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 FOR PETITIONER

Team 23
Counsel for Petitioner

QUESTIONS PRESENTED

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

II. Whether a state-funded research study violates the Establishment Clause when its principal investigator suggests the study's scientific data supports future research into the possible electromagnetic origins of Meso-Pagan religious symbolism and that investigator has also expressed an interest in using the study to support his religious vocation.

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JURISDICTION

The Fifteenth Circuit Court of Appeals entered judgment on March 7, 2024. Petitioner filed a petition for writ of certiorari, which the Supreme Court granted. The Supreme Court has proper jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Dr. Cooper Nicholas, Ph.D., holds undergraduate degrees from Delmont University in astronomy and physics, in addition to a doctoral degree from The University of California, Berkeley, in astrophysics. R. at 3. His work has set him apart as one of the premier scholars in the field of observational astrophysics, and he has been widely published in this field. R. at 3.

In the fall of 2021, Dr. Nicholas was awarded a state-funded Astrophysics Grant by the University of Delmont, to run from March of 2022 until March of 2024, giving him access to Delmont University's GeoPlanus Observatory to study the Pixelian Comet, which was set to appear in the spring of 2023. R. at 4-6. Delmont University received a large number of applications for this position, and Dr. Nicholas was chosen due to his "eminence in the field and his reputation as a wunderkind with intuitive, often ground-shifting observations." R. at 5. The language of the Astrophysics Grant mandated that the study of the so-called "Pixelian Event" and Dr. Nicholas' subsequent conclusions "conform to the academic community's consensus view of a scientific study." R. at 5.

After nine months of research in preparing for the Pixelian Event, Dr. Nicholas published an article in the journal *Ad Astra* in which he concluded that "something momentous was occurring in the galaxy," generating excitement in the scientific community. R. at 6.

After the Pixelian Event, Dr. Nicholas sought again to publish his findings in *Ad Astra*. R. at 6. His new article supported the widely-debated Charged Universe Theory and stated that his findings were consistent with tenets of the Meso-Pagan faith. R. at 7. Dr. Nicholas, a devout Meso-Paganist himself, agreed to have his article prefaced with an editorial essay distancing the journal from Dr. Nicholas' findings; he stated that "his focus was on studying the Pixelian event from a scientific perspective" and that "he was open to whatever findings were the result, regardless of their religious implications." R. at 8.

After receiving some amount of backlash from the public, Delmont University, by and through its President, Miriam Seawall, wrote Dr. Nicholas a letter reminding him of the grant's condition that he conform his views to the scientific community's consensus view of what constitutes a scientific study and threatening to take away his funding if he did not conform. R. at 9-10. Dr. Nicholas refused, leading to a back-and-forth of letters and emails between Dr. Nicholas and President Seawall. R. at 10-11.

Finally, President Seawall gave Dr. Nicholas an ultimatum for conforming his conclusions to the grant condition. R. at 11. Dr. Nicholas refused, and the next day, he was denied admittance to the school's observatory. R. at 11. Dr. Nicholas then filed this suit against Delmont University and the State of Delmont on February 5, 2024. R. at 12.

SUMMARY OF ARGUMENT

Dr. Cooper Nicholas has a constitutional right to freedom of speech. If a governmental body wishes to restrict that constitutional right, that governmental body bears the burden of demonstrating that the restriction is justified. Delmont University and the State of Delmont have made no such demonstration.

The grant requirement in question does not fall into the "time, place, or manner" category of exceptions. It is also a content-based restriction on speech, which triggers strict scrutiny. The requirement is content-based because it draws a distinction based on the message being conveyed. The State of Delmont decided that they did not like the message that Dr. Nicholas was conveying, so they tried to stop him – this is classic content-based speech restriction. The State chose a specific view on a matter, namely the academy's view of what is scientific, and they enacted a requirement restricting speech that does not conform to their chosen view. As this is a content-based restriction, the government bears the burden of meeting the strict scrutiny standard.

