

No. 23-CV-1981

IN THE SUPREME COURT OF THE UNITED STATES

COOPER NICHOLAS, PH.D.

Petitioner,

v.

STATE OF DELMONT and DELMONT UNIVERSITY

Respondent.

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

BRIEF FOR RESPONDENT

Team 25

Counsel for Respondent

January 31, 2024

QUESTIONS PRESENTED

1. Does a state's requirement 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?

2. Does a state-funded research study violate the Establishment Clause when its 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?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... 1

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES..... 3

OPINIONS FROM THE COURTS BELOW.....5

STATEMENT OF JURISDICTION..... 5

SUMMARY OF ARGUMENT..... 12

ARGUMENT..... 13

I. THE FIFTEENTH CIRCUIT COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT THE CONDITION PLACED ON THE ASTROPHYSICS VISITORSHIP DID NOT VIOLATE THE FIRST AMENDMENT..... 13

A. Delmont University was Advancing a Specific Policy Initiative with its Conditions on the State-Funded Research Grant, Presenting a Constitutional Condition on Speech under the First Amendment..... 13

B. Alternatively, Even if Delmont University’s Condition on the Research Grant is Considered to be Viewpoint Discrimination, the Condition Remains a Permissible Government Restriction on Speech under First Amendment Jurisprudence..... 15

C. The Condition Placed on the Astrophysics Grant Funding Remains Constitutionally Valid and Permissible, as Dr. Nicholas’ Refusal to Continue Compliance with the Grant Funding Conditions He Accepted was the Result of Neither State Actor Coercion nor a Penalty for Engaging in Restricted Speech..... 16

D. Delmont University Did Not Suppress Dr. Nicholas’ Ideas Because He Was Free to Publish His Thoughts in Other Capacities..... 19

E. Delmont University Had a Right to Place Conditions Upon the Grant Because Dr. Nicholas Was Engaged in Government Speech..... 21

II. THE FIFTEENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT DR. NICHOLAS’ PLANS FOR HIS STATE-FUNDED RESEARCH MAY IMPLICATE ESTABLISHMENT CLAUSE CONCERNS THAT THE UNIVERSITY MAY MITIGATE..... 22

A. Locke v. Davey remains binding precedent upon the Court’s Establishment Clause jurisprudence..... 22

B. The Historical Understanding of the Establishment Clause Supports the Fifteenth Circuit’s Continued Application of Locke v. Davey to Decide this Matter..... 23

C. Both Court Precedent and Policy Concerns Compel Continued Deference to University Discretion in Making Educational and Resource Judgments in order to Mitigate the Possibility of Establishment Clause Violations..... 26

CONCLUSION..... 28

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Agency for Int’l Dev. v. All. for Open Soc’y Int’l Inc., 570 U.S. 205, 218 (2013).....14, 17, 19

Agostini v. Felton, 521 U.S. 203, 233 (1997)..... 25

American Communications Assn. v. Douds, 339 U.S. 382 (1950).....18

Arkansas Writers’ Project Inc. v. Ragland, 481 U.S. 221, 237(1987).....21

Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529, U.S. 217, 229 (2000).....22

Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 90, (1978).....28

Engel v. Vitale, 370 U.S. 421, 431 (1962).....24

Espinoza v. Montana Dep’t of Revenue, 140 S. Ct. 2246, 2259 (2020).....23

Garner v. Board of Public Works, 341 U.S. 716 (1951).....18

Gerende v. Board of Supervisors, 341 U.S. 56 (1951).....18

Grutter v. Bollinger, 539 U.S. 306, 328 (2003)..... 27

Locke v. Davey, 540 U.S. 712, 722 (2004).....23, 24

National Endowment for the Arts v. Finlet, 524, U.S. 569, 587 (1998).....21

Perry v. Sindermann, 408 U.S. 593, 597 (1972).....9

Police Dep’t of Chicago v. Mosley, 480 U.S. 92, 96 (1972).....15

Regan v. Tax’n with Represent’n of Wash., 461 U.S. 540, 548 (1983).....20

Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985).....27

Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986).....15

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 824 (1995).....21

Rust v. Sullivan, 500 U.S. 173, 193 (1991).....13

Speiser v. Randall, 357 U.S. 513, 526 (1958).....17

Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 263 (1957)..... 27

Widmar v. Vincent, 454 U.S. 263, 276 (1981).....27

OTHER CASES

Ass'n of Christian Sch. Int'l v. Stearns, 362 F. App'x 640 (9th Cir. 2010).....27

Bowman v. United States, 564 F.3d 765 (6th Cir. 2008)..... 25

United States v. Indianapolis Baptist Temple, 224 F.3d 627, 631 (7th Cir. 2000)..... 25

Vision Church v. Vill. of Long Grove, 468 F.3d 975, 995 (7th Cir. 2006)..... 25

U.S. Constitution and Statutes

U.S. Const. art. I, § 8, cl. 8

OPINIONS FROM THE COURTS BELOW

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 Feb. 20, 2024). 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. Mar. 7, 2024).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment in favor of the State of Delmont and Delmont University on March 7, 2024. Petitioner Cooper Nicholas, Ph.D., then filed a writ of certiorari, which this Court granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The State of Delmont is home to Delmont University, a dynamic higher education institution aiming, both literally and figuratively, for the stars. Led by President Miriam Seawall, Delmont University aims to leverage its public and private resources to strengthen the caliber and reputation of its research mission and programs. Seawall Aff. ¶¶ 2, 4, 7. The GeoPlanus Observatory and the research it intends to produce act as a key lodestar in achieving that goal.

