No. 23-CV-1981

In the Supreme Court of the United States

COOPER NICHOLAS,

Petitioner,

v.

STATE OF DELMONT & DELMONT UNIVERSITY,

Respondent.

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

BRIEF FOR PETITIONER

Team 17
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does a university policy that constrains its academics to conclusions that adhere to the scientific community's consensus violate the Free Speech Clause?

II. Does a state-funded research study violate the Establishment Clause when its recipient has expressed an interest in using the study to support his religious vocation?

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The unpublished opinion of the United States District Court for the District of Delmont, Mountainside Division, may be found at Nicholas v. Delmont, C.A. No. 23-CV-1981 (D.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 The unpublished opinion of the United States Court of Appeals for the Fifteenth Circuit may be found at Delmont v. Nicholas, C.A. No. 23-CV-1981 (15th Cir. Mar. 7, 2024).

STATEMENT OF JURISDICTION

The District Court granted Dr. Cooper Nicholas's motion for summary judgment on February 20, 2024, pursuant to Fed. R. Civ. P. 56(a). R. at 30. The Court of Appeals reversed the District Court and entered final judgment for the State of Delmont and Delmont University (hereinafter collectively "the University") on March 7, 2024. R. at 51. The Court then granted Dr. Cooper Nicholas's writ of certiorari. R. at 59-60. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution, as relevant here, states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . .

STATEMENT OF THE CASE

1. Dr. Cooper Nicholas

Dr. Nicholas is a thirty-three-year-old native of Delmont and a renowned astrophysicist, who practices a Meso-American pagan faith. R. at 3-4. He graduated summa cum laude from Delmont University with joint degrees in astronomy and astrophysics. R. at 55 ¶ 3. After his undergraduate education, he received a doctorate in astrophysics from the University of

California-Berkeley. R. at 55 ¶ 4. He is currently considering becoming a Sage, a religious leader in the Meso-Pagan faith, but has not yet applied to any Meso-Pagan seminary. R. at 57 ¶ 15. After a series of academic appointments and visitorships, Dr. Nicholas became and is currently the scholar in residence at The Ptolemy Foundation, a scientific research institution. R. at 3. He has received several post-doctoral grants and his work in astrophysics has been published many times including a leading treatise on observing celestial phenomena. R. at 3. Dr. Nicholas is known as a trailblazer in the astrophysics field. R. at 5.

2. The Delmont University Grant

The Pixelian Comet only appears in the Northern Hemisphere once every ninety-seven years. R. at 5. To take advantage of this unique astrological event, the University offered the Astrophysics Grant to provide a researcher with facilities, personnel, and equipment. R. at 5. This Grant would also cover the costs of publication for academic articles on the Pixelian Event. R. at 5. As a condition of receiving the Grant, the recipient had to "conform to the academic community's consensus view of a scientific study." R. at 5. Due to his reputation and previous astrophysics research, Dr. Nicholas was awarded the Grant and began to prepare for the Pixelian Event. R. at 5-6. Dr. Nicholas was hopeful that, beyond the academic significance, this research could also improve his application to become a Sage. R. at 57 ¶ 13-14.

3. The Publications

Dr. Nicholas twice published his observations on the Pixelian Event in *Ad Astra*, MIT's astrophysics journal. R. at 6. His conclusions were highlighted at scientific conferences and generated several response papers. R. at 6. Dr. Nicholas speculated that ancient Meso-Americans may have observed prior Pixelian Events and suggested that scientists should date Meso-American glyph drawings to test this hypothesis. R. at 7. Finally, Dr. Nicholas concluded that the

phenomena he observed could support the Charged Universe Theory, which argues that the interaction of charged electrical particles can explain astronomical events. R. at 7.

While some scientists support the Charged Universe Theory, it is not the current scientific consensus. R. at 7. Because Dr. Nicholas's conclusions pushed the boundaries of that consensus, *Ad Astra*'s editor, Dr, Elizabeth Ashmore, published his article with a preceding editorial. R. at 8. This note stated that *Ad Astra* did not endorse Dr. Nicholas's findings, which it viewed as extreme and potentially religious in nature. R. at 8. Dr. Nicholas's article provoked a wide range of responses, with most scientists denouncing his conclusions on the Pixelian Event. R, at 9. Many foreign astrophysicists, however, cautioned that the academy would need further study to discredit Dr. Nicholas's research. R. at 9.

