lack of narrowed tailoring for any purported interest, the transfer of Red Rock does not satisfy strict

scrutiny. As such, this Court should find that the ECIA and subsequent transfer of Red Rock violate the First Amendment Free Exercise rights of Montdel United.

II. RESPONDENTS VIOLATED PETITIONER'S FREE SPEECH RIGHTS UNDER THE TRADITIONAL PUBLIC FORUM ANALYSIS, FOR PETITIONER'S ACTIVITIES AT RED ROCK ARE IN THE SPIRIT OF WHAT THE DOCTRINE PROTECTS.

The traditional public forum doctrine should extend to this case because Petitioner's activities at Red Rock are in the spirit of what the doctrine protects. The First Amendment's Free Speech Clause—applicable to the states through the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652, 666 (1925)—provides that, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Here, the proposed sale of portions of Painted Bluffs State Park to Delmont Mining Company, (R. at 47), restricts the expressive activity of the Montdel by limiting their access to government property. Whenever a free speech claim challenges a speech restriction on government property, the Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

The Supreme Court typically divides fora into three types: traditional public fora, designated public fora, and nonpublic fora. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992). Traditional public fora are places such as "streets and parks which 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." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)). Next, designated public fora involve

"public property which the State has opened for use by the public as a place for expressive activity." *Id.* "[T]he government may close a designated public forum whenever it chooses, but it 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). Lastly, there are nonpublic fora, where "all comers may be subject to a prohibition of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment, so long as the government acts reasonably in imposing such restrictions and the prohibition is content neutral." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 115 (1981).

The Court should hold that Red Rock is a traditional public forum. Furthermore, the Court should utilize the "time, place, and manner" test to determine that Petitioner is likely to succeed on the merits of its Free Speech claim.

A. The Court should hold that Red Rock is a traditional public forum because it is a park.

The Court should hold that Red Rock is a traditional public forum. Typically, "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). Red Rock is within Painted Bluffs State Park, and in most cases, "a determination of the nature of the forum would follow automatically from this identification." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). "No particularized inquiry in the precise nature of a [forum] is necessary. *Id.* at 481.

Foremost, the activities that occur at Red Rock are compatible with traditional public forum status. For over 1500 years, the Montdel have travelled to Red Rock to conduct rituals, most notably Montdel Observances. (R. at 50–51). During Montdel Observances, which occur four times per year, (R. at 3), "every Observer who is able gathers at the base of the bluff at midday"

and "[t]he Elders hear requests from all members of the community who wish for divine assistance with their troubles," (R. at 51). These requests can include "everything from illness to financial difficulties to political issues relevant to the community," and "usually take several hours." (R. at 51). The only time the ritual was not practiced was during the Great Depression and World War II, but since 1952 the practice has been rekindled and "grown much larger." (R. at 52). Montdel Observances demonstrate "the crucial relationship between the Elders and the people—making the Elders responsible to the people and teaching the people to put their trust in the Elders." (R. at 51). Stated otherwise, this tradition builds community and is a public good, which is precisely what the traditional public forum doctrine is designed to protect.

Furthermore, the Montdel's centuries-old tradition of performing religious activity at Red Rock is the type of activity that involves "communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n*, 460 U.S. at 45 (quoting *Hague*, 307 U.S. at 515). Prayer has historically formed an important part of American public life, and "the invocation of divine guidance [has] been accepted as part of American political discourse throughout the history of this Republic." *Deboar v. Vill. of Oak Park*, 267 F.3d 558, 570 (7th Cir. 2001). In *Deboar v. Village of Oak Park*, the Seventh Circuit held that the prohibition of a National Day of Prayer event in a public forum because it was not "civic" violated the First Amendment because "the philosophical and theological position that prayer . . . can never be 'civic' . . . discriminated against the speech of those of its citizens who utilize these forms of expression to convey their point of view on matters relating to government." *Id.* at 568.

Petitioner sojourns up to Red Rock to seek divine guidance and assistance with the most important issues affecting their community, such as financial difficulties and political issues

relevant to the community. (R. at 52). Prayer, certainly in this case, is civic in nature and supports the conclusion that Red Rock is a traditional public forum.