After years of fundraising efforts from local, state, and federal sources, the University opened The GeoPlanus Observatory on Mt. Delmont, “universally considered one of the best locations for viewing celestial phenomena from the Northern Hemisphere[.]” Seawall Aff. ¶¶ 4. By founding this Observatory, the University and its supporters hoped to build “one of the foremost centers for celestial study in the world.” *Id.* The unique geographical situation of the Observatory was to be one of many elements working to achieve this vision. An esteemed team

of faculty members would also contribute to the prestige of this new academic institution, with access to state-of-the-art telescopes and remote astrophysical sensing equipment bolstering the faculty's research, teaching, and publishing in the field. *Id.*

Perhaps most exciting for the University and their Observatory plans would be the appearance of the Pixelian Comet over a three-week period in Spring 2023. Occurring once every ninety-seven years, the Pixelian Comet presented an especially fortuitous opportunity for boosting the Geoplanus Observatory and its reputation as a world-class celestial research facility. Seawall Aff. ¶¶ 5. In order to take advantage of this opportunity, the State of Delmont established a "Visitorship in Astrophysics" at Delmont University, creating a "Principal Investigator" at the Observatory who would manage the research team, operations, and publications relevant to the Pixelian Comet and whose salary would be funded by the State of Delmont in the form of an Astrophysics Grant. *Id.*; R. at 1.

University administrators and supporters have invested in the Observatory for years to ensure it can be an exemplar of the high-quality research and scholarship which Delmont University aims to produce. Seawall Aff. ¶¶ 3-7. The research and publications produced through the Observatory's Visitorship in Astrophysics were intended to align with and strengthen that reputation of academic standard-setting for the Observatory. *Id.* As a result, "any and every resource" was to be at the Principal Investigator's disposal. Seawall Aff. ¶¶ 6. Conversely, by accepting the state-funded Astrophysics Grant in order to complete this work, the Principal Investigator agreed to collect extensive research before, during, and after the appearance of the Pixelian Comet and to publish findings and observations in pre-selected forms—scientific, peer-reviewed articles, a "final summative monograph on the event," and a public collection of all raw data supporting the Principal Investigator's analyses and research conclusions. R. at 2.

In an effort to reinforce the Observatory as a “purely academic institution,” one with a reputation for high-quality research and a standard of excellence among the academic community and donors, the Astrophysics Grant’s terms required that the Principal Investigator’s research and subsequent publications—funded by the state and promulgated under the imprimatur of the University and its Observatory—conform to the quality standards for a scientific study, as defined by the scientific academy’s consensus view. Seawall Aff. ¶¶ 6-7; R. at 5.

This was not Delmont University’s first attempt at structuring these types of potentially high-publicity research grant programs. Two years prior, a privately funded grant for the Anthropology Department stirred up doubts and criticisms of Delmont University from the academic community and donors when these anthropology publications were said to have “overtly championed dubious religious positions” under the sponsorship of the University and associated private grant. Seawall Aff. ¶¶ 9. In structuring the Astrophysics Grant and conditioning the funding upon the following of widely-accepted standards of scientific study then, University leadership intentionally worked to ensure that the state-funded research produced on the Pixelian Comet would, regardless of actual outcome, at least positively reinforce the University’s reputation for excellence and quality of research through the standards themselves used. Seawall Aff. ¶¶ 7, 9. President Seawall noted that the University to “remain vigilant” that the work funded by the state’s Astrophysics Grant did not undermine the mission and standing of the University amongst the academic community and donors as the past controversy with the Anthropology Department had. Seawall Aff. ¶¶ 9.

In the fall of 2021, Cooper Nicholas, Ph.D., (hereinafter “Dr. Nicholas”) was selected as the inaugural recipient of the Astrophysics Grant, slating him to assume the Visitorship of Astrophysics at The GeoPlanus Observatory. Seawall Aff. ¶¶ 8. A summa cum laude graduate of

Delmont University with joint degrees in astronomy and physics, Dr. Nicholas has gained eminence in his particular field through his well-known scientific research in observational astrophysics and his wide range of accompanying publications. R. at 3. In accepting the Visitorship of Astrophysics, and consequently the Astrophysics Grant and its accompanying conditions for conducting research with the funds, Dr. Nicholas agreed to receive a salary, use of Observatory facilities and equipment, funding of research assistants, and incidental costs associated with the study of the Pixelian Comet. R. at 1.

When the Pixelian Comet eventually appeared over the course of three weeks in Spring 2023, Delmont University garnered significant attention in the media, as expected, due to the Observatory's prime location and resources dedicated to its research. Six months following the event, Dr. Nicholas sought to publish for a second time as Principal Investigator in *Ad Astra*, the premiere peer-reviewed journal in the field. His first such publication in *Ad Astra*, prior to the Pixelian Comet, had generated several response papers and animated conference discussions with its argument that certain cosmic measurements indicated that something "momentous" was occurring in the universe prior to the Pixelian Comet's appearance. R. at 6. His second submission to *Ad Astra* discuss his post-Pixelian Comet, interim conclusion, arguing that the "atmospheric phenomena and electro-magnetic disturbances observed before, during, and immediately after the comet's appearance" were commensurate with those reflected in the ancient religious history of Meso-American indigenous tribes. R. at 6-7. Dr. Nicholas encouraged the investigation of Meso-American cave and rock hieroglyphs and the dates of their creations, suggesting that the drawings may have been primitive depictions of the same celestial movements from the Pixelian Comet. R. at 7. To Dr. Nicholas, the glyphs could be memorializing the kind of electrical interplay that Meso-Pagans consider to be the lifeforce, a

hypothesis consistent with the highly controversial “Charged Universe Theory” which he hoped to pursue with further post-Pixelian research. R. at 7. The “Charged Universe Theory” is not the academic community’s consensus view either of the creation or composition of the universe, nor the believed inspiration for the glyph art of Meso-Americans. R. at 7.

