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,

Respondents.

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

BRIEF FOR THE RESPONDENTS

TEAM 2
Counsel for Respondents
January 31, 2024

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fifteenth Circuit correctly concluded that a state's requirement that a grant recipient conform his research and conclusions to the academy's consensus view of what is scientific does not impose an unconstitutional condition on speech?

II. Whether the United States Court of Appeals for the Fifteenth Circuit correctly concluded that a state-funded research study does implicate the Establishment Clause when its principal investigator suggests the study's scientific data supports future research into 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The opinion of the United States District Court for the District of Delmont, Mountainside Division, is unpublished and may be found at *Nicholas v. Delmont*, C.A. No. 23-CV-1981 (D. Delmont Feb. 20, 2024), and it appears on pages 1–31 of the Record. The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found at *Delmont v. Nicholas*, C.A. No. 23-CV-1981 (15th Cir. 2024) and appears on pages 32–52 of the Record.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment in favor of the Respondents, State of Delmont and Delmont University, on March 7, 2024. R. at 32. Petitioner then timely filed a writ of certiorari, which this Court granted. R. at 59–60. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Statement of Facts

In the fall of 2020, Delmont University opened the GeoPlanus Observatory at the summit of the Delmont Mountain Range, Mt. Delmont, which is objectively one of the best locations in the Northern Hemisphere to view celestial phenomena. R. at 4. To bring attention to Delmont University's world-class observatory, the University and the State of Delmont established a Visitorship in Astrophysics (the Visitorship) to run from March of 2022 to March of 2024 funded by a state Astrophysics Grant. R. at 5. The purpose of creating the Visitorship was to advance scientific study of the Pixelian Comet over the Northern Hemisphere, known as the "Pixelian Event," which occurs once every ninety-seven years. *Id.*

The Astrophysics Grant was the first of its kind and was intended to cover the salary of the principal investigator; the use of Observatory equipment and facilities; funds for research

assistants; and any ensuant costs incurred throughout the study of the Pixelian Event. *Id.* The state-funded grant also covered the cost of publishing scientific articles regarding the event. *Id.* As a condition, the grant required that the study and conclusions "conform to the academic community's consensus view of a scientific study." *Id.*

In the spring of 2021, the Visitorship was publicized and attracted significant interest among the scientific community. *Id.* In the fall of 2021, after a rigorous and competitive process, the Visitorship was granted to Dr. Cooper Nicholas, a native of Delmont and a summa cum laude joint degree graduate of Delmont University. R. at 3, 5. Dr. Nicholas had further completed a doctorate in astrophysics and distinguished himself with academic appointments, visitorships, and post-doctoral grants. *Id.* at 3. He was recognized as an expert in observational astrophysics who had published widely in the field, and at the time of his appointment he was the scholar in residence at The Ptolemy Foundation, an independent scientific research institution. *Id.*

During the first nine months of the study, Dr. Nicholas conducted measurements of the celestial environment prior to the Pixelian Event taking place, which he published under special arrangement with the peer-reviewed journal, *Ad Astra*. R. at 6. The Pixelian Event occurred in the spring of 2023 over a three-week period, during which the University drew significant attention as being the headquarters for the study. *Id.* After six months of observation and data collection, Dr. Nicholas desired to publish his interim conclusions with *Ad Astra*. *Id.* However, this article also included hypotheses relating the appearance of Pixelian Comet to the ancient religious history of Meso-American tribes, consistent with the Charged Universe Theory. *Id.* at 7.

Dr. Nicholas adopted the Meso-Paganist faith after having been raised in developing countries amongst the Meso-American culture. R. at 4. The religion focuses on the relationships between planets and celestial objects to gain insight into humanity's relationship with the cosmos,

and it considers stone hieroglyphs to be visual representations of past celestial phenomena. *Id.* Dr. Nicholas has attributed this faith as his inspiration for pursuing astrophysics. *Id.*

The editor of *Ad Astra* expressed concern about the position of Dr. Nicholas' research because the Charged Universe Theory is highly controversial, and it is not the consensus view of the scientific academy. R. at 7. Dr. Nicholas had never expressed these views in his prior scientific publications, and the *Ad Astra* editorial board was concerned by the religious nature of the discoveries. R. at 8. The editor agreed to publish the article if it was prefaced by an editorial essay indicating that Dr. Nicholas' observations were not endorsed by the journal publication, the editors, or the staff due to the potential that the journal could be perceived as supporting the theory. *Id.*

The article's publication garnered immense reaction from the public and private sphere. R. at 9. The academy vehemently discredited Dr. Nicholas' conclusions as conjectural from a scientific standpoint because they could not be proven. *Id.* The University received the brunt of the impact because the negative press associated with the Observatory embarrassed donors and the legislative and executive supporters of the Astrophysics Grant. *Id.* The public ridicule among the public and scientific community was attributed to a decline in post-graduate attraction and the improbability of conferring a future visitorship. *Id.*

