No. 23-CV-1981

In the

SUPREME COURT OF THE UNITED STATES

COOPER NICHOLAS,

Petitioner,

v.

STATE OF DELMONT and

DELMONT UNIVERSITY,

Respondents.

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

BRIEF FOR RESPONDENTS

Team 22
Counsel for Respondents
January 31, 2024

QUESTIONS PRESENTED

I. Whether a state-funded grant limiting research and conclusions to the academic community's consensus view of what constitutes a scientific study is constitutional.

II. Whether the Establishment Clause prevents state-funded research from being used to advance a religious vocation or to investigate possible origins of Meso-Pagan religious symbolism.

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The opinion of the United States District Court for the District of Delmont, Mountainside Division, is unpublished and may be found at *Nicholas v. Delmont*, C.A. No. 23-CV-1981 (D. Delmont Feb. 20, 2024). The opinion of the United States Circuit Court of Appeals for the Fifteenth Circuit is unpublished and may be found at *Nicholas v. Delmont*, C.A. No. 23-CV-1981 (15th Cir. Mar. 7, 2024).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on March 7, 2024. Afterward, Petitioner filed a writ of certiorari, which this Court granted. R. at 59-60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Delmont University ("University"), run by the State of Delmont ("Delmont") (collectively, "Respondents"), after years of fundraising from an eclectic array of sources, opened The GeoPlanus Observatory ("Observatory") atop Mount Delmont in the Delmontian Mountain Range. Seawall Aff. ¶¶ 3-4. Mount Delmont is the highest mountain peak in the range and promised to be one of the best to view celestial phenomena in the Northern Hemisphere. Seawall Aff. ¶ 4. The University equipped the Observatory with state-of-the-art technology. *Id*. In anticipation of the Pixelian Event ("Event"), a rare celestial phenomenon involving the Pixelian Comet which occurs once every ninety-seven years, the University created a Visitorship in Astrophysics ("Visitorship") funded by a state-approved Astrophysics Grant ("Grant"). R. at 1, Seawall Aff. ¶ 5. The recipient of the Grant is the University's "Principal Investigator." R. at 1. They receive access to the Observatory and all its resources, research assistants, a salary, and coverage of all incidental costs related to the Event. R. at 1, Seawall Aff. ¶ 6. The terms of the

Grant require that the study of the Event and any published conclusions by the Principal Investigator align with the academic community's consensus of what constitutes a scientific study. *Id*., R. at 5. The University put those terms in the Grant specifically in order to remain a "purely academic institution[.]" Seawall Aff. ¶ 7. They wanted to avoid being labeled as a religious institution and/or attracting religious donors. *Id.* After a highly competitive grant application process involving numerous qualified applicants, the University chose Cooper Nicholas, Ph. D. ("Dr. Nicholas") to be the Principal Investigator. Seawall Aff. ¶ 8, R. at 5.

Dr. Nicholas, a Delmont University graduate, is widely known within the field of Astrophysics. Seawall Aff. ¶ 8, Nicholas Aff. ¶ 3. After graduating summa cum laude from Delmont University, he received a doctorate in astrophysics from the University of California-Berkeley. Nicholas Aff. ¶¶ 3-4. His work with land and space-based telescopes and remote sensing equipment to observe celestial events is prolific. Nicholas Aff. ¶ 5. Unfortunately, some time after Dr. Nicholas began the Visitorship, the University found out from social media that he intended to use the appointment as a foundation for his personal religious study and eventual vocation. Seawall Aff. ¶ 10.

Dr. Nicholas adheres to a Meso-Paganist faith, centered in the study of the stars. Nicholas Aff. ¶ 6. These religious beliefs are the continual inspiration for his work and the only reason he has pursued the study of astrophysics at all. Nicholas Aff. ¶¶ 6, 9. The Meso-Paganist faith includes a belief in a "lifeforce" that connects the universe, sun, moon, and stars to living creatures. Nicholas Aff. ¶ 9. Dr. Nicholas sees this belief about a lifeforce reflected in the Charged Universe Theory a highly controversial theory that contends "cosmological phenomena…are dependent upon charged particles, rather than gravity." R. at 7. It is in direct conflict with the scientific community's ideas about the makeup of the cosmos. *Id.* Although Dr. Nicholas was, in theory, "open to whatever

findings were the result [of his study], … he was hopeful that it would confirm his personal beliefs and theories he was entertaining about Meso-Paganism." R. at 8. Despite this dogmatism, Dr. Nicholas has never before published any conclusions about the Charged Universe Theory. R. at 8, Nicholas Aff. ¶ 8.

"*[P]ending the results of [that] study*," Dr. Nicholas intends to apply to become a First Order Sage. Nicholas Aff. ¶ 15, emphasis added. Meso-Paganist Sages are religious leaders who set policy and doctrine within the religion. Nicholas Aff. ¶ 14. Dr. Nicholas has desired to become a First Order Sage "for as long as [he] can remember." Nicholas Aff. ¶ 13. Scholarly pursuits are a prerequisite to becoming a First Order Sage. Nicholas Aff. ¶ 14. Dr. Nicholas is, by his own admission, fighting for his right to publish conclusions unsupported by the scientific community. Nicholas Aff. ¶ 16.

