No. 23-CV-1981

In the Supreme Court of the United States

NICHOLAS COOPER,

Petitioner,

v.

STATE OF DELMONT and
DELMONT UNIVERSITY,

Respondents.

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

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BRIEF FOR PETITIONER

TEAM 5
Counsel for Petitioner

Submitted: January 31, 2024

QUESTIONS PRESENTED

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

II. Whether the state was wrong to terminate, citing potential violations of the Establishment Clause, a state-funded astrophysics grant recipient, after the recipient suggested positive upshots of his scientific studies for the Meso-Pagan faith and expressed a private intention to use his work in pursuit of a religious vocation.

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The opinion of the district court (R. 1–31) is unpublished and may be found at Nicholas v. Delmont, C.A. No. 23-CV-1981 (D. Delmont Feb. 20, 2024). The opinion of the court of appeals (R. 32–51) is unpublished and may be found at Nicholas v. Delmont, C.A. No. 23-CV-1981 (15th Cir. Mar. 7, 2024).

JURISDICTION

The court of appeals entered final judgment (R. 51) on March 7, 2024, from which this Court granted writ of certiorari (R. 60). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

This case presents the question of government's ability to not only restrict the pure speech and research of a lauded astrophysicist—indeed, one whose published work and credentials it carefully vetted (R. 5) before conferring upon him a prized research grant—but to also define what is scientific and not, when the speech in question was published by a "premiere peer-reviewed journal in the [scientist's] field" and where the validity of the hotly-contested theory, itself, remains subject of live debate. R. 6, 8. Respondents Delmont State and Delmont University have created a historic grant dedicated to studying a rare cosmological phenomenon known as the Pixelian Event which occurs just once every ninety-seven years. R. 5. The grant not only confers a generous salary and funding for research assistants, but also avails to its one Principal Investigator full access to Delmont University's world-class observatory and state-of-the-art facilities, and covers all costs incidental to both the study of the event as well as the publication of a raw public dataset and "scientific, peer-reviewed articles related to [the] event." R. 1–2. After a careful and competitive search, respondents conferred this historic honor to one of its own: thirty-year-old alumnus and astrophysicist "wunderkind," Dr. Cooper Nicholas (hereinafter "Dr. Nicholas"). R. 5. Dr. Nicholas,

a devout Meso-Paganist from early childhood (R.4), was selected for his reputation for making "intuitive, often ground-shifting observations." R. 5.

Months into his grant, respondents claim Dr. Nicholas ran afoul of the grant's strict conditions—that his "study" and "derivation of subsequent conclusions [on the Event] conform" to the academy's "consensus view of a scientific study" (R. 5)—when he published an article in premier astrophysics journal *Ad Astra*, claiming, alongside data derived from the comet's travel and his own observations of atmospheric phenomena prior, during, and after the comet's appearance, that early glyphs found in Meso-American caves may corroborate so-called "Charged Universe Theory." R. 7. The theory is a hotly-contested topic rooted in the idea that cosmological phenomena result not from gravity, but charged particles. *Id.* Following widespread negative press about the Observatory, complaints of embarrassed donors and legislative and executive supporters, and speculation regarding the University's ability to secure similar future grants given the "strange direction" of Dr. Nicholas' work, University President Meriam Seawall wrote to Dr. Nicholas warning him that "[c]ontinued funding of the grant," including access to the Observatory's telescope, laboratory, and equipment, was "dependent on [Dr. Nicholas'] agreement to limit [his] research experiments and conclusions to those comporting with the language of the state's grant." R. 10. Further, she warned, the University would not be "seen as endorsing a religious tenet." *Id.* When Dr. Nicholas made clear that no one, not even the University "owned science," that there was nothing unscientific about what he was concluding, and that he would not back down from his scholarship, the University ultimately changed security protocol, denying Dr. Nicholas admittance. R. 10–11.

Respondents' grant conditions place an effective bar on Dr. Nicholas from scientifically evaluating a disfavored minority view. Allowed to stand, the Fifteenth Circuit's precedent will

stymy not only private speech, academic inquiry, and a private citizen's exercise of religious freedom, but also the evolution of science itself, preventing scientific scholars from following where truth leads.

SUMMARY OF ARGUMENT

This case reflects growing incoherence in First Amendment jurisprudence between the blanket exception provided to government when it seeks to speak for itself and the First Amendment's strict scrutiny requirement for governmental restrictions on pure speech. The government's restrictive grant requirements—here, effectively compelling a private citizen's speech and academic research as a condition for receiving a public grant—fail strict scrutiny for content and viewpoint discrimination and are an unconstitutional condition on speech.

Likewise, the state's termination of Dr. Nicholas' funding based on his religious affiliations fails strict scrutiny and is an unconstitutional penalty on the free exercise of religion. While the Establishment Clause unequivocally allows government to fund academic research via the secular conditions at bar, respondents' actions veer into violating Free Exercise.

