No. 23-CV-1981

In the

Supreme Court of the United States

COOPER NICHOLAS,

Petitioner,

V.

STATE OF DELMONT and
DELMONT UNIVERSITY,

Respondents.

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

BRIEF OF DR. COOPER NICHOLAS, PETITIONER

ORAL ARGUMENTS REQUESTED

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Dated: January 31, 2024

QUESTIONS PRESENTED

I. This Court has held that conditions attached to public funds that discriminate based on a particular viewpoint must survive strict scrutiny. That is, they must further a compelling government interest and be narrowly tailored by the least restrictive means to fulfill that interest. Respondents revoked Dr. Nicholas's grant after determining that the nexus between his research and the Meso-Pagan religion prevented his research from fitting the scientific community's views on the Pixelian Event. Does a state have the right to revoke grant funding because of the viewpoint of the research when the state considers the research to not fall within the consensus of the scientific community?

II. This Court has held that the Establishment Clause must be interpreted in light of historical practices that prevent a state from requiring individuals to abandon any sign of visible religiosity. The recipient of a state-funded research grant suggests the study's research and conclusions supports future research into the possible electromagnetic origins of Meso-Pagan religious symbolism and has also expressed interest in using the study to support his religious vocation independent of his research for the state. Does the state allowing the grant recipient to continue his research violate the Establishment Clause?

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OPINION BELOW

The opinion of the United States District Court for the District of Delmont, Mountainside Division is unpublished and may be found at *Cooper v. State of Delmont*, C.A. No. 23-CV-1981 (D. Delmont Feb. 20, 2024). The opinion of the United States Court of Appeals for the Fifteenth Circuit is also unpublished and may be found at *Cooper v. State of Delmont*, C.A. No. 23-CV-1981 (15th Cir. Mar. 7, 2024).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on March 7, 2024. R. at 51. Petitioner then filed a writ of certiorari, which this Court granted. R. at 59-60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE FACTS

Dr. Cooper Nicholas ("Petitioner") is the first person to receive the State of Delmont ("State") and Delmont University's ("University") (together, "Respondents") Visitorship in Astrophysics. R. at 2. To bring attention to Delmont University's world-class observatory during the once-in-a-lifetime appearance of the Pixelian Comet ("Pixelian Event"), the State and University approved an Astrophysics Grant ("Grant") to provide a principal investigator the necessary resources to study the phenomenon. R. at 1. The Grant gives the recipient a salary, use of University facilities and equipment, and funds for other costs associated with studying the Pixelian Event, including the costs of publishing the results and conclusions of the study in scientific, peer-reviewed articles. R. at 1-2. By the Grant's terms, the recipient would need to make observations and gather data before, during, and after the Pixelian Event, running from March 2022 to March 2024. R. at 2.

Dr. Nicholas is a distinguished alumnus of Delmont University, where he earned his bachelor's and master's degrees in astronomy before earning his Ph.D. in astrophysics from the University of California, Berkeley. R. at 2. Before accepting Respondents' Grant to study the Pixelian Event, Dr. Nicholas served as the scholar-in-residence at The Ptolemy Foundation, an independent scientific research institution in Nevada. R. at 2. Dr. Nicholas has earned several academic appointments, visitorships, and postdoctoral grants and is widely published on topics of observational astrophysics. R. at 3. Due to his eminence in the field and his reputation as a "wunderkind" with intuitive, ground-shifting observations, Dr. Nicholas was awarded the Grant and he took leave from the Ptolemy Foundation to return to his alma mater. R. at 5. The University widely publicized Dr. Nicholas's return. R. at 6.

During his youth, Dr. Nicholas's parents worked for medical organizations to provide healthcare services in developing countries, such as those of Meso-America. R. at 4. Dr. Nicholas adopted the region's Meso-Paganist faith, which centers its spirituality on the study of the stars. R. at 4. Sages of the Meso-Pagan faith seek to interpret the cosmos and consider ancient Meso-American hieroglyphics to account for ancient celestial phenomena. R. at 4. Dr. Nicholas credits the Meso-Pagan faith as one of his inspirations for studying astrophysics. R. at 4.

At the beginning of the Visitorship, Dr. Nicholas developed a variety of widely-accepted standards to measure the Pixelian Event and the surrounding cosmic environment. R. at 6. Additionally, professional relationships were built with Dr. Ashmore of the *Ad Astra* journal, the astrophysics field's premiere, peer-reviewed journal. R. at 6. After the Pixelian Event occurred, Dr. Nicholas produced observations to be published in *Ad Astra,* in which Dr. Nicholas suggests the comet's appearance is consistent with ancient depictions from various cultures, but especially those of the Meso-American indigenous peoples. R. at 6-7. Furthermore, the atmospheric

phenomena and electro-magnetic disturbances in the cosmic environment showed similarities with cosmic changes and frameworks remarked upon by Meso-Pagans and other cultures. R. at 6-7. These similarities led Dr. Nicholas to suggest exploring the glyphs of the Meso-Pagans to better understand how ancient indigenous people understood and memorialized what they thought to be the universe's lifeforce, which ultimately may support the controversial Charged Universe Theory. R. at 7. Dr. Nicholas admits that although it is not the underlying incentive for his research methods and conclusions, he is hopeful his findings from the Pixelian Event will support an application to become a Sage in the Meso-Pagan faith. Nicholas Aff. ¶¶ 15.