The restriction fails strict scrutiny because it neither advances a compelling governmental interest nor is it narrowly tailored to any such interest if one exists. Addressing public confusion between science and religion does not rise to the level of a compelling governmental interest as demonstrated in case law. The State has also made minimal efforts to address this purportedly compelling interest in any other way, suggesting that it is not such a compelling interest at all. Even if this was a compelling governmental interest, the restriction is not narrowly tailored to achieving that interest. The restriction finds a way to be both underinclusive and overinclusive, demonstrating resoundingly that it is not narrowly tailored. Thus, the grant restriction fails strict scrutiny.

The government is also mistaken in its assertion that any of this constitutes government speech. The attenuation removes this possibility: once Delmont University pays Dr. Nicholas, any speech he makes after that is his own as a private actor. This is not government speech.

No Establishment Clause concerns arise from either the release of Dr. Nicholas' conclusions or his continued research. When the Court hears Establishment Clause cases, it repeatedly looks to history as a guide. Considering the history of the Establishment Clause as it relates to this case, the hypothetical harm that the State is worried about is not comparable to the harms that the Founders were concerned with when drafting the First Amendment. Historical analysis demonstrates that Dr. Nicholas' conclusions would not lead to an Establishment Clause violation.

Based on the plain language of the First Amendment and recent Supreme Court precedent, this would not create an Establishment Clause violation. A governmental establishment of religion is not created every time there is some slight interaction between church and state. The concerns that the State raises here are far removed from the types of state establishments of religion that the Supreme Court has struck down in the past, and the release of Dr. Nicholas' conclusions would not lead to any Establishment Clause violation.

Further, this requirement imposes an inappropriate restriction on Dr. Nicholas' rights under the Free Exercise Clause of the First Amendment. The State's attempt to rely on its Establishment Clause concerns to justify this is misguided: the protections of the First Amendment work together, not on opposite sides; the State cannot satisfy one constitutional right at the expense of another. The interplay of the protections of the First Amendment provides further evidence that the grant requirement is unconstitutional.

Finally, the Fifteenth Circuit granted an inappropriate degree of deference to Delmont University on this issue. They ultimately decided that Delmont University itself was the arbiter of whether or not it itself committed an Establishment Clause violation. While some deference is allowable to public universities, this represents the Fifteenth Circuit giving Delmont University *carte blanche* to do the job of the judiciary for the judiciary. The decision as to whether or not a constitutional violation has taken place should always lie in the hands of the federal judiciary. There exists no cause for concern related to the Establishment Clause in this case.

ARGUMENT

I. Delmont University's Grant Requirement Places an Unconstitutional Condition on Dr. Nicholas' Speech.

The First Amendment of the United States Constitution prevents the government from "abridging the freedom of speech." U.S. CONST. amend. I. This freedom protects every American citizen, "putting the decision as to what views shall be voiced largely into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971). The First Amendment also demands protection of less popular, non-consensus views, "for popular ideas have less need for protection." *Mahanoy Area Sch. Dist. v. B.L. by and through Levy*, 141 S.Ct. 2038, 2046 (2021).

In the case at issue here, the State of Delmont unconstitutionally restricted Dr. Cooper Nicholas' speech in an attempt to prevent him from effectuating speech that they deemed to go against the scientific community's consensus views. The speech that Dr. Nicholas attempted to convey after countless hours of research is exactly the type of speech that the First Amendment was designed to protect. Here, the State's restriction oversteps the bounds of the First Amendment and unconstitutionally limits Dr. Cooper Nicholas' speech.

The First Amendment prohibits the government from "dictating the subjects about which persons may speak and the speakers who may address a public issue." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). In particular, if the governmental limitation on speech "suggests an attempt" to advantage one side of a debate over another, the constitutional right to freedom of speech is "plainly offended." *Bellotti*, 435 U.S. at 785-86.

Here, the very language of the grant itself suggests such an attempt; the grant requires that Dr. Nicholas' conclusions "conform to the academic community's consensus view." R. at 5. Requiring published conclusions to conform to a specific view advantages that view over others, plainly offending the constitutional right to freedom of speech.

