Brief on the Merits

No. 23-CV-1981

In the Supreme Court of the United States

COOPER NICHOLAS,

Petitioner,

v.

DELMONT UNIVERSITY,

Respondent.

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

BRIEF FOR PETITIONERS

QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY AUTHORITIES

CONSTITUTIONAL PROVISIONS

OPINIONS BELOW

The order of the United States District Court for the District of Delmont Mountainside Division is reported in *Nicholas v. Delmont,* No. 23-CV-1981 (D.D. Delm. 2024) and can be found in the Record at 1-31.

The opinion of the United States Court of Appeals for the Fifteenth Circuit, reversing the lower court, is reported at *Delmont v. Nicholas*, No. 23-CV-1981 (15th Cir. 2024) and can be found in the Record at 32-51

JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit reversed the United States District Court for the District of Delmont Mountainside Division in favor of Respondent State of Delmont and Delmont University. This Court granted a petition for writ of certiorari to the Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

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.

STATEMENT OF THE FACTS

In January 2024, Petitioner Dr. Cooper Nicholas, Ph.D., (hereinafter "Dr. Nicholas") was locked out of an observatory and cut off from vital research for refusing to draw the conclusions Respondents wanted him to. R. at 11. Dr. Nicholas had been awarded a "highly sought after" Visitorship in Astrophysics to study the once-every-ninety-seven-years Pixelian Event from Respondent Delmont University's GeoPlanus Observatory. R. at 5. Dr. Nicholas's research and publications initially garnered the University much attention. R. at 5-6. But once he published an article unpopular with American scholars and press, the University cut off access to the observatory until he restated his agreement to only come to conclusions within the "academic consensus." R. at 11. Instead of capitulating, Dr. Nicholas brought this First Amendment action to get access to his research before it is lost forever and finalize and publish his ultimate conclusions on the Pixelian Event. R. at 11.

I. Dr. Nicholas is Awarded the Astrophysics Grant to Study the Pixelian Event.

Dr. Nicholas was born and raised in Delmont City, Delmont, and graduated summa cum laude from Delmont University with joint degrees in astronomy and physics. R. at 3. He received a doctorate in astrophysics from the University of California, Berkely, and, at just thirty-three years old, has quickly distinguished himself in the field of observational astrophysics through appointments, grants, and a leading treatise. R. at 3. He is even the scholar in residence at the Ptolemy Foundation, a scientific research organization in Nevada. R. at 3. Dr. Nicholas was raised by his parents primarily in the Meso-American culture and has adopted the Meso-Paganist faith as his own, calling his beliefs his "inspiration for entering astrophysics." R. at 4.

Central to Meso-Paganism is the study of the stars. R. at 4. Meso-Paganist Sages have long mapped celestial objects and trajectories in hopes of understanding humanity's "relationship with

cosmos." R. at 4. Sages also study ancient hieroglyphs to understand past celestial phenomena. R. at 4. These glyphs have been interpreted to display a "lifeforce"—an "animated linkage" between the cosmos and living creatures. R. at 4.

In Spring 2021, Dr. Nicholas applied for the University of Delmont's "Visitorship in Astrophysics," a state-funded position for studying the upcoming once-in-every-ninety-seven years appearance of the Pixelian Comet in the GeoPlanus Observatory. R. at 5. After a "rigorous, competitive" process, Dr. Nicholas was selected on the "objective criteria" of his distinction in the field and reputation as a "wunderkind." R. at 1, 39, 5. The University hopes the Observatory becomes "one of the foremost centers of celestial study in the world." R. at 5. In an effort to further that goal, the University broadly publicized Dr. Nicholas's return. R. at 5-6.

The Astrophysics Grant gives the "principal investigator," Dr. Nicholas's position, many benefits: salary, use of the Observatory, research assistants, incidental costs of studying the Pixelian Event, the costs of publishing academic articles related to the event, and the costs of a final monograph. R. at 5. The grant lasts from March 2022 to March 2024 and allows for researching data and drawing conclusions before, during, and after the Pixelian Event. R. at 5. Importantly, the grant requires that the study of the Pixelian Event and the drawing of conclusions "conform to the academic community's consensus view of a scientific study." R. at 5.

Before the Pixelian Event, from March 2022 to early 2023, Dr. Nicholas led a research team in many "widely accepted parameters" for measuring the cosmological environment where the Event was to take place. R. at 6. He published these measurements in *Ad Astra*, the "premier peer-reviewed journal in the field," and concluded that certain changes in the spectral array pointed to "something momentous" occurring. R. at 6. His conclusions were widely discussed and responded to by other scientists. R. at 6.