The connection between Dr. Nicholas's research and the Charged Universe Theory alarmed both Respondents and Dr. Ashmore, who refused to publish observations supporting the theory unless she and the journal could disclaim endorsement of research supporting the theory. R. at 8. Respondents made no such attempts to disclaim Dr. Nicholas's research and conclusions. While some scientists believe Dr. Nicholas's observations come close to the medieval sciences of the past, they also acknowledged they could not readily disprove them. R. at 8.

Despite the scientific community's inability to readily disprove Dr. Nicholas's observations, Respondents requested Dr. Nicholas cease his studies that correlated to the Meso-Pagan faith and affirm his intention to research in accordance with the general scientific academy's consensus interpretation of "scientific." R. at 9-10. When Dr. Nicholas refused, claiming that neither Respondents nor the academy owned "science," Respondents revoked his benefits of the Grant. R. at 11. Respondents claim they were required to revoke Dr. Nicholas's ability to research to avoid promoting the Meso-Pagan faith, prevent running afoul of the Establishment Clause, and reducing the opportunity to confuse the public on what is "science" and what is "religion." R. at 11.

SUMMARY OF THE ARGUMENT

I. When a state prohibits a specific expression of opinion, it must act with more than a mere desire to avoid the controversy of an unpopular viewpoint. This Court has held that a state may exert control over the speech of government employees when the speech of those employees arises out of their job duties in a clearly defined employer/employee relationship. Additionally, conditions on state-sponsored funds may be permissible when they are content-neutral and indirectly burden speech. However, restrictions to speech must survive strict scrutiny when state-sponsored funds are revoked in response to a recipient's viewpoint. Respondents' revocation of Dr. Nicholas's funding does not survive strict scrutiny because they have not articulated a compelling interest in revoking Dr. Nicholas's funding and their actions weren't narrowly tailored to accomplish any state goal. Therefore, this Court should reverse the ruling of the Fifteenth Circuit in favor of Respondent on Dr. Nicholas's Free Speech claim.

II. Claims under the Establishment Clause must be decided with strong regard for balancing the right to be free from religion with the right of an individual to freely engage in religious expression. This Court has used a variety of approaches to address Establishment Clause claims. Regardless of approach, Dr. Nicholas's research is independent of his private, religious views. Ruling in favor of Respondents would create a chilling effect on the religious expression of Dr. Nicholas as well as of other members of the scientific community. Thus, this Court should overturn the lower court's ruling on the Establishment Clause claim in favor of Respondents.

ARGUMENT

I. RESPONDENTS' RESTRICTION ON DR. NICHOLAS'S FREE SPEECH IS IMPERMISSIBLE, VIEWPOINT-BASED DISCRIMINATION. BECAUSE RESPONDENTS DO NOT HAVE A COMPELLING INTEREST FOR THE RESTRICTION AND THE RESTRICTION IS NOT NARROWLY TAILORED TO FURTHER ANY STATE INTEREST, THE LOWER COURT'S RULING IN FAVOR OF RESPONDENTS ON DR. NICHOLAS'S FREE SPEECH CLAIM SHOULD BE OVERTURNED.

The core function of the First Amendment's Free Speech Clause is to prevent the state from limiting expression based on the expression's message, content, ideas, etc. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Although a state may exert control over the speech of government employees when the speech of those employees arises out of their job duties, such control is only permissible when there is a clearly established employer/employee relationship. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). In the absence of this employer-employee relationship, this Court first determines whether a regulation is content-neutral or content-based. Although not an easy task, content-based regulations are those that distinguish favored speech from disfavored speech. Turner *Broad. Sys. v. FCC*, 512 U.S. 622, 642-43 (1994). Conversely, content-neutral actions are those which can be justified "without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

If it has been determined that the state seeks to prohibit a specific expression of opinion, the state must show it is acting with more than a desire to avoid the controversy of an unpopular viewpoint. *Tinker* v. *Des Moines Independent Community School Dist., 393* U. S. 503, 509 (1969). Furthermore, it is "rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). This Court has held that when a content-based restriction goes a step further by singling out a particular viewpoint, the state's conduct is especially egregious. *Rosenberger v. Rector & Visitors of the*

Univ. of Va., 515 U.S. 819, 829 (1995). Under such circumstances, laws that are content-based are subject to strict scrutiny even if the state lacks animosity towards the viewpoint of the regulated speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015).

In this case, Respondents offer a plethora of justifications for infringing on Dr. Nicholas's fundamental right to free speech. Despite Respondents' assertion that Dr. Nicholas is not entitled to full free speech protections because of his employment with Delmont University, such an assertion is not reflective of this Court's precedent. *See generally Connick v. Myers*, 461 U.S. 138, 147 (1983) ("our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government."). Additionally, Respondents did not impose a neutral restriction against Dr. Nicholas's speech under the premise that they were solely restricting speech that did not conform with the research consensus of the scientific community. Respondents actively discriminated against Dr. Nicholas based on his research's ties to the Meso-Pagan faith. Therefore, strict scrutiny applies.