The Meso-American indigenous faith which Dr. Nicholas discusses in his work holds a strong personal significance for him, as he was raised primarily in the Meso-American culture and adopted the Meso-Paganist faith of the indigenous peoples of the region. R. at 4. Meso-Paganist spirituality is an ancient practice centering around study of the stars, whose Meso-Pagan Sages ponder the significance of inter-planetary events in the belief that their observations will provide insights into human nature and humanity’s relationship to the cosmos. R. at 4. They regard the ancient hieroglyphs etched into stone throughout Meso-America as visual accounts of ancient celestial phenomena, particularly conveying the idea that the universe is connected through a lifeforce. R. at 4. This belief system centered around the lifeforce is what Dr. Nicholas credits as his inspiration for entering astrophysics. R. at 4.

While the University certainly acknowledges the value in Dr. Nicholas’s research and its personal significance to him as an extension of his religious practice, the demonstrated inability to reconcile Dr. Nicholas’s research and related conclusions on the “Charged Universe Theory” with the consensus views or standards of the scientific academy created material questions about Dr. Nicholas’s compliance with the conditions of the Astrophysics Grant. Dr. Elizabeth Ashmore, the editor of *Ad Astra*, recognized the theory as an extreme view similar to the “kind of quantum leaps and unsupported analogies of the early alchemists,” early chemists who tried to create elixirs of immortality and find the stone of knowledge, and did not believe *Ad Astra* could be seen as endorsing it. R. at 6, 8. In addition, *Ad Astra*’s editorial board also expressed concerns

that information found in the archeological and Meso-Pagan foundational texts were religious in nature, not empirical. R. at 8. Ultimately, *Ad Astra* would not agree to publish the article without a qualifying editorial statement that Dr. Nicholas's interpretation of his observations did not have the endorsement of the publication. R. at 8. Dr. Nicholas agreed to the addition of this editorial statement to his article and was hopeful that his findings would in part support his application to become a Sage in the Meso-Pagan faith, a clerical position in this religion. R. at 8-9.

Upon the issue's release, the article generated widely negative responses from the scientific academy and the press, embarrassing donors as well as the legislative and executive supporters who had secured the Astrophysics Grant's approval. R. at 9. "[T]he academy roundly discredited [his] suppositions as ultimately unprovable from a scientific standpoint, and as outright 'medieval' in their references" to some kind of mystical connection between animate and inanimate matter. R. at 9. In trying to make a splash on the scientific stage, the school and Observatory were instead becoming associated with "weird science" and even mocked on late night television. R. at 9. Applications for post-graduate studies saw a decline, while chatter on scientific websites echoed that the research position at the Observatory was undesirable, given the strange direction they were taking with Dr. Nicholas. R. at 9. Neither the University's President Seawall nor the director of the Observatory's Dr. Van Pelt wanted to risk the huge economic investment in the Observatory. R. at 9. On January 3, 2024, President Seawall sent a letter to Dr. Nicholas, communicating that Delmont University could not be seen as endorsing a religious tenet. R. at 10. The letter conditioned the grant on Dr. Nicholas's agreement to limit his research experiments and conclusions to those comporting with the language of the state's grant: "the study of the event and derivation of subsequent conclusions [that] conform to the academic community's consensus view of a scientific study." R. at 10.

On January 5, 2024, Dr. Nicholas responded that he would not be told what to conclude or upon what his observations might rest and warned that any attempt by the Observatory to censor his research went against everything science stood for. R. at 10. He claimed that he knew other University scientists had made references to the writings of other pagans, such as the Greeks, Romans, Incas, and Phoenicians and were not stopped. R. at 10. On January 12, 2024, President Seawall replied by letter explaining that Dr. Nicholas was free to conclude and publish whatever he wanted on the subject, wherever he liked, but not under the auspices of the grant-funded research, the terms of which he'd accepted as its principal investigator. R. at 10. The state had been clear from the start that it was subsidizing only science-based conclusions. R. at 10. Further, considering the connections Dr. Nicholas was drawing to Meso-Paganism in his work, the University could not be perceived as endorsing his particular religious belief system. R. at 11. On January 16, 2024, Dr. Nicholas emailed President Seawall and shot back that there was nothing unscientific about what he was concluding. R. at 11. Both parties stipulate that this dispute is over the term "science" and its derivations. R. at 11.

President Seawall, on behalf of all parties who funded and administered the Astrophysics Grant, gave Dr. Nicholas a date to restate his agreement to limit his study and conclusions to the academic community's consensus view of scientific study. R. at 11. Once again, Dr. Nicholas replied in an email that his study and conclusions were scientific. R. at 11. Seeing this as Dr. Nicholas having made his choice, the Observatory resorted to changing the security protocol so that Dr. Nicholas was denied admittance. R. at 11. They made a public statement that said this action was taken because of a fundamental disagreement with Dr. Nicholas over the meaning of science itself, and they could not countenance the confusion of science and religion. R. at 11.