II. Dr. Nicholas's Second *Ad Astra* Article is Criticized.

Finally, in the Spring of 2023, with much fanfare, the Pixelian Event occurred. R. at 6. The Event was closely covered by the media internationally, and watch parties occurred across North America. R. at 6. The largest watch party took place at the University itself due to the attention it had received from Dr. Nicholas's study. R. at 6. Dr. Nicholas and his research team continued their observations and data-gathering. R. at 6.

Six months after the Pixelian Event, Dr. Nicholas submitted a second article to *Ad Astra*. R. at 6. This piece reported standard data of the Event but added an historical overlay and some notable, tentative conclusions. R. at 6. Particularly, Dr. Nicholas argued that the cosmic changes he observed before, during, and after the Event paralleled phenomena predicted by ancient Meso-American hieroglyphs. R. at 7. The glyphs seem to present depictions of the lifeforce central to Meso-Paganism. R. at 7. He speculated it would be worth studying possible connections between the glyphs and past appearances of the Pixelian Comet. R. at 7. He further suggested that the cosmic changes demonstrated an interaction of "electrical currents, filaments, atmospheres, and formations of matter" were consistent with "Charged Universe Theory;" a minority view arguing that cosmic phenomena are due to charged particles rather than gravity. R. at 7.

Ad Astra, through editor Dr. Elizabeth Ashmore, agreed to publish Dr. Nicholas's piece. R. at 8. Dr. Ashmore considered Dr. Nicholas's take on "Charged Universe Theory" as a potentially "groundbreaking" but "extreme" view. R. at 8. While some hold to the theory, it is not the "scientific academy's consensus" explanation for cosmological phenomenon or Meso-American hieroglyphs. R. at 8. Dr. Ashmore did not wish for *Ad Astra* to be seen as endorsing the theory, so she prefaced the article with an essay clarifying these were Dr. Nicholas's views and that some of his conclusions might be seen as close to the "early alchemist's" theories. R. at 8. She also

expressed concern that the referenced information from Meso-Paganist texts was "religious in nature, not empirical." R. at 8. Dr. Nicholas, on the other hand, was confident he was simply studying the Event from a scientific perspective. R. at 8. He was open to whatever findings the evidence pointed to, "regardless of religious implications." R. at 8. He hoped, however, his research confirmed his theories to help support an application to train as a Meso-Paganist Sage. R. at 8-9. He had shared on social media the possibility he apply to this seminary. R. at 57.

The *Ad Astra* article generated an intense reaction, both nationally and internationally. R. at 9. The academy labeled his speculations "unprovable" and "medieval," and the American press repeated these criticisms. R. at 9. The foreign press, however, featured more receptive reactions from astrophysicists in Meso-America, Australia, and Europe. R. at 9. These astrophysicists believed Dr. Nicholas "might be onto something big" but only "further study" would tell. R. at 9.

III. The University Demands Dr. Nicholas Change His Conclusions.

For the University, this intense reaction to its major study "embarrassed donors." R. at 9. The Observatory was now being associated with "weird science" and mocked on late night television. R. at 9. Some on "scientific web chats" wondered about the "strange direction" the Observatory was taking with Dr. Nicholas. R. at 9. And the number of post-graduate applications had leveled out (though the University thought this was mostly due to the completion of the Pixelian Event). R. at 9. University President Meriam Seawell, the faculty, and the state wanted to avoid risking "the huge economic investment" in the Observatory, so on January 3rd, 2024, they sent Dr. Nicholas a letter. R. at 9-10. In it, President Seawell explained that if he did not limit his research and conclusions to the "academic consensus view of a scientific study," all benefits of the Astrophysics Grant would be revoked immediately, prior to the March 2024 completion date. R.

at 10. The University did not want to "gamble" with the Observatory's reputation or be seen as "endorsing a religious tenet. R. at 10.

Dr. Nicholas responded vigorously. R. at 10. He would not be told "what to conclude" or "upon what his observations might rest." R. at 10. President Seawell, the University, *Ad Astra*, and the academy did not "own science" and this attempt to censor his research and its conclusions "in this outrageous fashion" ran up against everything "upon which and for which science stood." R. at 10. He also knew from his university colleagues that other faculty members had previously relied in publications on the writings of other pagans like the Greeks, the Romans, the Incas, and the Phoenicians. R. at 58.