When the government limits speech, the government bears the burden of demonstrating that its actions are justified. *Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535 (1980). The Supreme Court in *Consolidated Edison Co. of N.Y.* outlined three theories that can justify such a state action. *Id*. The Court considered whether the restriction was "(i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest." *Id*. The Court should apply the same test here to determine whether the State of Delmont's limitation on Dr. Nicholas' speech is justified.

Following the *Consolidated Edison* framework, the State of Delmont's limitation on Dr. Nicholas' speech is not justified because (A) it is not a reasonable time, place, or manner restriction, (B) it is not a permissible subject-matter regulation, and (C) it is not narrowly tailored to serve a compelling governmental interest. Because the State cannot justify its restriction via

any of these three avenues, its restriction on Dr. Nicholas' speech is unconstitutional. Further, the release of Dr. Nicholas' results does not constitute government speech.

A. The Grant Requirement is Not a Reasonable Time, Place, or Manner Restriction.

The State's limitation on Dr. Nicholas' speech is not a reasonable time, place, or manner restriction. However, Supreme Court jurisprudence since *Consolidated Edison* renders this prong of the test moot. Under the *Consolidated Edison* three-part test above, if a restriction on speech is found not to be a reasonable time, place, or manner restriction, the analysis moves to the second prong: whether it is a permissible subject-matter regulation. More recent Supreme Court opinions have mandated that even reasonable time, place, or manner restrictions must be content-neutral to avoid strict scrutiny, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), requiring that these restrictions have "nothing to do with content." *Id*. at 792 (quoting *Boos v. Barry*, 485 U.S. 312, 320 (1988)). Thus, whether this is a reasonable time, place, or manner restriction or not, the analysis must shift next to whether the restriction is a permissible subject-matter restriction. Petitioner maintains that the State's mandate is not a time, place, or manner restriction at all, as it focuses on the conclusions themselves, rather than the time, place, or manner in which they are relayed to the public. However, whether the Court agrees with that statement or not, the analysis must shift to the question of whether this is a permissible subject-matter restriction.

B. The Grant Requirement is a Content-Based Restriction, Triggering Strict Scrutiny.

The State's limitation on Dr. Nicholas' speech is a content-based restriction. The government "has no power to restrict expression because of its … content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). A government restriction on speech is a content-based restriction if it "applies to particular speech because of the topic discussed or the idea or

message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The consideration that must be made under this doctrine is whether the restriction "draws distinctions based on the message a speaker conveys." *Id*. (citing *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2664 (2011)); restrictions that do so are facially content-based.

The State's restriction on Dr. Nicholas' speech is content-based because it only applies to Dr. Nicholas' speech because of the message he is conveying; the restriction "draws distinctions" based on his message. *Ibid*. The restriction does not explicitly say that Dr. Nicholas cannot convey Meso-Paganist concepts in his speech, but it does apply differential treatment to any message that is not in line with what they describe as the 'consensus view of the scientific community.' The fact that the restriction does not single out viewpoints within that umbrella does not make this any less of a subject-matter restriction. This Court has already determined that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980).

In 2020, the Court heard a free speech case regarding the legality of certain types of robocalls. *Barr v. American Ass'n of Pol. Consultants, Inc.*, 140 S.Ct. 2335 (2020). Justice Kavanaugh put the analysis there simply: "A robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. That is about as content-based as it gets." The same logic solves the problem here. A message that says, "The scientific community is correct" is allowed. A message that says, "The scientific community is incorrect" is disallowed. That is about as content-based as it gets.

The Fifteenth Circuit relied on *Rust v. Sullivan* in holding that the State's restriction is not viewpoint discrimination. 500 U.S. 173 (1991). The analogy between *Rust* and the case at issue

is misguided. There, the Court upheld the restriction on speech by framing it as "a prohibition on a project grantee … from engaging in activities outside of the project's scope." *Rust*, 500 U.S. at 194. Here, instead, the State's condition prohibits the project grantee, Dr. Nicholas, from expressing certain conclusions while engaging in activities within the project's scope. In performing research and reaching conclusions that happen to push back against the scientific consensus of the time, Dr. Nicholas engages in activities well within the scope of the grant; he simply attempts to convey a message that the State does not like. This is viewpoint discrimination in its simplest form, and it is not analogous to *Rust*. The State's restriction on Dr. Nicholas' speech is content-based on its face.

