No. 23-CV-1981

In the

Supreme Court of the United States

March Term 2024

COOPER NICHOLAS

Petitioner,

v.

STATE OF DELMONT AND DELMONT UNIVERSITY

Respondent.

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

BRIEF FOR THE RESPONDENT

Team 28

Counsel for Respondent

January 31, 2024

QUESTIONS PRESENTED

I. Does a state's requirements that a grant recipient conform his research and conclusions to the academy's consensus view of what is scientific impose an unconstitutional condition on speech?

II. Does a state-funded research study violate the Establishment Clause when it is principal investigator suggests the study's scientific data supports future research into the possible electromagnetic origins of Meso-Pagan religious symbolism and that investigator has also expressed an interest in using the study to support his religious vocation?

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The opinion of the United States District Court for the District of Delmont, Mountainside Division, is unpublished and may be found at Cooper Nicholas v. State of Delmont and Delmont University, C.A. No. 23-CV-1981 (D. Delmont February 20, 2024). The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found at State of Delmont and Delmont University v. Cooper Nicholas, C.A. No. 23-CV-1981 (D. Delmont March 7, 2024).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit Entered final judgment on March 7, 2024. R. at 51. Petitioner then filed a writ of certiorari, which this Court granted. R. at 60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Delmont University created a world-class observatory, the GeoPlanus Observatory atop Mt. Delmont in 2020. R. at 4. To bring attention to this new observatory the Univesrity created a Visitorship to use the observatory to study the Pixelin Commet, an astronomical occurrence that appears once every ninety-seven years. R. at 4. This Visitorship provided by the state would entitle the individual with a salary and full use of the University's facilities. R. at 4. Besides the promotion of the new observatory the Visitorship the Respondent also provided funding to the University's Delmont Press to cover the publication of scientific and peer-reviewed articles related to the event, by drawing conclusions on the event and data gathered. R. at 4-5. The grant also required that the study of the event and the derivation of subsequent conclusions conform to the academic community's consensus view of a scientific study. R. at 5. This was the first time

such a grant had been funded by the state for such a specific purpose, but the circumstances were considered auspicious with the appearance of the Pixelin Commet. R. at 5.

Dr. Cooper Nicholas was the recipient of the Visitorship. R. at 2. The first nine months of the Vistitorship, Dr. Nicholas led the observatory's efforts to develop study acceptable based on the accepted scientific community standards for measuring the event. R. at 6. Later in the Visitorship, in the Spring of 2023 the Pixelian Even occurred. R. at 6. The Pixelian event was watched by the world at large, with watch parties forming all over the United States and Canada, none were bigger than those around the University. R. at 6. Under special arrangement with the premiere peer-reviewed journal in astrophysics, Ad Astra, Dr. Nicholas published a series of cosmic measurements that were a hot topic in the scientific community. R. at 6.

Six months following the release of the first Ad Astra article, Dr. Nicholas sought to publish his observations and interim conclusion in a final Ad Astara article. R. at 6. Dr. Nicholas again relayed the standard data from the comet's travels, but he also added historical dimensions noting that the atmospheric phenomena and electro-magnetic disturbances in the cosmic environment that he observed. R. at 6. Dr. Nicholas remarked that these kinds of cosmic changes were noted by various cultures throughout history but in particular to the Meso-American indigenous tribes in their ancient religious history. R. at 7. In the article Dr. Nicholas surmised that the Meso-American hieroglyphs found on cave walls and rock facings may have been primitive depictions of the Pixelian Event. R. at 7. Furthermore, he summarized that the glyphs appeared to memorialize the same electrical interplay in the event that Meso-Pagans consider to be the "lifeforce" which animates all living beings and holds all matter in a precarious equipoise. R. at 7. Finally, he suggested that the occurrence demonstrated an interaction among electrical

currents and formations of a matter that appeared consistent with the "Charged Universe Theory." R. at 7.

The publishers of Ad Astra voiced their concerns with Petitioner's study as it was based upon ideas that were highly controversial. R. at 7. The controversy in part is that the Charged Universe Theory is not the scientific academy's consensus view of the make-up of the universe, of its beginnings, or of the inspiration for the glyph art of Meso-Americans and other indigenous peoples. R. at 7. As such the publishers at Ad Astra were cautious about printing the troubling study that was not within the scientific academy's consensus about the makeup of the cosmos. R. at 7. The editorial board was particularly concerned with the information in the article being religious in nature and not empirical. R. at 8. Regardless the publishers of Ad Astra agreed to put out the work with a qualification that the research of Dr. Nicholas did not have the endorsement of the publication, its editors, or its staff. R. at 8.