After utilizing University resources to monitor, study, and analyze both the environmental conditions before the Event as well as the Event itself, Dr. Nicholas published his "interim" findings, claiming his research served as proof for the Charged Universe Theory. R. at 6-7. He theorized that an electrical interplay existed, corroborating the presence of the "lifeforce" as defined by Meso-Paganists. *Id*. He avowed that his continued post-Pixelian Event studies would substantiate these claims. *Id*.

The scientific community "roundly discredited" Dr. Nicholas' theories with a "hailstorm" of rebuttals, claiming his conclusions were "medieval" and unprovable from a scientific standpoint. R. at 9. The University received considerable negative press and complaints, and feared for its economic investment in the Observatory, as it was now associated with "weird science." R. at 9. The outcry is reminiscent of an event from two years ago, when the University faced serious backlash after a faculty member used a private Anthropology Department grant to "overtly

champion[] dubious religious positions." Seawall Aff. ¶ 9. That scandal remains a problem for the University to this day; similarly, Dr. Nicholas' actions have likely hampered the University's ability to fill a visitorship in the future. *Id,* R. at 9.

The University informed Dr. Nicholas that his current research was not in alignment with the terms of the Grant and was "in part based on foundational texts religious in nature, not empirical." R. at 10. University President Seawall requested that he align his research, experiments, and conclusions with the state grant's terms. R. at 10. Dr. Nicholas refused, claiming the University was attempting "to stifle [his] speech." Nicholas Aff. ¶ 17. The University replied in a second letter that Dr. Nicholas could conclude and publish "whatever he wanted on the subject … but not under the auspices of the state-funded grant." R. at 10. The state had set out to subsidize only *scientific* conclusions. *Id*. Additionally, the University could not risk endorsing a particular religious belief. *Id.* To do so would risk a violation of the Establishment Clause. Seawall Aff. ¶ 10. Dr. Nicholas refused to comply, and the University had no choice but to terminate his position and grant funding. R. at 11.

SUMMARY OF THE ARGUMENT

I. Question Presented 1.

This Court should affirm the Fifteenth Circuit's decision and find the terms of the Grant constitutional. The government may speak for itself, even through private citizens, to promote a particular program without engaging in viewpoint discrimination. When Delmont University created the Visitorship, financed through a state-funded grant, it engaged in government speech.

If the Grant and Visitorship instead opened a limited forum, the government may still restrict the content of that speech to preserve the purpose of the forum. Its restrictions are reasonable and viewpoint neutral, therefore constitutional. Even if the Grant created a public

forum, its terms pass strict scrutiny—the limitations are narrowly tailored to serve a government interest. Moreover, this Court should grant deference to universities when making complex value judgments.

Additionally, Dr. Nicholas was not compelled to adopt a particular belief, nor were his religious views suppressed. He was free to publish his religious-based theories anywhere he wished, just not under the auspices of the University and Visitorship.

II. Question Presented 2.

This Court should affirm the Fifteenth Circuit's decision because for Delmont University to use state funds to research the origins of Meso-Pagan religious symbolism and to fund Dr. Nicholas' vocational pursuits would violate the Establishment Clause. *Locke v. Davey* determined that the government may not fund a religious vocation, absent a mechanism that includes an independent personal choice between government funds and religious vocational study. Additionally, Delmont University was at risk of violating the Establishment Clause based on an application of the history and original meaning of religious funding as required by *Kennedy v. Bremerton.*

ARGUMENT

I. THE LANGUAGE OF THE ASTROPHYSICS GRANT, REQUIRING THAT THE GRANTEE'S RESEARCH AND CONCLUSIONS ALIGN WITH THE SCIENTIFIC COMMUNITY'S CONSENSUS OF SCIENCE, IS CONSTITUTIONAL.

This Court should affirm the Fifteenth Circuit's decision to find the terms of the Grant constitutional and hold there was no First Amendment violation because the Grant and its research conclusions were government speech. At issue is whether a state may attach terms to its Grant that govern the grantee's use of its funds. Dr. Nicholas challenges the Grant's constitutionality, and in

doing so, he asks the Court to ignore *Shurtleff v. City of Bos.*, 596 U.S. 243 (2022) and misapply standards to determine when the government speaks for itself.