Even if the Court finds the State's restriction to be facially content-neutral, it is still an unjustifiable subject-matter restriction. The Court has recognized a "separate and additional category of laws" that are considered content-based even if they are facially content-neutral. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015). This category is made up of "laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message.'" *Ibid*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The State here does not even attempt to justify its restriction without reference to the content of Dr. Nicholas' speech. Delmont University's President herself stated that they "decided to align [themselves] with the academy's consensus view of the scientific enterprise." R. at 53. This is, in the State's own words, a decision to align with a certain view, and it is a decision achieved by restricting speech; thus, this is a content-based restriction.

C. The Grant Requirement Fails Strict Scrutiny and is Unconstitutional.

Content-based restrictions, such as this one, are "presumptively unconstitutional." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). In order to justify a presumptively unconstitutional content-based restriction, the government must demonstrate that the restriction is "narrowly tailored to serve compelling state interests." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). The government's burden is a heavy one in these cases; government actions that constitute viewpoint discrimination are subject to what has been called "strict scrutiny on steroids," leading to these types of restrictions being "almost always dead on arrival when subjected to judicial review." Rodney A. Smolla, SMOLLA & NIMMER ON FREEDOM OF SPEECH 2:64 (2000). Based on the *R.A.V.* case and its progeny, in order for the State of Delmont to justify its restriction on Dr. Nicholas' speech, the State must demonstrate that it is (1) attempting to serve a compelling state interest and (2) that its restriction is narrowly tailored to achieving this interest. 505 U.S. at 395. The State has failed to make either showing in this case, and the restriction on Dr. Nicholas' speech is unconstitutional.

1. Delmont University and the State of Delmont Have Not Demonstrated a Compelling State Interest Under the *R.A.V.* Strict Scrutiny Test.

The State's restriction on Dr. Nicholas' speech fails to meet the strict scrutiny standard because there exists no compelling state interest motivating the restriction. The Fifteenth Circuit only referenced one possible state interest: addressing public confusion between science and religion. This is not a compelling state interest under the *R.A.V.* strict scrutiny test, and the State's restriction is thus unconstitutional.

The Supreme Court has found some types of government interests to be compelling. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 729 (2000) (protecting medical patients in vulnerable

physical and emotional conditions); *Sable Commc'ns of Ca., Inc. v. FCC*, 492 U.S. 115, 116 (1989) (preventing minors from being exposed to obscene messages). However, many legitimate governmental interests have failed to meet the exacting standard to be considered "compelling" for First Amendment purposes. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that universal compulsory education is not a compelling governmental interest). Addressing potential future confusion among the public between science and religion fails to rise to the level of a compelling state interest based on this Court's First Amendment jurisprudence.

As the Court outlined in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, "where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." 508 U.S. 520, 546-47 (1993). The State of Delmont's grant condition acts only to confine Dr. Nicholas' speech, so because the State has made no showing of any attempts to restrict other conduct that might produce 'harm of the same sort,' their claimed interest is not compelling for First Amendment purposes.

The State cannot silence this potentially religiously-motivated speech under the guise of advancing legitimate state interests. State actions which "advance[] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id*., 508 U.S. at 546. The case at bar is not one of these rare cases. For lack of a compelling governmental interest, the State's restriction on Dr. Nicholas' speech cannot survive strict scrutiny and is thus unconstitutional.

2. The Grant Requirement is Not Narrowly Tailored Under the *R.A.V.* Strict Scrutiny Test.

Even if the Court disagrees and finds addressing public confusion between science and religion to be a compelling governmental interest, the State's restriction on Dr. Nicholas' speech still fails strict scrutiny because it is not narrowly tailored to address this interest. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). To satisfy this prong of strict scrutiny, the government must employ "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Even if one considers addressing public confusion between science and religion to be a compelling state interest, the State did not employ the least restrictive means of achieving this interest, so the State's restriction is nonetheless unconstitutional.