A few days letter, President Seawell wrote back that Dr. Nicholas was "free to conclude and publish whatever he wanted" and "wherever he liked" but not "under the auspices of grant-funded research." R. at 10. She argued that since the condition requiring only "science-based conclusions" that comported with the "academic consensus" had been present from the start, access to all facilities could be dependent on his agreement. R. at 11. Also, because Dr. Nicholas was drawing connections with Meso-Paganism, the University could not been seen as "endorsing" his beliefs. R. at 11.

Again, Dr. Nicholas retorted he was coming to science-based conclusions; there was "nothing unscientific" in his research. R. at 11. Further, he asked that if his conclusions stemmed from his evidence and happened to comport with religious teachings, what objections could the University have other those "grounded in arrogance and bigotry"? He then pressed that if his research was stopped now, just before his "post-Event data analysis," his entire project would be "compromised" and there was a risk the data would be lost forever. R. at 11.

IV. The University Locks Dr. Nicholas Out of the Observatory.

After this exchange of letters, the University gave Dr. Nicholas a date to "restate his agreement" to limit his conclusions to the academic community's consensus view of science. R. at 11. Dr. Nicholas immediately replied that his "conclusions were scientific" and should be recognized as such. R. at 11. The next day, the University changed the security protocol of the Observatory, locking out Dr. Nicholas. President Seawell then released a public statement explaining the University had a "fundamental disagreement with Dr. Nicholas over the "meaning of science itself" and the University "could not countenance the confusion of science and religion." R. at 11. In response, Dr. Nicholas immediately brought this suit. R. at 12.

V. Proceedings Below

Dr. Nicholas requested injunctive relief to prevent the University of Delmont and the State of Delmont ("the Defendants") from excluding him and requiring his reinstatement under the Astrophysics Grant until April 2024. R. at 12. Injunctive relief was necessary because "the study of a historical astrological even was in the balance;" monetary damages would be inadequate. R. at 12. Dr. Nicholas argued that the Defendants had violated his First Amendment right to freedom of speech by placing an unconstitutional condition on his speech. R. at 12. The Defendants answered that the Grant did not violate his First Amendment rights and that continued support of Dr. Nicholas's work would violate the First Amendment's Establishment Clause. R. at 12.

Before the district court, both parties filed cross-motions for summary judgement under Rule 56(a) of the Federal Rules of Civil Procedure because there was no dispute as to the material fact. R. at 12. The Defendants also voluntarily waived any sovereign immunity claim they were entitled to assert. R. at 12. The district court granted Dr. Nicholas's motion for summary

judgement, finding that the Defendants had violated the First Amendment by an unconstitutional condition and that further support would not violate the Establishment Clause. R. at 30.

The United States Court of Appeals for the Fifteenth Circuit reversed the grant of summary judgement, holding instead that the funding condition was not an unconstitutional condition because the Government may engage in selective funding. R. at 34. Further, the court of appeals held that the Defendant's continued support would violate the Establishment Clause because the Government might end up funding Dr. Nicholas's religious education. R. at 47-48. This Court granted certiorari and directed that briefing and argument be limited to the issues noted above.

SUMMARY OF THE ARGUMENT

The Fifteenth Circuit wrongly held that the University's funding condition did not violate Dr. Nicholas's First Amendment freedom of speech and was not an unconstitutional condition. If directly regulated, the funding condition would force Dr. Nicholas to adopt the Government's viewpoint on the meaning of science and the validity of Charged Universe Theory. This is textbook viewpoint discrimination and would trigger strict scrutiny—which the condition fails. It is overinclusive because it suppresses non-religious ideas out of step with majority views, and underinclusive because it allows for these theories to be published elsewhere.

Since the condition violates the First Amendment, the Government cannot employ it unless the condition is cabined to limiting inside-program speech, not outside-program speech. *Rust v. Sullivan*, 500 U.S. 173 (1991). Benefit programs limit outside-program speech when they restrict a recipient's speech outside the borders of the program and offer no alternative avenues for expression. Alternative speech channels are not sufficient, however, if they can only be accessed at the price of "evident hypocrisy." Here, the funding condition is an outside-program restriction because it prevents Dr. Nicholas from accessing the data and research needed to substantiate and

publish his unpopular conclusions. While the University claims he is free to publish where he likes, he can only access the vital research necessary for his publication by capitulating to the funding condition. He would then have to first publish a state-approved article rejecting all religion-tinted conclusions, before being able to publish a second article endorsing those rejected conclusions. Thus, the sole alternative speech channel is invalid because it can only be accessed at the price of evident hypocrisy. Because the condition is an outside-program speech limit and there is no valid alternative speech channel, it is an unconstitutional condition.