The First Amendment prescribes, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I This Court has held that the government violates that prescription when it suppresses particular viewpoints. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). But when the government speaks for itself or chooses to fund one activity over another, the First Amendment does not require a diversity of viewpoints. *Rust v. Sullivan*, 500 U.S. 173, 174 (1991). The First Amendment permits the government to "promote a program[.]" *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). When Dr. Nicholas utilized state funds and equipment—designed, built, and operated for the purpose of bringing world-class attention to a state-funded university—he engaged in such a government program.[1]

A. The government may speak for itself and promote a particular program without engaging in viewpoint discrimination.

The first and basic question at issue is whether research and conclusions made using Delmont University's state-funded observatory through the Astrophysics Grant constitute government speech. If so, the University may refuse religious-based content in favor of scientific consensus. The government may speak for itself and determine the content of that speech. *Walker*, 576 U.S. at 207, citing *Pleasant Grove City v. Summum*, 555 U.S 460, 467-468 (2009). In doing so, the government "is not barred by the Free Speech Clause." *Id*. The government "naturally chooses what to say and what not to say[,]" when it "wishes to state an opinion," or "to speak for

[1] Parties were not asked to litigate Dr. Nicholas' employee status nor contractual relation to the University; Respondents thus operate under the assumption that Dr. Nicholas' acceptance of the grant and salary from the State of Delmont and Delmont University qualifies him as a public employee.

the community[.]" *Shurtleff*, 596 U.S. at 251. Thus, government statements do not trigger the First Amendment rules in place to protect the marketplace of ideas. *Id*. citing *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 559 (2005).

This court has refused to hold that the Government unconstitutionally discriminated on the basis of a viewpoint when it chose to fund a program, and in doing so, advanced one goal and discouraged another. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Just as citizens exercise their First Amendment freedom of speech through monetary donations (*see Buckley v. Valeo*, 424 U.S. 1, 58-59 (1976), *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010), the government speaks when it selectively funds programs. *See Rust*, 500 U.S. at 192-93; *Maher v. Roe*, 432 U.S. 464, 473–74 (1977); *Harris v. McRae*, 448 U.S. 297, 316-18 (1980). The University's decision to fund research that aligns with the consensus of science advances one goal, and by its very nature discourages other goals. This Court has refused to label similar funding processes as viewpoint discrimination. Government should not be disallowed from creating funding for a particular purpose; under such a restriction the "government would not work." *Walker*, 576 U.S. at 207. The government may not deny a benefit based on viewpoint discrimination. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). But to hold that the government engages in viewpoint discrimination when it merely chooses to fund one activity over another would render numerous government programs "constitutionally suspect." *Rust*, 500 U.S. at 194; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (SCALIA, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view."); *see also Johanns*, 544 U.S. at 553 ("[T]he Government's own speech…is exempt from First Amendment scrutiny"); *see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) ("Government is not restrained by the First Amendment from controlling its own expression").

The government may also express its views even when it receives assistance from private sources, if those sources are utilized for the purpose of delivering a government message. See *Johanns*, 544 U.S. 550 (where the government controls the message, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *see also Rosenberger*, 515 U.S. at 833 (" it [the government] may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.")

1. The government may speak through private citizens; *Shurtleff v. City of Bos.* provides the proper test to determine when speech is government speech.

When the government invites a person to participate in a program, the lines blur between private expression and government speech. *Shurtleff*, 596 U.S. at 252. When does the government speak on its behalf and when does it create a public forum for private expression? This Court held that the determination must be driven by the context of each case rather than a "rote application of ridged factors." *Id.* It engaged in a "holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Id*. There are three factors to guide the analysis: (1) the history of the expression at issue, (2) the public's likely perception as to who is speaking, and (3) the extent to which the government has actively shaped or controlled the expression. *Id*.

In a unanimous decision, this Court held that the City of Bos. violated the First Amendment by refusing a request to fly a Christian flag in front of city hall. *Id*. at 249. The issue raised was whether Boston engaged in government speech by flying third-party flags or whether it opened a public forum for private speech. To make this determination, the court applied its three-factor holistic analysis. *Id* at 258.

The first factor weighed in the favor of the government. *Id.* at 254. Generally, flags are symbols that often represent an organization or government—the court held that the flag flying conveyed a government message. *Id*. at 253. For the second factor, the court found that public perception did not "tip the scale" in favor of one party or another. *Id*. at 255. Given Boston's pattern of allowing its flag to be "lowered and other flags to be raised with some regularity," individuals would not necessarily connect any particular flag on the pole to the government. *Id.* As to the third factor, this Court found that Boston actively asserted almost no control other than establishing a date and time—meaning Boston did not intend to convey a message through the raising of the flags. *Id*. at 256-57. Considering the history of flags as symbols, the public's perception of flags, and heavily weighing Boston's lack of control over the flag raisings, this Court ruled the speech was not government speech. *Id.* at 258.

2. This Court should find that Dr. Nicholas' research conclusions, made pursuant to the Grant, were government speech.

Applying the *Shurtleff* three-part test to the terms of the Grant yields that Dr. Nicholas' research and conclusions were government speech.

First, one looks to the history of universities and academic research. Academic study is a critical component of education that impacts the integrity and prestige of the institution. Universities can make a respected name for themselves, be labeled as religious, or become associated with "weird science," all because of their research publications. R. at 9. Universities speak through their published research. When Dr. Nicholas conducted research and published findings under the auspices of the Grant, it was understood that he spoke for the University.