Dr. Nicholas stated he did not care about the prefacing of the essay so long as his findings were published, as he was open to whatever findings were a result of his study, and he was hopeful that it would confirm his personal beliefs and theories about Meso-Paganism. R. at 8. He was also hopeful that if his research did not pan out, that he would still be able to use the research to support his application to become a Sage, a clerical position, in the Meso-Pagan faith. R. at 9. The publication of the article was met with a hailstorm of negative responses from academia and the press. R. at 9. The academy discredited the article as unprovable from a scientific standpoint, and it was described as "medieval" for the reference to religion, cave paintings, and mystical connection to matter. R. at 9. The American press responded with just as much criticism. R. at 9.

There were some counter voices in the field of astrophysics that were in support of Dr. Nicholas's study, but these came from abroad, in Meso-America, Australia, and Europe. R. at 9. As well as positive support from the Sage community, many established Sages encouraged Dr. Nicholas to submit his research to become a candidate for designation as a Sage. R. at 57. However, the repercussions of the article were already taking effect on the University as the negative press had embarrassed donners as well as the legislative and executive supports who secured the government funding of the grant. R. at 9. The University and its observatory were becoming associated with "weird science," and were even being mocked on late night television. R. at 9. The applications for post-graduate studies had leveled off at this time and even dropped, though it was thought to be mostly attributable to the Pixelian Event ending. R. at 9.

Out of fear of losing the huge economic investment in the observatory, the University gave Dr. Nichoals an ultimatum, either he would limit his research and conclusion to those comporting with the language of the grant that the study would conform to the academic community's consensus view of a scientific study, or the funding would be revoked. R. at 10. Dr. Nichoals responded that he would not concede to the University's requests. R. at 11. The University stated that Dr. Nichoals was free to conclude and publish whatever he wanted but not if it was done from a grant by the state, furthermore the University did not want to be perceived as endorsing any religious beliefs. R. at 10-11. Following Dr. Nicholas's rejection of the University's request, Dr. Nichoas was no longer allowed to use the observatory, nor the grant funding. R. at 11.

Dr. Nicholas immediately brought suit, requesting injunctive relief to prevent the State of Delmont and the University from excluding him and requiring his reinstatement under the grant, arguing a violation of his First Amendment rights to freedom of speech. R. at 12. At the district

court Dr. Nichoals won his motion for summary judgment. R. at 12. However, the court of appeals reversed granting summary judgment to the State of Delmont and the Univesrity. R. at 32.

SUMMARY OF THE ARGUMENT

Summary judgment was appropriately granted in this case. There are no disagreements as to the facts of this case and under the law the facts of this case should be examined in the light most favorable to the moving party. The case before the Court is deals with issues that have long been debated in this country, the freedom of speech and the freedom of religion. There are two main issues addressed in this case, one being on whether the government is speaking for itself, and the other being if the government would be violating the establishment clause as Dr. Nicholas is an employee of the university publishing religious based research.

The rules that govern when a government is speaking for itself can be derived from the *Shurtleff* case. The majority in the Shurtleff case conducted a two-prong test, first whether the government program constitutes government speech, and if it is government speech then it can be limited. The second prong of the test decided whether the speech can be confirmed or refused based on viewpoint discrimination. We begin by arguing that the government is speaking for itself because the government has long used university grants as a form of expression, the public has perceived the government as speaking through this medium, and the government has been actively controlling the speech of Dr. Nicholas. In the alternative we continue by arguing that even if the government was not speaking the speech can be limited because doing so would not constitute viewpoint discrimination.

Alternatively, we argue that if the funding were granted, it would violate the Establishment Clause as Dr. Nicholas's study supports future research into the possible origins of

Meso-Pagan religious symbolism and that has also expressed an interest in using the study to support his religious vocation. Dr. Nicholas is an employee of the government and in applying the neutral rules from the *Kennedy* case. We conclude that Dr. Nichoals deviated from the scientific method, thus invalidating his research. Leading the University's only option to cut off its funding, complying with the First Amendment's Establishment Clause, as Dr. Nicholas's research would have a government supporting a Meso-Pagen religion. As such the policy is generally applicable, this would be the approach for any individual seeking to be funded by the government.

Next, we establish that Dr. Nichoals was a public employee speaking pursuant to his official duties under the *Pickering-Garcetti* test. Dr. Nichoals is an employee of the government because he is receiving funds from the government, he is using government equipment to fund his research, he is being assisted by State University employees and students, and he is publishing his research through connections established by the University. Furthermore, the consequences of his speech severely outweigh the need to protect his speech. The government had a substantial interest in the observatory and the reputation of the University.

For the above reasons, neither the State nor the University overstepped its boundaries by requiring Dr. Nicholas to conform his research to standards accepted by the scientific community at large.