The Fifteenth Circuit also wrongly held that the University's continued funding of Dr. Nicholas's research would violate the Establishment Clause of the First Amendment. Establishment Clause arguments are addressed by a historical analysis. *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). Comparing the primary marks of an Establishment at the time of the Founding with the University's action here reveals that this is a far cry from an Establishment. There is no government control of church doctrine, no mandated church attendance, no government funded churches, no government prohibition of minority religions, no government use of church facilities, and no limiting of political participation to a certain church.

In fact, the University is closer to a Free Exercise violation than an Establishment violation. The Free Exercise Clause prevents public benefits from being denied on the basis of religion or religious conduct. The Fifteenth Circuit incorrectly relied on *Locke v. Davey*, 540 U.S. 712 (2004) and argued that Dr. Nicholas's interest in becoming a Sage prevents the University from funding a project that might be used in an application for religious education. But *Locke* has been narrowed to cases of vocational religious degrees; no such degree is being pursued in this case. And the Free Exercise Clause prevents benefits from being denied on mere "anticipated" religious conduct. For

these reasons, Dr. Nicholas respectfully requests the Court to reverse the Fifteenth Circuit's finding regarding Petitioner's motion for summary judgement.

ARGUMENT

I. THE FUNDING TERM IS AN UNCONSTITUTIONAL CONDITION BECAUSE IT (1) VIOLATES THE FREE SPEECH CLAUSE AND (2) RESTRICTS SPEECH OUTSIDE THE PROGRAM WITHOUT OPENING AN ALTERNATIVE SPEECH AVENUE.

The unconstitutional conditions doctrine prevents the Government from denying an otherwise available benefit because an individual exercises their constitutional right. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1070 (7th ed. 2023) (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983)). This doctrine is especially critical when the right at stake is the freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Denying benefits because someone exercises First Amendment rights effectively penalizes and inhibits these freedoms. *Id.* And the Government cannot manipulate funds and benefits to get results "which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Thus, under the traditional *Speiser-Perry* formulation, the Astrophysics Grant's funding condition is subject to normal First Amendment analysis just like a direct regulation.

Yet the unconstitutional condition cases present deep complexities beyond a simple First Amendment analysis. Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 Va. L. Rev. 479, 480 (2012) ("unconstitutional conditions therefore are considered a sort of Gordian knot"). While the Government can never exceed its constitutional limits when conditioning funds, the Government also is not forced to subsidize every individual's freedom of speech. *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983). And Government can selectively fund certain activities without being forced to fund every alternative approach to those activities. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). There is then some line that selective funding

might cross to become unconstitutionally coercive funding; though that line is "hardly clear" and disturbingly malleable. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215 (2013). The most recent test to discern that line asks whether the condition simply limits speech within the funding program or works to coerce speech outside the program as well. *Agency for Int'l Dev.*, 570 U.S. at 215. Also, whenever drawing this line, the Court remains vigilant against the Government "recast[ing] a condition on funding as a mere definition of its program." *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547 (2001). Thus, a condition on Government funds becomes an unconstitutional condition when it (1) would violate the First Amendment if directly regulated, and (2) coerces speech *outside* the limits of the program, not just *inside*. Here, because the University's funding condition is (1) viewpoint discriminatory when subjected to First Amendment analysis, and (2) a limit on Dr. Nicholas's speech outside the program, not just inside, the condition is an unconstitutional condition, and the Fifteenth Circuit should be reversed.

A. If Directly Regulated, the Funding Condition Would Violate the First Amendment and Fail to Satisfy Strict Scrutiny.

The first step in the unconstitutional condition analysis is scrutinizing the condition like a direct regulation. *Agency for Int'l Dev.*, 570 U.S. at 213. Generally, the Government cannot use conditions on funds to produce results it could not directly regulate. *Perry*, 408 U.S. at 597. The First Amendment, applicable to the states through the Fourteenth Amendment, prevents Government from passing laws "abridging the freedom of speech." U.S. Const. amend. I. Generally, laws that abridge speech because of its content or viewpoint are "presumptively unconstitutional" and are only upheld when narrowly tailored to a compelling government interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). While a categorical approach is important to First Amendment jurisprudence, no unprotected category of speech is triggered by this case. *See R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (citing obscenity, defamation, and fighting words as

examples of such categories). Here, because the funding condition abridges Dr. Nicholas's speech on account of his viewpoints, it must be narrowly tailored to serving a compelling interest. Because the condition is neither well-tailored nor justified by a compelling interest, it fails the test and violates the First Amendment.