Next, one must consider how the public views research published by a university. Delmont University witnessed the fallout that ensued when academic institutions published religious ideology in academic journals. Seawall Aff. ¶ 7. The public labeled these institutions as religious

when they were not. *Id.* Universities once seen as academic now attracted mostly religious donors. *Id*. Delmont University sought to prevent such a designation by the public. *Id.* Previously, University faculty, through a grant within the Anthropology department, published conclusions that included "dubious religious positions." Seawall Aff. ¶ 9. As a direct result of the religious undertones of that research, the public began to challenge the reputation of the entire department. *Id*. It continues to be a problem for Delmont University to maintain its designation as an academic institution and counter its appearance as a religious institution in the eyes of the public and academic community. *Id*. Public perception presumes that research (funded and published through a university) is authorized and endorsed by that institution.

Finally, the third factor requires an analysis of the extent to which Delmont University actively controlled the nature, creation, and terms of the Grant. Delmont University aspired to be one of the foremost centers for celestial study in the world. R. at 4-5. Through years of fundraising efforts, it built the Observatory atop the highest mountain range in the state. R. at 4. It established the Grant to fund the Principal Investigator as the director of the study, meant to bring acclaim to the University. R. at 1. Delmont University engaged in a rigorous application process to hire the Principal Investigator. R. at 5. The terms setting parameters around the scientific study evidence a high level of control over the implementation of the Grant by the University. *Id.* The Grant funding concerned numerous paid staff, high-tech equipment, and all costs of running and maintaining the Observatory. R. at 1. It covered the cost associated with the publication of scientific articles related to the once in a lifetime Pixelian Event. R. at 1-2. A "final summative monograph" is to be published through the University of Delmont Press. R. at 5. Limiting the research to that which comports with the scientific community's consensus, the University sought to ensure that the expression of scientific ideas emanating from the use of the Observatory and its resources. This

level of control, actively shaping every stage of the process, shows the University's intent to control the speech.

Each of the *Shurtleff* factors fall in favor of the University, designating the speech at issue as government speech. The government spoke for itself when it limited the study to that which aligns with the consensus of science. Since the government is not barred by the First Amendment from determining the content of its speech or promoting a particular program, *Shurtleff* supports the grant's constitutionality.

B. If the court finds that the Grant was not government speech but rather a forum, the terms of the Grant satisfy the requirements of a limited public forum.

The *Shurtleff* Court determined that Boston did not speak for itself through its flag raising program but instead created a limited public forum for private speech. *Shurtleff*, 596 U.S. at 248, 252. Delmont University contends that the terms of the Grant do not place an unconstitutional limit on free speech because the Principal Investigator speaks on behalf of the government. If this court finds that the speech in question is not government speech but that the Grant was instead a forum for private expression, then the Court must determine what kind of forum the government created, and whether the terms of the Grant complied with the requirements of that type of forum. *Cornelius v. NAACP Legal Def & Ed Fund, Inc*., 473 U.S. 788, 797 (1985).

In *Perry Educ. Ass'n v. Perry Local Educs.' Ass'n*, 460 U.S. 37 (1983) the Court identified three types of forums: traditional, designated, and nonpublic. *Cornelius*, 473 U.S. at 802. The Court has further recognized limited public forums as a subset of designated forums. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). The government's ability to control speech and the First Amendment protections regarding the right to speak varies based on the forum in which the speech takes place.

In places historically devoted to assembly and debate, the First Amendment protections of speech are the strongest. Streets and public parks are traditional public forums and are essentially subject to a strict scrutiny standard. *Perry Educ. Ass'n.,* 460 U.S. at 45. To restrict speech in a traditional forum, the government must show that the regulation is narrowly drawn to serve a compelling state interest. *Id.*

Designated forums are created when the state opens public property to be used by members of the public for an express purpose. *Id.* These forums are not subject to the same scrutiny as traditional public forums. The government can restrict these forums "to use by certain groups or dedicated solely to the discussion of certain subjects[.]" *Pleasant Grove*, 555 U.S. at 470. A speaker may be excluded from a limited designated forum if they intend to use the forum to address a topic outside of its purpose. *Cornelius*, 473 U.S. at 806. The First Amendment does not "demand unrestricted access" to a limited designated forum just because it "may be the most efficient means of delivering the speaker's message." *Id.* at 809. This Court observed a distinction between permissible content discrimination—which preserves the purposes of the limited forum and viewpoint discrimination—which is not permissible when directed at speech otherwise within the forum's purposes. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-830 (1995). Limited designated forums "may impose restrictions on speech that are reasonable and viewpoint neutral." *Pleasant Grove,* 555 U.S. at 470. *see also Rosenberger*, 515 U.S. at 829 (holding that the government may "legally preserve the property under its control for the use to which it is dedicated" and may exclude if "reasonable in light of the purpose served by the forum").