Out of concern for the Observatory's reputation, the President of Delmont University communicated to Dr. Nicholas on January 3, 2024, that he would need to limit his research and conclusions to the academy's consensus view of a scientific study to continue receiving funding. R. at 10. Over the course of several days, Dr. Nicholas and the University President shared dissenting communication wherein Dr. Nicholas alleged his conclusions were scientific and no one was entitled to censor his research or conclusions. R. at 10–11. Conversely, the president informed Dr. Nicholas that he was at liberty to publish any conclusions he wished, so long as it was not

under the auspices of and in direct violation of the grant. R. at 10–11. On January 17, Dr. Nicholas was denied admittance to the Observatory after he refused the president's appeal to limit his study and conclusions to the parameters accepted by the academy. R. at 11.

Procedural History

Following his exclusion from the Observatory premises, Dr. Nicholas commenced this suit on Monday, February 5, 2024, against the State of Delmont and Delmont University in the United States District Court for the District of Delmont, Mountainside Division. R. at 12. Dr. Nicholas alleged that the University violated his First Amendment rights by placing an unconstitutional condition on his speech, for which he sought permanent injunctive relief against the State and University for the immediate reinstatement of his salary, payment of research assistants, and the use of facilities under the Astrophysics Grant. R. at 2, 12.[1] The State of Delmont and Delmont University contended that Dr. Nicholas' exclusion was constitutional because continued support of his work would violate the Establishment Clause of the First Amendment. R. at 3.

In accordance with Rule 56(a) of the Federal Rules of Civil Procedure, the parties filed cross-motions for summary judgment on the conditioned speech and Establishment Clause claims asserting there was no genuine dispute as to the material facts. R. at 12. The district court granted summary judgment on both issues in favor of Dr. Nicholas. R at 30. The Fifteenth Circuit Court of Appeals reversed the judgment of the district court on both issues and granted summary judgment in favor of the State of Delmont and Delmont University. R. at 51. The Fifteenth Circuit held that the condition on speech was constitutional, and the Establishment Clause would be implicated by the continued support of Dr. Nicholas' research. R. at 34, 44. Consequently, Dr. Nicholas appealed

[1] Dr. Nicholas claimed monetary damages would be insufficient considering his research resulting from the once-in-a-lifetime Pixelian Event would be lost. R. at 12.

the Fifteenth Circuit's ruling, and this Court granted certiorari to address two issues: First, whether it is an unconstitutional condition to require that a grant recipient conform research and conclusions to the academy's consensus view of what is scientific, and second whether a state-funded research study implicates the Establishment Clause when its principal investigator suggests the study's scientific data supports religious symbolism and that investigator also expressed an interest in using the research to support his religious vocation. R. at 60.

SUMMARY OF THE ARGUMENT

First, this Court should affirm the decision of the Fifteenth Circuit because the State of Delmont did not impose an unconstitutional condition on the Astrophysics Grant. Not all conditions placed on speech are unconstitutional. In instances where the condition does not discriminate based on viewpoint or alternatively satisfies strict scrutiny, the condition should be upheld. The condition on the Astrophysics Grant does not invoke viewpoint discrimination because the State may choose to fund a scientific study, while choosing not to fund any other topic. The condition also does not penalize Dr. Nicholas for his speech, nor does it suppress his ideas or coerce him into taking a position he opposes. Dr. Nicholas had the option to accept the grant and publish conclusions similar to his previous scholarly scientific publications, and he could still publish his religious views through another unaffiliated avenue. Further, if Dr. Nicholas expected to promote his individual ideals through, he could have declined the Visitorship.

Second, this Court should affirm the Fifteenth Circuit's conclusion that out of concern for infringing the Establishment Clause the State and University had the right to revoke the Astrophysics Grant. Under the Establishment Clause the government cannot promote religion. The State of Delmont, and Delmont University were funding and promoting Dr. Nicholas' speech, which the public regarded as endorsement of Dr. Nicholas' religious views, hence violating the

Establishment Clause. Further, this nation has historically rejected government funding for clergy, and Dr. Nicholas explicitly stated that he intended to use the grant's research to become a Meso-Pagan Sage. Universities have historically been granted deference to make complex decisions, and Delmont University should have been afforded that deference.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT CORRECTLY HELD THAT THE ASTROPHYSICS GRANT CONDITION IS NOT AN UNCONSTITUTIONAL VIOLATION OF THE FIRST AMENDMENT.

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, and is applicable to the States through the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The unconstitutional conditions doctrine, established by this Court, prohibits a state from placing a condition on a government benefit that would infringe the recipient's constitutional rights. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 212 (2013); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). While the state may not compel "a grant recipient to adopt a particular belief as a condition of funding," the state may "enlist the assistance of those with whom it already agrees." *Agency for Int'l Dev.*, 570 U.S. at 218. Further, the state is within its right to place a condition on its own program or service in a way that would not restrict the activities of a private individual. *See Rust v. Sullivan*, 500 U.S. 173, 199 (1991).