4. The University's Response

Concerned that Dr. Nicholas's article could damage the University's investment in its observatory, the University's President, Meriam Seawall, sent him a letter reiterating that his findings had to conform to the scientific consensus. R. at 9-10. Dr. Nicholas responded that this attempt to censor his research was antithetical to science itself, noting that other University scientists referenced pagan writings in their work. R. at 10. The University replied that grant-funded research must be scientific, and voiced concerns that the public could perceive it as endorsing Dr. Nicholas's Meso-Pagan faith. R. at 10-11. Dr. Nicholas again refused to change his conclusions and insisted that they were scientific. R. at 11. Finally, the University changed its security protocol to keep Dr. Nicholas from accessing University facilities. R. at 11. President Seawall stated in a press release that the University took this drastic measure "because of a fundamental disagreement with Dr. Nicholas over the meaning of science itself." R. at 11.

5. Procedural History

Dr. Nicholas then filed suit for injunctive relief to reinstate his salary and use of the University's facilities. R. at 12. He asserted that the University had violated his First Amendment free speech right by placing an unconstitutional condition on his research. R. at 12. The University answered that allowing Dr. Nicholas to continue his research would violate the Establishment Clause. R. at 12. After cross-motions for summary judgment, the district court concluded that the University had violated Dr. Nicholas's rights and found no Establishment Clause violation, granting Dr. Nicholas summary judgment. R. at 12, 30. The University appealed this decision, and the Fifteenth Circuit reversed the lower court, granting summary judgment to the University. R. at 32, 51. Dr. Nicholas then filed a petition for certiorari which this Court granted. R. at 59-60.

SUMMARY OF THE ARGUMENT

Delmont University's restrictions on Dr. Nicholas's conclusions are unlawful because they constitute restrictions on his private viewpoint. While Dr. Nicholas conducted his research at a public institution, his findings were wholly private and did not represent the University's position. Dr. Nicholas's form of speech—academic research—is not historically associated with government speech. Because the University's initial oversight of Dr. Nicholas's initial research was at best minimal, this would be insufficient to show that Dr. Nicholas's conclusions were somehow linked to the University.

Furthermore, the government cannot limit rights through grant conditions unrelated to the actual goals of the grant itself. Here, the University funded Dr. Nicholas's research to study and analyze the Pixelian Event. The condition attached to the Grant—that he conform his conclusions to the scientific consensus—is unrelated to that goal. It forces Dr. Nicholas to

concede ground to the University's own viewpoint and harms the Grant's objective by narrowing the potential explanations of the Pixelian Event.

Moreover, the University's restriction violates strict scrutiny. Because the University's limiting of Dr. Nicholas's conclusion to the scientific community's consensus on the origins of the universe is viewpoint discrimination, we must apply the strict scrutiny analysis. The restriction is not narrowly tailored because the University failed to set forth a neutral policy that covers all academic research and conclusions influenced by religion. Addressing the confusion between science and religion is also not a compelling interest because this Court has rejected subjective notions of societal interests as compelling interests and, in the alternative, there are other avenues for satisfying the University's asserted interests.

Even if the University did not discriminate based on Dr. Nicholas's scientific viewpoint, its content-based restriction is still unreasonable and therefore unconstitutional. The Grant's objective was to provide Dr. Nicholas with resources necessary for the observation, study, and analysis of the Pixelian Event. To limit Dr. Nicholas's conclusions to the University's interpretation of the scientific consensus would threaten the very goal the University seeks to achieve with its Grant. The University's restrictions dictate Dr. Nicholas's conclusions and disregard the important information that he collected.

Delmont University can only justify its unconstitutional condition on Dr. Nicholas' speech if it would violate the Establishment Clause by continuing the Astrophysics Grant. But continuing to fund Dr. Nicholas' scientific study would not come close to a historical establishment of religion. Moreover, the University's Grant to Dr. Nicholas funds scientific, not religious, activity. Although he could use his findings to apply for religious training, states can award funding which the recipient could apply to religious purposes. Even when this Court has

held that states could restrict this type of funding, those cases involved direct support of religious activity which is not present here.

The University's establishment case also fails even if it would directly fund religious activity. States cannot restrict otherwise available public funds based on the recipient's religion. The Court should therefore reverse the court of appeals' judgment, because the Astrophysics Grant to Dr. Nicholas is not an establishment of religion.

ARGUMENT

I. The University's Grant restrictions on Dr. Nicholas's speech violate his First Amendment free speech rights.

As a public institution, the University, with narrow exceptions, cannot restrict Dr. Nicholas' speech. The University could assert that Dr. Nicholas's article is the University's speech and that its restrictions are a typical funding decision, but neither claim is true when analyzing the restrictions themselves. Instead, the University's restrictions are an example of viewpoint discrimination which is not narrowly tailored, as required by strict scrutiny, or, in the alternative, unreasonable content-based restrictions, both of which are unconstitutional. Thus, the University has violated the First Amendment by imposing these restrictions and the court of appeals' judgment should be reversed.