Nonpublic forums are spaces that are not "by tradition or designation a forum for public communication[.]" *Perry Ed. Ass'n*, 460 U.S at 46. Restrictions on speech within a nonpublic forum must meet the same standard as limited designated forum: the restrictions must be

reasonable and not made merely in opposition to the speaker's viewpoint. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018); *see also Cornelius*, 473 U.S. at 806; *see also Perry Ed. Ass'n* 460 U.S at 46.

Given this framework, if this Court finds that Delmont has created a forum with its Astrophysics Grant, it most closely resembles a nonpublic or limited designated forum. The precise label between these two is not crucial, given that they are subject to the same standards. The key distinction is that the Visitorship is not merely a designated forum, and this is because of the unique position of the Principal Investigator. They are solely appointed to be the University's spokesperson for the Event. R. at 1. They are to research, study, and publish conclusions regarding the Event, not just any scientific topic that interests them. *Id*. The Visitorship is thus a forum restricted to a "certain group" and restricted to "the discussion of [a] certain subject." Accordingly, its restrictions may be content-based and must be viewpoint-neutral and reasonable.

1. The terms of the Grant are viewpoint-neutral.

To determine the constitutionality of speech restrictions within a limited designated forum, we must first determine what is being restricted. Is it content that is outside of the forum's purpose? Or a restriction based on a particular viewpoint? The Court acknowledges the difficult distinction between permissible general content discrimination and unconstitutional discrimination against a particular view within a content's subset. *Rosenberger*, 515 U.S. at 830-31.

Rosenberger concerned a school funding program to pay for printing costs for school organizations. *Rosenberger*, 515 U.S. at 822-23. The Court identified this program as a "metaphysical" limited designated forum. *Id.* at 829-31. Crucial to the Court's analysis, the university's printing program "encourage[d] a diversity of views from private speakers." *Id*. at 834; *see Nat'l Endowment for the Arts*, 524 U.S. at 586; *see Legal Servs. Corp. v. Velazquez*, 531 U.S.

533, 542-43 (2001). However, under the program, printing costs were denied for organizations with religious editorial viewpoints. *Rosenberger*, 515 U.S. at 831. The Court notes that religion is often framed as a viewpoint, but to categorize "religious thought and discussion as just a viewpoint" would be an understatement. *Id*. Religion is also content it is a "comprehensive body of thought" that involves "the nature of our origins and destiny and their dependence upon the existence of a divine being." *Id*. But the school did not prohibit religion as an overall subject matter, i.e., as a content restriction. *Id.* The restriction was therefore not content-specific to maintain the purpose of the forum; rather it was an unconstitutional viewpoint restriction. *Id.*

Delmont University maintains that the purpose of the Grant is to provide access and resources to the Principal Investigator to publish conclusions regarding the Pixelian Event. Seawall Aff. ¶ 6. Additionally, the University placed a content restriction that research is to be rooted in the scientific community's consensus of science. R. at 5.

Far from the nominally independent, widely diversified student organizations in *Rosenberger*, the Principal Investigator is directly associated with the University and under contract to restrict their content to the academic community's consensus of science. R. at 1. Religious viewpoints, or as a more specific example Catholicism, are not banned as a subset; they would not be restricted, along with the Principal Investigator's views on sports teams, politics and public transportation.

Dr. Nicholas was free to make his religious conclusions "wherever he liked, but not under the auspices of the grant-funded research." R. at 10. The University is not required to grant access to publish under the auspices of the Visitorship merely because it is the most efficient way for him to communicate his religious ideas. *Cornelius,* 473 U.S. at 806. The purpose of the forum was not to prove the existence of a Meso-Pagan religious "lifeforce." Therefore, when the University

required Dr. Nicholas to conduct research and center his conclusions on science and not religion, it was a content restriction necessary to preserve the forum's intended use. The University did not engage in unconstitutional viewpoint discrimination.

2. The terms of the Grant are reasonable.

The reasonableness of a government's restriction on speech must be evaluated in "the light of the purpose of the forum and all surrounding circumstances." *Cornelius*, 473 U.S. at 809. Reasonableness is a low standard. There is no requirement that the restriction be narrowly tailored, or the government's interest be compelling. *Id*. The *Cornelius* Court reminds: "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

The purpose of the forum (if the government indeed created one through the Grant) was to study the once-in-a-lifetime celestial event: the Pixelian Comet. Seawall Aff. ¶ 5. Making an appearance once every ninety-seven years, the high-stakes circumstances surrounding the event meant the University had but one chance to properly research the Comet. Seawall Aff. ¶¶ 5-6. Additionally, the University had an interest in clarifying public confusion between science and religion. R. at 11. Considering the University's purpose, the limited opportunity to conduct the research, the amount of money and resources invested, and the public policy need to reduce public confusion, the limitation on the Grant was reasonable.