SUMMARY OF ARGUMENT

1. The Fifteenth Circuit Court of Appeals was correct in concluding that the condition placed on the Astrophysics Grant did not violate the First Amendment. The grant was created to advance some of the university's goals for its new Observatory. The conditions upon the grant were placed to facilitate that goal. Additionally, the conditions placed upon Dr. Nicholas were not coercive nor penalizing. Dr. Nicholas remained free to publish about the Charged Universe Theory in whatever capacity he pleased. Furthermore, Dr. Nicholas was engaged in government speech. As such, the university was allowed to restrict his speech because he would be speaking on their behalf.

2. The Court also correctly held that Dr. Nicholas' plans for his state-funded research may implicate establishment clause concerns that the University has the capacity to mitigate. *Locke v. Davey* has set a binding precedent that state-sponsored clergy implicate the Establishment Clause and thus threaten this nation's unwavering anti-establishment interests in preventing church and state entanglement. Dr. Nicholas intends to use his publications regarding the study of the Pixelian Event and its connection to the Meso-Pagan belief in the lifeforce as the strongest factor of his application materials for becoming a First Order Sage, a clergyman. In order to prevent the implication of the Establishment Clause and the conflation of science and religion, the Supreme Court should give deference to the University's decision to deny Dr. Nicholas access to this grant-funded research.

ARGUMENT

I. THE FIFTEENTH CIRCUIT COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT THE CONDITION PLACED ON THE ASTROPHYSICS VISITORSHIP DID NOT VIOLATE THE FIRST AMENDMENT.

The Supreme Court of the United States should affirm the Fifteenth Circuit’s decision to grant summary judgment in favor of the respondent. The Fifteenth Circuit correctly found the University of Delmont and the State of Delmont did not violate Cooper Nicholas’ First Amendment rights in any of the ways alleged by the appellant.

A. Delmont University was Advancing a Specific Policy Initiative with its Conditions on the State-Funded Research Grant, Presenting a Constitutional Condition on Speech under the First Amendment.

The Appellant has incorrectly claimed that the State and University of Delmont discriminated against Cooper Nicholas on the basis of his viewpoints. The First Amendment protects individuals from being denied a government benefit based on viewpoint discrimination. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Through the Fourteenth Amendment, this obligation to refrain from viewpoint discrimination also extends to state governments. However, a distinction must be made between viewpoint discrimination and selectively funding programs that the government deems good for the public. The government is permitted to use its resources to fund its policy goals—and it can do so at the exclusion of others. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

In *Rust*, the Supreme Court noted that “[t]he government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest.” *Id.* The court also noted that “[a] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.” *Id.* Although the subject matter differs, the facts in *Rust* are analogous to the ones in the present case. There, Title X fund

recipients were restricted from engaging in abortion-related activities as a condition of the grant. The court held that the program did not “encroach on a doctor's ability to provide . . . information concerning abortion-related services outside the Title X project.” *Id.* As was the case in *Rust*, the University awarded Dr. Nicholas the money to advance a particular policy interest. Here, that interest was establishing Delmont University as a leader in astronomy. Conditioning Nicholas’ receipt of the money upon his agreement to refrain from making statements that were considered “unscientific” was not viewpoint discrimination. The restrictions placed upon Nicholas closely resemble the ones in *Rust*. In both cases, a recipient of government funds is merely asked to remain silent on a matter while operating in the capacity of a fund recipient. Neither party was prohibited from speaking their mind in any other context.

It is true that the First Amendment places some constraints on what kind of conditions the government can place on its funding. Without such limits, the First Amendment would “be reduced to a simple semantic exercise.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l Inc.*, 570 U.S. 205, 218 (2013). However, there is no First Amendment violation when the government places the condition on a program rather than on the particular grantee and “leave[s] the grantee unfettered in its other activities.” *Rust*, 500 U.S. at 196. Here, the Astrophysics Grant came with restrictions on the grant itself, but not specifically on its recipients. If the restrictions were on Dr. Nicholas as an individual, the grant would not allow him to publish about the Charged Universe Theory in any capacity —that is clearly not the case here. The conditions placed by the university simply ask Dr. Nicholas not to publish views that are inconsistent with the academic views of science when producing work under the auspices of the Astrophysics Grant. The grant would not have been revoked from Dr. Nicholas if he wrote about the Charged Universe Theory under a different grant or for another publication. It is therefore clear that the restrictions placed

by the university were on the Astrophysics Grant program and not on Dr. Nicholas. As such, Delmont University did not exceed the First Amendment's limits on public funding for the advancement of state-selected policy goals.

B. Alternatively, Even if Delmont University's Condition on the Research Grant is Considered to be Viewpoint Discrimination, the Condition Remains a Permissible Government Restriction on Speech under First Amendment Jurisprudence.

The District of Delmont Mountainside Division found that the University of Delmont was engaging in viewpoint discrimination. The respondent firmly disagrees. However, even if this was the case, the university's actions were permitted by the Supreme Court's jurisprudence.

When the government seeks to regulate or restrict constitutionally protected speech, the restrictions are permissible if they are "content-neutral" and "serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986).