ARGUMENT

The Court of appeals properly granted summary judgment to Delmont University because Dr. Nicholas was speaking on behalf of the academy when he conducted and published his research and allowing his speech would violate the Establishment Clause. To grant summary judgement, this court must determine whether the moving party proved there are no genuine

issues of material fact and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). While the burden is on the moving party, all reasonable inferences are resolved in favor of the nonmoving party. *Id*. The First Amendment of the Constitution guarantees to its people that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. Amend. I. Within this Amendment, lies the Free Exercise Clause, where its doors remain tightly closed to bar any "governmental regulation of religious beliefs." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Additionally, it prohibits the misuses of secular programs and may condemn "certain applications clashing with the imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Id*. However, when one acts in accordance with their religion, it is not completely free from governmental restrictions if the act is found to be "in violation of important social duties or subversive of good order." *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961).

I. THE UNITED STATES COURT OF APPEALS PROPERLY CONCLUDED THAT A STATE'S REQUIREMENTS THAT A GRANT RECIPIENT CONFORM HIS RESEARCH AND CONCLUSIONS TO THE ACADEMY'S CONSENSUS VIEW OF WHAT IS SCIENTIFIC DOES NOT IMPOSE AN UNCONDITIONAL CONDITION ON THE SPEECH.

While the First Amendment stands as an advocate for free expression of individual views, it "does not demand airtime for all views" when the government speaks for itself. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1587 (U.S. 2022). The Free Exercise Clause does not prohibit the government from declining to express a certain view. *Id*. at 1588. The government shall be able to promote a program or policy in order to function. *Id*. at 1587. As we see in the case at bar, the line between a "forum for private expression and the government's own speech" can be unclear when "a government invites the people to participate in a program". *Id.* at 1587-88. To determine when the government is speaking, the majority in *Shurtleff* conducted a two-prong test

looking first at whether the government program constitutes government speech, and if so, whether the speech can be confirmed or refused based on viewpoint discrimination. *Id*. at 1589. In applying the *Shurtleff* test, the government can conform Dr. Nicholas' speech to the academy's consensus of science.

A. The grant of recipient's research and publications constitute government speech because the Visitorship meets the three factors from of the Shurtleff case.

The line between private speech and government speech can be difficult to discern. To determine whether the government is producing its own message, the majority in *Shurtleff* conducted a "holistic inquiry" which was created to determine whether the government intends to speak for itself or to regulate private expression. *Id.* at 629**.** This test is driven by the individual context of a case as opposed to the "rote application of rigid factors." Precedent has looked to three things under the First Prong of the *Shurtleff* test for government speech: "[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.*

1. The history and tradition of The First Amendment has long held Universities are limited public forums where governments speak for themselves.

At the outset it is important to note that Universities have long been held as limited public forums where the government may regulate the content of that forum and define the forum for the specific limited purposes for which it was created. *Viewpoint Neutrality Now! v. Regents of the Univ. of Minn.*, 516 F. Supp. 3d 904, 918 (D. Minn. 2021). In this case, the government was

speaking for itself when it provided funding and equipment to Dr. Nicholas because the government held the final approval over the individual who would be granted the Visitorship and the various benefits associated with the government grant.

The precedential justification for Petitioner's argument can actually begin outside of the university in *Summum*, where the Supreme Court considered when the government again dealt with its own speech in a traditionally public forum. In *Summum*, Pleasant Grove City did not grant the request of Summum, a religious organization, to erect a monument in a public park. Summum had claimed that the City violated the First Amendment's Free Speech clause. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009). The United States Supreme Court found that the city was engaging in its own expressive conduct when it chose which statutes to put up in public parks. *Summum*, 55 U.S. at 481. In making this decision the Court noted that the City's monuments clearly represent government speech, as even if some of the statutes were donated or funded entirely by privet entities the City effectively controlled the message because it exercised final approval authority over whether the monument was placed in the park. *Id*. at 461.

The Court in Summum was clear that there was no issue in establishing if the government had created a traditional public forum because public parks have long been held to be such. *Id*. at 466. It is obvious that members of the public retain strong free speech rights when they venture into public streets and parks. *Id*. at 460. The message is clear that even in the most public places, where the speech of the citizens should be unabridged, there can be exceptions. The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Id*. at 461.

The present matter deals with a university and not a public park. In the public park, one might allow a statue to be erected in which the message can only be viewed by the individuals

who decide to visit that park, thus limiting the effect of the forum. The message is still clear, a government can exercise control when it receives assistance from private sources if it exercises final approval authority. *Id*. at 468. Here, the University reserved the right of final approval of the speech, as the Principal Investigator for the Visitorship was selected only after a rigorous and competitive process, thus expressing final approval authority over the individual to receive funding for all research expenses. If it can be the case that monuments in the city's park that were not designed or built by the City, but donated in by private entities, were government speech it can be held the same for the adoption of applicants for privately funded research.