ARGUMENT

The First Amendment has long been declared a "fixed star" in the U.S. Constitution, barring "official[s], high or petty, [from] prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion" including by "forc[ing] citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The First Amendment was created by Founders who—in abhorring government tyranny and cherishing the power of private inquiry—sought to organize government such that "the final end of the State was to make men free to develop their faculties" and for "deliberative forces [to] prevail over the arbitrary." *Whitney v. California*, 274 U.S. 357, 375 (1927). As Justice Kennedy observed, "the

right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government" and, indeed, "a necessary means to protect it." *Citizens United v. F.E.C.*, 558 U.S. 310, 339 (2010).

Respondents' ability to circumvent the First Amendment's categorical bar on viewpoint and content-based discrimination is an unconstitutional burden on petitioner's free expression and creates a paradox that strikes at the very heart of the First Amendment.

I. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING TENSION BETWEEN GOVERNMENT SPEECH DOCTRINE AND STRICT SCRUTINY.

"Government speech doctrine," as it is often referred, acts as a shield where the state seeks to regulate private speech—derived from the notion that the government not only has a right to speak for itself, but is not required when doing so to be viewpoint or content neutral. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 235 (2000); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972); *Pleasant Grove City v. Summum*, 555 U.S. 460, 484–85 (2009). Though developed to serve a strong state interest in controlling its own speech, the exception has since expanded to permit near unfettered discretion to censor any private speech the government deems offensive. Such expansions are reflected in *Walker v. Sons of Confederate Veterans*, 576 U.S. 200 (2015), which exempts officials in Texas from the First Amendment's blanket ban on viewpoint discrimination. That a state may determine what messages are printed on specialty license plates and, at its pleasure, bar offensive iconography from appearing on them poses an existential threat to the First Amendment's limits on government power to discriminate based on content and viewpoint.

Cases such as *Walker*; *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Matal v. Tam*, 582 U.S. 218 (2017), *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation with Representation*,

461 U.S. 540, 548 (1983), among others, have fanned confusion among the appellate courts, spreading uncertainty over how to harmonize the First Amendment's strict scrutiny requirement with government speech doctrine. *See* Caroline M. Corbin, *Government Speech and First Amendment Capture*, 107 Va. L. Rev. Online 224 (2021); Clay Calvert, *The Government Speech Doctrine in* Walker*'s Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 Wm. & Mary Bill Rts. J. 1239 (2017). The case at bar is an ideal vehicle for resolving such disharmony in First Amendment jurisprudence.

II. RESPONDENTS' GRANT REQUIREMENTS UNCONSTITUTIONALLY RESTRICTED PETITIONER'S FIRST AMENDMENT RIGHTS.

"The First Amendment […] prohibits the enactment of laws "abridging freedom of speech." *Reed*, 576 U.S. at 163 (citing U.S. Const. amend. I). Speech necessary to convey ideas, "divorced from actually or potentially disruptive conduct" constitutes "pure speech" and "is entitled to comprehensive protection under the First Amendment." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969). Dr. Nicholas's research constitutes "pure speech" and must be afforded comprehensive protection.

A. Respondents' Restriction on Petitioner's Speech is Viewpoint and Content-Based.

The First Amendment opposes two forms of government restrictions on private expression: content and viewpoint-based restrictions. A policy that "target[s] speech based on its communicative content . . . [is] presumptively unconstitutional." *Reed*, 576 U.S. at 163; *R. A. V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). Whereas the First Amendment flatly bars viewpoint discrimination—observed by the *Reed* Court as "the regulation of speech based on 'the specific

motivating ideology or the opinion or perspective of the speaker'"—content-based restrictions are forbidden such that government may not institute a blanket ban on speech solely to "prohibit[] public discussion of an entire topic." *Reed*, 576 U.S. at 168–9 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)). Respondents' restriction on Dr. Nicholas's speech is viewpoint-based and content-based "on its face" and by its justifications.

1. The restriction on petitioner's speech is viewpoint-based.

Repeatedly, this Court has held that respondents' stated motivation for rescinding petitioner's grant—"pronounced reactions" and fear of decline in public reputation—belies an impermissible elevation of particular views over others. R. 10. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (collecting cases) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Moreover, when "the purported concern to avoid controversy excited by particular groups" in fact conceals "a bias against the viewpoint advanced by the excluded speakers," such justifications "cannot save an exclusion . . . based on the desire to suppress a particular point of view." *Cornelius v. NAACP Legal Def. and Educ. Fund., Inc.*, 473 U.S. 788, 812 (1985).

Respondents' conditions that petitioner adhere his "study of the [Pixelian] event and the derivation of subsequent conclusions [to] conform to the academic community's consensus view of a scientific study" are an unconstitutional viewpoint-based burden on his speech. R. 10. The state's restrictions are predicated on its judgment that petitioner's viewpoint *must* be excluded, because on the state's admission, Dr. Nicholas' views on the Charged University Theory do not constitute science. The state ignores the fact that the validity of the theory remains hotly contested among the astrophysicist community. Indeed, once Dr. Nicholas' article on the theory appeared in

Ad Astra, academics on one side of the globe labeled his suppositions as "medieval" and "ultimately unproveable from a scientific standpoint" while his colleagues in Meso-America, Australia, and Europe observed he "might well [have] be[en] on to something big" but that his theories would require "further study" to bear that out. R. 9.