Furthermore, this case should not be construed in the context of *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508 (D.C. Cir. 2010). In *Boardley*, the D.C. Circuit Court of Appeals found that remote wilderness areas are the type of place "which never [has] been dedicated to free expression and public assembly, would be clearly incompatible with such use, and would therefore be classified as [a] nonpublic [forum]." *Id.* at 515. The physical character of some "areas—even large areas, such as a vast wilderness preserve . . . would be clearly incompatible" with traditional public forum status. *Id.* However, courts across the country have recognized the traditional public forum status of state parks and nature preserves set aside for use by the public. *See Leydon v. Town of Greenwich*, 777 A.2d 552, 570 (Conn. 2001) (holding that because Greenwich Point Park "contains shelters, ponds, a marina, a parking lot, open fields, a nature preserve, walkways, trails, picnic areas with picnic tables, a library book drop and a beach, it is clear that Greenwich Point qualifies as a park [a traditional public forum] for purposes of First Amendment analysis"); *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir. 2000) (holding that even a small beach state park constitutes a traditional public forum because "the public may swim, play games, rest, and enjoy the surroundings"). "National Parks . . . are traditional public fora." *United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000). Red Rock, a particularly popular area within a state park, should be treated the same.

Red Rock is certainly not comparable with a remote wilderness area. For over 1500 years, the Montdel have traveled to Red Rock, an area within Painted Bluff State Park, to conduct religious rituals. (R. at 50). Hundreds of Montdel gather at these rituals, (R. at 52), and thousands of visitors attend the equinox festivals at Painted Bluffs, a mere mile from Red Rock, to witness

Mondel Observances. (R. at 15). The State has "put the Montdel Observance in its advertising campaigns for the state park[] and has licensed vendors to come and sell goods." (R. at 52).

Respondents may cite *State v. Ball*, 796 A.2d 542 (Conn. 2002) as authority that Red Rock is not a traditional public forum, but the Court should reject this argument. The Connecticut Supreme Court held that "state forests and undeveloped state parks" are not traditional public fora. *Id.* at 549. But the dispositive question is the "purpose [the forum] serves, either by tradition or specific designation." *Boardley*, 615 F.3d at 514. And as aforementioned, Red Rock has traditionally been used "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n*, 460 U.S. at 45.

Respondents may attempt to argue that Red Rock's limited and irregular expressive activity makes it as unlike a park as a state fairground is unlike a public street. *See Heffron v. Int'l Soc. for Krishna Consciousness*, 454 U.S. 640, 654 (1981). In *Heffron*, the Court highlighted that "a street is continually open [and] often uncongested," while a state fairground is congested and open only for a short time. *Id.* at 651. However, Red Rock is part of a public park that is continually open to the public year round. While Montdel Observances and the accompanying festivals occur four times per year, this is due to their religious beliefs. (R. at 50-51). Furthermore, the only irregularities with regard to Montdel Observances occurred during the Great Depression and World War II, but these irregularities are easily explained. (R. at 52). The Great Depression saw "financial hardships that made travel impossible," and "many Montdel were serving overseas" during World War II. (R. at 52). But since 1952, the practice "has grown much larger." (R. at 52). As a result, the Montdels' expressive activity at Red Rock is within the spirit of the public forum doctrine and should be given such status.

B. The Court should utilize the "Time, Place, And Manner" Test to determine that Petitioner is likely to succeed on the merits of its free speech claim.

The Court should utilize the "time, place, and manner" test to determine that Petitioner is likely to succeed on the merits of its Free Speech claim. The Supreme Court has stated that a government "may not [on] its own . . . destroy the 'public forum' status of streets and parks which have historically been public forums." *Grace*, 461 U.S. at 180 (quoting *Greenburgh Civic Ass'ns*, 453 U.S. at 133).

Grace stands for the proposition that "destruction of public forum status . . . is . . . presumptively impermissible" and triggers strict scrutiny. *See id.* While the Court has not expressly held that the closure of a public forum must pass strict scrutiny, by stating that any such closure is presumptively impermissible, the Court implicitly requires that closing a public forum must pass a higher standard of scrutiny than closing other government property. *See id.* (holding that broad congressional prohibition of the display of flags, banners, or devices advocating a cause on the sidewalks around the Supreme Court "results in the destruction of public forum status that is at least presumptively impermissible"); *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir. 1993) (expressing "grave doubts about the City's ability, should it so choose, to withdraw [a city park area] from its status as a traditional public forum"); *Denton v. City of El Paso*, 475 F. Supp. 3d 620, 631 (W.D. Tex. 2020) (noting that a "municipality cannot pass a law to render a traditionally public forum non-public").

On the other hand, Respondents may argue that the Court should follow Justice Kennedy's words that "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, to change the property's forum status." *Int'l Soc'y for*

Krishna Consciousness, 505 U.S. at 699 (Kennedy, J., concurring). They may argue that a traditional public forum may be closed in the same manner as a designated public forum, and thus they only need show that the proposed sale of Red Rock is reasonable and viewpoint neutral.