Under a strict scrutiny analysis, this type of viewpoint discrimination cannot be sustained. Respondents do not have a compelling reason for censoring scientific research related to the Pixelian Event. Additionally, Respondents' method of discriminating against Dr. Nicholas's research is not narrowly tailored, nor the least restrictive means of achieving its goal of only funding research that complies with research standards accepted by a consensus of the scientific academy. For these reasons, this Court should overturn the lower Court's ruling in favor of Respondents on Dr. Nicholas's Free Speech claim.

A. <u>Respondents are not entitled to a special First Amendment analysis because Dr. Nicholas is not an employee of the university and thus enjoys the full breadth of First Amendment protections.</u>

It is sometimes grudgingly said that the Bill of Rights stops at the office door, but when the government has the role of employer, government employees have constitutional protections many private employees lack. Mark A. Rothstein, et al. Employment Law: Cases and Materials (9th ed. 2020). When the government acts as an employer, it can exert control over the speech of its employees without violating their First Amendment rights if there is a compelling interest the government seeks to preserve. *Garcetti*, 547 U.S. at 418 ("the problem in any case… is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs"). In fact, a government employer can exert complete control over its employees' speech when that speech is produced as part of the employee's job duties. *Id.* at 421. Unless the government clearly establishes an employer-employee relationship with an individual, it cannot exert employer-like control over the message that individual creates. *See generally Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). In other words, if Respondents are Dr. Nicholas's employer, and the observations and conclusions about the Pixelian Event are part of his employment, Respondents can exert complete control of Dr. Nicholas's speech.

Respondents were not, however, Dr. Nicholas's employer, nor did they adopt a specific view about the Pixelian Event they sought to promote through the study. Instead, the purpose of the Grant was for the recipient to use Respondents' funds and facilities to perform observations and draw their own conclusions about the event. R. at 5. This Court has determined methods to

distinguish employees who can have their speech controlled by their employers from independent contractors whose employers cannot exert the same control over. *See generally NLRB v. United Ins. Co.*, 390 U.S. 254 (1968). While distinguishing employees from independent contractors is a factor test in which courts weigh various facts equally to decide, key factors used to determine how to classify a worker include whether they work a fixed schedule, their level of independence, and their ability to take initiative in decision-making. *Id.* at 258.

Respondents exerted minimal control over the work done under the grant by merely expressing the desire that the event be studied "accurately," and gave Dr. Nicholas substantial liberties, such as "access to any and every resource" and without control over the method and manner of his work. Seawall Aff. ¶¶ 6. Furthermore, Respondents gave Dr. Nicholas a salary, funding for research assistance, and costs for incidental necessities related to the study on top of practically unfettered access to the Observatory. R. at 5. By giving Dr. Nicholas such extensive leeway to perform his research of the Pixelian Event, Respondent created a relationship with an independent contractor, not with an employee. As such, Respondent is unable to exert employer-like control over the speech Dr. Nicholas creates during his studies of the Pixelian Event. Thus, Dr. Nicholas is not entitled to a less stringent First Amendment analysis than it would be for claims brought by any other private person.

B. The condition placed on the Grant to conform research and conclusions to the academy's consensus view of "scientific" in order to avoid leading the public to associate Delmont University with the Meso-Pagan religion is an impermissible viewpoint restriction that fails strict scrutiny.

This Court has regularly held that even if a regulation appears neutral on its face, it may be a content-based restriction if its main goal is to restrict speech simply because of its message. *See, e.g.*, Turner *Broad. Sys.*, 512 U.S. at 645.; *United States v. Eichman*, 496 U.S. 310, 315 (1990). State action that limits speech based on its content runs counter to the fundamental premise that

the First Amendment ensures the opportunity for each person to "decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641. Otherwise, such action can be used by the state to eliminate from public view those viewpoints it deems unfavorable. *Id.* Furthermore, when the state targets particular views instead of subject matter, the infringement on the First Amendment is even more clear. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). In this case, Respondents have implemented a policy to cease funding to Dr. Nicholas solely because of his research's tie to the Meso-Pagan faith and his personal religious views. Because Respondents targeted Dr. Nicholas's funding over his particular viewpoints, the restrictions placed on his speech through removal of the grant are content-based.