That petitioner could neither conclude nor publish his desired views under the "auspices" of the grant, without losing access to "[c]ontinued funding" and "use of the GeoPlanus telescope and remote sensing equipment," is further testament to the viewpoint-based nature of the state's restrictions. R. 10–11. Delmont University knew, in telling petitioner he was "free" to write "whatever he wanted" on the Pixelian Event, just "not under the auspices of the grant-funded research," that his ability to use the data he'd collected—the key to scientifically publishing on the Event at all—was predicated on his agreement to not discuss Charged Universe Theory. *Id.* Otherwise his research, which he would not be able to replicate, as the Event occurs just once every ninety-seven years, would be lost. R. 52, 56.

Respondents' refusal to permit Dr. Nicholas to access his laboratory-generated data not only established a condition "that define[d] the federal program," but "reach[ed] outside it" to limit his private speech writ large. *Agency for Int'l Dev. v. All for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013). Again, the Court has been unequivocal that such a limitation is verboten under the auspices of the First Amendment. Unlike in *Rust*, where grantees were left "unfettered" in their practical ability to perform abortions as well as engage in abortion-related advocacy and services by "conduct[ing] those activities . . . separate[ly] and independent[ly]" from government Title X funds, Dr. Nicholas had no such option. 500 U.S. at 196. And without an alternative to publish scientifically regarding the Pixelian Event's relationship to Charged Universe Theory, the state's restrictions are violative of petitioner's rights. *Id.* at 197–98. *Accord Regan*, 461 U.S. at 544–45.

2. The restriction on petitioner's speech is content-based.

Content-based restrictions exist in two forms: one that regulates speech "on its face" through "distinctions based on the message a speaker conveys," or a restriction that is "facially content neutral" but cannot be "'justified without reference to the content of the regulated speech.'" *Reed*, 576 U.S. at 163-64 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

i. The restriction on petitioner's speech is content-based on its face.

Respondents imposed a facially content-based restriction on Dr. Nicholas's "pure speech" by limiting his "expression because of its message, its ideas . . . [and] its content." *Mosley*, 408 U.S. at 95. President Seawall, on behalf of the University, required Dr. Nicholas "to render and publish conclusions aligned with the scientific academy's consensus," restricting the content of his research to a consensus viewpoint. Seawall Aff. ¶¶ 6. "On its face" this restriction limits the message of Dr. Nicholas to those conforming with particular scientific ideas. Compare, for example, the restrictions on Dr. Nicholas to those in *United States v. Playboy Entm't Group.*, 529 U.S. 803, 811 (2000) (holding that that the U.S. engaged in content-based restriction by statute restricting the viewing hours of channels "primarily dedicated to 'sexually explicit adult programming or other programming that is indecent'"). Just as the U.S. restricted channels that were sexually explicit in *Playboy Entertainment Group*, the University restricted research that was not conforming with the scientific academy's consensus in this case. Similarly, the *Reed* court determined differential treatment based on subject matter was content-based. *Reed*, 576 U.S. at 169. Like the restrictions at issue in *Reed*, the University's restrictions treat messages that conform with the academy's consensus view more favorably than those that do not.

ii. The restriction on petitioner's speech is content-based through its justifications.

Additionally, the restriction is content-based through its justifications. In other words, the restriction was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791). Specifically, the University imposed the restriction on Dr. Nicholas's research due to a dislike for what the University views as conclusions that "overtly champion dubious religious positions," whether or not his research had that effect. R. 53.

B. Respondents' Restriction on Petitioner's Speech Fails Strict Scrutiny.

Restrictions on speech "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *R. A. V.*, 505 U.S. at 395. So both content and viewpoint-based regulations must satisfy strict scrutiny. *Sable Commc'n of Cal., Inc v. F.C.C.*, 492 U.S. 115, 126 (1989); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006). The strict scrutiny test is difficult to satisfy, and this Court has sustained such restrictions "only in the most extraordinary circumstances." *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 65 (1983). To claim something is a compelling state interest, there must be proof of an "'actual problem' in need of solving," supported by compelling evidence. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799–800 (2011) *(*citing *Playboy Entm't*, 529 U.S. at 822–23). "Ambiguous proof will not suffice" when there is a risk of uncertainty. *Brown*, 564 U.S. at 799–800. Also, to be narrowly tailored, there must not be "a less restrictive alternative [that] would serve the Government's purpose." *Playboy Entm't Group.*, 529 U.S. at 811. The government bears the burden of proving that "proposed alternatives will not be as effective as the challenged" restriction. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

Respondents' demand that Dr. Nicholas conform his research and conclusions to the academy's consensus view of what is scientific does not pass the strict scrutiny test for restrictions

on speech. The respondents' restriction fails because (1) the state interest is not compelling, (2) there is not an actual problem in need of solving, (3) the restriction is underinclusive, and (4) several less restrictive alternatives exist.