This argument should be rejected as an unconstitutional workaround. "The principal difference between traditional and designated public fora is that the government may close a designated public forum whenever it chooses, but it may not close a traditional public forum to expressive activity altogether." *Seattle Mideast Awareness Campaign*, 781 F.3d at 493. To hold that a traditional public forum may be closed by sale or transformation would be to collapse the category in a designated public forum.

Therefore, the Court should use the "time, place, and manner" test to evaluate regulations of a traditional public forum. *See McCullen v. Coakley*, 573 U.S. 464, 477 (2014). Under this test, regulations must be "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

With regard to content neutrality, a law is content neutral when it may be "justified without reference to the content of the regulated speech." *Id.* This law may appear neutral on its face, but its effects target the Montdel people the hardest. Red Rock is the only location at which the Montdel may perform the ritual of Montdel Observance, for the Montdel believe "the Creator made Red Rock for the special purpose of hearing communal supplications." (R. at 50-51). The mining operation "would lead to the total destruction of Red Rock and its surrounding area," and Red Rock would be "transformed into a water-filled quarry, making it too hazardous for public access." (R. at 48). Moreover, "there will be no possibility for reclamation of the Red Rock area."

(R. at 48). While the law also prohibits everyone from gathering beneath Red Rock and at the equinox festivals, non-Montdel onlookers go to these areas "to catch a glimpse of the ritual." (R. at 52). The Montdel are the central players and the law will target them the hardest and in an irreversible manner, so the Court should find that this prong of the test is not satisfied.

Furthermore, the law must be "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 791. Narrow tailoring under intermediate scrutiny does not require that the government use the least restrictive means to achieve its ends, only that "the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). The Respondents claim interest in clean energy alternatives to fossil fuels, mining lithium to provide economic benefits, and that mining is necessary to comply with a federal mandate. (R. at 9, 47-48).

Respondents cannot demonstrate that their interests would be less effectively achieved by the alternative plans that Respondents rejected before agreeing to transfer the portion of Painted Bluffs State Park. There were two alternative plans. The first agreement involved "a proposed transfer of land . . . for its rich nickel deposits . . . and was canceled after the environmental impact study revealed that the extraction process would destroy the habitat of two endangered species. (R. at 9-10). The second agreement for "lithium brine extraction" was canceled "when the environmental impact study indicated a roughly thirty-five percent risk of water contamination affecting an aquifer that supplies reserve water" to a town in Delmont. (R. at 10). These plans would have helped Respondents achieve their interests but were summarily rejected. (R. at 10).

Lastly, the State fails to "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. The duty of the government to maintain alternative channels when it restricts expressive activity in a public forum does not require it to provide "perfect

substitutes" for restricted areas. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006). But restrictions "that impact speech must leave open sufficient alternative avenues of communication to minimize the 'effect on the quantity or content of th[e] expression.'" *Vincenty v. Bloomberg*, 476 F.3d 74, 88 (2d Cir. 2007).

The Court should construe this case in the context of *Chabad of South Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975 (S.D. Ohio 2002). There, the court held that the city of Cincinnati's seven-day ban on private speech, which prevented the plaintiffs from putting a menorah display, left "no venue for speech in Cincinnati which compares to Fountain Square . . . and . . . no ample alternative channel of communication available to Plaintiffs" due to "the unique role of Fountain Square in the City of Cincinnati. *Id.* at 986. Here, there is no alternative site to Red Rock for the Montdel Observance. The Record states that the Montdel believe "the Creator made Red Rock for the special purpose of hearing communicable supplications" and can be done "only at Red Rock." (R. at 50-51). There is no alternative to Red Rock, just as there were no comparable alternatives to Fountain Square for the religious display in *Chabad of South Ohio*, 233 F. Supp. 2d at 986.

Therefore, the Respondents cannot demonstrate that the transfer of Red Rock meets the "time, place, and manner" test, and the Court should hold that Plaintiff is likely to succeed on the merits of its Free Speech claim.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to reverse the Fifteenth Circuit and affirm the District Court's grant of a preliminary injunction to Petitioner.

Dated at Hawkins, DM, January 31, 2025.

Respectfully submitted,

TEAM 11, S.C.
Counsel for Petitioner, 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

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;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C § 1292

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing,

modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

28 U.S.C § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rules

Fed. R. Civ. P. 65

(a) Preliminary Injunction.

(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not

ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

CERTIFICATE OF COMPLIANCE

Pursuant to rule IV(C)(3) of the Seigenthaler-Sutherland Moot Court Competition's Official Rules, counsel for Petitioner certify that:

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

/s/ Team No. 11

Counsel for Petitioner