The condition requiring that the research and conclusions derived from the Astrophysics Grant coincide with the academy's consensus view of scientific does not impose a constitutional violation on Dr. Nicholas' rights. First, the condition does not unconstitutionally infringe Dr. Nicholas' right to free speech. Second, the condition was not imposed on a private speech, and Dr.

Nicholas was not forced to accept the grant. Accordingly, this Court should affirm the Fifteenth Circuit's holding.

A. The Condition to Conform Research and Conclusions to the Academic Community's Consensus of What is Scientific Does Not Violate Petitioner's Freedom of Speech.

This Court has held it unconstitutional for the government to "deny a benefit to a person because he exercises a constitutional right." *Regan v. Tax'n with Represent'n of Wash.*, 461 U.S. 540, 545 (1983). Neither Congress nor the states are permitted to condition the disbursement of government funds on the forfeiture of constitutional rights. *Speiser v. Randall*, 357 U.S. 513, 518–19 (1958). However, not all funding conditions are found to interfere with an individual's constitutional rights. *See Rust*, 500 U.S. at 196–98. A state's refusal to fund an individual's exercise of a constitutional right does not by itself infringe on that right. *See id.* at 193; *Maher v. Roe*, 432 U.S. 464, 474–75 (1977); *Harris v. McRae*, 448 U.S. 297, 316–18 (1980).

1. Refusal to Fund a Constitutionally Protected Activity Does Not Inherently Constitute Viewpoint Discrimination.

Courts have clearly established that it would be unconstitutional for the government to deny a benefit based on viewpoint discrimination. *Perry*, 408 U.S. at 597. However, the state may selectively fund certain programs while choosing not to fund alternatives without unconstitutionally discriminating amongst viewpoints. *Rust*, 500 U.S. at 193. If the government seeks to restrict speech based on viewpoint, the restriction is subject to strict scrutiny and must be (1) narrowly tailored to (2) achieve a compelling government purpose. *See Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 546 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). The state may regulate speech so long as it is also able to justify the regulation

by establishing that there is a pervasive problem, *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 822–23 (2000), and the restriction on speech would be essential to the solution, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

The government may regulate a speaker's content of expression when the government is the speaker or when it enlists a private individual to convey its message. *Widmar v. Vincent*, 454 U.S. 263, 277–78 (1981). This court upheld that sentiment in *Rust*, explaining that choosing to fund one activity at the exclusion of others does not constitute viewpoint discrimination. 500 U.S. at 193. In *Rust*, the Department of Health and Human Services imposed a regulation that limited the ability of organizations that received federal funds from engaging in abortion-related activities. *Id.* at 180. The Court held that the government can constitutionally fund programs that encourage certain activities without funding alternative programs that would also provide a solution. *Id.* at 193. The Court further held, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194.

The government must refrain from regulating speech when the rationale for the restriction is motivated by the speaker's opinion or perspective. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). In *Rosenberger*, a university withheld subsidies from student publications that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a particular deity or an ultimate reality," *id.* at 823 (internal quotation marks omitted). The Court held that the university's objection to a Christian organization surmounted to viewpoint discrimination because the university provided funding to a variety of publications but not to the petitioner's publication solely because of its specific religious perspective. *Id.* at 831.

Further, the state may not discriminate on the basis of viewpoint unless it has a limited purpose for doing so. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384

(1993). In *Lamb's Chapel*, a school district offered the use of school facilities to after-hours community groups for a range of social and recreational purposes. *Id.* at 386. A church applied to use the facilities to show a film series but was consequently denied access because of being "church related." *Id.* at 388–89. The Court found the denial to discriminate based on viewpoint because all views were allowed except those dealing with subject matter from a religious standpoint, and there was no indication that the request was "denied for any reason other than the fact that the presentation would have been from a religious perspective." *Id.* at 393–94. Similarly, in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), the Court held it was viewpoint discrimination for a school to exclude religious purposes from the use of a space otherwise available for "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community," *id.* at 102.

The State of Delmont is not engaging in viewpoint discrimination by refusing to fund speech that does not conform to the academy's view of what is scientific. Just as in *Rust,* where it was constitutional for the government to selectively fund programs, 500 U.S. at 193. Here, the State of Delmont can constitutionally choose not to fund alternative programs or activities. The State chose to fund and publish research that conforms to the academy's consensus view of science, R. at 5, and it is not required to fund an alternate activity such as the research and promotion of religion. In cases such as *Lamb's Chapel*, *Good News Club*, and *Rosenberger*, the Court determined that it was unconstitutional viewpoint discrimination because the schools in those cases were all providing unfettered access to their facilities or subsidies to any secular groups that were interested. It was the specific prohibition of only religious viewpoints that caused the Court to find viewpoint discrimination. Whereas in the present case, the State and University are requesting that

the research conclusions and publications that they fund are limited to the academy's consensus view of scientific, they are not only refusing to fund religion, but any conclusions that do not accord with the academy's parameters.