The government has long funded such research projects not only to push the boundaries of science and understanding of the world but also to promote certain ideals. Public universities do more than allocate fees, of course. There is intention as part of the process, the University did more than just amplify the speaker. This was the first time the state had funded a grant for such a specific purpose as the government sets curricula, supports research, provides the employees, provides the connections for publication, and does all of this not only to support scientific conclusions on a celestial event but to raise awareness for new facilities and to spur enrolment. The University had adopted such speech, the actions of the government have gone far beyond passively setting up a statue in a public park but has subsidized a market for scientific discovery, a market that is at risk of closing if the Court were not to continue the precedent of Summum.

2. *The public perception as to who is speaking has been directed to the government.*

The public perceived Delmont University as speaking when Dr. Nicholas published his research on the Charged Universe Theory because the research Dr. Nicholas was publishing was conveying a message on behalf of the academy. To for the public to perceive the government as

being a speaker, the courts look to whether the speech plays an important role in defining the identity that the government projects to the outside world. *Shurtleff*, 142 S. Ct. at 1591. In addition, the public must see the speech or expression as conveying some message on the government's behalf. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 217 (2015). The speech is to be understood as closely identified in the public mind with the state. *Walke*r, 576 U.S. at 200.

The public is likely to perceive the government as speaking when the speech plays an important role in defining the identity that the government projects to the outside world. In Shurtleff, the City of Boston's City Hall has three flagpoles, usually representing the American Flag, the Commonwealth of Massachusetts Flag, and the Boston Flag. *Shurtleff*, 142 S. Ct. at 1584. Between 2005 and 2007, Boston approved raising unique flags for ceremonies, like another country's ceremony or the pride flag. *Id*. In 2017, Harold Shurtleff asked to hold an event on the plaza to celebrate the civil and social contributions of the Christian community and raise the Christian Flag. *Id*. The Supreme Court held that this did not constitute government speech although the perception of the public would have associated the flags as the government's speech. *Id*. at 1585. The court reasoned that on an ordinary day, a passerby on the street would see the government flags from the Nation, State, and City waving in unison just outside the entrance to Boston's seat of government. *Id*. Therefore, the flags played an important role in defining the identity that the city projects to its own residents and to the outside world, so it was only natural for the public to associate the Christian Flag with the government's message. *Id*.

When it appears to the public that the speech in question is conveying some message on the government's behalf, it is likely that the public's perception is that the government is speaking. In *Walker*, the State of Texas offers automobile owners a choice between an ordinary

or specialty designed license place. *Walker*, 576 U.S. at 203. The Texas Department of Motor Vehicles either approves or denies the proposed plate design and if they approve it, the State will make it available for display on vehicles registered in Texas. *Id*. Here, the Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag, to which The Board rejected. *Id*. Justice Breyer concluded that the rejection was not a violation of free speech guarantees because it was government speech since the speech conveyed some message on behalf of the government. *Id*. at 219. Those who observe license plate designs "routinely and reasonably interpret them as conveying some message on the [issuer's] behalf." *Id*. at 212. As a result, the Court concluded that license plates are closely identified within the public mind as government speech, and putting a Confederate Flag on the license plate would be a government endorsement. *Id*.

The public would perceive Delmont University as being the speaker of Dr. Nicholas's research and publications because it played in an important role in identifying the government projects to the outside world and because the public saw it as conveying a message of the government. This case is like both *Shurtleff* and *Walker*. This is like *Shurtleff* because in both cases, the speech played an essential part in portraying the identity of the government's projects to outsiders. Similarly, in our case, Delmont University has stated before that it wants the research done by the grant recipient to help promote its new observatory and make it one of the foremost centers for celestial study in the world. The observatory was in a prime location for the Pixelian event, and because of the publicity when the Observatory came out, it was understood that the research from Dr. Nicholas was gathered for the University's purpose. Due to the fact the University is attempting to be identified through their observatory, it is undisputable that the public would perceive Dr. Nicholas's publications and research as that as the government's own

identity. Just as the court in Shurtleff held that the flags would be perceived by the public as government speech, the court in this case should find that the outside world would identify Dr. Nicholas's research as that of something the school is trying to promote because the University is marketing the observatory through the speech.