1. The Funding Condition Would Be Viewpoint Discriminatory and Trigger Strict Scrutiny.

Viewpoint discrimination is prohibited to prevent the Government from driving "certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387. Central to the First Amendment is the idea that truth is not determined by state-enforced orthodoxy, but by "the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This jurisprudential pillar is so fundamental as to be deemed the "fixed star in our constitutional constellation." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Here, the Government used the funding condition to force Dr. Nicholas into adopting the Government's viewpoint on two controversial issues: (1) that Charged Universe Theory is illegitimate and (2) that any use of religious texts in a scientific study is unscientific. Thus, the condition drives "certain ideas or viewpoints" on Charged Universe Theory and science from the marketplace. Because *R.A.V.* and *Barnette* (and many other cases) explicitly forbid such a result, the condition is viewpoint discriminatory and can only be saved if narrowly tailored to a compelling interest.

2. The Funding Condition Would Fail Strict Scrutiny because It is Poorly Tailored.

But the funding condition is not narrowly tailored. Tailoring of a speech-restriction is measured by how accurately it prevents only the speech alleged to be so harmful that the Government has a compelling interest in silencing it. *See e.g.*, *Reed*, 576 U.S. at 172. An underinclusive or overinclusive restriction will fail the test, even if justified by a compelling

interest. *Id.* In *Reed*, the Court applied the compelling interest test to a town ordinance that strictly outlined size and time limits for temporary directional signs but had more relaxed restrictions for ideological signs. 576 U.S. at 159-60. The town asserted interests in aesthetic appeal and traffic safety, but the Court held the ordinance was "hopelessly underinclusive" in serving these interests. *Id*. at 171. Temporary directional signs were "no greater an eyesore" than ideological signs, and ideological signs might actually be more distracting to passing drivers. *Id*. at 172.

Here, the Fifteenth Circuit was wrong to find the funding condition was well-tailored—it is actually both overinclusive and underinclusive. It is overinclusive because restricting *any* research out of step with the academy's idea of science outlaws most groundbreaking theories, regardless of whether they commingle science and religion. It is underinclusive because the University would let Dr. Nicholas publish his views elsewhere, even though his views in another medium would have the *exact same effect* on the public's confusion of science and religion. Plus, the University has already published research based on pagans like the Greeks, Romans, Incas, and Phoenicians, and that research is no less likely to confuse science and religion than Meso-American sources. The Fifteenth Circuit begs the question when it treats the condition's exclusive application to the Grant as narrow tailoring. That reasoning would let *any* funding condition pass strict scrutiny, simply because it covers fewer people than a direct regulation. In all, like the sign ordinances in *Reed*, the speech-restriction is not well tailored to honestly serving the interest the University asserts.

3. Even If the Funding Condition is Well-Tailored, It is Not Justified by a Compelling Government Interest.

Even if the funding condition was well-tailored, avoiding the confusion of scientific and religious ideals is not a compelling interest. Findings of compelling interests are rare because such a finding permits governmental silencing of an idea. Instead, our First Amendment jurisprudence

teaches that, in almost all cases, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting). Truly compelling interests are the exceptions that prove the rule. *See e.g.*, *New York v. Ferber*, 458 U.S. 747 (1982).

In *Ferber*, the Court considered whether child pornography could be regulated without passing the full obscenity test. 458 U.S. at 755 (*Miller v. California*, 413 U.S. 15 (1973)). In the end, the Court held the government interest compelling and allowed the regulation, explaining that "preventing sexual exploitation and abuse of children" was "a government objective of surpassing importance." *Ferber*, 458 U.S. at 757. But most interests fail to reach the level of "compelling." *See e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989). In *Johnson*, the Court held the interest in "preserving the flag as a symbol of nationhood and national unity" was *not* a compelling enough interest to justify the regulation of expressive burning of the flag. 491 U.S. at 413-17.

Here, the Fifteenth Circuit was wrong to hold the University's interest was "substantial." *Ferber*'s bar on the sexual exploitation and abuse of children, and even *Johnson*'s preservation of the flag as a symbol of national unity, involve clear and fundamental values. But the avoidance of the confusion of religious and scientific ideals is a vague and amorphous idea that could easily become a weapon in the hands of a university if granted compelling interest status. The Court should not risk religion's "enforced silence" in the academy by agreeing with the Fifteenth Circuit and allowing the University to stamp out religion's effect on science free of judicial review.