If this Court does find that the condition on the Astrophysics Grant surmounts to viewpoint discrimination, the condition is not unconstitutional because it is narrowly tailored and serves a compelling government interest. The Fifteenth Circuit correctly held that the condition was narrowly tailored because it only regulates the conclusions that are derived under the Astrophysics Grant. R. at 35. The president of Delmont University explicitly communicated to Dr. Nicholas that he had the choice to take his findings and publish them independently in any way he wished. R. at 10. As such, the condition does not discriminate against Dr. Nicholas' viewpoint, nor does it burden his right to free speech, given that he can express his views in any avenue aside from the grant. Further, the State was concerned that an esteemed university in astrophysics endorsing Dr. Nicholas' conclusions would cause public confusion between science and religion. R. at 11. By refusing to associate the University, and subsequently revoking the grant, the State was merely serving a compelling interest. Thus, the State's condition should not be regarded as a constitutional violation based on viewpoint discrimination.

2. Refusal to Fund Religious Conclusions Does Not Penalize the Speaker, Nor Does it Suppress the Speaker's own Ideas or Coerce Them into Expressing an Opposing Viewpoint.

There is a distinct line between what the government can and cannot impose as a condition on public funds; the complexity lies in determining on which side of the line the facts of a case rest. The government may create a spending program and it is entitled to define the limits of the program as well as impose requirements for the distribution of funds. *See United States v. Am.*

Libr. Ass'n, Inc., 539 U.S. 194, 211 (2003). Conditions may be attached to a grant so long as the government does not use the funding to suppress the recipient's right to expend private funds to express a differing viewpoint. *See id.* at 213–14. Further, the government may insist that public funds be spent according to the manner in which they were established by enforcing a condition without encroaching upon constitutional rights. *See Rust*, 500 U.S. at 196. However, the government may not entirely prohibit constitutionally protected conduct outside the scope of a government funded program. *Regan*, 461 U.S. at 544. Nor may the government apply a condition to penalize a speaker. *Speiser*, 357 U.S. at 526. The government also may not impose a condition to coerce private actors into relinquishing their freedom of speech, *see Nat. Endowment of the Arts v. Finley*, 524 U.S. 569, 587 (1998); *Speiser*, 357 U.S. at 519, or compel an individual to engage in involuntary expression. *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

This Court noted in *Harris*, "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity," 448 U.S. at 317 n.19. Accordingly, the State of Delmont's actions, in the present case, would have to have extended farther than just denying grant funding if it were to have penalized Dr. Nicholas for exercising his constitutional rights. For example, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017), where a church daycare was denied funding for playground resurfacing, the Court held that the state would be punishing the church by conditioning the availability of the playground benefit on the church's willingness to surrender its religious status. However, here, Dr. Nicholas does not have to surrender his religious status in order to receive the grant and conduct his research. Rather, he can conduct his research and simultaneously or in the future publish his religious work through an independent pathway.

Further, the condition does not require Dr. Nicholas to suppress his right to free speech. Instead, it requires that he separate his religious devotion from the research and conclusions published by the University. The distinction to be made is whether the condition applies to "recipients" or to the "project." *See Legal Aid Soc. of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017, 1025 (9th Cir. 1998). The condition is unconstitutional if it prohibits the recipient from individually partaking in the protected activity, but it is constitutional for the condition to restrict what can be exercised through the grant. *Id.*; *see also Rust*, 500 U.S. at 197. In *Planned Parenthood of Mid-Missouri. & Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 463 (8th Cir. 1999), the court found that a statute that prohibited state funds from being used to perform, assist, encourage, or refer abortions was constitutional so long as the applicant was able to exercise their free speech with private funds and could apply for funding through an independent affiliate. Dr. Nicholas, in this case, is more than welcome to publish his scientific findings through the University's grant-funded publishing, and he can independently publish his Charged Universe Theory conclusions as they relate to his findings obtained through the Visitorship. So, the condition is only applicable to how the grant funding can be exercised, and the condition does not interfere with Dr. Nicholas' rights when not being expressed through the Visitorship.