Delmont University can be seen to the public as unquestionably conveying a message because the reactions to Dr. Nicholas's publications were placed on the burden of the State, not Dr. Nicholas himself. Just as in Walker, the expression in question in this case, is one that would be interpreted as conveying a message that the academy is endorsing. Upon the release of the issue, Dr. Van Pelt, the director of the Observatory, began to receive calls from the University President. There was a great deal of negative press regarding the Observatory, and many donors of the University became embarrassed at the school being associated with "weird science". Additionally, the school was being mocked on late at night television, and there was a major decline in applications for post-graduate studies. This court should similarly find, just as the Court in *Walker* did, that this reaction to the publication can be equated to the public perceiving the speech as a message of the government.

3. *The extent to which the government has actively shaped or controlled the expression.*

A government is considered to have actively shaped or controlled an expression of speech when they have exercised final approval authority over the selection. *Pleasant Grove City v. Summum*, 555 U.S. 460, 461 (2009). In *Summum*, a religious organization, called "Summum", requested to erect a stone monument that would display the "Seven Aphorisms of Summum." *Id*. at 465. Salt Lake City denied the requests, reasoning that "its practice was to limit monuments in the Park" to those that related to the history or were donated by groups with strong ties to the

Pleasant Grove community. *Id*. While Summum argued that this was a violation of the First Amendment, the court in Summum held that the monuments clearly represented government speech, and thereby did not violate the constitution. *Id*. at 462. The monuments were confirmed to be government speech because the city had effectively controlled the messages by selectively choosing monuments that portray the image the city wishes to show to its visitors. *Id*. Additionally, the city has taken ownership of most of the monuments in the park and expressly set out selection criteria. *Id*. In conclusion, by authorizing final approval over the speech, a government can claim it as their own. *Id*.

Delmont University setting terms of what it expected the grant recipient to produce is exercising control over Dr. Nicholas because it is authorizing general and final approval over what Dr. Nicholas does. The case with Dr. Nicholas is like Summum because in both cases, the government exercised control over the speech, making it their own speech. The monuments in Summum were considered government speech because the city had effectively controlled the messages by selectively choosing monuments that potentially could be displayed in the park based on its vision. Similarly, Delmont University is simply implementing authority over the grant recipient by limiting its publications to the contract's terms, which are to limit the research experiments and conclusions to those comporting with the language of the state grant: "the study of the event and the derivation of subsequent conclusions [that] conform to the academic community's consensus of a scientific study." By shaping what Dr. Nicholas was able to publish, the government was exercising final authority and control over the expression. Just as the court in Summum held that exercising final authority over the selection of an expression constitutes government speech, this court should hold that the contract's limiting terms constitute exercising final authority over the selection of Dr. Nicholas' speech.

B. Even if this is not government speech, the speech can be refused because it is not viewpoint discrimination and is narrowly tailored to further a substantial government interest.

1. The government's restriction of Dr. Nicholas' speech is not viewpoint discrimination.

The very nature of the First Amendment prohibits the government from regulating speech to an extent that it favors some viewpoints to the detriment of others. *Matal v. Tam*, 582 U.S. 218, 234 (2017). However, legislature may decide not to subsidize the exercise of a fundamental right, and by doing so does not infringe on the right. *Rust v. Sullivan*, 500 U.S 173, 191 (U.S. 1991). Precedent has repeatedly held that a government can selectively fund a program to "encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id*. at 193. By following this approach, the government avoids discrimination based on viewpoint and instead chooses to fund one activity at the exclusion of another. *Id*.

Viewpoint discrimination is "an egregious form of content discrimination" where the government targets particular views taken by speakers on a subject. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). It is the government's duty to resist "regulating speech when the specific motivating ideology or opinion" of the person portraying the speech is the reason for restricting the speech. *Id*. Even when a limited public forum is one of its own creations, it is forbidden that the state exercises any form of viewpoint discrimination. *Id*. It remains necessary to limit a forum to the legitimate purpose in which it was created. *Id*.

A government can selectively fund one program and not another without their decision being deemed as viewpoint discrimination. *Rust*, 500 U.S. at 192. In Rust, the Secretary of Health and Human Services issued new regulations to Title X of the Public Health Service Act, which provides federal funding for family planning services, specifically preventive family services, population research, infertility services, and other related medical, informational, and educational services. *Id*. at 178. The new regulation prohibited Title X projects from using its funds to engage in counseling concerning referrals for, and activities advocating abortion as a method of family planning. *Id*. at 179. Petitioners contended that this regulation was facially discriminatory based on viewpoint because it prohibits all discussion about abortion. *Id*. at 192. The government held that the regulation is not viewpoint discrimination, instead, it is simply funding an activity it believes to be a public interest, in this case preventive family measure, without funding abortion, which is a program which seeks to deal with the problem in another way. *Id*. at 193. In this case, the Title X program was designed specifically to encourage family planning, not to promote abortion. *Id*. As the majority in Rust stated, this is not a case where the Government seeks to suppress "a dangerous idea" but to prohibit a project's grantee or employee from "engaging in activities outside of the project's scope." *Id*.