A restriction is "content-neutral" so long as it is not formed "on the basis of content alone." *Police Dep't of Chicago v. Mosley*, 480 U.S. 92, 96 (1972). In the present case, Delmont University's restriction is based on much more than content alone. The condition for the grant is based on several factors including scarcity of resources and the risk of Dr. Nicholas' opinions being conflated with government's. Both of these factors are the driving force behind the grant's conditions—not the actual content that Dr. Nicholas seeks to share.

Having established that the condition was content-neutral, we now turn to government interest and the availability of alternatives. The government interest in this case is multifold. First, there is an interest in preserving the Observatory as a "purely academic institution." *Seawall Aff.* ¶¶ 7. This desire is in fact directly aligned with the goal of promoting a multitude of ideas. As history had shown the university's administrators, religious ideology appearing in

scientific journals ended up stifling the flow of discourse and appeared only to beget more religion-centered research. *Id.* Preserving the flow of academic discourse is certainly a substantial government interest. This interest was heightened by the paucity of opportunities to conduct the kind of research that the Pixelian Event offered. The celestial occurrence only occurred once every ninety-seven years, and Delmont University was uniquely positioned to observe the event because of its unique geographic placement and its recently-unveiled state-of-the-art facility. *Id.* at ¶¶ 4-5. To use this opportunity for anything other than the university's substantial interest in promoting the flow of discourse would be to squander it.

Delmont University had a strong interest in the research produced within the capacity of the Astrophysics Grant and they conditioned the grant accordingly. What they did not do was place any conditions on what grant recipients could do with their observations beyond the scope of the program. There was no restriction barring Dr. Nicholas from using his findings to write something non-scientific and have it published in a different capacity later on. The only relevant restriction was that the work produced for the Astrophysics Grant needed to be consistent with the academy's views on science. Given that Dr. Nicholas was at complete liberty to speak about the Pixelian Event outside the scope of the grant, Delmont University did not unreasonably limit his access to alternative forms of communication.

C. The Condition Placed on the Astrophysics Grant Funding Remains Constitutionally Valid and Permissible, as Dr. Nicholas' Refusal to Continue Compliance with the Grant Funding Conditions He Accepted was the Result of Neither State Actor Coercion nor a Penalty for Engaging in Restricted Speech.

The District Court found that the conditions of the Astrophysics Grant amounted to a penalty against Dr. Nicholas for participating in protected speech and that Delmont University was attempting to coerce Dr. Nicholas into silence through the imposition of the grant's conditions. This is incorrect.

It is true that the government cannot use its power to “produce a result which [it] could not command directly.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958). It is also true that the government cannot coerce individuals to refrain from certain speech. *Id* at 519. However, the District Court’s reliance on *Speiser* was misguided as the present case more closely resembles—and is even less restrictive than—a trio of cases that *Speiser* was distinguished from.

Speiser was about veterans who were denied tax exemptions (which they had previously accessed in years past) because of their refusal to make an affirmative oath. That scenario is similar to *Agency for Int’l Dev.* where the grant recipients suddenly became ineligible to receive funds they had previously relied on because of their refusal to accept a new condition. *Agency for Int’l Dev.* 570 U.S. 218. In contrast, the present case is about accessing a new government grant which Dr. Nicholas has never relied upon.

In *Speiser*, a previously accessed benefit was being withheld until an affirmative statement was made. The plaintiffs were being coerced into making an oath if they wanted to continue accessing their benefit. If they refused to make the oath, they would be penalized by losing access to the tax exemption they had previously enjoyed. The court held that this was unacceptable.

In Dr. Nicholas' case, he was seeking to access a *new* government benefit. The condition in this case was very different. It did not require any affirmative oaths or declarations. In comparison to the condition in *Speiser*, these conditions were very permissive. They simply required that the research Dr. Nicholas produced for the Astrophysics Grant were within the confines of acceptable science. Dr. Nicholas was not being coerced into making a statement in order to access the grant. He still had the choice to make whatever statements he wanted. They just could not be for the Astrophysics Grant. Similarly, Dr. Nicholas was not being penalized by

these conditions. Nothing was being taken away from him for his violation of the grant conditions. Unlike the plaintiff in *Speiser*, Dr. Nicholas had never accessed the grant before. He applied for the grant knowing what its conditions were. The conditions were not placed on him retroactively as they were in *Speiser*. He also knew that he could publish whatever speech he wanted about the Charged Universe Theory in other capacities. As such, these restrictions were neither coercive nor punitive.

There are a number of cases that Justice Brennan distinguishes *Speiser* from. *Speiser* at 528. See also: *Garner v. Board of Public Works*, 341 U.S. 716 (1951), *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951); *American Communications Assn. v. Douds*, 339 U.S. 382 (1950). In those cases, municipal employees, prospective election candidates and labor organizers were required to make affirmative statements in order to access a certain position or benefit that they previously held or had access to. Justice Brennan noted that the conditions in those cases were acceptable because the “congressional purpose was to achieve an objective other than restraint on speech” *Speiser* at 527. Similarly, Delmont University and the State of Delmont have a clear objective for placing the conditions upon the Astrophysics Grant. They want to promote a clear distinction between religion and science and want to promote the Observatory as an academic institution. Furthermore, the restrictions Dr. Nicholas faces are significantly less demanding than in the trio of cases mentioned in *Speiser*. Unlike in those cases Dr. Nicholas was never asked to make an affirmative pledge—he was merely asked to keep his work for the Astrophysics Grant within certain constraints in order to receive government money for his work. This condition is consistent with many government programs. Refusing to fund research that is not “science” according to the academic consensus is not a penalty upon Dr.