It is not a penalty to decline to fund an activity if the government does not have an underlying obligation to provide funding for the exercise of a constitutional right. *See Hill v. Kemp*, 645 F. Supp. 2d 992, 1001 (N.D. Okla. 2009). The State of Delmont is not sanctioning a penalty by refusing to fund any conclusions that do not fall within the academy's consensus view of what is scientific because the State can "selectively fund a program to encourage certain activities it believes to be in the public interest." *Rust*, 500 U.S. at 193. The State and University established the Astrophysics Grant and founded the Visitorship to promote scientific study through the

Observatory, which it hoped would address public confusion between religious and scientific ideals. R. at 11. Consequently, because the State had no obligation to fund Dr. Nicholas' free speech, and it was concerned with increasing public confusion, the State may elect to remove Dr. Nicholas from his position because he is encouraging the conflation of science and religion. *See Speiser*, 357 U.S. at 528.

Lastly, Dr. Nicholas was not coerced or compelled to express a viewpoint he disagreed with. This Court, in *Agency for International Development*, found that conditioning the receipt of funding on a requirement for organizations to express opposition is unconstitutional because it was not a case where the government was enlisting the assistance of those with whom it already agreed, but it was about compelling a grant recipient to adopt a particular belief as a condition of funding, 570 U.S. at 218. Unlike *Agency for International Development*, this is not a case where the State is conditioning federal funding to enforce the adoption of certain speech, 570 U.S. at 218. Rather, the State in this case appointed Dr. Nicholas because he had previously represented the scientific community through academic appointments and publications that conformed with the academy's consensus view of what is scientific. R. at 3. Additionally, Dr. Nicholas was privy to the objectives of the Visitorship prior to accepting the Astrophysics Grant, so he had the opportunity to decline. Dr. Nicholas was not being asked to adopt a certain type of speech that he has never before embodied; he is an astounding member of the scientific community, and he has extensively published scientific material in accordance with what the grant was requiring. *Cf. F.C.C v. League of Women Voters of Cal.*, 468 U.S. 364 (1984). Therefore, the condition does not impose a constitutional violation because it does not act as a penalty, it does not suppress Dr. Nicholas' rights or ideas, and it does not coerce Dr. Nicholas to adopt an insincere belief.

B. The Astrophysics Grant was not Designed to Facilitate Private Speech, and if Petitioner Disagreed with the Objective of the Grant, He Should Have Declined the Visitorship.

"Any conditions on federal grants must be unambiguous, clearly communicating to states the consequences of their participation in the federally funded scheme." *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002) (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). Regardless of whether a recipient is entitled to a benefit, the state may not deny them the benefit in a way that would constitutionally interfere with their freedom of speech. *See Rumsfeld v. F. for Acad. & Inst. Rts. Inc.*., 547 U.S. 47, 59 (2006). However, if funding contains a condition that the recipient objects to, the appropriate recourse is to decline the funds, even if the objection is based on the anticipation that the condition will affect the free exercise of First Amendment rights. *See Am. Libr. Ass'n, Inc.*, 539 U.S. at 212; *Regan*, 461 U.S. at 546.

This Court has held in previous cases that viewpoint-based funding decision are acceptable in situations where the government itself is the speaker, *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 235 (2000), or in circumstances like *Rust*, where the government conveyed information regarding its program through a private speaker, *see Rosenberger*, 515 U.S. at 833. Here, the State of Delmont distributed public funds through the Astrophysics Grant to expressly convey a message promoting scientific study, and as such, it could take appropriate measures to ensure its message was not misconstrued or distorted. *See Rust*, 500 U.S. at 196–200. Because the Astrophysics Grant was awarded to only one highly qualified recipient, the State was not encouraging private speakers to reach a variety of conclusions regarding the Pixelian Event. This shares a distinct resemblance with *Finley*, where content consideration was a direct and natural part of the funding process, 524

U.S. at 586. Both the present case and *Finley* are in contrast to *Rosenberger*, where any publication from a student organization could receive subsidies, 515 U.S. at 824. The condition placed on the Astrophysics Grant was the clear and unambiguous statement that the State and University were not giving the recipient of the Visitorship autonomous limits to formulate conclusions. *See Legal Servs. Corp.*, 531 U.S. at 548.

If Dr. Nicholas sought to come to his own unfettered conclusions regarding the Pixelian Event, he should have declined the Visitorship as deemed appropriate recourse in *Agency for International Development*, 570 U.S. at 206. Here, like in *Mayweathers* where the statute was unambiguous in its conditional language, 314 F.3d at 1067, the condition attached to the Astrophysics Grant was plainly specified as a part of the grant requiring 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. Dr. Nicholas had the option to accept the Visitorship and use the grant to support conclusions that would have corresponded with the academy's consensus to be published by the University, and he could have benefited from the research to independently support his Charged Universe Theory. Alternatively, Dr. Nicholas could have declined to accept the Visitorship when it was clearly stipulated that the University would not publish his religious work. However, the condition is not inherently made unconstitutional because he chose neither of the reasonable options. *See Regan*, 461 U.S. at 545. Similar to *Rumsfeld*, where the university had a choice to accept the funding by complying with the condition or declining the funds, 547 U.S. at 47, Dr. Nicholas had the opportunity to accept the funds and comply with the limited grant requirement with the option to pursue independent endeavors or decline the funds. Neither option would have violated his constitutional rights, nor will revoking the funding. Therefore, the condition was not unconstitutional because the grant was not intended to promote Dr. Nicholas'

individual suppositions, and if that is what he sought to do with the grant, then he could have declined the Visitorship.