Regardless of whether a policy draws distinctions on a message's subject matter or its purpose, this Court has held that content-based restrictions will be subject to strict scrutiny. *Reed*, 576 U.S. at 163-64. To satisfy strict scrutiny, the burden is on the state to show that their policy furthers a compelling government interest and the policy is narrowly tailored to achieve that interest by the least restrictive means. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Because of the demanding nature of strict scrutiny, rarely does a state action ever satisfy strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

1. *Respondents have not demonstrated a compelling governmental interest in censoring Dr. Nicholas's scientific research solely because it has a tie-in to Meso-Pagan theology.*

A compelling interest identified by a state as justification for action that restricts free speech must identify an "actual problem" that is addressed by the restriction on speech. *Id.* In *Brown*, this Court held that a statute that prohibited the sale of violent video games did not fulfill a compelling state interest. *Id.* at 803. Because the video game industry had implemented a rating system to assess the age appropriateness of video games, the remaining risk of children obtaining

violent games that was addressed by the state law did not represent a compelling enough state interest to overcome the infringement on free speech. *Id.* This Court reached its conclusion in part by holding that a compelling state interest presented by the state must reach a "high degree of necessity". *Id.* at 804.

Prohibiting protected speech on the grounds that such speech would violate the Establishment Clause is not guaranteed to be considered a "compelling interest" by this Court. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2420 (2022). In *Kennedy*, the respondent claimed that its infringement on its employee's ability to pray on the job was necessary to prevent violating the Establishment Clause. *See id.* This Court held that this argument ignored that the Establishment and Free Speech Clauses (in addition to the Free Exercise Clause) were to have "complementary purposes, not warring ones." *Id.* at 2426. Thus, the state could not violate one provision of the First Amendment in order to potentially not violate another.

Similar to the respondents in *Brown* and *Kennedy*, Respondents have failed to provide a compelling interest for restricting Dr. Nicholas's speech that would satisfy strict scrutiny. The Grant originally expressed a requirement that the recipient conform their research and publications to methods that fall within the consensus of the scientific community. The ability of Dr. Nicholas to have his research published in *Ad Astra* and the inability of the scientific community to readily disprove Dr. Nicholas's research confirms he met this requirement. Next, Respondents allege that restriction of Dr. Nicholas's speech is necessary to prevent the public from confusing science and religion. However, this reason was presented post hoc and not in response to any "actual problem" other than that Respondents did not like the religious underpinnings of Dr. Nicholas's research.

Respondents' decision to implicate a nexus between religion and the state, like the respondents in *Kennedy*, fails to recognize that just as the state has a compelling interest in abiding

by the Establishment Clause, the state must balance this interest with its duty to refrain from infringing on individuals' free speech rights. Thus, preventing the public from confusing science and religion can hardly be described as a compelling state interest with a "high degree of necessity" as required by *Brown*. Because Respondents have not satisfied the first prong of strict scrutiny review by presenting a compelling interest for restricting Dr. Nicholas's speech, this Court should overturn the lower court's ruling in favor of Respondents.

2. *Respondents' policy that led to the denial of continued funding to Dr. Nicholas was not narrowly tailored or the least restrictive means of accomplishing its stated goal of minimizing public confusion between science and religion.*

For a government entity to restrict one's constitutional rights in the least restrictive means available, the government must act in a way that doesn't completely prohibit that person's right. *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 437 (9th Cir. 2008). In *Jacobs*, the Ninth Circuit determined that while a school dress code may limit the ways in which students can exercise their freedom of speech, it did not eliminate all avenues available for students to enjoy their freedom through conversations, joining clubs, or writing articles for the school newspaper. Alternatively, this Court determined that the government will not be considered to use the least restrictive means when it makes an outright prohibition on protected conduct. *Kennedy*, 142 S. Ct. at 2420. In other words, when a government entity puts an individual in a position to forfeit their constitutional rights, it will almost certainly be found to not have acted in the least restrictive means.

Additionally, this Court has held that speech within the university education system is "so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure" is prohibited for reasons of vagueness and overbreadth. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). At issue in *Rust* was a federal regulation that prohibited recipients of Title X funds from engaging in abortion-related

services. *Id.* at 177. Although this Court ultimately upheld the regulation, it noted that providing recipients of government funds the ability to speak freely outside the scope of the project while restricting their speech inside the project was not automatically constitutional just because there is money attached to the relationship. *Id.* at 199.

When Respondents discovered that Dr. Nicholas's research and conclusions did not comport with how the academy defines "science," it requested Dr. Nicholas to affirm his commitment to developing his research about the Pixelian Event in the academic community's consensus view of a scientific study. R. at 10. When Dr. Nicholas responded that there was nothing unscientific about his conclusions, Respondents changed security protocol to the Observatory to deny Dr. Nicholas admittance. R. at 11. When restrictions are placed on speech and content-neutral alternatives are available, the restriction will be struck down as unconstitutional. *R. A. V. v. St. Paul*, 505 U.S. 377, 395 (1992).

Respondents had at least two viable alternatives to revoking Dr. Nicholas's funds and Observatory access when he refused to state his research and conclusions did not comport with the academy's interpretation of science. First, Respondents could have allowed Dr. Nicholas to continue his study and use disclaimers to convey that neither the State of Delmont nor Delmont University endorses his results. Dr. Ashmore of the *Ad Astra* journal implemented such a disclaimer when she did not wish to give an appearance of personally endorsing Dr. Nicholas's findings. R. at 8. Respondents could easily have allowed Dr. Nicholas to continue his research and publish it with disclaimers to inform the public that the University did not endorse the results of the research, just as Dr. Ashmore did. Second, Respondents could have treated Dr. Nicholas's studies that implicate Meso-Pagan religion like they treat the work of Delmont faculty members who reference or rely on other pagan religions, such as the Greeks, Romans, Incas, and

Phoenicians. R. at 10. There is no indication that these other faculty members who have referenced or relied upon other pagan religions have been treated similarly to Dr. Nicholas. Because Respondents had at least two other means of balancing Dr. Nicholas's research with its desire to appear neutral, their decision to revoke the Grant and access to the Observatory from Dr. Nicholas cannot be considered the least restrictive means of achieving their goal.