Nicholas' speech, nor is it coercion. It is simply the state making an effort to promote a certain view of what *it* considers scientific.

Additionally, the District Court's concerns about hypocrisy are misplaced. The conditions for the Astrophysics Grant would not force Dr. Nicholas to make inconsistent statements as the Supreme Court feared in *Agency for Int'l Dev.*, 570 U.S. at 219. The strength and appeal of the Charged Universe Theory and other pseudoscientific ideologies is that they are consistent with modern science and have not yet been disproven. There is nothing to suggest that the observations Dr. Nicholas made could not be used to support the Charged Universe Theory *and* other hypotheses consistent with the requirements of the Astrophysics Grant. It is incorrect to say that a phenomenon can only lend itself to a single theory. Dr. Nicholas was never asked to use the Astrophysics Grant to reject or disprove his faith. At worst, he was asked to not use the grant to publish about non-scientific matters. In his years of research, this is something he has shown he is capable of doing.

However, even if Dr. Nicholas did have to make a contradictory statement in the future, that would not make him a hypocrite in the way that the court feared in *Agency for Int'l Dev.* Science is always changing and researchers can change their hypotheses. Doing so is not hypocritical. It is the very essence of science.

D. Delmont University Did Not Suppress Dr. Nicholas' Ideas Because He Was Free to Publish His Thoughts in Other Capacities

The district court concluded that Delmont University's decision to place conditions upon the Astrophysics Grant was "aimed at the suppression of dangerous ideas." R. at 19 quoting *Speiser* 375 U.S. at 519. However, this conclusion is merely conjecture. The university's decision to place conditions upon the grant was not meant to suppress any ideas at all. Rather, the

conditions were meant to make it clear to the general public that the Observatory was “a purely academic institution.” R. at 53.

The Respondent agrees with the District Court’s finding that it is unconstitutional for the state to discriminate in grant funding for the purpose of suppressing ideas. R. at 20 citing *Regan v. Tax’n with Represent’n of Wash.*, 461 U.S. 540, 548 (1983). In *Regan*, the court is discussing the non-administration of government grants and tax benefits. In that case, a party was denied a tax exemption because of their past speech and the government’s expectations on what the applicants would do based on their speech history. The attempted coercive effect in that case was to get the party seeking a government benefit to abandon its practices or to be denied the benefit outright. Despite that seemingly coercive effect, the court still held that the government was allowed to decide to withhold the tax benefit from the organization. The facts here suggest in even stronger terms that the State of Delmont and Delmont University did not exert any coercive force over Dr. Nicholas by placing conditions upon the grant..

Unlike in *Regan*, Dr. Nicholas was able to access the government benefit he sought. He won the Astrophysics Grant because he is a brilliant scholar. R. at 53. The conditions for the grant were known before Dr. Nicholas submitted his application. He was seeking a benefit knowing what its conditions were, and he was given the benefit and asked to create a piece of work that adhered to the conditions he accepted. In stark contrast to *Regan*, Dr. Nicholas was not being judged negatively for any of his past speech nor was he being asked to refrain from engaging in such speech in the future in order to access the benefit that he was awarded. The government was not seeking to coerce Dr. Nicholas into changing his views or completely refrain from articulating his religious beliefs as was the case in *Regan*. Dr. Nicholas was simply asked to publish findings that were in keeping with the academy’s views on science. This was a

much more permissive condition than the ones placed in *Regan*. The District Court’s reliance on *Regan*, when compared to the facts of the present case, was mistaken.

Indeed, it would be improper if a government grant was “manipulated to have a coercive effect” as was the case in *National Endowment for the Arts v. Finlet*, 524, U.S. 569, 587 (1998) (citing *Arkansas Writers’ Project Inc. v. Ragland*, 481 U.S. 221, 237(1987) (Scalia, J. Dissenting)) (internal citations omitted). However, *Finlet* shows us that the government does have the ability to impose conditions upon funding and even change those conditions later on. Writing for the majority of the court, Justice O’Connor noted that “congress has wide latitude to set spending priorities.” *Finlet*, at 588. Naturally, that latitude should extend to state legislatures which serve a parallel function. As certain decision-making tasks have been delegated to Delmont University, that latitude should be extended to them as well. Following this logic, the university should have the ability to revoke Dr. Nicholas’ grant on the basis of his non-compliance with the grant’s conditions. Unlike the artists in *Finley*, Dr. Nicholas did not even have conditions imposed upon him retroactively. He knew or should have known the conditions of the grant at the time he accepted it and chose to violate them anyways.

E. Delmont University Had a Right to Place Conditions Upon the Grant Because Dr. Nicholas Was Engaged in Government Speech

Delmont University could not have violated Dr. Nicholas’ First Amendment rights because he was engaged in government speech while publishing for the Astrophysics Grant. In general, university funding should be granted to any organization that is “related to the educational purpose of the University.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 824 (1995). But unlike a general pool of funding available for any student publication at a university, Dr. Nicholas was individually selected for the sole purpose of observing and publishing scientific findings based on the Pixelian Event. Dr. Nicholas was not selected

randomly. He was given the grant to effectively act as an ambassador for the Observatory and promote it as an academic institution through his findings.