1. Addressing the confusion between science and religion is not a compelling government interest.

What constitutes a "compelling state interest" may be decided on a case-by-case basis, but this Court has held that it requires a "high degree of necessity." *Brown*, 564 U.S. at 804. Respondents have provided no evidence-based reasons for why "addressing the confusion between science and religion" is a problem that requires a restriction of speech. Additionally, it is unclear how public confusion can be determined and why the work of Dr. Nicholas should be subject to speech restrictions in comparison to the many academics at public institutions that look at the interplay of culture, religion, and science. Instead, accepting the confusion between science and religion as a "compelling state interest" poses a dangerous extension of state power to limit speech. This Court has long held that the "government must afford all points of view an equal opportunity to be heard." *Mosley*, 408 U.S. at 96. To permit the restriction imposed by the respondents is to allow the government to identify some points of view as more worthy of being heard than others. If "addressing the confusion between science and religion" were a "compelling state interest," the state would be able to impose content-based restrictions on blogs, news articles, podcasts, companies, and any other forum or entity that discusses connections between religion and science. Indeed, even during the height of COVID-19, this Court refrained from using "the confusion between science and religion" as a justification for state-imposed limitations on speech and possible misinformation related to the COVID-19 vaccine. This Court has not recognized "any general exception to the First Amendment for false statements" precisely because "some false

statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation." *United States v. Alvarez*, 567 U.S. 709, 718 (2012). The respondents do not even go as far as to claim that the views expressed by Dr. Nicholas are definitively false yet still ask this Court to uphold a restriction against his views. To uphold the restriction imposed by the respondents would contradict the value the U.S. has long found in open and vigorous expression.

2. The state did not produce sufficient evidence to prove that public confusion between science and religion was caused by petitioner's research.

The respondents provided no compelling evidence that public confusion between science and religion was an "actual problem" furthered by Dr. Nicholas's research, which is required under the strict scrutiny test. *Playboy Entm't*, 529 U.S. at 822–23. Respondents primarily rely on the subjective observation that "other academic institutions publish religious ideology in scientific journals" and are branded as religious institutions. Seawall Aff. ¶ 7. But their contention makes no reference to which academic institutions were branded and does not show how that branding extended the confusion between science and religion. Dr. Nicholas considered possible historic, cultural, and scientific theories relating to the Pixelian Comet. R. 6. By considering ancient religious history, Dr. Nicholas did not "confuse science and religion." Rather, he looked to history for possible evidence of the Pixelian Comet. In fact, the evidence suggests that Dr. Nicholas's research was scientific in nature and did not risk public confusion of science and religion because (1) his research was published in *Ad Astra*, the "premier peer-reviewed journal" on astronomy, (2) astrophysicist scholars in Meso-America, Australia, and Europe acknowledged the potential of Dr. Nicholas's research, (3) responses to Dr. Nicholas's work, while sometimes critical, did not themselves confuse science and religion as a result of his research, and (4) Dr. Nicholas developed

"widely accepted parameters" for his study of the environment preceding the Pixelian Event. R. 6, 9. At most, the respondents provide "ambiguous proof" which this Court has held is not enough to demonstrate an actual problem. *Brown*, 564 U.S. at 799-800. In *Brown*, the California legislature provided psychological research to support the claim that restricting violent video games was narrowly tailored to protect minors, and this Court held that "the state's evidence was not compelling." *Id.* at 800. By comparison, no research, data, or proven anecdotes have been provided by the respondents to establish a compelling interest. To maintain consistency, the judgment of the Fifteenth Circuit should be reversed.

3. Respondents' restriction on petitioner's speech is underinclusive, raising doubts about the authenticity of the provided justification.

The University's restriction on Dr. Nicholas's speech was inconsistent with its treatment of other faculty. The University restricted Dr. Nicholas's research because of its connection to the ancient religious history of Meso-American indigenous tribes. But the institution continued to support Delmont University faculty members who have relied on and referenced the "writings of other pagans, such as Greeks, Romans, Incas, and Phoenicians" "in their own publications." R. 6; Nicholas Aff. ¶ 18. Respondents claim addressing the confusion between science and religion is their compelling interest, yet they continue to fund research that connects to religious history.

This court has held that "underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. Aside from inconsistent policies, the context under which the University limited Dr. Nicholas's speech suggests that the University's true motivation was its disfavor towards Dr. Nicholas's viewpoint. It was not until "negative press about the Observatory's premier enterprise had embarrassed donors as well as the legislative and executive supporters who

had secured the Astrophysics Grant's approval" that the University President acted. R. 9. Not wanting to "risk the huge economic investment in the Observatory," Dr. Seawell sent the letter to Dr. Nicholas. R. 9. Rather than attempting to protect the public from confusion, it appears the University restricted Dr. Nicholas due to reputational concerns.

4. There are several less restrictive alternatives the state could impose to "address the confusion between science and religion."