II. THE FIFTEENTH CIRCUIT CORRECTLY HELD THAT ESTABLISHMENT CLAUSE CONCERN WARRANTS THE STATE'S REFUSAL TO FUND PETITIONER'S PRIVATE RELIGIOUS BELIEFS.

The purpose of the Establishment Clause is to prohibit the government from either infringing upon or establishing religion. U.S. Const. amend. I. Effectively, the Establishment Clause acts to maintain separation between church and state. *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 16 (1947). The drafters of the First Amendment specifically sought to bar the government from providing financial support to an established church that would demonstrate preference to one denomination over others. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131, 2169–76 (2003).[2]

This Court should hold that the Establishment Clause of the First Amendment is implicated by the State's funding. First, the University, and consequently the State, was perceived to have been promoting Meso-Paganism by funding and publishing Dr. Nicholas' religiously founded conclusions. Second, it is deeply rooted in our nation's history that a State does not have to fund the pursuance of a clerical title. Finally, courts have routinely granted universities considerable deference in making academic judgments regarding complex decisions. Therefore, the State and University should not be enforced to fund Petitioner's research and publication.

[2] There were six categories of religious establishments that the framers intended the laws to proscribe: "(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." McConnell, *supra*, at 2131.

A. It is a Violation of the Establishment Clause for State-Funded Research and Publication to be Grounded in Religious Conviction.

Traditionally, Establishment Clause jurisprudence resulted in a three-part test to determine the constitutionality of government actions related to religion, which required that government action (1) have a primary secular purpose; (2) not have the effect of advancing or inhibiting religion; and (3) not foster excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). This Court has since abandoned *Lemon*'s approach to discerning Establishment Clause violations and has replaced it with the instruction that the Establishment Clause "must be interpreted by 'reference to historical practices and understandings.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). This new interpretation of Establishment Clause violations is perceived to stem in part from a "carve out exception" where the Court found that it was not necessary to precisely identify the boundaries of the Establishment Clause if history demonstrates that the specific practice has been permissible. *See generally Marsh v. Chambers*, 463 U.S. 783 (1983); *see also Town of Greece*, 572 U.S. at 577.

However, where a display of religion is not entrenched in a long-standing tradition of historical significance, it remains necessary to determine whether religion is being endorsed as a violation of the Establishment Clause. There is a critical distinction between private speech endorsing religion, which is protected by the Free Speech and Free Exercise clauses, and government speech endorsing religions, which is forbidden by the Establishment Clause. *See Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990); *see also Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). In the present case, Dr. Nicholas is not a private speaker who is individually expressing his views. Instead, he is speaking for the State and as a representative

of the University. While an Establishment Clause violation does not automatically occur if the government or a public school neglects to suppress private religious speech, *see Mergens*, 496 U.S. at 250, "government inculcation of religious beliefs has the impermissible effect of advancing religion," *Agostini v. Felton*, 521 U.S. 203, 223 (1997). From the view of donors, prospective students, and legislative and executive supporters of the Astrophysics Grant, the University was seen to be assuming the religious stance with Dr. Nicholas' work. R. at 9.

Further, the University, and thus the State, are funding Dr. Nicholas, the research, and publications. R. at 5. This Court stated that the determination of whether funding "results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs . . . could reasonably be attributed to governmental action," *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion), and it must be proven that funding was used for religious purposes, *id.* at 857 (O'connor, J., concurring in judgment). State action occurs if the connection between the State and the action at issue is so close that seemingly private behavior could be perceived as that of the State. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Because Dr. Nicholas' representations in the *Ad Astra* publication were interpreted by readers as the viewpoint of the University, and Dr. Nicholas' article was grounded in the Meso-Pagan religion, R. at 7, 9, the State and University's continued support of Dr. Nicholas' work would violate the Establishment Clause.

Under the circumstances in *Widmar*, where university facilities were open to various student organization groups, 454 U.S. at 265, this Court held that the Establishment Clause was not a compelling reason to deny religious groups the same access to facilities, *id.* at 276. The reasoning was based on the conclusion that there would not have been a realistic danger that the community would attribute the university as endorsing religion, and any benefit afforded to the

religion would be merely incidental. *Id.* at 271–72; *see also Lamb's Chapel*, 508 U.S. at 395 ("[P]ermitting district property to be used to exhibit the film series involved in this case would not have been an establishment of religion."). In the present case, however, the Visitorship and grant funding was not a general public accommodation open to the general public to express beliefs, opinions, or hypotheticals regarding the Pixelian Event, rather the position was one of a kind and served a limited purpose. R. at 5. More importantly, there was not just a realistic danger that the community would regard the University as endorsing religion, there was realistic certainty because the community and University supporters explicitly conveyed that assertion. R. at 9.