As noted in *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529, U.S. 217, 229 (2000), “[t]he government, as a general rule, may support valid programs and policies’ despite the fact that it will inevitable “adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.” Through this quotation, it is clear that the government —and its delegates— have the right to promote its own positions. In furtherance of their exercise of this freedom, Delmont University decided that the approach they wanted to take when promoting their Observatory was one that was consistent with the academic consensus on science. This, they decided, was the path that would maximize the institution’s esteem and the return on its investment. Furthermore, Dr. Nicholas was expected to publish his initial findings in only one publication —the University of Delmont Press. This is another clear indication that the research was meant to elevate Delmont University’s stature and was not meant to be a platform for Dr. Nicholas to share his own private beliefs.

II. THE FIFTEENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT DR. NICHOLAS’ PLANS FOR HIS STATE-FUNDED RESEARCH MAY IMPLICATE ESTABLISHMENT CLAUSE CONCERNS THAT THE UNIVERSITY MAY MITIGATE.

A. *Locke v. Davey* remains binding precedent upon the Court’s Establishment Clause jurisprudence.

Having already established that the state would be funding the designation of a clergyman by allowing Dr. Nicholas to continue to publish his faith-related findings, this case still falls under the concern with state-sponsored clergy that the Court in *Locke* had and fulfills the limitation that the Court in *Espinoza* sets regarding *Locke*’s application solely to public schools.

Locke v. Davey, 540 U.S. 712, 722 (2004); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020). *Locke*'s precedent surrounding state-sponsored clergy, which is a contemporary repetition of the precedent in *Calvary Bible Presbyterian Church v. Board of Regents*, is a stand alone rule whose historic and substantial tradition deserves to be treated as a binding precedent rather than an exception to the rule recognized in *Trinity Lutheran, Espinoza*, and *Carson*. *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash.2d 912, 919 (1967); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza*, 140 S. Ct. at 2259; *Carson v. Makin*, 142 S.Ct. 1987 (2022). The prevailing argument that taxpayers do not wish to fund the next generation of clergy, the fact that a case as recent as *Carson* announces that *Locke* is still good law, and the failure of *Espinoza* to limit *Locke* so that it does not apply to the facts of this case all point towards the strength of its application to numerous sets of facts in future cases and a confident recognition of its holding.

B. The Historical Understanding of the Establishment Clause Supports the Fifteenth Circuit's Continued Application of Locke v. Davey to Decide this Matter.

Dr. Nicholas intends for his contributions to the study of the Pixelian Event to fulfill a requirement in his Meso-Pagan faith in order to be designated as a First Order Sage: that one must engage in an approved scholarly pursuit regarding the lifeforce. Nicholas Aff. ¶¶ 14. Dr. Nicholas's own language, such as "strongly considering" and "competitive candidate", coupled with the encouragement he has received from multiple Sages to use his research in his application materials and his sharing the possibility of his becoming a Sage on social media makes it plausible that this Visitorship is the catalyst to Dr. Nicholas becoming a Sage. In addition, having published widely on observational astrophysics before, his decision to discuss findings related to his religious endeavors now, with possibly the largest audience his work will ever receive due to the rarity of the Pixelian Event, signals that Dr. Nicholas's article is meant for

more than just scientific recognition amongst the academic community. Sages are the leaders of the Meso-Pagan faith and set policy and doctrine about it just as clergy teach doctrines and practices about the Christian faiths that they are leaders of. Nicholas Aff. ¶¶ 14. Thus, funding provided by the State of Delmont to Dr. Nicholas which allows him to maintain his scholarly quest towards explaining how the science of the Pixelian Event in a sense proves the existence and/or nature of the lifeforce supports his desire to become the equivalent of a clergyman by making him a competitive candidate for a First Order Sage. Nicholas Aff. ¶¶ 14. The State would be funding the designation of a clergyman.

The Establishment Clause was drafted in order to prevent church-state entanglement. Our nation's Founding Fathers believed that entanglement of government and religion tends not only to destroy government but to degrade religion. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Their belief was founded in historical truths that in this country, whenever a government had allied itself with one particular religion, those who held contrary beliefs inevitably put forth hatred, disrespect and even contempt towards that government. *Id.*, 370 U.S. at 421. Contemporary reactions of church-state entanglement are evidenced by the negative responses of the academic community and school donors when the entire reputation of Delmont University's Anthropology Department was questioned in a similar incident two years ago. Seawall Aff. ¶¶ 9.

Anti-establishment interests are still unwavering in the 21st century. In *Locke v. Davey*, a 2004 case, the court held that a state denying grant funding to those who intend to seek a devotional religious degree does not violate the Free Exercise Clause of the First Amendment because there were few areas in which a State's anti-establishment interests could come more into play than this one. *Locke*, 540 U.S. at 712. Additionally, in *Bowman v. U.S.*, a 2008 case, the court allows a U.S. military program to refuse to provide retirement credit for an early military

retiree working as a youth minister, performing religious activities related to religious instructions, worship services, and proselytization, because the program avoids violating the Establishment Clause and avoids excessive entanglements between government and religion. *Bowman v. United States*, 564 F.3d 765 (6th Cir. 2008).