A. Dr. Nicholas's article is his own private speech and is thus not within the bounds of the University to control.

Dr. Nicholas's publications are his private speech, not the University's speech. To determine whether the government is regulating its own speech or limiting private expression, this Court has looked to several factors "including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022) (citing *Walker v. Tex. Div., Sons of Confederate*

Veterans, Inc., 576 U.S. 200, 209-14 (2015)). As historical and recent cases have viewed university academics' speech as their own there is no reason to think that the speech of academics has historically been anything but their own. Further, because of how Dr. Nicholas's article was originated and presented, the public is likely to interpret Dr. Nicholas's articles as his own speech. And because the university had not previously controlled Dr. Nicholas's expression, Dr. Nicholas' speech is his own and not the University's to control.

If the public has historically associated a type of speech with the government, that speech is likely government speech. In *Shurtleff*, this Court was asked to determine whether displaying flags selected by private parties outside a government building was private or government speech. *Id.* at 247-49. The Court analyzed the history of flags and their relation to messaging and the government, from ancient history to the modern day. *See id.* at 253-55. The Court concluded that flags have historically been considered as government speech, because of their use as symbols of the state. *See id*. Although the Court ultimately concluded that other factors outweighed this historical argument, the historical use of flags was an important factor which weighed in Boston's favor. *See id.* at 255, 258.

The public perception of speech is another factor which the Court has used to examine whether speech is government or private. In *Pleasant Grove,* the Court was asked to determine whether placing a privately-funded statue in a public park was government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009). The Court concluded that the public would likely associate a statue with the owner of the land the statue was on. *See id.* at 470-72. Because the populace associates monuments on public land with the government, the privately- funded statue was nonetheless government speech. *See id.*

Finally, if the government exercises direct control over the speech in question, that speech is government speech. In *Walker*, the Court had to determine whether the design of license plates was government speech. *See Walker*, 576 U.S. at 203-04. As part of its analysis, the Court considered the under Texas law, the state directly oversaw almost every aspect of license plate design, even rejecting several of them. *Id.* at 213-14. Because of this direct control of license plate design, the plates were government speech. *See id.* at 213-14, 219.

Conversely, the speech of academics has not been historically tied to the institution which employs them. Unlike the history of flags, as discussed in *Shurtleff*, audiences have attributed academic publications to their author, not the author's employer. This was the case even before the founding. When Galileo published his data which showed the Earth revolved around the Sun, he was tried by the Inquisition, not his employer, the University of Padua (which was also named on the title page of his research). *See* Galileo Galilei, *Siderius Nuncius* 1 (1st ed. 1610); *See* Owen Gingerich, *The Galileo Affair*, 247 Sci. Am. 133, 134-35 (1982) (on Galileo's persecution). In more modern times, courts have reached the same conclusion and attributed academic speech to the academic themself, not the university for which they work. *See Burnham v. Ianni*, 119 F.3d 668, 675 (8th Cir. 1997) (photographs placed by professors in university display case); *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021) (choice of language in lecture). Thus, the historical evidence shows that Dr. Nicholas's article is private speech.

The public is also unlikely to view Dr. Nicholas's article as the University's speech. Major media publications largely attribute scientific articles to their author, not the university which employs them. *See e.g.*, Dennis Overbye, *That Famous Black Hole Gets a Second Look*, N.Y. Times, Jan. 30, 2024, at D3 (attributing study and findings to researchers by name and position); Marcia Dunn, *Oldest Black Hole Discovered Dating Back to 470 Million Years After*

The Big Bang, AP News (Nov. 6, 2023, 1:56 PM), https://apnews.com/article/oldest-black-hole-nasa-big-bang-810d6494b037217a42d03f61f96f734f (attributing study findings to researchers by name and position). Thus, when an academic study is brought to public attention, the public generally attributes it to the academic. After all, Dr. Nicholas, not the University, was defended by the foreign press, R. at 9, and *Ad Astra* communicated with Dr. Nicholas, not the University, concerning his article's publication. R. at 8. While the University may have felt some of the blowback from Dr. Nicholas's article, the public merely associates Dr. Nicholas with the University, rather than viewing his speech as the University's speech. R. at 9. Because the public did not attribute Dr. Nicholas's article to the University, that factor weighs in his favor.

Finally, the University did not directly control Dr. Nicholas while he researched and analyzed the Pixelian Event. There is no evidence that the University approached anything like the level of control this Court found necessary to reach the control factor in *Walker*. *See* 576 U.S. at 213-14. The University did not directly review Dr. Nicholas's work, nor did it have the final say on what he published. R. at 6-8. And nothing indicates that the University has previously stopped a professor from publishing because they did not conform to the University's message. Therefore, the University clearly did not exercise any control over Dr. Nicholas during his actual research.