B. The Funding Condition is an Unlawful Outside-Program Limit Without Any Adequate Alternative Speech Avenue.

After determining the condition would violate the First Amendment if directly regulated, a second step is required before deeming it an unconstitutional condition. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013). Government is allowed to selectively fund and define the limits of its program to a point, so long as it does not compel a recipient to

adopt a particular belief. *Id.* at 217-18. The line between selective funding and coercive funding is "hardly clear," but the Court has attempted to identify it by distinguishing between (1) conditions that limit speech inside the program, and (2) conditions that regulate speech outside the program. *Id*. at 213; *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (distinguishing between conditions placed on the program and conditions placed on the recipient). Thus, even if the condition would violate the First Amendment if directly regulated, the Court allows such conditions when they only affect speech occurring within the program itself. *Rust*, 500 U.S. at 197.

This makes alternative avenues for speech critical; less harm is done if a recipient can express his true views outside the program than if his views are silenced both within *and* without. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984). But alternative avenues only save conditions to a point: if a recipient's outside-program speech is contrary enough to their inside-program speech to create "evident hypocrisy," then the condition is not truly an inside-program limit and becomes unconstitutional despite the alternative avenue. *Agency for Int'l Dev.*, 570 U.S. at 219. To sum up, (1) conditions may regulate inside-program speech but not outside-program speech, and (2) while alternative speech avenues save some conditions, they do not save conditions creating "evident hypocrisy." Here, because the University's funding condition bars Dr. Nicholas from accessing the data and research unless he publishes the Government's views, and because publishing two conflicting, flip-flopping articles would be "evident hypocrisy," the funding condition is an impermissible outside-program limit on speech and must be struck down as an unconstitutional condition.

1. Inside-Program Speech Restrictions Compared with Outside-Program Speech Restrictions.

Inside-program speech conditions only limit recipients' speech within the bounds of the program itself; this is often accomplished by allowing for alternative speech channels. *See Rust v.*

Sullivan, 500 U.S. 173, 197 (1991). In *Rust*, Title X of the Public Health Service Act funded family planning services on the condition that the recipient did not "include abortion as a method of family planning." *Id*. at 178. Later regulations clarified Title X prevented recipients from referring women to abortion providers or from promoting abortion. *Id*. at 179. But though recipient providers argued the condition was viewpoint discriminatory, the Court disagreed. *Id*. at 192. The Court first emphasized the Government's ability to fund what it wishes, saying that Government can "selectively fund a program . . . without at the same time funding an alternative program." *Id*. at 193.

The Court then explained that Title X did not implicate the unconstitutional conditions doctrine because "the Title X *grantee* can continue to perform abortions . . . and engage in abortion advocacy" it simply must keep those activities "separate and independent" from the specific project receiving Title X funds. *Id*. at 196. The Court saw a difference between a condition on the *recipient* and a condition on a particular *program*; the former prohibits the recipient from "engaging in the protected conduct outside the scope of the federally funded program," and that would be an unconstitutional condition. *Id*. at 197. While the Court did not rest its holding exclusively to the alternative speech-avenues, it was important to the decision. *Id*. 197.

Outside-program speech conditions, on the other hand, restrict recipients' speech beyond the borders of the program itself and leave no alternative speech avenues available. *See Agency for Int'l Dev.*, 570 U.S. at 219-20. In *Agency for International Development*, Congress offered funding to organizations fighting HIV/AIDS on a key condition: recipients needed a policy expressly opposing prostitution and sex trafficking. *Id*. at 210. The Court first used *Rust* and *League of Women Voters* to articulate the line between inside-program and outside-program speech conditions. *Id*. at 215-17. Next, the Court applied these rules, explaining that the condition

controlled outside-program speech because if the recipient ever expressed the opposite view of the Government, even on "its own time and dime," the funds would be revoked. *Id*. Further, while the Government allowed recipients to establish affiliates who did not espouse the policy, the Court found this was *not* sufficient to save the condition, because the recipient would be expressing the Government's views "at the price of evident hypocrisy." *Id*. at 220.