Entanglement does not necessarily involve the most extreme outcome: a complete adoption of one religion over another by a national, state, or local government. Entanglement in the 21st century just has to be excessive enough to run afoul of the Establishment Clause. *Agostini v. Felton*, 521 U.S. 203, 233 (1997). For example, an excessive government action must involve “intrusive government participation in, supervision of, or inquiry into religious affairs”. *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006) (quoting *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000)). In fact, courts have allowed funding restrictions on religious training simply because they avoid the mere appearance of excessive government entanglement with religion. *Bowman*, 564 F.3d at 776. The publishing of Dr. Nicholas’s article has created an entanglement between church and state, and if his findings continue to be published, that entanglement will only intensify. The article has received a hailstorm of harsh criticism from the scientific academy and the press, where the academy is calling his reference to cave etchings outright medieval, and donors as well as legislative and executive political figures are embarrassed to support the Astrophysics Grant they helped gain approval for. The University and state government of Delmont will lose all respect in their academic legitimacy, while the Meso-Pagan faith will be further exposed to destructive criticism by the scientific community. In this way, scientists who are also religious, such as Dr. Nicholas, may actually suffer from the publication of articles that merge science and religion, leaving their faiths unprotected from the attack of scientists who hold the consensus view of scientific study.

The press will only exacerbate the reach of this hailstorm, leading to a contemporary destruction of state government and degradation of religion that our nation's Founders sought to prevent.

C. Both Court Precedent and Policy Concerns Compel Continued Deference to University Discretion in Making Educational and Resource Judgments in order to Mitigate the Possibility of Establishment Clause Violations.

Faced with the possibility of being stripped of its reputation as a legitimate institution with an exemplar Observatory, losing donors and support from influential political figures for the University's science departments and grants, and contributing to the public's confusion between religion and science, the University's esteemed Observatory faculty and President made the informed decision to provide Dr. Nicholas with a choice, once which the doctor would make himself regarding access to the Observatory, its facilities, and further grant-funded research. Seawall Aff. ¶¶ 9. Dr. Nicholas is an agent who had an option – to elect to comply with the expectations the University set and receive funding, or to pursue his ideas and publications in other forums and thereby decline to take the University's funding. In deciding to provide this option, the University carefully contemplated their own educational goals, research strategies and aspirations, and institutional values that they strived to convey to students and society. University faculty also recalled the years of fundraising efforts from local, state, and federal sources spent to open the Observatory and associate its technology as a rare academic marvel which can be utilized by the scientific community for decades to come. Seawall Aff. ¶¶ 4. Finally, the University painstakingly considered how quickly their professional and academic reputation could be tarnished and permanently damaged, as it already has been, by allowing the publication of material with dubious religious positions. Seawall Aff. ¶¶ 9. After weighing each significant factor and recognizing the further potential consequences in the world of academic

institutions they are a part of, the final decision that the University and its leadership made deserves deference and respect by the federal judiciary.

While we recognize the authority that the Supreme Court has in enforcing the supreme law of the land, no enforcement is needed in this case because no violation has been committed. Instead, a university's right to “make academic judgments as to how to best allocate scarce resources” must be respected rather than questioned. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Every day, the University exercises its essential academic freedom by determining for itself on scholarly grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study those teachings. *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 263 (1957). Preventing the University from using their discretion to deny Dr. Nicholas a grant-funded research opportunity would signal that the Supreme Court refuses to defer to a university’s judgment of what is essential to its educational mission and does not give respect to its academic freedom. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). In recent similar circumstances, courts have respected a state university’s decision to reject certain coursework taught by certain religious schools when the content was not consistent with the viewpoints and knowledge generally accepted in the scientific community. *Ass’n of Christian Sch. Int’l v. Stearns*, 362 F. App’x 640 (9th Cir. 2010). In the same way, the Supreme Court should grant deference to the faculty’s professional judgment about a complex decision in order to avoid overstepping their judicial role, exercise judicial restraint, and shield universities from the decisions of politically-insulated judges. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). Just as judges decline to make decisions about whether to dismiss students for academic reasons, they should decline to make decisions about whether to dismiss academics for instructive reasons, as the historic judgment of educators made from expert evaluation of

cumulative information is not adaptable to the procedural tools of administrative and judicial decisionmaking. *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 90, (1978).

In keeping with the concept of respect towards the decisions of university leadership regarding complex instructional matters in their curriculum and the like, Dr. Nicholas's claims that his colleagues at Delmont University make references to Greek, Roman, Incan, and Pheonician writings should be disregarded as without factual support and having no proven relation to the references being made in Dr. Nicholas's findings which muddle religion and science. Even if these past practices did have religious undertones, it is once again up to the University to decide, based on a careful analysis of the amalgamation of facts in each particular circumstance, whether or not the writings negatively affect the educational mission of the school.

CONCLUSION

For the above-stated reasons, 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, and a state-funded research study does violate the Establishment Clause when its 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. Respondent respectfully asks this Court to deny Petitioner's challenge and affirm the granting of summary judgment to Respondent by the Fifteenth Circuit Court of Appeals.

Respectfully submitted,

Team 34

Counsel for Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Rule IV(C)(3) of the Official Competition Rules of the 2023-24 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, we, Counsel for Respondent, certify the following:

1. The work product contained in all copies of our team's brief is, in fact, the work product of the team members.
2. Our team has complied fully with our law school's governing honor code, and
3. Our team has acknowledged and complied with all Competition Rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

Respectfully submitted,

Team 34

Counsel for Respondent