C. **Even if this Court finds the conditions of the Grant to be content-neutral, Respondents' revocation of funding to Dr. Nicholas fails intermediate scrutiny analysis and thus is unconstitutional.**

When a state action implements a content-neutral regulation that only imposes an incidental burden on free speech, the time, place, or manner of the speech can be regulated if such a restriction furthers a substantial government interest, is narrowly tailored to serve that interest, and the state still leaves open multiple, alternative methods for conveying the restricted information. *Ward*, 491 U.S. at 791, 799. Though a lower standard than strict scrutiny, intermediate scrutiny still requires courts to carefully weigh constitutional protections against a state's valid governmental powers. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 51 (1961). Even if this Court holds that Respondents' infringement on Dr. Nicholas's free speech is a content-neutral regulation, the regulation should still be overturned for failing to survive intermediate scrutiny: Respondents have failed to present a significant government interest that is furthered by revocation of the Grant, the restriction is not narrowly tailored, and it does not leave ample alternatives for Dr. Nicholas to convey his research and conclusions regarding the Pixelian Event. For these reasons, the lower court's ruling in favor of Respondents on Dr. Nicholas's Free Speech claim should be overturned.

When the state enacts regulations against free speech to address a problem that does not exist, it does not have a substantial interest in regulating speech. *See McCullen*, 573 U.S. at 481. In *McCullen*, this Court held that although a regulation concerning speech on sidewalks outside

abortion clinics was content-neutral, it was not narrowly tailored to serve a significant governmental interest. *Id.* at 478. In making its determination, this Court held that otherwise acceptable restrictions on speech can be used by the state to put its thumb on the scale of what information is communicated on issues of public concern. *Id.* at 483. Additionally, this Court found that the regulation at issue suppressed speech as a matter of mere convenience and took the path of least resistance in silencing speech it disagreed with. *Id.* at 486.

State action that regulates the manner of speech cannot burden more speech than necessary in order to further a governmental interest. *Ward*, 491 U.S. at 799. In *Ward*, this Court held that town restrictions against noise levels at a public park furthered the substantial government interests of protecting its citizens from unwelcome noise and allowing everyone to enjoy the benefits the park has to offer. *Id.* at 796-97. Although this Court upheld the regulation, it noted that a content-neutral government regulation cannot burden speech more than necessary to advance its goals. *Id.*at 799.

In this case, Respondents' restrictions on Dr. Nicholas's free speech, even if this Court considers it to be a content-neutral restriction on the manner of speech, do not satisfy intermediate scrutiny. Respondents' communicated interest in avoiding confusion between science and religion is questionably legitimate on its own merits. But when the precedent set by *Ward* is considered, Respondents' restriction on Dr. Nicholas's speech burdens his rights more than necessary, particularly given that Respondents have allowed references to other pagan faiths in education.

Additionally, Respondents have not allowed for ample alternatives for Dr. Nicholas to convey his message. Respondents have damdaged Dr. Nicholas's reputation by stripping him of his funding, likely leading to his ostracization in the scientific community. Respondents trying to prevent Dr. Nicholas from publishing his research and conclusions in the *Ad Astra* journal while

claiming that he can publish in other journals does not provide ample alternatives. Dr. Nicholas is unable to complete his research within continuation of the Grant; thus, publishing in an alternative journal would not even be an option because the research is incomplete. Because Respondents have not identified a substantial government interest that is furthered by cutting off funding to Dr. Nicholas and given that such a restriction burdens Dr. Nicholas's speech more than necessary, the action does not survive intermediate scrutiny. Therefore, this Court should overturn the lower's court's ruling in favor of Respondents on Dr. Nicholas's Free Speech claim.

II. REGARDLESS OF DOCTRINAL APPROACH, DR. NICHOLAS'S STATE-FUNDED RESEARCH OF THE PIXELIAN EVENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE; THEREFORE, THIS COURT SHOULD OVERTURN THE LOWER COURT'S RULING IN FAVOR OF RESPONDENTS' ESTABLISHMENT CLAUSE CLAIM.