The factors which this Court uses to determine government speech all point towards the speech of Dr. Nicholas being solely his own. In the past, both recent and distant, the speech of academics has been tied to that academic, not to their employer. The public is not likely to and has not attributed Dr. Nicholas's speech to his employer. Furthermore, the University did not exercise any control over Dr. Nicholas's article before it was published. Thus, each of the relevant factors indicate that Dr. Nicholas's article is private speech.

B. The restrictions placed on the Grant are restrictions on speech, not a choice of what to fund.

Although the University claims it can place restrictions on research stemming from its Grant, the government cannot use program conditions to restrict speech outside of the program itself. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-15 (2013). The University's restrictions on Dr. Nicholas's research regulate conduct outside of the Grant, and these restrictions are thus unconstitutional.

The government can attach restrictive funding conditions that infringe on free speech if those conditions are directly tied to the use of the funds. This exception protects the government's ability to make many routine funding decisions without violating the First Amendment. In *Rust v. Sullivan*, the Court examined a statute that provided grants for family planning projects with the condition that project recipients not advocate for abortion. *Rust v. Sullivan*, 500 U.S. 173, 178-79 (1991). The Court concluded that the restrictions were permissible because they ensured that recipients furthered the government's goal of promoting childbirth. *See id.* at 193. Because the restrictions were directly related to the goal of the grants, the restrictions did not violate the First Amendment as the government was simply choosing to fund activities which promoted childbirth rather than abortion. *Id.* at 194.

The government cannot attach conditions to funding, however, which regulate speech that is unrelated to the goals of the funding. In *Agency for Int'l Dev.*, the Court examined a program which provided funding to HIV/AIDS prevention programs with the condition that the NGOs which ran those programs opposed prostitution. *Agency for Int'l Dev.*, 570 U.S. at 208. The Court concluded that such a requirement placed a regulation on speech outside the scope of the funded programs and was thus a way for the government to impermissibly regulate speech rather than decide what it funded. *Id.* at 218-19.

The conditions the University has placed on the Grant are unrelated to the actual use of funds and are thus unconstitutional. Although the University asserts it is simply an issue of Dr. Nicholas adhering to the scientific community's consensus of a scientific study, this is not actually the case. R. at 10. The University's real concern is the conclusions which Dr. Nicholas came to in his study. R. at 10-11 (stating that the state was "subsidizing only science-based conclusions"). Thus, unlike in *Rust* where the government was simply choosing what programs it wanted to fund, the University is not simply choosing who will operate its observation program. Rather, it is requiring that said person conform their conclusions to the University's desires. *See* R. at 10-11. Here, the University seeks to regulate Dr. Nicholas's conclusions. Like the required policy in *Agency for Int'l Dev*, the regulation falls outside the Grant's purpose, which is to fund the research and publication of the Pixelian Event. R. at 21. Unlike *Rust*, the University's terms against Dr. Nicholas exceed constitutional bounds because they are not just criteria to help the University determine what to fund. Rather, the terms allow the University to limit funding to only those with certain beliefs. *See Rust*, 500 U.S. at 194.

Dr. Nicholas's Grant terms exceed what is constitutionally permissible. While a state actor may choose what it wants to fund, it is unconstitutional for them to fund something and then place speech restrictions for someone to receive it. *See Agency for Int'l Dev.*, 570 U.S. at 218-19, 221. The University chose to fund an observation program and subsequent publications from that observation. R. at 5. However, they now seek to enforce a requirement that the funding recipient is constrained from making certain conclusions. R. at 21, 35. These constraints are contrary to the University's wishes for the program. Thus, these conditions are outside the First Amendment's permissible bounds.

C. The University's restriction on Dr. Nicholas's conclusions is viewpoint discrimination which fails strict scrutiny.

From the outset, the University failed to satisfy its burdens under the First Amendment to justify its viewpoint discrimination against Dr. Nicholas. This burden includes a strict scrutiny analysis where parties must demonstrate that a restrictive speech policy fulfills a compelling interest and is narrowly tailored to satisfy that compelling interest. The University fails at every level of the strict scrutiny analysis.

1. The University's restriction on Dr. Nicholas's conclusions is viewpoint discrimination.

The University's restriction on Dr. Nicholas constitutes viewpoint discrimination. As repeatedly emphasized by this Court, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)). Here, the University is engaging in viewpoint discrimination because it is restricting Dr. Nicholas's viewpoint on the subject matter of the origins and general composition of the universe. While the Charged Universe Theory may not be the "scientific academy's consensus view" of the universe's composition or beginnings, R. at 7, it is still a viewpoint that "has its adherents," R. at 7, including support from "*astrophysicists* in Meso-America, Australia, and Europe," R. at 9 (emphasis added). Dr. Nicholas's in-depth research and conclusions about the Charged Universe Theory, combined with supporters from multiple backgrounds, demonstrates that Dr. Nicholas's conclusions are, at the very least, a credible viewpoint. Thus, the University's targeting of such a conclusion is "all the more blatant," *Rosenberger*, 515 U.S. at 829, and must be strictly scrutinized.