Narrow tailoring for First Amendment purposes requires the avoidance of being either underinclusive or overinclusive. The State's restriction on Dr. Nicholas' speech is in different ways both underinclusive and overinclusive.

That a restriction cannot be underinclusive means that the restriction cannot purport to be narrowly tailored toward achieving a governmental interest and then simultaneously let other harms to that same interest carry on. Indeed, a "law cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). Here, the State's restriction is underinclusive because they let similar harms go on uninhibited despite claiming that these harms go against a compelling governmental interest. Dr. Nicholas was not the only academic at Delmont University attempting to effectuate speech with some religious

underpinnings in his work. In fact, Dr. Nicholas' colleagues at Delmont University referenced various pagan writings in their own works. R. at 58.

That a restriction cannot be overinclusive means that the restriction cannot, in an attempt to achieve a legitimate governmental interest, simultaneously restrict speech that does not relate to that interest. Under the *R.A.V.* test, the restriction must be "narrowly tailored," 505 U.S. at 395, which is why the *McCullen* Court dictated that the "least restrictive means" be used in achieving these interests. 573 U.S. at 478. Here, the State fails to narrowly tailor the means to its purportedly compelling end. The State's restriction requires Dr. Nicholas' speech to "conform to the academic community's consensus view of a scientific study." R. at 10. It makes no mention of religion or public confusion, and it uses this phrase which includes all sorts of speech, whether it is related to religion or not. Under this condition, Dr. Nicholas could not effectuate speech related to his conclusions that was debatably "scientific" according to the consensus view of the community, even if it was completely secular, because it would not conform to the academy's consensus views. There exists no reasonable argument to support a claim that forbidding secular speech might actually further the government's alleged interest in addressing public confusion between science and religion. Thus, this is an overinclusive restriction, and it is not narrowly tailored to achieving the state's purported interest. The restriction fails to meet the strict scrutiny standard.

D. The Release of Dr. Nicholas' Results Would Not Constitute Government Speech.

The Fifteenth Circuit also erred in not considering the grant awarded to Dr. Nicholas to be a facilitation of private speech. Although government funds were involved, this was never intended to be government speech. Public universities cannot enact viewpoint-based restrictions on speech "when the University does not itself speak or subsidize transmittal of a message it

favors but instead expends funds to encourage a diversity of views from private speakers." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995). Here, Delmont University did not choose a view and decide to speak on it but rather it made funds available to a variety of private speakers who could have reached any conclusion about the Pixelian Event. If Delmont University really had one view that they wanted to express as government speech, there would have been no reason to spend thousands of dollars to create the grant in the first place. Although government funds were involved, this was not government speech, and the First Amendment still prevents the State from enacting a content-based restriction on speech that cannot hold up under strict scrutiny. *See id*.

II. Delmont University and the State of Delmont Face No Establishment Clause Concerns as a Result of Dr. Nicholas' Research.

The Establishment Clause of the First Amendment of the Constitution states in relevant part that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. Delmont University and the State of Delmont claim that allowing Dr. Nicholas to continue his research and publicize his conclusions would create an unconstitutional governmental establishment of religion. This logic is misguided when one considers (A) the history of the Establishment Clause, (B) the actual effect of Dr. Nicholas' actions, (C) the interplay of the First Amendment protections, and (D) the reasonable scope of deference in these types of cases.

A. The History of the Establishment Clause Supports Dr. Nicholas' Claim.

When the Court considers challenges brought under the Establishment Clause of the First Amendment, it "looks to history for guidance." *American Legion v. American Humanist Ass'n*,

139 S.Ct. 2067, 2087 (2019). In many Establishment Clause cases, the Court has "review[ed] the background and environment of the period in which that constitutional language was fashioned and adopted." *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 8 (1947). Even the most recent Establishment Clause cases in this new era of jurisprudence have stood by this approach. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535-36 (2022) ("[T]his Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'") (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014)).