This focus on outside-program conditions and alternative avenues is previewed in earlier decisions. *See e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-47 (2001). In *Velazquez*, Congress established the Legal Services Corporation to provide free legal representation to indigent clients, including help in seeking welfare benefits. *Id*. at 536. But there was a condition: the recipient's attorney could not challenge existing welfare law. *Id*. at 537. If such a challenge arose at any point in the representation, LSC attorneys had to withdraw. *Id*. at 539. The Court, after first addressing the unique concerns of the judicial role, found the condition problematic because "there is no alternative channel for expression." *Id*. at 546. Because the program was geared to indigent clients, they would be unlikely to find other counsel if the LSC attorney withdrew. *Id*. In *Rust*, the patient could first get counseling within the Title X program and then later get abortion counseling from an affiliate program. *Id*. at 547. But in *Velazquez*, the indigent clients received no such "joint representation;" the instant a welfare validity question arose, the LSC attorney withdrew. *Id*. Receipt of the benefits meant total suppression of the welfare-validity argument—no LSC attorney or affiliate counsel. *Id*.

2. The Funding Condition is an Outside-Program Speech Restriction with no Alternative Speech Avenues.

In this case, the funding condition on the Visitorship Grant is an outside-program speech condition, only offering an alternative avenue for expression "at the price of hypocrisy." The condition denies Dr. Nicholas access to the data and research tools necessary for his conclusions,

barring him from "engaging in the protected conduct outside the scope of the federally funded program" just as the *Rust* Court forbade. Like the indigent clients in *Velazquez*, he is faced with a choice: either give up the benefits or capitulate to the viewpoint dictated by the Government. It is disingenuous for the University to cut Dr. Nicholas off from crucial data and research and then protest he is free is to publish conclusions about the data outside of the program.

The Fifteenth Circuit believes Dr. Nicholas has a remedy in simply "publish[ing] one theory" through the University and then "chang[ing] his views entirely" in another publication. R 38-39. But this claim runs into the brick wall of *Agency for International Development*'s rule against "evident hypocrisy." Contrary to the Fifteenth Circuit's claims, it is not "standard protocol" for scientists to publish two papers with opposite conclusions where the only explanation for the flip-flop is Government coercion. R 39. Publishing one paper ignoring a religious-historical contribution to science and then a second paper treating the contribution as groundbreaking evidence is even more hypocritical than the *Agency for International Development* organization explicitly opposing prostitution while its affiliate does not. Because Dr. Nicholas needs access to the University's unique research tools to publish his next article, the condition bars his speech inside and outside of the program's limits without any viable "alternative channel of expression."

II. CONTINUING TO FUND DR. NICHOLAS'S RESEARCH DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BUT REVOKING FUNDING RISKS VIOLATING THE FREE EXERCISE CLAUSE.

The First Amendment directs that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U.S. Const. amend. 1. This Court once used a three-pronged test to determine whether an Establishment Clause violation existed. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). But now it is clear that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy v. Bremerton*

School District, 597 U.S. 507, 535 (2022) (quoting *Town of Greece, N.Y., v. Galloway*, 572 U.S. 565, 576 (2014)). Also, the Government cannot be so overzealous in complying with the Establishment Clause that it crosses into a violation of the Free Exercise Clause. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017). Thus, to determine whether the University has run afoul of the First Amendment, we must (1) determine by historical analysis whether continuing to fund Dr. Nicholas's research could be categorized as an Establishment of Religion, and (2) examine whether the University's attempts to comply with the Establishment Clause would violate Dr. Nicholas's Free Exercise of Religion.

A. Funding Dr. Nicholas's Research Does Not Violate the Establishment Clause Based on a Historical Analysis.

The Establishment Clause was included specifically to prevent the formation of a "nationally recognized church." Vincent J. Samar, *Finding the Correct Balance Between the Free Exercise of Religion and the Establishment Clauses*, 21 First Amend. L. Rev. 109, 112 (2023). At the Founding, many of the states had selected a specific denomination as the state's official church. *Id.* Since then, the Court has generally struck down laws that followed the mold of founding-era avenues to church establishment, apart from the interruption of the unworkable *Lemon* test. *See Shurtleff v. City of Boston*, 142 S. Ct. 1538, 1606-07 (2022) (Gorsuch, J., concurring). Laws may be judged by six general marks of establishment: (1) government control of "doctrine, governance, and personnel of the church;" (2) government mandated church attendance; (3) government funded churches; (4) government prohibition of worship in other denominations; (5) government use of the established church's facilities for civic events; and (6) government limited "political participation to members of the established church." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, Wm. & Mary L. Rev. 2105, 2131 (2003). Here, the University's funding of Dr. Nicholas's research bears none of these marks.