2. The University's restriction on Dr. Nicholas's conclusions is not narrowly tailored.

The University's restriction on Dr. Nicholas's conclusions about the Charged Universe Theory—confining the conclusion to the scientific consensus of the moment—is unconstitutional. As the Court emphasized, "the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *R.A.V.*, 505 U.S. at 392. Here, the University attempts to justify its restriction on Dr. Nicholas's speech by standing behind the pretext of science, requiring that "the derivation of subsequent conclusions [by Dr. Nicholas] . . . conform to the academic community's consensus view of a scientific study." R. at 10. The University's restriction is unconstitutional because it fails to be "narrowly tailored to serve compelling state interests." *R.A.V.*, 505 U.S. at 395.

First, the University's restriction is unconstitutional because it fails to be narrowly tailored. As this Court has noted, "the 'danger of censorship' presented by a facially content-based [restriction] . . . requires that the [restriction] be employed only where it is '*necessary* to serve the asserted [compelling] interest" and that "[t]he existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of such a [restriction] . . . ." *Id.* (internal citations omitted). Here, the University asserts that their targeting of Dr. Nicholas's conclusions was part of an effort to prevent "the confusion of science and religion." R. at 11. However, in sharp contrast and detrimental to their alleged compelling interest, the University has permitted scientists on faculty to reference and even rely upon "writings of other pagans, such as the Greeks Romans, Incas, and Phoenicians." R. at 10. The University could have taken a neutral approach to its goal of preventing the confusion and comingling of science and religion by establishing a blanket policy with clear standards applicable to all the University's scientific departments. Instead, the University singles out Dr. Nicholas's work out of the haystack of

religion-influenced scientific literature and creates a true "danger of censorship." *R.A.V.*, 505 U.S. at 395. The lack of a neutral policy, and by extension the lack of a narrowly tailored approach, thus presents significant unconstitutional barriers to Dr. Nicholas's ability to freely convey his conclusions. *See Rosenberger*, 515 U.S. at 830 (Citing *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393 (1993) (The government discriminates based on viewpoint when it allows presentations on all views of a particular issue, except for religious viewpoints).

3. The University's restrictions on Dr. Nicholas's conclusions do not serve a compelling interest.

Second, the University's restriction is unconstitutional because it fails to satisfy a compelling state or government interest. To satisfy this prong of the strict scrutiny test, the Court states that "to recite the Government's compelling interest is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest." *U.S. v. Alvarez*, 567 U.S. 709, 725 (2012). Furthermore, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." *Id*. Here, the University indicated that their main concern is preventing the confusion of science and religion. R. at 10. However, the University did not provide even a cursory rationale as to why rectifying this alleged confusion is a compelling interest in the first place. The Court has rejected alleged compelling interests rooted in subjective beliefs of societal interest and morality. *See* John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 Brook. L. Rev. 1, 30-31 (2023) (citing *U.S. v. Stevens*, 559 U.S. 460 (2010) and *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786 (2011)). In fact, the Court has even pointed out that "the nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry through human history." *Rosenberger*,

515 U.S. at 831. This suggests, at the very least, that the science-religion confusion will be an ever-continuing problem that lies outside of the University's ability to solve.

But even if the University's goal of clearing up the confusion between science and religion is a compelling interest, the restriction would still fail because it is not *necessary* for achieving the University's interest. The University's restrictions on Dr. Nicholas would create more confusion between science and religion. As the Court made clear about the importance of free speech, "[f]or the University, by regulation, to cast disapproval on particular viewpoints . . . risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life . . . ." *Id.* at 836. To suppress Dr. Nicholas's viewpoint by cornering it into the scientific community's consensus is to prevent the free flow of ideas that would clarify the science-religion debate. Here, there are avenues, aside from the University's restrictions, that allow the University to achieve its compelling interest. For example, Dr. Ashmore characterized Dr. Nicholas's conclusions as an "extreme view," R. at 8, the scientific academy came out strongly saying that the conclusions were "medieval," R. at 9, and even the American press "echoed the criticisms." R. at 9. The accountability system created through the scientific community provided a sufficient off-ramp which indicates that the University's restriction is not the end-all-be-all policy necessary to address its alleged compelling interest.