It is impermissible for a government to regulate speech when the motivating factor of that speech is the reason for its restriction. *Rosenberger*, 515 U.S. at 829. In Rosenberger, the University of Virginia allows payments from its Student Activities Fund to outside contractors for costs related to publications issued by select student groups, referred to as CIO's. *Id*. at 822. The purpose of the Student Activities Fund is to support student activities that relate to the University's educational purpose. *Id*. at 824. Wide Awake Production was an organization on campus, classified as a CIO, whom had a mission to publish a magazine with Christian

viewpoints and religious expression. *Id*. at 825. The organization was denied funding, and the Supreme Court held the denial was based on viewpoint discrimination. *Id*. The court reasoned that the Student Activity Fund terms did not indicate the exclusion of religious material but still treats organizations who wish to publish religious material unfavorably. *Id*. In conclusion, the University of Virginia limited the speech solely because it was religious. *Id*.

Delmont University is justified in limiting what Dr. Nicholas publishes using the grant because its suppression does not equate to viewpoint discrimination. This case is like *Rust* but unlike *Rosenberger*. Just as in *Rust* where the court held it is acceptable to fund one activity at the exclusion of another, the court in this case should hold that Delmont University was not engaging in viewpoint discrimination, but simply choosing to fund its program without religious ideology being mentioned. Under the terms of the grant, Dr. Nicholas was provided with resources to carry out scientific study of the Pixelian Event and publish scientific articles about his findings. The University's decision to not subsidize religious expression does not infringe on his First Amendment right. Dr. Nicholas was provided fair notice to understand that introducing theories on Meso-Pagan faith and the "Charged Universe Theory" was against the term of his grant, and he cannot claim viewpoint discrimination as the University has the right to selectively fund whatever it chooses. Like *Rust*, Dr. Nicholas was acting outside the grant's scope, and therefore the University was able to permit him to conform his speech to its consensus.

Dr. Nicholas cannot conclude that the University was discriminatory against him based on viewpoint because his speech was not limited solely because it discussed the "Charged Universe Theory." The Pixelian Comet in the Northern Hemisphere only happens every 97 years. Delmont University has said that it offered the Astrophysics grant to take advantage of the Pixelian event. Because the Observatory is in an ideal location and has such state-of-the-art

equipment, the University wishes for it to become the foremost center for celestial study in the world. The Court in *Rosenberger* held that it is the government's duty to limit speech when the specific motivating ideology of the person portraying the speech is the reason for restricting the speech. However, this holding is not applicable in this case. It is undisputable that Dr. Nicholas' ideology was a huge part of his publications and research. The University limited his speech for two reasons. First, as mentioned, this is only a once in a lifetime event, and the University was eager to find strictly scientific research on the phenomena. Two, it was within the terms of the speech that the research be confined to what the University's consensus on science is. Therefore, it was not at all Dr. Nicholas' ideology that got his work struck down, but the fact that he took advantage of the opportunity given to him and the University itself by not abiding by the terms of the grant.

2. Dr. Nicholas' research is a compelling government interest that is narrowly tailored to support the government interest.

Normally, courts use a rational basis standard to review speech that includes government employment. *United States R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980). However, if the first prong of the *Shurtleff* test fails, and the court next reviews whether the condition was denied based on viewpoint discrimination, it is reviewed using strict scrutiny. While most statutory classifications involving government speech typically use a rational related to a legitimate governmental purpose standard, statutes that interfere with the exercise of a fundamental right, such as freedom of speech are subject to a stricter scrutiny. *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983). It has been said that when it comes to censoring ideas, the government's interest must be narrowly tailored to serve the compelling government interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

Delmont University governmental interest is addressing the publics confusion between science and religion. This is a compelling interest because the government is supposed to be separated from religious ideology and serve as a neutral institution for all of those that it serves. However, by allowing Dr. Nicholas to publish content using the Astrophysics Grant that connects the Pixelian event to his Meso-Pagan faith, and even use it to promote his standing within his religious group, they would be failing at their mission of keeping their academy secular. This interest is narrowly tailored to the action of the University conforming Dr. Nicholas' speech because by doing so, the University is not seen as endorsing the views that the Pixelian Event is related to the "Charged Universe Theory."

In conclusion, Dr. Nicholas' work and research was subject to the conformity of Delmont University and the Observatory's consensus on what science is because in applying the Shurtleff factors of government speech, Dr. Nicholas is speaking on behalf of university. In addition, even if the first prong of the test failed, the speech does not constitute viewpoint discrimination, and therefore the University has the right to selectively fund only scientific expression.