To satisfy the strict scrutiny test, the state must take the "least restrictive means" of advancing a "compelling" governmental interest. *Sable Commc'ns of Cal*, 492 U.S. at 126. When there are alternative mechanisms to further a government interest or insufficient evidence of a substantial risk, the risk may not be "sufficiently pressing to warrant . . . broad suppression of speech." *FCC v. League of Women Voters of Cal.*, 468 U.S. 391 (1984). There were several alternative solutions for the respondents to address the distinction between science and religion that were far less restrictive than those imposed on Dr. Nicholas. For example, the University could have required permission to publish a disclaimer before any publication to clarify the difference between science and religion. The University could have also required that any publication crafted while using the grant funds and during the grant period obtain peer review. Additionally, the University could have provided Dr. Nicholas a mechanism to continue to accept grant funds, produce research that complied with the academy's consensus view of science, and produce additional research in another forum. For example, the University could have required that research in the University publication conform to the terms of the grant, but allow research in other publications to explore alternative theories. Each alternative solution would limit confusion between science and religion, while also being less restrictive on Dr. Nicholas's speech.

III. ACADEMIC RESEARCH FUNDS ARE PERMISSABLE UNDER THE ESTABLISHMENT CLAUSE, AND THE DENIAL OF SUCH FUNDS INFRINGES ON PETITIONER'S FREE EXERCISE RIGHTS.

The State of Delmont calls upon the Establishment Clause of the First Amendment to justify a discriminatory denial of funding to Dr. Nicholas, a qualified recipient of the Astrophysics Grant who suggested religious implications in recently published work. In relevant part, the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. Const. Amend. 1. The Establishment Clause guards against government enforced religion, but it does not prevent the neutral application of government funds to individual citizens or organizations who happen to be religious. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260–63 (2020). This, of course, would be discrimination. In the words of Justice Black, the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

Delmont University granted Dr. Nicholas the Astrophysics Grant based on his "eminence in the field" and stellar reputation. R.5. It was only when his work suggested connections with the Meso-American Pagan faith that the state terminated its funding. Relevant history and case precedent on this issue reveal that state funding of such work is not prohibited by the Establishment Clause. *See Locke v. Davey*, 540 U.S. 712 (2004); *Zelman v. Simmons-Harris,* 536 U.S. 639, 652 (2002); *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664 (1970). Instead, the question best centers on a balancing act between the state's antiestablishment interests and Dr. Nicholas' interest in freely exercising his religion. The state's antiestablishment interests lose credence when cast in the informative light of the founders' intentions, the historical roots of the establishment clause, and

lingering concerns of today. *Locke*, 540 U.S. at 719. Evaluated under strict scrutiny, the state's antiestablishment interests do not overcome Dr. Nicholas' right to freely exercise his religion.

A. The Establishment Clause Does Not Prohibit the Neutral Application of State Funds to the Independent Religious Actions of its Citizens.

The Establishment Clause, marking a foundational break from the Anglican British crown, was written to prevent the mistakes of the old world where strict religious doctrine and political power were tightly interwoven. *Everson,* 330 U.S. at 508. Concern about government-backed churches and persecution, seclusion and exploitation of nonbelievers led Madison and other founders to demarcate a clear line between government and religious institutions. *Everson,* 330 U.S. at 509–11 (reproducing James Madison, *A Memorial and Remonstrance Against Religious Assessments* (1785)). Establishment concerns remain, but mostly in the shadow of the founders' grimmest fears.

Justice Gorsuch condenses this tradition into six "historical hallmarks" of establishment, ranging in their level of acceptance by the Court. *Shurtleff v. City of Boston*, 596 U.S. 243, 285–87 (2022) (Gorsuch, J., concurring) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110–2112, 2131 (2003)). Whereas requiring political officials to declare a belief in God or allowing churches to monopolize civil functions amounts to coercion with respect to religion, in violation of the Establishment Clause, courts have repeatedly upheld the nondiscriminatory use of public funds by religiously affiliated individuals or organizations. *Shurtleff*, 596 U.S. at 285–97. In short, "Government control over religion offends the Constitution, but treating a church on par with secular entities […] does not." *Id.* at 287. Though anti-establishment concerns may linger in a world long departed from colonial religious regimes, specific concerns over public funds

overlapping with religious practice have repeatedly been dismissed in Supreme Court jurisprudence. *Id.*

Starting with *Everson* in 1947, the Court held that the use of taxpayer dollars to fund a child's bus fare to parochial school did not run afoul with the Establishment Clause of the First Amendment. 330 U.S. at 507. From there, the rule was repeatedly applied, relying on the recurring idea that, "[t]he link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719. This was affirmed recently in *Espinoza*, where the Court ruled even a scholarship program neutrally applied to a religious school was permissible under the Establishment Clause. 140 S. Ct. at 2254. *See also Zelman*, 536 U.S. at 662–63; *Carson ex rel. O. C. v. Makin,* 596 U.S. 767 (2022). Establishment concerns were particularly "unavailing" to the Court in *Espinoza* because "government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools." 140 S. Ct. at 2254. Similarly, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a Missouri program funding playgrounds for eligible institutions, could *not* exclude, eligible churches as recipients to the grant. 582 U.S. 449 (2012). When the state distributes funds based on a religiously neutral application criterion, it is not then held responsible for the recipient's independent religious decisions or affiliations.