D. The restrictions placed on Dr. Nicholas's speech are not reasonable and are thus unconstitutional.

Even if the university's restriction on Dr. Nicholas's speech is content, and not viewpoint, based, it is still an unreasonable restriction and thus unconstitutional under the First Amendment. Even content-based restrictions in non-public forums must be "reasonable in light of the purpose served by the forum." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1880 (2018) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). The

requirement that Dr. Nicholas's research conclusions conform to the scientific academy's consensus of what constitutes a scientific study, *see* R. at 10, is unreasonable and antithetical to the purpose of the Grant. Thus, the restriction is unconstitutional and the lower court's judgment should be reversed.

Restrictions placed on speech in nonpublic forums must be reasonable. This reasonability is adjudicated based on the purpose of the forum. In *Martinez*, this Court had to determine whether a requirement that all student groups at Hastings College adhere to a non-discrimination policy in their membership was a reasonable requirement. *See Christian Legal Soc'y v. Martinez,* 561 U.S. 661, 668 (2010). The Court identified several different justifications for the policy—promoting a more inclusive educational atmosphere, encouraging tolerance amongst students, and preventing the use of state funds for activities which the people of the state did not approve. *See id.* at 688-90. The Court concluded that these justifications were reasonable and held in favor of the school. *See id.* at 698.

The restriction placed on Dr. Nicholas is unreasonable considering the Grant's purpose. That purpose was providing its recipient with resources to observe the Pixelian Event and publish their data and conclusions. *See* R. at 2, 5. The University seeks to enforce a restriction which requires that Dr. Nicholas's conclusions concerning the Pixelian Event adhere to the expectations of the scientific academy. *See* R. at 10-11. Unlike in *Martinez*, in which the college was able to provide several reasons why their policy was reasonable, *See Martinez*, 561 U.S. at 688-90, the excuses given by the University fail to create a reasonable justification for their restriction. The University claims that Dr. Nicholas's conclusions hurt the University's reputation and confuse science and religion. *See* R. at 9-11. However, no evidence indicates Dr. Nicholas caused this confusion, only that he triggered a discussion about the origins of the

universe. *See* R. at 9. And the University attributes its drop in post-graduate applications, its only tangible harm in this case, to the Pixelian Event concluding, not to Dr. Nicholas. R. at 9. Thus, unlike in *Martinez*, the University has not given any reasonable reason for its restriction on Dr. Nicholas's speech. This restriction is unreasonable, as the purpose of the Grant is to help form and publish those conclusions. By requiring that Dr. Nicholas's conclusion fit a mold, the University is, in effect, determining those conclusions themselves without regard for the data. Furthermore, even if the purpose of the Grant was generalized as promoting science in general, it would still be unreasonable to require that the conclusions of Dr. Nicholas conform to a set of expectations. Scientific studies are, by definition, not predetermined. *See* University of California: Berkeley, *Understanding Science 101: What is Science?* 3 (available at https://undsci.berkeley.edu/lessons/pdfs/how_science_works.pdf). For the state to determine what constitutes science is antithetical to the nature of science itself and has historically been used to support now-debunked theories. *See e.g.*, Rafael Medoff, *America and the Holocaust: A Documentary History* 44-55 (2022) (describing the Nazi's use of academic institutions to promote their ideology); Owen Gingerich, *The Galileo Affair*, 247 Sci. Am. 133, 134 (1982) (describing the persecution of Galileo for promoting science contrary to the ideas of the Catholic Church). Thus, there is no reasonable justification for the restrictions imposed by the University on Dr. Nicholas and the restriction is unconstitutional.

The University's restriction of Dr. Nicholas's research violates his First Amendment free speech rights. The University suppressed Dr. Nicholas's private speech to impermissibly police the scientific consensus on the universe's origins. It therefore engaged in the kind of viewpoint discrimination—directed against Dr. Nicholas's innovative perspective—that courts strictly scrutinize. And even if the University's restriction was content-based, the restriction was still

unreasonable because it undermined the Grant's purpose—to help scientists study and draw conclusions from the rare Pixelian Event.

II. Continuing the Grant to Dr. Nicholas would not violate the Establishment Clause.

Having established that Delmont University imposed an unconstitutional condition on Dr. Nicholas's free speech right, the University claims that it had to impose this condition to avoid violating the Establishment Clause. R. at 12. Continuing the Astrophysics Grant to Dr. Nicholas would, in its view, impermissibly fund his religious activity. But funding a scientific grant which the grantee could use as part of a religious application is not an establishment of religion. The history of the Establishment Clause and this Court's precedent informed by that history point toward reversing the court of appeals's decision. The University's Establishment Clause concerns cannot justify its unconstitutional restriction on Dr. Nicholas' speech and its stifling of his academic expression.

A. Awarding a scientific grant which the grantee could use for religious purposes is not a historical establishment of religion.