II. ALTERNATIVELY, A STATE FUNDED RESEARCH STUDY VIOLATES THE ESTABLIHSMENT CLAUSE WHEN THE PRINCIPAL INVESTIGATOR, ACTING WITHIN THEIR EMPLOYMENT SCOPE, ADJUSTS THEIR RESEARCH TO SUPPORT THEIR RELIGIOUS VOCATION.

Under the First Amendment, the government is prohibited from making any law that establishes a religion. *U.S. Const. amend. I.* When interpreting the Establishment Clause, it must be interpreted complementary with the Freedom of Speech and Free Exercise clauses. *Kennedy v Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426 (2022). Strict scrutiny becomes the review standard when the government policy is found to be neither neutral nor general applicability toward religion. *Id.* at 2423. After determining the level of scrutiny, the Pickering-Garcetti test is used to determine if the public employee's speech is rendered as government speech. *Id*.

A. The government policy is both neutral and general applicable and therefore strict scrutiny is not required.

A government policy fails neutrality if it is "specifically directed at. . . a religious practice." *Kennedy* 142 S. Ct. 2407, 2422 (quoting Smith, 494 U.S. at 878). A government fails general applicability if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" or "if it provides 'a mechanism for individualized exemptions.'" *Id.* (quoting Fulton, 593 U.S. at 1877). Strict scrutiny only becomes the standard when the government's policy fails neutrality or general applicability. *Id.*

In *Kennedy*, Joseph Kennedy, a high school football coach, would engage in silent prayer at midfield after a football game. *Id.* at 2416. His activity occurred over seven years, seeing members of the football team participating of their own accord. *Id.* For those years the school district received no complaints, and the school district did not act until an employee from another school commented positively about Kennedy's actions on the Bremerton High School Principal's social media account. *Id.* Two days after the posting, the school district sent Joseph Kennedy a letter informing him that his actions were constituted as prayers and that he must cease those activities. *Id*. Despite complying with the school district orders, Kennedy was released from his position as high school football coach for continued prayer. *Id.* at 2417-18**.** The Court found that the school district's actions were neither neutral nor generally applicable. *Id.* at 2422. The district's policy was not neutral because it was specifically directed at Kennedy's religious practices (and thus violated the Free Exercise Clause). ***Id.*** The district's actions were not generally applicable because the district created a non-religious reason to fire Kennedy to cover the reality that Kennedy was being fired because of his religious activities. *Id.* at 2423.

The University released Dr. Nicholas from his position for two reasons. The first reason is because Dr. Nicholas had deviated from the scientific method, a process that automatically invalidates research and therefore any data collected. The second reason was to ensure compliance with the First Amendment's Establishment Clause, as Dr. Nicholas's research would have a government supporting a Meso-Pagen religion. Regarding the first reason, for decades, in the scientific environment, the fundamental way to share information and build reputation has been by publishing studies. If a scientist or professor wanted to publish a study, they must follow the scientific method. That method, having been developed over the course of centuries and accepted by scientists worldwide, has seven steps: Observation, Question, Hypothesis, Prediction, Experiment, Analysis, and Conclusion. It is the policy of any publishing authority and university that a study becomes invalidated when any of the steps are violated. It is the policy that every well-known scientist world-wide fundamentally understands. It is because of this well-known process that we adopted this process as our policy because it is the most accurate method, we must reach the objective truth of any experiment. Therefore, our policy is neutral because it prohibits no person because of their religion or creed.

Regarding the second reason, our policy removed Dr. Nicholas in the same manner we would have removed another professor who would have committed a similar issue. In this case, the University and Ad Astra, a publisher, hold that same policy to any scientist, regardless of their nationality or religion, which includes Dr. Nicholas. Dr. Nicholas violated the seventh step, analysis, when he drew data from outside the experiment, this being his religion. He began comparing the data to his religion rather than comparing the mathematical data to previously proven mathematical data. This comparison, aside from being deliberate intervention, has not only made the information useless, but a waste of public taxpayer's resources because the study

can no longer be used for its intended purpose. Therefore, as per our policy, we had to remove him for that reason. He was not released because of his religion, but because he tainted the results using his religion.

B. Dr. Cooper Nicholas was speaking as a government employee and therefore caused the government to violate the Establishment Clause.

In *Kennedy*, the court instructed that whenever there is a case that involves both an establishment clause violation and the rights of speech of a government employee, that the *Pickering-Garcetti* test is to be employed. *Kennedy,* 142 S. Ct. at 2423. The test begins by saying that teachers do not shed their rights at the schoolhouse gate. *Tinker v Des Moines Indep. Cmty. Sch. Dist.*, 89 S. Ct. 733, 736 (U.S. 1969). However, this does not mean that they can conduct any action they chose, as teachers are also "government employees paid in part to speak on the governments behalf and convey its intended message." *Kennedy* 142 S. Ct. at 2423.