University of Delmont's award of the Astrophysics Grant to Dr. Nicholas, falls squarely in line with this precedent. The attenuated use of public funds for an individual's scientific research, even with religiously tinted conclusions, does not offend the Establishment Clause. The only establishment concern triggered here is that of financial support, and that concern is mitigated by Dr. Nicholas' expression of individual agency. Like the parents' decision in *Everson* to use their transportation stipends to send their children to parochial schools or the independent choice of

Montanans in *Espinoza* to use their scholarships at sectarian schools, Dr. Nicholas made the independent choice to include religious conclusions in his publicly funded research. And he may further choose to use that publicly funded research to apply for religious schooling in the future. In each case, the "link" between government funds and religious teachings is easily broken by an individual's decisions. See *Locke,* 540 U.S. at 719.

Likewise, the rigorous selection process by which the grant was made echoes the funding criterion of past cases like *Espinoza* and *Trinity Lutheran*. Dr. Nicholas' Astrophysics Grant was not provided to him based on his religious beliefs, but rather based on secular professional criterion. Like the way taxpayer money "ma[de] its way" to the churches and schools in *Espinoza* and *Trinity Lutheran* via attenuated decisions of the recipients unrelated to initial criteria, taxpayer money here is attributed on a neutral basis. *Espinoza,* 140 S. Ct. at 2254. Dr. Nicholas' decisions, and his alone, are what land the money near the Meso-American faith. As a result, the state's claim that funding Dr. Nicholas' research would violate the Establishment Clause is unfounded.

1. This case arises within the "play in the joints" between anti-establishment and free exercise concerns where strict scrutiny should be applied.

Dr. Nicholas' case brings about questions not just of establishment but of free exercise, which require the most exacting scrutiny.

i. Petitioner's case is situated beyond the reach of the Establishment Clause and under the purview of Free Exercise jurisprudence.

That the Establishment Clause permits state funding of individuals and institutions with religious affiliations is so well enshrined in Supreme Court jurisprudence , it is undisputed in recent cases. *See Trinity*, 137 S.Ct. at 2018; *Espinoza,* 140 S. Ct. at 2251; *Carson,* 596 U.S. at 774–75. The Court does not stray from this precedent in *Locke,* instead recognizing the familiar tension

between the Establishment Clause and Free Exercise Clause. *Locke,* 540 U.S. at 718. Sometimes the state, in efforts to avoid "respecting [the] establishment of religion," skirts around religion so as to express hostility—hindering "the free exercise thereof." U.S. Const. amend. I. As the *Locke* Court explained, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 U.S. at 719. This case, like *Locke, Trinity Lutheran,* and *Espinoza,* arises amid this tension—beyond the reach of the Establishment Clause, and, instead, creeping toward infringement on Free Exercise. This is a place where there is "room for play in the joints." *Locke*, 540 U.S. at 718 (citing *Walz,* 397 U.S. at 669). In other words, there is room for nuanced evaluation of both concerns.

In *Locke v. Davey*, Washington State had a scholarship program for gifted students to help fund post-secondary education, *id.* at 712, and Davey sought to use his scholarship to fund a devotional degree, which was prohibited by the State Constitution, *id.* at 716. The Court made clear "there was no doubt that the State *could*, consistent with the Federal Constitution, permit [scholarship recipients] to pursue a degree in devotional theology." *Id*. at 719 (emphasis added). The question instead was whether denying Davey the scholarship infringed on his right to exercise his religion, ushering in a balancing test between the state's interest in antiestablishment and the burden that the denial of funding would have on Davey's free exercise. *Id* at 719–21.

The same general framework was then revisited in *Trinity Lutheran* and *Espinoza*, where a state's neutral benefits program withstood the requirements of the Establishment Clause, but the state constitution went a step further by adding "no aid" provisions. *Espinoza,* 140 S. Ct. 2246. The court, in both cases, considered the "no aid" provisions discriminatory to otherwise qualified applicants with religious affiliations or expressions, and thus "odious to our Constitution." *Trinity Lutheran*, 137 S.Ct. at 2025; *Espinoza,* 140 S. Ct. at 2263. To deny funding based on the religious

character of a recipient is to "impose[] a penalty on the free exercise of religion," thus calling upon the "'most rigorous' scrutiny." *Trinity Lutheran,* 137 S.Ct. at 2024 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 546 (1993)).

In all three cases, the question for the Court arose after an acceptance that funding *would have been* permitted under the Federal Constitution, instead asking if a denial of funding violated the Free Exercise Clause. With the understanding that funding Dr. Nicholas' research is permitted under the Establishment Clause, the question is more accurately centered around whether the state's antiestablishment interest can override Dr. Nicholas' free exercise rights. To equate a permissible state limitation on funds with a *prohibition* on the use of state funds under the Establishment Clause is a fundamental misunderstanding of the Court's decision in *Locke*. The State of Delmont is almost certainly permitted to fund Dr. Nicholas' research even with its religious upshots. The more interesting question arises in the "play in the joints" where the problem is not raised by the the Free Exercise Clause. *Locke*, 540 U.S. at 718 (citing *Walz,* 397 U.S. at 669).

ii. This Court's precedent demonstrates a preference for applying strict scrutiny within this context.