C. If the grant defies forum analysis, deference for value judgments should be given to Delmont University.

When the government seeks to award funds through a competitive process, it does not universally "encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. *Nat'l Endowment for the Arts v. Finley* and *Legal Services Corp. v. Velazquez* demonstrate that the "no man's land" speech at issue here is akin to "metaphysical" forums and is not unconstitutionally

restricted. *see Ark. Educ. Television Comm'n v. Fores*, 523 U.S 666, 672-73 (1998) (holding that some selective processes defy forum analysis: "the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting.") The government did not commit viewpoint discrimination when it "allocate[d] competitive funding according to criteria that may be impermissible were direct regulation of speech…at stake." *Nat'l Endowment for the Arts*, 524 U.S. at 587. When the National Endowment for the Arts chose which artist to subsidize it did not "discriminate on the basis of a viewpoint; it [] merely chose[] to fund one activity to the exclusion of the other." *Id.* at 588, citing *Rust*, 500 U.S. at 193.

Additionally, the Court noted that within the context of art funding, certain content-based aesthetic judgments must be made. These judgments set decision-making apart from the funding at issue in *Rosenberger*, where resources were made available to all student organizations. *Nat'l Endowment for the Arts*, 524 U.S. at 586. Universities may also make value judgments when deciding how to allocate resources. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). This Court expressly stated the importance of providing deference to universities, as complex educational judgments are best left to the expertise of the university. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *see also Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (noting that universities may determine on academic grounds who teaches, what is taught, and who may be admitted to study).

Because the Grant was based on a competitive process, sought a singular voice, and did not encourage a diversity of views, it may defy forum analysis. This Court has long provided deference to university decision-making. Delmont University's decision to create a limited-use grant is no different, and this Court should not mandate how to achieve its unique academic mission.

D. If the court finds that the University created a public forum with the Visitorship, the terms of the Grant also comply with strict scrutiny.

If the Court finds that the terms of the Grant are not government speech and instead that the government created a public forum for expression, the standard to evaluate the constitutionality is strict scrutiny. The government may regulate protected speech if the restriction is justified by a compelling government interest that is narrowly tailored to serve that interest. *R. A. V. v. St. Paul*, 505 U.S. 377, 395 (1992). To satisfy the standard the state must "specifically identify an 'actual problem' in need of solving." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011), citing *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000). The restriction placed on the free speech must also "be actually necessary to the solution." *Brown*, 564 U.S. at 799. The terms of the Grant satisfy this demanding standard.

The University's problem in need of solving is the public's confusion between science and religion. Seawall Aff. ¶¶ 7, 9. Delmont University has witnessed academic institutions being labeled as religious, when they were not, after publishing religious ideology in academic journals. Seawall Aff. ¶ 7. The University came under fire from its donors and the academic community when former grant recipients released conclusions grounded in "dubious religious positions." Seawall Aff. ¶ 9. The solution to this very real problem was to limit the Grant to research and conclusions in alignment with the scientific community's definition of science. Seawall Aff. ¶ 6.

E. Dr. Nicholas' speech was not compelled nor unconstitutionally suppressed.

The government may not compel a recipient, as a condition of funding, to adopt a particular belief. *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013). Yet Dr. Nicholas was never compelled to adopt a belief. He was tasked with continuing the research on celestial phenomena, as he had done for years. Dr. Nicholas now claims his religious beliefs are what fueled his interest in astrophysics, though it appears his previous published work did not

contain religious overtones. Nicholas Aff. ¶¶ 5-6, 9, R. at 8. The University, with no reason to believe Dr. Nicholas' research would conflict with scientific consensus, offered him the opportunity to utilize their facility for the once-in-a-lifetime study of the Pixelian Event. Dr. Nicholas could have continued, as he had in the past, to conduct rigorous academic research while maintaining his deeply held religious beliefs. The University did not interfere with his religious beliefs. The University did not require Dr. Nicholas to adopt a belief. *See Maher*, 432 U.S. at 475. Yet he sought to leverage the Observatory and Grant as an opportunity to become a First Order Sage in his religion.

Government funding that is "ideologically driven" and attempts to "suppress a particular point of view" is unconstitutional. Rosenberger, 515 U.S. at 830. The government may not create funding aimed "at the suppression of dangerous ideas[.]" *Speiser v. Randall*, 357 U.S. 513, 519 (1958). But when the lines are drawn between content and viewpoint discrimination, it is evident that the University controlled the grant's content, not the viewpoint of the grantee.

II. DELMONT UNIVERSITY USING STATE FUNDS TO RESEARCH THE ORIGINS OF MESO-PAGAN RELIGIOUS SYMBOLISM AND FUND DR. NICHOLAS' RELIGIOUS VOCATIONAL PURSUITS WOULD VIOLATE THE ESTABLISHMENT CLAUSE.