In *Everson*, Justice Black spent considerable time describing the types of evils that the Establishment Clause was enacted to prevent, beginning with the earliest American settlers' disdain for European "laws which compelled them to support and attend government favored churches." 330 U.S. at 8-9. The ultimate goal of enacting the Establishment Clause was to set up a division between church and state. *Id*. at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). Case law since the founding has clarified the scope of this division to where the concept of separation of church and state does not always mean the complete separation of the two "in every and all respects." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). A common sense reading of this case law next to the Founders' goals suggests that separation of church and state as a concept is mainly centered around preventing laws like those European ones described above from ever being enacted in the United States.

If Dr. Nicholas was to deliver the results of his research with some reference to his Meso-Paganist faith, it would not create a situation even remotely like the ones that the Founders were concerned about in the eighteenth century. While it would not be an Establishment Clause violation to begin with, as discussed below, what the State is suggesting would not even mirror

what the drafters of the First Amendment considered to be a potential Establishment Clause violation. History is critical when it comes to Establishment Clause jurisprudence, and history favors Dr. Nicholas here; there would be no impermissible government establishment of religion were he allowed to carry out the rest of his research.

B. The Public Release of Dr. Nicholas' Conclusions Would Not Create an Establishment Clause Violation.

If and when Dr. Nicholas continues his research and publishes his findings with some amount of religious underpinnings, this will not create a government establishment of religion in violation of the Establishment Clause of the First Amendment. As incorporated to the states, the Establishment Clause disallows governmental actions which have the "'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (quoting *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). Here, Delmont University would certainly not be funding Dr. Nicholas' research for the 'purpose' of advancing religion, so the analysis turns on whether it would have that 'effect.' Supreme Court jurisprudence interpreting this doctrine demonstrates that the actions would not have the dangerous effects contemplated by *Zelman*. Therefore, there would be no governmental establishment of religion at all.

Zelman itself is enlightening here. In that case, an Ohio program gave tuition aid to students in districts that had been taken over by the state. Religious and nonreligious schools alike participated in this program, and the parents ultimately chose what type of school to send their children to with this government tuition aid in hand. The ruling in that case which upheld Ohio's program despite Establishment Clause challenges rested on the fact that the program was one "of true private choice." *Id*. at 653. The Court went through several similar cases and relied

on these same themes, *see Mueller v. Allen*, 463 U.S. 388 (1983), emphasizing that their "focus again was on neutrality and the principle of private choice." *Zelman*, 536 U.S. at 652.

Dr. Nicholas' speech similarly would not constitute a government establishment of religion because of the attenuation between the outlay of State funds and the private actions which the State claims would constitute a government establishment of religion. Delmont University provided funds to the grant program, Dr. Nicholas received those funds as a result of earning the grant, Dr. Nicholas conducted unbiased, scientific research, and he came to conclusions. The logical step in between the outlay of funds and the pronouncement of the conclusions removes any doubt about whether or not there would be a government establishment of religion: there would be no such establishment. *See id*.

The State argues that the effect of Dr. Nicholas' conclusions would be the advancement of religious goals, spoken from a governmental perspective. The Supreme Court's Establishment Clause jurisprudence does not support this argument. Once the government disburses the money, what a recipient chooses to do with it is the choice of that recipient; it is not governmental action. *See id*. at 652. Indeed, this Court has opined in plain English that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Ibid*. This again comes back to the critical factor in Establishment Clause analysis: history. The evil which the Founders sought to remedy was government-sponsored religious establishments, not the complete separation of church and state "in every and all respects." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970) (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). Links in the logical chain between government outlay of funds and the alleged religiously-affiliated conduct remove these Establishment Clause

concerns because the government's ability to influence the conduct ends after the disbursement of funds. *Mitchell v. Helms*, 530 U.S. 793, 810 (2000). In the case at bar, the speech and actions relating to the scientific conclusions were all attributable to Dr. Nicholas. Just as in *Mitchell*, the attenuation between the outlay of funds and the alleged religiously-affiliated conduct removes any reasonable concerns about governmental establishment of religion. *Ibid*. The State chose to disburse funds to Dr. Nicholas, he conducted his research, he reached his conclusions, and now he wishes to publicize them; there is nothing that he could say to create a governmental establishment of religion because at this point in the logical chain, the speech and actions are entirely his own and not attributable to the State.