This Court has long instructed that the Establishment Clause "must be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). The Establishment Clause's ambiguity prevents courts from adopting rigid rules to identify every possible establishment of religion. *See Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 668-70 (1970). But if a government practice which might implicate the Establishment Clause has a strong historical foundation, "it is not necessary to define the precise boundary of [that] Clause." *Town of Greece*, 572 U.S. at 577. This Court recently affirmed in *Kennedy v. Bremerton School Dist.* that determining historical practice is the bedrock of Establishment Clause jurisprudence. *See* g S. Ct. 2407, 2428 (2022).

Using that historical approach, the University would not establish religion by continuing to fund Dr. Nicholas's research into the Pixelian Event. During the founding era, states established religion by enforcing religious orthodoxy and requiring financial support of the established church. *See Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring in part). States also directly supported religious institutions through public land grants and religious taxes. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 Wm. & Mary L. Rev. 2105, 2148-59 (2003). In this case, any funding of a religious institution is at most indirect. The University's Grant funding goes to Dr. Nicholas, not to any Meso-Pagan seminary to which he might apply. And Dr. Nicholas is only considering applying to a seminary "pending the results of [his] study." R. at 57 ¶ 15. Therefore, the University's claim that it would directly fund religious training by continuing its Grant is speculative and unfounded.

Even if the University would directly fund Dr. Nicholas's religious training through the Astrophysics Grant, it is not clear that such funding is a historical establishment of religion. The court of appeals relied on James Madison's Memorial and Remonstrance, written to denounce a proposed Virginia tax to support the clergy. R. at 45-46; J. Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 63-72 (1947) (appendix to dissent of Rutledge, J.). The Remonstrance does not support, however, a blanket ban on state funds which individuals could use for religious training. Madison did not view the Establishment Clause as requiring a "wall of separation between church and State," nor government "neutrality . . . between religion and irreligion." *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) (citing Madison's statements during the House debate on the Religion Clauses). Rather, he objected not just to the Virginia bill's

direct taxation to support the clergy, but to its preferential treatment of certain Christian sects. *See Rosenberger*, 515 U.S. at 855 (Thomas, J., concurring). Therefore, this specific episode, and the wider historical practice, do not indicate continuing the Astrophysics Grant would be an establishment of religion.

B. *Locke* should not be extended to hold that Delmont University would violate the Establishment Clause by continuing the Grant to Dr. Nicholas.

In holding that the University had to condition Dr. Nicholas's free speech to avoid violating the Establishment Clause, the court of appeals relied heavily on this Court's decision in *Locke v. Davey*. R. at 46-48. Yet neither that case's law nor its facts control this case. Dr. Nicholas has only used his Pixelian Event research for scientific purposes, not religious ones. And even if he uses his research to become a clergy member, it would be a novel extension of this Court's Establishment Clause precedent to hold that a state must restrict public benefits from being used for religious training.

1. States need not restrict available public funds from going to religious training to satisfy the Establishment Clause.

In *Locke v. Davey*, the state of Washington barred the plaintiff, who enrolled at a Christian college to pursue a pastoral ministries degree, from receiving state Promise Scholarship money. *See* 540 U.S. 712, 716-17 (2004). This Court held that Washington could prevent this state funding from going to clergy training without violating the plaintiff's Free Exercise right. *See id.* at 718, 724. *Locke* does not mandate, as the court of appeals argued, that states must condition public benefits in this way. This Court explicitly stated that within the "play in the joints" between the two Religion Clauses, Washington "could . . . permit Promise Scholars to pursue a degree in devotional theology." *Id.* at 719. This is fatal to the University's case. Because the University did not have to condition Dr. Nicholas's Grant funding to avoid its use for religious purposes, it could not violate his rights under the Free Speech Clause by doing so.

2. This case involves much less government entanglement with religious activity than *Locke.*

The court of appeals's and the University's reliance on *Locke* also fails because of the tenuous relationship between the University and religious training in this case. While the state of Washington would have unambiguously funded pastoral training, the University may not have to fund any religious activity by Dr. Nicholas. The plaintiff in *Locke* had already enrolled at a Christian college and had decided to pursue a degree in pastoral ministries. *See id.* at 716-17. Here Dr. Nicholas has not applied or been accepted to any Meso-Pagan seminary. R. at 57 ¶ 15. Furthermore, his research on the Pixelian Event would make him at best a "competitive candidate" for seminary admission. *Id.* ¶ 14. The University cannot assert, before Dr. Nicholas has even decided to pursue religious training that it would impermissibly fund that training by continuing the Astrophysics Grant.