Part one of the *Pickering-Garcetti* test is to determine whether the public employee is speaking 'pursuant to [his or her] official duties,' [where] this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is – for constitutional purposes at least – the government's own speech." *Kennedy*, 142 S. Ct. 2407, 2423 (U.S. 2022) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). A public employee speaks for themselves when they are addressing a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006). If the employee is not speaking on a matter of public concern the employee is not granted this level of protection. *Garcetti*, 547 U.S. at 423. Part two of the *Pickering-Garcetti* test occurs when the courts have determined the employee is speaking on matters of public concern, and now must engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." *Id.* This

balancing the Court must consider is whether the employee's speech interests are outweighed "by the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id*.

The present case is like *Garcetti. Garcetti* delt with a public employee, a deputy district attorney (DDA), who used a memo to share his ideas of a then ongoing case where Garcetti addressed his concerns and gave his recommendation for the case. Garcetti was a DDA tasked as a calendar deputy where he exercised a supervisory role over other attorneys. *Garcetti*, 547 U.S. at 413. During his employment, he received a call from a defense attorney requesting that Garcetti investigate a warrant since the defense attorney believed there was foul play involved. *Id*. at 414. Like the present case, where Dr. Nicholas is being asked to investigate a phenomenon. In both these cases, their investigations are not uncommon. Garcetti, in solving his issue, used a memorandum to reply to his superiors that the warrant he was investigating possessed serious flaws and therefore the case should be dismissed. *Id*. In response, for carrying out what he believed was constitutional, his superiors retaliated by demoting him and transferring him to another courthouse. *Id*. at 415. The court would find that despite DDA Garcetti's efforts that were done for unselfish reasons, would not be protected by the First Amendment because Garcetti was doing his job as a government employee. *Id*. at 426. To the present case, Dr. Nicholas used his official position to advance his own agenda, regardless of motivation, and because he used his official position, he was a government employee. Due to him being a government employee, he does not have First Amendment protections.

To determine whether Dr. Nicholas was speaking as a citizen on a matter of public concern, we must first examine whether he was a citizen or a government employee. It is clear that Dr. Nicholas is a government employee, through the University, as he is receiving funds

from the government via a grant to do research sanctioned by a state government. The scope of his employment was to research and determine the nature of the Pixelian Event in a method required by the scientific community. To this extent alone, Dr. Nicholas is not a citizen as defined *Pickering* and therefore this case need not advance further. As a counter, Dr. Nicholas may argue that the Court in *Grutter* protects teachers as it is necessary to speak and write in order to fulfill their scope of employment. *Grutter v. Bollinger*, 539 U.S. 329, 126 (2003). If this is the case, it also removes him as a citizen and further solidifies him as a government employee whose scope of employment was to speak and write on the Pixelian Event, a matter found to be of public concern. If we are to advance to the second step, the government will still win. The second step requires the Court to balance between the protection of Free Speech and the consequences of that speech. There is a substantial interest for the government to ensure that the information it finds and releases to the public be accurate as it can. It is why the government spent so much money in building the observatory at the state university, creating a grant, seeking the most qualified candidate to do research directed by the grant, and to require that any applicant to follow the scientific method. To forgo this interest because a government employee deviated from the internationally accepted scientific method to advance his sole interest, would not only be against the government's interest, but to the public's interest. Dr. Nicholas may counter, stating the international community supports his view that he has not deviated. However, the international community has said his ideas may be true "dependent on further study." Further study would be impossible for two reasons. The first is that the data he has utilized comes once every ninety-seven years and the second his conclusion is impossible to recreate because it relies on selects only data that confirms his religion.

CONCLUSION

For the foregoing reason, the withholding of state funds to Dr. Nichoals is constitutional, because the government was speaking when providing Dr. Nichoals with funding, equipment, and staff. Further, if the funds were not withheld the State of Delmont and the University would have violated the Establishment Cluse by supporting an established religion. Therefore, Dr. Nicholas's challenge should be denied, and the judgment of the Fifteenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Team 28

Counsel for Respondent.

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 grievance.

The First Amendment of the Constitution guarantees to its people that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Federal Rules of Civil Procedure

Fed. R. Civ. P. 56(a)

A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

CERTIFICATE OF COMPLIANCE

Following the requirements of Rule IV(C)(3) of the Official Rules of the 2023-24 Seigenthaler-Sutherland Moot Court Competition, we, Counsel for Respondent, certify that:

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

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

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

Team 28

Counsel for Respondent