Mitchell also dictates that a lack of consideration of religion in the decision to outlay funds removes Establishment Clause concerns from the start. *Id*. at 809. Indeed, the *Mitchell* Court guides that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Ibid*. The inverse of this statement is what the Founders were trying to prevent in enacting the Establishment Clause: religious indoctrination of citizens at the behest of the government. Dr. Nicholas received the grant as the result of an arduous, thorough selection process, in which several accomplished scientists were considered, regardless of any faith to which they may proscribe. The "religious, irreligous, and areligious [were] all alike eligible" for the grant, *ibid*., so *Mitchell* controls and dictates that any perceived Establishment Clause harms that might arise out of the results of the grant cannot be reasonably attributed to the government itself. *Ibid*.

The Court's recent landmark decision in *Kennedy v. Bremerton School District* is instructive here. 597 U.S. 507 (2022). There, a public school district attempted to prevent a high

school football coach from kneeling to pray on the football field before games in an attempt to avoid creating a governmental establishment of religion. *Id*. Justice Gorsuch conducted a similar analysis to the one just discussed, and he reached a similarly correct conclusion: this private action by the football coach did not create an impermissible governmental establishment of religion. *Id*. A key takeaway from that case is that there is no duty for a governmental entity to prevent private actors from religious speech, even if they have Establishment Clause concerns. *Id*. at 534-35. Justice Gorsuch explained that "[a]n Establishment Clause violation does not automatically follow whenever a … government entity 'fail[s] to censor' private religious speech." *Ibid*. (quoting *Board of Ed. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). There, if the school district had not censored the football coach's speech, there still would have been no Establishment Clause violation. *Id*. Similarly, here, Delmont University seeks to prevent a harm that does not exist. If they simply leave Dr. Nicholas alone to come to his own conclusions and deliver them how he sees fit, there will be no governmental establishment of religion, even if his speech rises to the level of 'private religious speech.' Delmont University's actions against Dr. Nicholas cannot be justified under the guise of the Establishment Clause because there are no legitimate Establishment Clause concerns in the first place. The State here over-regulates speech in hopes of avoiding a nonexistent harm.

C. The State's Grant Requirement Further Violates Dr. Nicholas' First Amendment Right to Free Exercise.

In erroneously relying on the Establishment Clause in an attempt to justify its condition, the State stomps all over another First Amendment principle: Dr. Nicholas' right to free exercise. The First Amendment, while also preventing the government from abridging freedom of speech or creating an establishment of religion, provides that "Congress shall make no law …

prohibiting the free exercise [of religion]." U.S. CONST. amend. I. The provisions of the First Amendment do not operate as three distinct clauses so much as they operate as a unit, protecting each of these rights in coordination with each other; the three Clauses have "'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." *Kennedy*, 597 U.S. at 532-33 (citing *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 13, 15 (1947)). Here, the State effectively claims that it is justified in limiting Dr. Nicholas' rights under the Free Exercise Clause in an attempt to avoid violating the Establishment Clause; this is a fundamental misunderstanding of how First Amendment jurisprudence operates. The State cannot limit Dr. Nicholas' right to free exercise in order to avoid an Establishment Clause violation, even if this were a legitimate Establishment Clause concern.