Within the "play in the joints" the rules adopted in *Locke* presented a rather loose balancing test. The Court there found that the state's "substantial interest" in antiestablishment outweighed the "minor burden" that rejecting funding created. *Locke,* 540 U.S. at *725*. Where most First Amendment cases adopt the most exacting scrutiny, Justice Rehnquist's test in *Locke* was more akin to rational basis. *Id.* at 720, 726 (Scalia, J., dissenting) (citing *Lukumi,* 508 U.S. at 546). Subsequent cases, by contrast, resorted to strict scrutiny, where antiestablishment interests did not override individuals' interests in freely exercising their religion. *Trinity Lutheran,* 137 S.Ct. at

2024; *Espinoza,* 140 S. Ct. at 2263; *Carson,* 596 U.S. at 780. Given the specific context of *Locke*, the Court has cabined the rational basis approach, leaving strict scrutiny as the ruling precedent.

Where the Court in *Locke* applied a balancing test, the later cases are loyal to the strict scrutiny approach described in *Lukumi*. *See* 508 U.S. at 543 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."); *Locke,* 540 U.S. at 719; *Trinity Lutheran*, 137 S.Ct. at 2024; *Espinoza,* 140 S. Ct. at 2263. The Court attempts to distinguish *Locke* from the *Lukumi* cases as a burden on free exercise of a "far milder kind." *Locke,* 540 U.S. at 720. Importantly, the "mild" restriction on funding in *Locke* "does not require students to choose between their religious beliefs and receiving a government benefit." *Id.* This idea of restricted choice was interpreted as a defining line in the cases that followed. *Trinity Lutheran,* 137 S.Ct. at 2023, *Espinoza,* 140 S. Ct. at 2257. The Court found that the state could not force an institution to "renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified." *Trinity Lutheran,* 137 S.Ct. at 2024. Such a restriction amounts to a discriminatory *penalty* based on the religious character of the institution or individual. *Espinoza,* 140 S. Ct. at 2260. Application of strict scrutiny in free exercise contexts is now so common as to be considered "unremarkable in light of prior decisions." *Id* at 2021. *See also Carson,* 596 U.S. at 779.

Dr. Nicholas' free exercise concerns should be examined under the most exacting scrutiny, in accordance with *Trinity* and *Espinoza*. Here, the state demanded that Dr. Nicholas renounce his religious beliefs to continue receiving funding for which he was otherwise qualified for. The choice presented was between free expression of his religious beliefs or access to a government benefit. Such a choice was precisely the instance from which *Locke* was distinguished. *Locke,* 540 U.S. at

720. To force Dr. Nicholas to remove all suggestion of his Meso-Paganist values from his work or lose the funding upon which he relied to build his project is a discriminatory penalty based on his beliefs. Applying *Locke*'s rational basis approach to Dr. Nicholas' case would not only conflict with the past decade of Court precedent, but also undermine the very reasoning in *Locke* itself.

2. The state's anti-establishment concerns do not outweigh petitioner's free exercise concerns.

Under strict scrutiny, a government action must "advance 'interests of the highest order'" and "be narrowly tailored in pursuit of those interests." *Lukumi,* 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). The University's refusal to fund Dr. Nicholas' research based on the religious upshot of his thesis fails on both fronts.

i. The state's interest is inconsistent with history and too attenuated from anti-establishment concerns.

To start, the lower court recognizes a state interest in refusing to fund those who intend to become clergy. But given the facts of the case, this interest fails to rise to the level of "substantial" let alone "highest order," as required here. *Id. See also Locke,* 540 U.S. at 725. It is true that the history and tradition of our nation show a foundational fear of the power of the clergy and resistance to state support for clergies. The Court in *Locke* vindicated these antiestablishment concerns by heavily relying on those foundational fears. This case, however, differs from *Locke* in two key respects: first, the Meso-Pagan faith is not one which the State is at risk of favoring and second, the funding is not for Dr. Nicholas' religious schooling, but for his independent research.

On the first point, history and tradition are of recurring importance to the Court, especially in cases with establishment concerns. From the dark illustration of colonial America in *Everson* to the categories of religious establishment outlined by Justice Gorsuch in his *Shurtleff* concurrence,

it is clear that our country continues to be haunted by the fears of our forefathers. *Everson,* 330 U.S. at 508–11; *Shurtleff*, 596 U.S. at 285-87 (Gorsuch, J., concurring). It would be incomplete, however, not to recognize the common current of Christianity beneath each narration. The fear that was vindicated in *Locke* was not that taxpayer dollars might end up with some religious implications, but rather that there could be backdoor funding for a powerful ministry. 540 U.S. at 723. The Court was clear to recognize that the program was in fact very supportive of Christian values, and that the Washington Constitution's provision against funding the clergy merely acted as a constraint. Specifically, this constraint was a remnant of the colonial goal that "public schools… shall be free from sectarian control." *Id.* at 724 (citing the Washington Constitution). The case at bar—where one individual expressed support for a Meso-Paganist faith which has very little name recognition, let alone power in society—does not present a similarly historical nor substantial antiestablishment interest. Concerns over the Meso-Pagan faith do not logically arise from the same context nor history that concerns over a state-funded clergy might.