Over the years, this Court has shown an "unwillingness to be confined to any single test or criterion" when evaluating claims under the Establishment Clause of the First Amendment. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). As a result, this Court has relied on a variety of legal tests and doctrines to examine whether state action conflicts with the Establishment Clause including the *Lemon* test (as modified by *Agostini v. Felton*, 521 U.S. 203 (1997), [hereinafter the "*Lemon*" test]), the endorsement test, and the coercion test. *See generally Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman*, 505 U.S. 577 (1992). Most recently, this Court solidified its intent to consider Establishment Clause claims by "reference to historical practices and understandings". *Kennedy*, 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, (2014)). The *Kennedy* opinion noted that this Court had long abandoned the *Lemon* test and its Endorsement test offshoot due to its "ambitious, abstract, and ahistorical approach to the Establishment Clause". *Id.* at 2414. However, the *Kennedy* decision did not explicitly overturn holdings that stemmed from the *Lemon* decision, particularly as they relate to

state funding. Therefore, this analysis will undertake a thorough review of multiple doctrinal approaches.

Regardless of the approach adopted to analyze Establishment Clause claims, the Establishment Clause does not require that the state eliminate all perceived references to or endorsements of religion. *Kennedy*, 142 S. Ct. at 2427. This Court has made clear that the Establishment Clause should work in tandem with the Free Exercise Clause to protect religious freedoms. *See Lee*, 505 U.S. at 592 (1992). Respondents' position of favoring secularism over Dr. Nicholas's right to free religious expression violates the historical practice of balancing the Free Exercise Clause and the Establishment Clause. Furthermore, Respondents have also failed to show how funding Dr. Nicholas's research violates the Establishment Clause under offshoots of the *Lemon* test, erroneously conflated Dr. Nicholas's personal religious views with the technical and scientific independence of his work, and potentially created a chilling effect on religious expression in the scientific community. For these reasons, this Court should reverse the holding of the lower court and rule in favor of Dr. Nicholas on Respondents' Establishment Clause claim.

A. <u>This Court should overturn the lower court's ruling in favor of Respondents' Establishment Claim because it is not in keeping with the historical practice of balancing the Free Exercise Clause and the Establishment Clause.</u>

To determine if a state action implicates the Establishment Clause, courts must draw a line between what is and is not permissible that "accords with history and faithfully reflects the understanding of the Founding Fathers." *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014). Furthermore, the Establishment Clause does not implicate activity based on merely perception or discomfort. *Kennedy*, 142 S. Ct. at 2428. Instead, the Establishment Clause must be interpreted according to historical practice and understandings. *See Marsh v. Chambers*, 463 U.S. 783 (1983)

(holding that the Establishment Clause was not violated when a state legislature opened its session with a prayer because there was a long, and historical precedent for such conduct).

In *Kennedy*, this Court held that the Establishment Clause does not require the state to take a hostile stance to religion. *Kennedy*, 142 S. Ct. at 2416. *See also Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (holding public school regulations allowing students to miss school for religious purposes did not violate the Establishment Clause). A coach of a high school football team was fired for praying on the field after games. *Kennedy*, 142 S. Ct. at 2415. The school district argued that allowing the coach to publicly pray could be perceived as an endorsement by the school of the coach's religious beliefs. *Id.* at 2416. Although the lower courts sided with the school district, this Court overturned those rulings, holding that the Establishment Clause is not automatically violated if a school fails to stop private religious expression. *Id.* at 2427. Instead, this Court held the Establishment Clause does not require the state to eliminate "anything an objective observer could reasonably infer endorses or partakes of the religious." *Id.* at 2428. Adopting an approach that had been introduced in previous cases, this Court officially abandoned the *Lemon* test, holding that Establishment Clause claims should be reviewed under a historical lens that balances freedom of and freedom from religion. *Id.* at 2421.

The state may not refuse a public benefit to an otherwise eligible recipient solely because of the would-be recipient's religious character except for in the strictest circumstances. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2020). Furthermore, when the public benefit in question concerns government funding for religious schooling, the Establishment Clause concern is eliminated by the "independent and private choice of recipients". *Locke v. Davey*, 540 U.S. 712, 719 (2004). These holdings were decided in a pair of cases that reached opposite conclusion: in *Locke*, this Court held that a state program that provided funding to students of post-secondary

institutions could prohibit those funds from being used for the study of theology. *See id.* at 719-20. Conversely, in *Espinoza*, a state program that prohibited state-funded scholarships from being used at religious schools while allowing scholarships to be used at other private institutions was held to be unconstitutional. *See Espinoza*, 140 S. Ct. at 2254. Both Courts performed a historical analysis when reaching their conclusions. The *Locke* Court emphasized that the "historic and substantial state interest" against taxpayer money directly funding church leaders was one of the core underpinnings of the Establishment Clause. *Locke*, 540 U.S. 722, 724. In *Espinoza*, this Court held that the indirect transfer of state funding to private schools was well within the historical tradition of school funding as many state governments actively supported such policies since the Founding. 140 S. Ct. at 2258.

Similar to the respondent in *Kennedy*, Respondents are essentially requiring that Dr. Nicholas cease any outward expression of his religious beliefs in violation of this country's longstanding history supporting the free exercise of religion. It is undisputed that Dr. Nicholas's research suggests a potential connection to the Meso-Pagan faith. However, the precedent set by the *Kennedy* decision makes it clear that Respondents are not required to distance themselves from Dr. Nicholas's research solely because of this religious tie. Instead, Respondents are required to balance its responsibility to refrain from sponsoring a religion with Dr. Nicholas's right to freely practice his faith like the petitioner in *Kennedy*. Respondents' demand that Dr. Nicholas ignore the scientific findings of his work in order to cherry-pick results that don't create a perception of religiosity is wholly unreasonable and not in keeping with the standards of the scientific community or First Amendment protections under the Constitution.