This Court should affirm the Fifteenth Circuit's decision because absent an individual's independent and private choice to direct government funds towards a religious purpose, there is no separation between the government and religion, and thus the Establishment Clause is violated. The First Amendment's Establishment Clause prohibits the government from making any law "respecting an establishment of religion[.]" U.S. Const. Amend. I. The Clause prohibits government actions that may favor one religion over another. This Court has long grappled with the tension between the requirements of the Establishment Clause requirements and the First Amendment's religious protections. There is often overlap between these aspects. The Court

recognizes the "play in the joints" between what the Establishment Clause permits and what freedom of religion compels. *Locke v. Davey*, 540 U.S. 712, 718 (2004). That being said, Petitioner here does not allege a violation of his Free Exercise rights, and therefore it will be mentioned only as a background contrast to the Establishment Clause.

A. *Locke v. Davey* provides the framework for analyzing vocational study funding, noting the Establishment Clause requires an independent choice between government funds and religious training.

The *Locke* Court described, through four prior decisions, how to engage with the tension between the Establishment Clause and First Amendment religious freedom. Common features of these cases include funding available to a wide range of participants and facial neutrality with respect to religion *Locke* described a government funding process that did not run afoul of the Establishment Clause. *Locke v. Davey*, 540 U.S. 712, 725 (2004). Most importantly the Court notes the funding process involves an independent link in the chain between government funds and religious training. *Locke*, 540 U.S. at 719 (2004).

1. There must be a personal choice between government funds and religious vocational training to avoid violating the Establishment Clause.

Locke v. Davey involved a scholarship program for students who met certain academic and income prerequisites. Students could utilize scholarship dollars to study at secular or religious schools. The Washington state constitution, however, placed a condition upon the award requiring that the funds not be used to "pursue a degree in theology." *Locke*, 540 U.S. at 716. One scholarship recipient attempted to pursue a pastoral degree and was denied the scholarship funds. *Id*. at 718. He sued, alleging a violation of the Free Exercise Clause, and the state countered claiming that funding his religious training would violate the Establishment Clause. *Id.*

Ultimately, the Court found neither a violation of the Establishment Clause nor the Free Exercise Clause, and thus the state's conduct was more or less constitutional by default. *Locke*,

540 U.S. at 724-25. However, the Court illustrated that the recipe for constitutionality under the Establishment Clause requires an independent link, e.g., a personal choice, to separate government funds from religious vocational study. The Court relied on four cases to describe this simple idea.

There is no Establishment Clause issue when grants are disbursed to students, "who then use[] the money to pay for tuition" at the school of their choice. *Agostini v. Felton*, 521 U.S. 203, 226 (1997), citing *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). In the Court's view, this transaction is "no different from a State issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution." *Agostini*, 521 U.S. at 226, citing *Witters*, 474 U.S. at 487. Ultimately, any funds that went to a religious institution "did so 'only as a result of the genuinely independent and private choices of' individuals.'" *Id*.; see *Witters*, 474 U.S. at 488 (noting the break in the chain between the government and religious school: "[t]he combination of these factors, we think, makes the link between the State and the school petitioner wishes to attend highly attenuated one."); *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S 1, 10 (1993) ("By according parents freedom to select a school of their choice, the statute ensures…an interpreter's presence there cannot be attributed to state decisionmaking."); *see also Mueller v. Allen*, 463 U.S. 388, 400 (1983) ("The historic purposes of the [Establishment] clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents"), *see also Zelman v. Simmons-Harris*, 536 U.S 639, 652 (2002) ("parents were the ones to select a religious school…the circuit between government and religion was broken").

It is therefore only when government funds contain a mechanism that provides a genuinely independent personal choice that individuals may seek religious education without violating the Establishment Clause. It is this understanding of the relationship between government funds and

religious vocations that informs the discussion of whether the Establishment Clause prevents Delmont University from funding Dr. Nicholas' religious vocation.

2. Continuing to fund Dr. Nicholas' pursuit of a religious vocation with a state grant violates the Establishment Clause.

Dr. Nicholas' vocational study is inextricably linked to government funding. The Grant was not awarded to a wide range of individuals nor was it facially neutral. It was awarded to a single person, Dr. Nicholas. R. at 2. There was no funding mechanism within the Grant that allowed for an independent personal choice. Instead, the Grant was narrowly focused on the study of the Event—the Pixelian Comet—and only permitted conclusions regarding the Event rooted in scientific consensus. R. at 1-2. Absent a necessary independent link in the chain, government funds directly enabled Dr. Nicholas' vocational study which violates the Establishment Clause.

B. *Kennedy v. Bremerton* provides the framework to analyze Establishment Clause implications from a historical perspective.

This Court, by a 6-3 decision in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), significantly altered Establishment Clause jurisprudence. Ruling in favor of a high school football coach who engaged in private contemplative prayer on the 50-yard line after games, the Court abandoned the use of the *Lemon* test. *Id*. at 534-35; *see Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Instead, the Court held the Establishment Clause analysis should be made according to its "original meaning and history." *Kennedy*, 597 U.S. at 536.