There is a push-and-pull, or "'play in the joints,' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)). In *Trinity Lutheran*, the Missouri Department of Natural Resources withheld otherwise-available government benefits from a school because the school was operated by a church. *Id*. at 453-54. The Court in *Trinity Lutheran* found this to be not only a non-issue as it related to the Establishment Clause but also an overstep infringing on the rights of the church under the Free Exercise Clause. *Id*. According to Chief Justice Roberts, policies such as this one "impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id*. at 462. The policy in that case failed to meet this exacting standard, and the condition in the case at bar likewise fails to do so. Delmont University's condition on Dr. Nicholas' grant puts him in a constitutional bind from which this Court should free him, wherein his constitutionally-proscribed religious "freedom comes at the cost of automatic and absolute exclusion from the

benefits of a public program for which [he] is otherwise fully qualified." *Ibid*. The State is telling Dr. Nicholas that, in order to continue to be eligible for this grant of public funds for which he is otherwise fully eligible, he must abandon any connections to his faith when announcing his scientific conclusions. This flies in the face of Supreme Court precedent and ignores the interplay among the First Amendment protections.

Kennedy is instructive yet again here. There, in the erroneous eyes of the school district, it "did not matter" that they were stepping on the football coach's rights to free exercise and free speech, 597 U.S. at 533, and they created a "self-imposed trap" between the different clauses of the First Amendment, escaping the "self-imposed trap" by violating the football coach's rights to free exercise and free speech. *Ibid*. This did not justify their actions, which were ruled unconstitutional. *Id*. In the case at bar, Delmont University has created for themselves a similar conundrum: they imagine that they cannot maintain Dr. Nicholas' rights to free exercise and free speech without violating their duties under the Establishment Clause, and they choose one over the other, leaving Dr. Nicholas without his constitutional rights. Unfortunately for the respondents in this case, that is not how First Amendment analysis works. They cannot choose to sacrifice Dr. Nicholas' First Amendment freedoms in favor of their own Establishment Clause concerns; this both violates the Constitution and only solves a problem that never existed in the first place. Dr. Nicholas has a right to free exercise of religion, a right to free speech, and a shared right with us all that the government not create an establishment of religion; just as in *Kennedy*, none of these need to be left behind. The grant condition is thus unconstitutional.

D. The Court of Appeals Granted Excessive Deference to Delmont University.

The Fifteenth Circuit posits that this grant condition was a university decision that is subject to significant deference from the judiciary. This view misunderstands the case law in this area and takes any amount of reasonable deference much too far.

The Fifteenth Circuit cites *Widmar v. Vincent* and the legitimate concern for not questioning a university's allocation of "scarce resources." 454 U.S. 263, 276 (1981). Here, however, this was no cost-cutting decision; in fact, Delmont University stood to make significant long-term profits from this research. While some amount of deference to budget allocation decisions at universities is reasonable and supported by cases like *Widmar*, this concept is inapplicable in this case where scarcity of resources was irrelevant.

There also must be a distinction between deference and removing the judiciary from its role entirely. The Fifteenth Circuit declared that "[u]niversities are entitled to this kind of deference in choosing … when a certain study would run afoul of the Establishment Clause." R. at 49. If this conclusion is adopted by the Supreme Court, no federal judge will ever be able to hear an Establishment Clause case of this kind ever again. This would allow universities to be the arbiters of when they themselves violate the Establishment Clause. Apart from being unreasonable on its face, this would violate the axiom of *nemo judex in causa sua*, or 'no one is judge in their own case.' If citizens in the future are concerned about a study creating a governmental establishment of religion, they would have no recourse in the federal courts because the judge would simply be bound to defer to the defendants and dismiss the action every time. Deciding whether someone has violated the Constitution of the United States is not only a core function of the judiciary, but it is perhaps *the* core function of the judiciary and is certainly the reason why one was created in the first place. Deferring to universities to decide when they

themselves violate the Establishment Clause of the First Amendment is a dangerous precedent and seriously infringes on the rights of all Americans. The deference argument below is without merit.

CONCLUSION

The judgments of the Fifteenth Circuit Court of Appeals should be reversed.

CERTIFICATE OF COMPLIANCE

Team 23 hereby certifies that:

1. The work product contained in all copies of the Team 23's brief is in fact the work product of members of the team and members of the team alone.
2. Team 23 has fully complied with the team's law school's governing honor code.
3. Team 23 has fully complied with all Competition Rules.