Additionally, based on the precedent set in *Espinoza* and *Locke*, Dr. Nicholas's grant does not violate the Establishment Clause. Similar to the funding in *Espinoza*, Dr. Nicholas's use of his

research to become a Sage in the Meso-Pagan faith is too far removed from what the Founding Fathers intended to prevent with the Establishment Clause. The research's main purpose was to provide scientifically objective observations of the Pixelian Event—Dr. Nicholas's intended use of the research to become a sage is merely secondary to this purpose. This can be distinguished from *Locke* where the state funds at issue served one purpose: to provide for the religious education of the student who received the scholarship. Because Dr. Nicholas's research was funded in a manner consistent with historical practices and this Court's past precedent, the lower court's ruling in favor of Respondents' Establishment Clause claim should be overturned.

B. Although relying on abandoned precedent established by the *Lemon* Test, several cases that offer precedential value for evaluating state funding within a religious context demonstrate that Dr. Nicholas's research of the Pixelian Event does not violate the Establishment Clause.

A historical review of the Establishment Clause by this Court confirms the Founding Fathers strong opposition to the state directly providing any type of funding to a religious affiliated institution. *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947). Therefore, despite this Court disavowing *Lemon* with its holding in *Kennedy*, there are several post-*Lemon*/pre-*Kennedy* cases that are instructive to the specific issue of state funding under the Establishment Clause. These cases stem from *Lemon's* key premise that the appropriate line of separation between church and state is "far from being a wall" and instead "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614. The *Lemon* test requires state action to have a secular purpose and that the primary effect of the action doesn't promote or inhibit religion based on the following factors: 1) the action doesn't result in state-sponsored religious indoctrination; 2) the state action doesn't define its participants by reference to religion, and 3) the action doesn't create excessive entanglement between church and state. *Agostini*, 521 U.S. at 222-23.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017), this Court held that publicly available grant money cannot be conditioned on whether a recipient is willing to renounce their religious status. The petitioner in *Trinity Lutheran* was a preschool and daycare center that engaged in religious programming. *Id.* at 454. The center was denied a publicly available grant from the state that would have allowed playground surfaces at the center's playground to be resurfaced with recycled tires. *Id.* at 453. The state had a policy of categorically denying funding to religious organizations to prevent a violation of the state's antiestablishment principle in its constitution. *Id.* at 450. This Court emphasized that separation of church and state under the Establishment Clause was limited by the Free Exercise Clause, ultimately holding that placing a condition upon a benefit or privilege conferred by the state based on religious status could infringe on religious freedoms. *Id.* at 466, 464.

Additionally, in *Mitchell v. Helms*, 530 U.S. 793 (2000), this Court held that providing state aid to religious schools in the form of equipment and materials did not violate the Establishment Clause. Under a federal program, states received funding to provide equipment and materials to both public and private schools. *Id.* at 801. The aid provided to schools included books, computers and software, projectors and screens, lab equipment, etc. *Id.* at 803. The program was challenged, alleging that disbursements of funds to religious schools violated the Establishment Clause. *Id.* at 801. In a plurality opinion, Justice Thomas wrote that so long as a recipient of state funding furthers the state's secular purpose, the religious nature of the recipient does not implicate the Establishment Clause. *Id.* at 827.

When analyzing an Establishment Clause claim in education, potential religious conflicts with colleges and universities are viewed less stringently than those in elementary or secondary schools. *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). At issue in *Tilton* was federal aid provided

to religious colleges for the construction of academic facilities. *Id.* at 674. Taxpayers sued, claiming the funding was a violation of the Establishment Clause while the religious colleges argued they only used the new facilities for secular educational purposes. *Id.* at 676. Utilizing the factors of the *Lemon* test, this Court held that the funding had not violated the Establishment Clause: the Act had a secular purpose that was complied with by the colleges. *Id.* at 680 This Court also rejected the premise that religious and secular educational functions are inseparable. *Id.* The funding did not promote religion because this Court reasoned that college students are less impressionable and less susceptible to religious indoctrination when compared to elementary or secondary school students, thereby reducing the risk the state would be seen as actively supporting religion. *Id.* at 686.

Respondents' attempts to condition Dr. Nicholas's Grant on his willingness to denounce his faith does not comport with this Court's clearly established precedent. Similar to the respondents in *Trinity Lutheran*, Respondents have created an imbalance between the Establishment Clause and Free Exercise Clause when awarding the Grant by discriminating based on Dr. Nicholas's religious ties. As illustrated by this Court's decision in *Trinity Lutheran*, Respondents need not prevent Dr. Nicholas from practicing his faith to throw off the balance between free exercise and establishment—it is enough that Respondents are attempting to deny Dr. Nicholas the benefits of the Grant that would otherwise be available to him if he presented himself in a secular manner.