The *Kennedy* Court did not provide exact parameters for the history and original meaning analysis that replaced *Lemon*. *See*, *e.g.*, *Kennedy*, 597 U.S. at 534-36. The Court pointed to prior decisions as guidance, each including, at least in part, a historical analysis: *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); and Justice Gorsuch's concurrence in *Shurtleff*. *See Shurtleff*, 596 U.S. at 276 (GORSUCH, J.,

concurring). These cases, along with *Kennedy*, all relied upon Michael McConnell's scholarship of the history of the framer's view of the Establishment Clause. *Town of Greece*, 572 U.S. at 606 (THOMAS, J., concurring in part and concurring in the judgment); *Am. Legion*, 139 S.Ct. at 2081 n.15; *Shurtleff*, 596 U.S. at 286 (GORSUCH, J., concurring). McConnell's work is therefore worth analyzing as a frame for the discussion of Delmont University's Establishment Clause claims.

1. Michael McConnell's scholarship provides an analysis of the history and original meaning of religious funding as related to the Establishment Clause.

McConnell defines establishment as "the promotion and inculcation of a common set of beliefs through governmental authority." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). It may be broad to allow a range of opinions or narrowly focused on a particular set of beliefs, and it may be tolerant or intolerant of competing views. *Id.* at 2127-31. McConnell notes that at the founding laws were typically "ad hoc and unsystematic." *Id*. at 2131. Even so, he summarized six categories of an establishment that the framers sought prevent.[2] *Id*.; *Shurtleff*, 596 U.S. at 286 (GORSUCH, J., concurring). The category most relevant to the discussion here is financial support.

McConnell details examples of financial support to churches and ministries in the colonies both before and after the revolution. McConnell, *Establishment and Disestablishment* at 2115-2130. Religious support often took the form of tax dollars directed toward local churches. *Id.* at 2152. In pre-revolutionary New England it was typical for each town to "negotiate a salary with

[2] Although the laws constituting the establishment were ad hoc and unsystematic, they can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church. *Id.*

the minister" and in turn "impose the level of taxes necessary to comply with the contract." *Id*. The Revolution brought an end to support for the Anglican church—financial assistance for an establishment committed to royal supremacy made little sense in a revolutionary America. *Id.* at 2155. However, Americans were not quick to discard the "long-held view that religion was worthy of government support." *Id*.

Post-Revolution the states faced a long process of debate around whether and how the government should financially support religion. *Id*. Much of the debate centered around how a state might encourage its citizen's moral values, if not through financial support of churches. *Id*. at 2157-59.

McConnell advocates that a primary reason for the establishment of religion was to wield control over religion and in turn, control the moral character of citizens. *Id.* at 2207. With many states reluctant to give up control, legislation around financial support for churches varied greatly in the early post-revolution years. *Id*. at 2155-57. Some states rejected all forms of financial aid, some continued with compulsory financial contributions for churches, and some even passed new legislation establishing an official state religion. *Id*. Ultimately the Bill of Rights unified this ad hoc process, with the First Amendment ending government control of religion—government shall make no law respecting the establishment of religion. U.S. Const. Amend. I. However, McConnell cautions that though the First Amendment prohibits religious establishment, the government's impulse to control religion survives even in modern times. McConnell, *Establishment and Disestablishment* at 2208.

2. Given the history and original meaning of religious funding, the University is at risk of violating the Establishment Clause.

The University was and is correct in its concerns over continuing to fund Dr. Nicholas' research. Seawall Aff. ¶¶ 7, 9-10. He was at the helm of the Visitorship, directing research away

from science and towards his goals to prove existence of the "lifeforce" through the Charged Universe Theory. R. at 6-7, Nicholas Aff. ¶¶ 11-13. Utilizing paid staff and costly high-tech equipment and commandeering the limited opportunity to study the Pixelian Comet from an ideal location all to lay a foundation for his religious beliefs would position the University as a powerful driving force for the advancement of the Meso-Pagan religion. The amount of resources wielded by Dr. Nicholas through the University is precisely the government control McConnell warned against. Government control of religion sits squarely at odds with the Establishment Clause. This Court should find Delmont University was correct in taking action to remove Dr. Nicholas from his position, as utilizing state funds in this way violated the Establishment Clause.

CONCLUSION

For the foregoing reason, the language of the Grant is constitutional, and the University took appropriate action to avoid an Establishment Clause violation. Therefore, Respondents respectfully requests that this Honorable Court deny Petitioner's challenge and affirm the judgment of the Fifteenth Circuit Court of Appeals granting summary judgment for the Respondents.

Respectfully submitted,

/s/ Team 22

Counsel for Respondents

APPENDIX A

Constitutional Provisions

U.S. Const. Amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutory Provisions

28 U.S.C. § 1254(1).

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

CERTIFICATE OF COMPLIANCE

Following the requirements of the Official Rules of the 2023-2024 Seigenthaler-Sutherland Moot Court Competition, we, Counsel for Respondents, certify that:

1. The work product contained in all copies of our team's brief is, in fact, the work product of the team members;

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

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

Team 22

Counsel for Respondents