Further, *Kennedy* takes the posture that so long as the government is not coercing the devotion, it does not violate the Establishment Clause, 597 U.S. at 538. However, *Kennedy* specifically relates to private speech and a personal prayer demonstrated by one individual in a public space, *id.* at 514–15. Unlike the present case where Dr. Nicholas is publicly disseminating his religious views under the semblance of the State and University with public funds, R. at 11, *Kennedy*'s prayer was not funded by the school nor did it appear that the school was expressing his private views, 597 U.S. at 529–30. So, while Delmont University is not coercing anyone to respect the establishment of Meso-Paganism, it is perceived to be publicly supporting and disseminating religion.

B. The State has an Interest in Refusing to Support the Pursuance of a Vocational Degree in an Effort to Maintain Separation Between Church and State.

This Court has established that state funds may be provided to religious schools without raising an Establishment Clause concern. *See, e.g.*, *Trinity Lutheran*, 582 U.S. at 462; *cf. Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664 (1970). However, our country's constitutional history has long upheld the anti-establishment interest which prompted the espousal of baring clergy from

funding. *See McDaniel v. Paty*, 435 U.S. 618, 628 (1978). There is a difference between respecting equal access funding of both sectarian and religious education institutions and providing direct funding for the pursuance of a devotional degree. *Compare Trinity Lutheran*, 582 U.S. at 453, *and Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246, 2251–52 (2020), *with Locke v. Davey*, 540 U.S. 712, 717 (2004).

In *Trinity Lutheran*, a church daycare program sought a reimbursement grant funded by the state to replace the gravel on their playground with rubber surfacing, 582 U.S. at 454. The grant was provided to qualifying nonprofit organizations that purchase recycled scrap tire surfacing, but the church was denied the grant because the state constitution prohibited funds from being distributed to religious institutions. *Id.* at 455. This Court found that it was unconstitutional to deny a public benefit to a religious organization solely based on its religious characterization. *Id.* at 462.

Similarly, in *Espinoza*, this Court held that if a state decides to subsidize private education, then the state may not disqualify private institutions merely because of their religious affiliation, 140 S. Ct. at 2261. The state created a scholarship program for students attending private schools, but a student who had received the scholarship was unable to use the funds for tuition at their religious school. *Id.* at 2252. Even if the state was attempting to avoid an establishment concern, the Court held that it cannot constitutionally withhold funding from only religious institutions. *Id.* at 2262.

Further, in *Carson v. Makin*, 596 U.S. 767, 772 (2022), the state enacted a program to subsidize tuition for students who lived in a district with no public school. To utilize the program, the parent had to designate the school their child would attend, and as long as the school was approved as nonsectarian, the tuition payment would be transferred. *Id.* at 772–73. The Court held

that it was unconstitutional for a state law to prohibit students from choosing to attend religious schools in order to receive funding. *Id.* at

This Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*, simply do not comport with the present case. This is not a public benefit that is generally available for a wide range of topics, only excluding religion. This was a benefit, provided to one person only, for the exclusive study of scientific phenomena exhibited by the Pixelian Comet. The study was offered to a highly qualified individual in the industry and intended for scientific conclusions based on the Event. The district court took the position that the State in the present case could not constitutionally permit the funding of all studies aside from those that take a religious stance. However, the State is not denying the funding on the sole basis of Dr. Nicholas' religious posture. It is denying the funding in part because Dr. Nicholas' conclusions do not align with the scientific academy's consensus. R. at 53. The State's decision to revoke the Astrophysics Grant is also founded on Dr. Nicholas' explicit anticipation that the research conducted under the grant will be used to pursue a designation as a Sage of the Meso-Pagan Faith. R. at 54, 57.

It has been established through our nation's history beginning with the earliest laws that the clergy could not seek the state's support. Frank Lambert, *The Founding Fathers and the Place of Religion in America* 229 (2003) ("With the cry for freedom growing louder during the Revolution . . . the lawmakers ended the establishment to the extent that the 'clergy could no longer look for support to taxation."). As the Court of Appeals stated, "[i]t is simply not the role of the state to pay for the religious education of future ministers." R. at 46 (citing R. Freeman Butts, *The American Tradition in Religion and Education*, 15–17, 19–20, 26–37 (1950)). This sentiment is carried out in *Locke*, 540 U.S. at 712, and *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash.2d 912 (1967) (en banc).