Because of the nature of the funding provided by the Grant, Dr. Nicholas's research and conclusions about the Pixelian Event does not violate the Establishment Clause. Similar to the petitioners in *Mitchell* and *Tilton*, Dr. Nicholas was granted the use of equipment, supplies, and facilities which he also used for a secular purpose: to research and draw objective, scientific

conclusions regarding the Pixelian Event—not to promote the Meso-Pagan faith. Thus, there is no reasonable inference that Respondents have promoted Dr. Nicholas's religious beliefs: 1) Dr. Nicholas's work is through a university and as held by this Court in *Tilton*, this setting creates a very unlikely chance that any potentially religious activity will result in indoctrination; 2) The grant Dr. Nicholas received was not premised on any type of religious affiliation; and 3) There is no excessive entanglement between Respondents and religion because Dr. Nicholas's grant was for a brief period of only two years. Because Dr. Nicholas's research passes offshoots of the *Lemon* test specific to state funding of religion, this Court should overturn the lower court's holding in favor of Respondents' Establishment Clause claim.

C. **The coercion test, while still valid law after the *Kennedy* decision, is not particularly applicable to this case because it concerns a positive act. However, its treatment by this Court provides insight into the potentially chilling effect that Respondents' actions could have on research within the scientific community.**

This Court has routinely held that the First Amendment prohibits the state from demanding a positive, expressive act from its citizenry, whether it be through compelled speech or coerced religious participation. *See, e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (forcing private, crisis pregnancy centers to post notices in their clinics amounted to compelled speech and was unconstitutional under the First Amendment's Free Speech clause); *Lee*, 505 U.S. at 587 (holding that the Establishment Clause forbids the state from coercing anyone into supporting or participating in a religious exercise); *Engel v. Vitale*, 370 U.S. 421 (1962) (a state law allowing school sponsored prayer, even though optional, was considered coercive and a violation of the Establishment Clause). Conversely, this Court has held that a state must be careful to not create a chilling effect on individual conduct when looking to prohibit certain types of undesirable expression in freedom of speech cases. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965) (prosecuting civil rights organizations under a state subversion statute created a chilling

effect on the organization's freedom of speech and thus, was unconstitutional); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473 (2013) (the state has created a chilling effect when it creates an environment which discourages individuals from engaging in expressive conduct). This Court has never expressly recognized that the state can create a chilling effect on an individual's religious expression in the context of an Establishment Clause claim. However, the similarities between speech and religious expression create a compelling argument for the adoption of precedent for the chilling effects on speech to religious claims under the Establishment Clause and to serve as a complement to the current caselaw analyzing coerciveness.

In the same way that state action can chill speech, Respondents have chilled Dr. Nicholas's religious expression by requiring him to essentially denounce his religion to maintain his professional reputation. In doing so, Respondents have failed to distinguish Dr. Nicholas's personal religious beliefs and goals from his independent, scientifically sound research. Yes, Dr. Nicholas has a personal desire to deepen his religious ties to the Meso-Pagan faith through becoming a Sage. However, this information is not relevant when examining Dr. Nicholas's competency as an astrophysicist for the purposes of the Grant. He has continually been recognized as one of the top researchers in his field and his research of the Pixelian event complied with the terms of the Grant from a technical perspective (even though Respondents would argue otherwise). Respondents' hostile response to Dr. Nicholas might also disincentivize other members of the scientific community from freely engaging in religious expression out of fear that their research will also be stripped of state funding. To prevent this chilling effect on both Dr. Nicholas and the scientific community at large, this Court should reverse the lower court's ruling in favor of Respondents' Establishment Clause claim.

This Court's approach to addressing Establishment Clause claims is complex and everchanging; however, one concept has stood the test of time: an individual's right to practice their faith should not be sacrificed at the altar of the First Amendment in favor of state-sponsored secularism. Failing to strike the delicate balance between religion and non-religion sends the chilling message that an individual must abandon certain core principles to take advantage of full benefits offered by the state. Respondents' funding of Dr. Nicholas's research was indirect, not intended to advance a state-sponsored view of religion, and squarely within the type of conduct that this country has historically allowed for centuries. Therefore, this Court should overturn the lower court's ruling in favor of Respondents' Establishment Clause claim.

CONCLUSION

For the foregoing reasons, the conditions Respondents placed on the Grant are unconstitutional and the subsequent revocation of the Grant from Dr. Nicholas is an unconstitutional consequence of his freedom of speech. Further, Respondents cannot claim its avoidance of an Establishment Clause issue as a reason to burden Dr. Nicholas's speech — his conclusions about the Pixelian Event — that correlate to Meso-Pagan faith. Wherefore, Dr. Nicholas's relief should be granted, and the judgment of the Fifteenth Circuit Court of Appeals should be reversed.

Signed,

/s/ Team 21

Counsel for Petitioner

APPENDIX A: CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. I.
Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CERTIFICATE OF COMPLIANCE

We hereby certify that:

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

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

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

Signed,

/s/ Team 21

Counsel for Petitioner