Dr. Nicholas has also repeatedly maintained that his research on the Pixelian Event is scientific, not religious, in nature. R. at 8-11. In his communications with University President Seawall, he insisted that his conclusions regarding the Charged Universe Theory were scientific, not religious, in nature. R. at 10-11. The University, in its initial January 3 letter and its eventual termination of the Grant, based its termination on Dr. Nicholas's failure to conform to the scientific consensus. While Dr. Nicholas believes that his research could have religious significance, his concern over improper academic censorship, not his own religious belief, forms the basis of his claim. He is not asking the University to fund religious activity. Rather, he merely seeks to recognize that it cannot terminate his Grant because his conclusions fall outside the scientific consensus.

C. Even if the University would fund religious activity by continuing the Astrophysics Grant, it cannot exclude Dr. Nicholas from Grant funding because of his religion.

Dr. Nicholas's dispute with the University is a scientific one. It does not rest on any denial of his Free Exercise right to practice his Meso-Pagan religion. Yet, even if Dr. Nicholas uses his scientific research to apply to and study at a Meso-Pagan seminary, the University cannot condition his Grant because of his religious activity. Just as states cannot violate the Free Exercise Clause to separate church and state more than the Establishment Clause requires, *see Espinoza v. Mont. Dep't of Revenue,* 140 S. Ct. 2246, 2260 (2020), the University cannot unlawfully condition Dr. Nicholas' speech when it poses no establishment concern. Government institutions cannot exclude otherwise eligible religious recipients from public benefits, whether based on their religious status or use of the funds.

1. Dr. Nicholas's private choice to pursue religious training would remove any Establishment Clause concern.

This Court has consistently found no Establishment Clause issue with government programs whose funds could pass to religious institutions through private choice. Dr. Nicholas's choice to apply to a Meso-Pagan seminary would break any "link between government funds and religious training." *Locke*, 540 U.S. at 719. While this Court has only recently permitted direct aid to religious institutions, it has always allowed public benefit programs which indirectly benefit churches and religious schools through private choice. *See, e.g., Mueller v. Allen,* 463 U.S. 388 (1983) (tax deductions for educational expenses), *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (sign language interpreters for deaf students). This Court relied on that line of cases in *Locke* to affirm that Washington could allow scholarship recipients to pursue pastoral training. *See* 540 U.S. at 719. As in *Locke*, the University would not directly fund any religious institution in a way which would raise Establishment Clause concerns. Government

funding of a Meso-Pagan seminary would only occur indirectly through Dr. Nicholas's independent and private choice to pursue a religious education.

2. Delmont University impermissibly excluded Dr. Nicholas from continued Grant funding based on his Meso-Pagan religion.

If there was any doubt that the University can continue to fund the Astrophysics Grant without violating the Establishment Clause, this Court's recent religious funding cases remove it. They make clear that government institutions violate religious individuals' Free Exercise rights by excluding them from otherwise available public benefits.

In the first case of *Trinity Lutheran*, this Court held that Missouri could not prevent a church from applying for a grant to repair its playground. *See Trinity Lutheran Church v. Comer*, 582 U.S. 449, 454-58 (2017). The state's denial was a form of impermissible discrimination based solely on the recipient's "religious character." *Id.* at 462. Using the same rationale, this Court invalidated Montana's total ban on state tuition assistance going to religious schools. *See Espinoza*, 140 S. Ct. at 2246. Can the University then argue that it is not terminating the Astrophysics Grant because of Dr. Nicholas's beliefs, but because of his possible religious use of the Grant? *Carson v. Makin* shows that answer must be no. That case involved a Maine tuition assistance program that, unlike Montana's program, gave funding to students at "nonsectarian" religious schools. *Carson v. Makin*, 142 S. Ct. 1987, 1994 (2022). The Court affirmed that even if this narrower restriction only discriminated based on religious use of the funding, it still violated the recipients' Free Exercise rights. *See id.* at 2000-01. Moreover, it limited *Locke* to its specific facts, making clear that case does not "generally authorize the State to exclude religious persons from . . . public benefits on the basis of their anticipated religious use of the benefits." *Id.* at 2002. Therefore, the University cannot exclude Dr. Nicholas from grant funding because of his Meso-Pagan religion.

The University cannot rely on a trumped-up establishment interest not recognized in the First Amendment to suppress Dr. Nicholas's free speech. The Astrophysics Grant is not an establishment of religion under historical practice or the Court's precedent. Dr. Nicholas may not use Grant funding for any religious purpose, yet even if he does, the University still cannot condition funding to discriminate against his religion.

CONCLUSION

The judgment of the court of appeals should be reversed.

CERTIFICATE OF COMPLIANCE

Under Rule IV(C)(3) of the 2023-24 Seigenthaler-Sutherland Moot Court Competition's Official Rules, we, counsel of record for the Petitioner, certify that:

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

2. We have complied fully with our law school's governing honor code, and

3. We have complied with all Rules of the Seigenthaler-Sutherland Moot Court Competition.

Team 17
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