Second, support for Dr. Nicholas' religious aspirations are much more attenuated than the funding of a devotional degree which was at stake in *Locke*. Dr. Nicholas produced his research on his own, with the supportive funds of the school. There is no doubt that this research is a product of Dr. Nicholas' hard work and personal belief system. What he does with this work, is not a product of the state, but rather his own choices. While Dr. Nicholas may use his work to supplement an application to become a Sage in the Meso-Pagan faith, he is not asking the University of Delmont to funnel taxpayer dollars to those aspirations. Any antiestablishment concerns are mitigated by this reality. If funding the clergy is truly the state's concern, they cannot expand that concern to prevent those who benefit from public funds to later pursue a relationship

with a religious institution. Just as the plaintiff in *Locke* was free to fund his devotional degree, Dr. Nicholas should be able to use his own work to pursue a future devotional degree.

Repeatedly noted by this Court, a state's "interest in separating church and state 'more fiercely' than the Federal Constitution ... 'cannot qualify as compelling' in the face of the infringement of free exercise." *Carson*, 596 U.S. at 781. (citing *Espinoza,* 140 S. Ct. at 2260, quoting *Trinity Lutheran,* 137 S.Ct. at 2024). The state's interest in alienating Dr. Nicholas because of his beliefs is not compelling and cannot overcome his right to freely exercise his religion.

B. The policy is not narrowly tailored and directly discriminatory.

Far from being narrowly tailored, the school's decision to refuse funding and exclude Dr. Nicholas from the premises was a unilateral decision made in reaction to his religious expression. The University did not take a nuanced approach, permitting religious expression. Instead it ceased funding, and changed the security protocol to block his entrance. R.9. This reaction failed to leave space for religious expression in any meaningful capacity and entertain more inclusive alternatives.

First, the reactionary approach of the school following the publication of Dr. Nicholas' article demonstrates a clear hostility to religion. Whereas in *Locke*, the scholarship program was welcoming of religious schools and Christian education but drew the line at funding a devotional degree, the school here expresses clear hostility to Dr. Nicholas' expression. *Locke,* 540 U.S. at 724–25. The school does not leave room for negotiation, such as an addendum, instead enforcing a strict wall between science and Meso-Paganism. The Court has long been suspicious of such "animus toward religion." *Id.* at 725 (citing *Lukumi*, 508 U.S. at 520).

Second, the University's aggressive approach was not for lack of options. As demonstrated by the publication in *Ad Astra*, it is very possible for an institution to disagree or even denounce the views of its contributors. R.9. The University could have issued a statement to the public

declaring their own views, without restricting Dr. Nicholas' ability to exercise his own faith. In the days that followed Dr. Nicholas' dismissal, President Seawall took to the media, issuing press releases and explaining their fundamental disagreement with Dr. Nicholas. R.9. A policy that promoted such public statements in lieu of firing Dr. Nicholas or terminating his funding may have been narrowly tailored, but this instance of unilateral dismissal was not.

Without a compelling state interest to bar Dr. Nicholas from a grant he is otherwise qualified for, and without a narrowly-tailored approach to accomplish such a mission, the state fails strict scrutiny. Further, given the clear factual and historical distinctions between this case and *Locke*, it is not clear the state's antiestablishment interest would survive even the most lenient of scrutiny. While it is true the state cannot favor any particular religion, the state is not free to penalize citizens for their own religious affiliations.

It is the "unremarkable" conclusion of Establishment Clause precedent that the state could have funded Dr. Nicholas' religiously tinted research without offending the Federal Constitution. *Trinity Lutheran,* 137 S.Ct. at 2021. The question at bar more accurately arises within the "play in the joints," beyond the reach of the Establishment Clause, where Dr. Nicholas' free exercise of religion is at stake. *Locke,* 540 U.S. at 719. When viewed in light of our foundational history and the standards applied in recent precedent, the state's decision to terminate funding in reaction to Dr. Nicholas' religious findings was unconstitutional religious discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

TEAM 5
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

As required by Rule III(C)(3) of the Official Rules of the 2024 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, Counsel for Petitioners (Team #5) certify:

1. In compliance with Supreme Court Rule 33(1)(h) and Official Competition Rules IV(C)(2)(vii), that the foregoing brief complies with word limitations set by the Competition in that it does not exceed 25 pages, excluding portions exempted by Rule IV(C)(2)(vii);
2. The work product contained in all copies of the foregoing brief is the exclusive work product of Team #5;
3. Team #5 has complied fully with its law school's governing honor code; and
4. Team #5 has complied with all Competition Rules.

Respectfully submitted,

TEAM 5
Counsel for Petitioner

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