In *Locke*, the state established a scholarship program to help academically achieving students attain a higher education, 540 U.S. at 715. The award of the scholarship was based on academic scores, family income, and enrollment requirements, which specified that the student may not pursue a degree in theology while receiving the scholarship. *Id.* at 716. The Court held that in considering the historic and substantial state interest, it could not conclude that the "denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 725. Similarly, *Calvary Bible* held that the framers of the constitution intended to limit the establishment of religion as it related to "the category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct," 72 Wash.2d at 919.

While the district court has chosen to view *Locke* as an anomaly of Establishment Clause jurisprudence, the cases cited in the court's discussion provide the opposite conclusion, regarding *Locke* as precedent when presented with the issue of state funded clergy. *See Espinoza*, 140 S. Ct. at 2259; *Carson*, 596 U.S. at 788. Just like *Locke* held that it was not a constitutional violation for the state to refuse scholarship assistance to pursue a vocational degree, 540 U.S. at 725, the State of Delmont should not be required to fund Dr. Nicholas' religious research when it has been explicitly stated that he was encouraged to submit the completed research to gain designation as a Sage, and he received application materials and was "strongly considering applying pending the results of [the] study." R. at 57. *Locke* does not represent the position that it would be an Establishment Clause violation for the State to fund Dr. Nicholas' research as this Court has long held that "there is room for play in the joints" between the Establishment Clause and Free Exercise Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Witters v. Wash. Dept. of Servs. For Blind*, 474 U.S. 481, 487 (1986). However, *Locke* and *Calvary Bible*, 540 U.S. at 725; 72

Wash.2d at 919, support the position that a state can deny funding of religious instruction intended to prepare scholars for the ministry, *see also Witters*, 474 U.S. at 369–70. As such, the State of Delmont is permitted to deny directly or indirectly funding research that will be used to pursue the clerical designation of a Meso-Pagan Sage without violating Dr. Nicholas' rights.

C. This Court Should Give the University Deference in Choosing Not to Fund a Study That Would Infringe the Establishment Clause.

This Court has routinely granted universities considerable deference when defining "intangible characteristics . . . that are central to its identity and educational mission." *Fisher v. Univ. of Tex. Austin*, 579 U.S. 365, 388 (2016). The tradition of imparting deference to a university's academic decisions must be maintained "within constitutionally prescribed limits." *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 217 (2023). Courts should not question a university's determination "as to how best to allocate scarce resources." *Widmar*, 454 U.S. at 276. When universities are bestowed this privilege, it is because it has been recognized that the universities' decisions involve various complex factors including, budget, research, public and private insight, complicated facts, and scrutiny. *See Regents of Univ. of Mich. V. Ewing*, 474 U.S. 214, 226 (1985) (stating that the court is not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions"); *Bd. of Curators of Univ. of Mo. v. Horrowitz*, 435 U.S. 78, 89–90 (1978) (stating it is not the court's place to make "an expert evaluation of cumulative information" because the determination "is not readily adapted to the procedural tools of judicial or administrative decisionmaking").

The State of Delmont and Delmont University established the Visitorship for two main purposes, studying the once in a lifetime Pixelian Comet and promoting the University's word

class Observatory. R. at 5. The Astrophysics Grant is the epitome of a scarce resource. It was the first of its kind and it could only be awarded to one recipient to study an event that would not occur for another century. *Id.* Further, the University came under direct and overwhelming scrutiny stemming from the publication in *Ad Astra*, potentially affecting the University's future private funding, quality of academic scholars, and overall reputation. R. at 9. The University was placed in the position of violating the Establishment Clause by directly funding and publicly supporting the Meso-Pegan faith or constitutionally choosing not to fund Dr. Nicholas' pursuit of a religious designation. So long as the University is exercising its decision within constitutionally proscribed limits, the choice and its ramifications should be left to the University alone to decide which course of action would best serve its academic mission.

Altogether, the State incurs a valid Establishment Clause concern if it were to maintain the appearance that it is supporting and endorsing the Meso-Paganist religion. Additionally, the State of Delmont is within its right to terminate the grant due to Dr. Nicholas' publicly expressed anticipation of pursuing a clerical title with the research from the Pixelian Event. The University is entitled to deference to make the determination that will present the best outcome.

CONCLUSION

For the foregoing reasons, the condition requiring that the Astrophysics Grant may only be used for research conclusions that conform with the academy's consensus view of what is scientific is not an unconstitutional violation of the First Amendment. Further, in light of the Establishment Clause, the State and University have the right to constitutionally terminate the grant. Therefore, Petitioner's challenge should be denied, and the judgment of the Fifteenth Circuit Court of Appeals should be affirmed.

APPENDIX

Constitutional Provision

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 Provision

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y 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

Per the requirements of Rule IV(C)(3) of the Official Competition Rules governing the 2023–24 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, we, Counsel for Respondent, certify that:

1. The work product contained in all copies of our team 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 Competition Rules of the Seigenthaler-Sutherland Cup Moot Court Competition.

TEAM 2
Counsel for Respondents
January 31, 2024