Government funding of religious action is typically permitted by the Establishment Clause and sometimes required by the Free Exercise Clause. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017). In *Mitchell v. Helms*, the Court upheld a law which allowed Alabama to award school supplies grants to religious schools, even if the supplies were used in religious instruction. 530 U.S. 793, 809 (2000) (plurality). The Court concluded that government only ran afoul of the Establishment Clause in funding programs if "any religious indoctrination that occurr[ed]" as a result of the funding "could reasonably be attributed to governmental action." *Id*. Further, in *Trinity Lutheran*, the Court held that a church which operated a daycare should not be denied a playground materials grant if the sole reason for the denial was the religious character of the church. 582 U.S. at 462. In denying a religious organization a publicly available benefit to which secular organizations are entitled, the government is in danger of violating the Free Exercise Clause through its effort to enforce the Establishment Clause. *Id.*

On the other side, Government is primarily limited when hinging political access on affirming religious truth. In *Torcaso v. Watkins*, the Court struck down a state constitutional provision that required citizens to declare a belief in God before they were eligible to hold public office, because such a declaration mandated a religious test. 367 U.S. 488, 490-492 (1961). Similarly, in *Larkin v. Grendel's Den, Inc.*, the Court struck down a zoning ordinance that allowed churches to object to any business receiving a liquor license within a certain distance of the church. 459 U.S. 116, 123 (1982). Because the ordinance delegated power to the church to approve or veto a liquor license application, the state had created a preference for a religious institution in violation of the Establishment Clause. *Id.*

Here, the six historical factors bolstered by the caselaw show that University funding of Dr. Nicholas's research would reflect no special preference or access to religion. First, as in *Mitchell*,

the state funding gives the government no say over the teachings or personnel of the Meso-Pagan religion. There is a stronger argument that *revoking* the funding gives the government more authority to determine which Meso-Pagan teachings are permissible. Second, unlike the religious test in *Torcaso*, funding research requires no one to profess Meso-Paganism. Third, since Dr. Nicholas is not an official representative of Meso-Paganism, the government is not funding a religion nor delegating decision-making authority to a religion as in *Larkin.* Fourth, as in *Mitchell*, continued funding does not compel anyone else to adhere to Dr. Nicholas's theories or religion—no indoctrination will occur through the government action. Fifth, allowing a believer to use government resources is not the same as the government using religious facilities. To suggest otherwise opens the University to liability over the Roman, Greek, Incan, and Phoenician religions used in other University faculty research. Sixth and last, funding a research project clearly does not limit political participation to religious or Meso-Paganist believers. The University's funding of Dr. Nicholas's research is a far cry from an Establishment.

B. Revoking Funding of Dr. Nicholas's Research Burdens His Free Exercise of Religion.

The First Amendment does not allow for an "absolutely straight line" between religion and the government. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). Rather, the Court has recognized that the Free Exercise Clause makes such a separation nearly impossible. *See id.* While there is no right to be exempt from neutral and generally applicable laws, free exercise prevents discrimination against religious beliefs or conduct undertaken for religious reasons. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Facially neutral government action can still violate the Free Exercise Clause by subtle departures from neutrality *Id*. at 534. Here, revoking funding from Dr. Nicholas risks crossing the line into discriminating against religion.

The Free Exercise Clause gives religious groups a right to public benefits. *See Everson v. Board of Ed. Of Ewing*, 330 U.S. 1, 16-17 (1947). In *Everson*, the Court determined that the reimbursement of schoolchildren's bus fares could not be denied to citizens "because of their faith" since the reimbursement was available to all children. *Id.* at 16. Similarly, in *Trinity Lutheran*, this Court forbade the government from "impos[ing] [a] special disability[y] on the basis of religious status" to a church-run daycare applying for a playground materials grant. 582 U.S. at 458. And in *Espinoza v. Montana Dep't of Revenue*, the Court held that the state had to make funding grants available to religious private schools if those grants were available to secular private schools. 140 S. Ct. 2246 (2020). Once a state decides to subsidize something, it must make the subsidies equally available to the secular and the religious. *Id.*

Denying public benefits because they might be used for religious purposes also violates the Free Exercise Clause. *See Carson v. Makin*, 142 S. Ct. 1987 (2022). In *Carson*, the state argued its program was justified because it only prohibited the funding of religious schools which taught students "through the lens" of their religion. *Id.* at 1994. But the Court held that use-based discrimination equally violates the Free Exercise Clause by limiting what schools can teach their students. *Id.* at 2001. Requiring education to be completely devoid of any religious ideas or influences would prevent the schools from fulfilling their educational mission and prevents free exercise of their faith. *Id.*

The Fifteenth Circuit incorrectly relies on *Locke v. Davey*, 540 U.S. 712 (2004) to argue that public benefits with the potential to contribute towards religious vocational degrees may be denied. R. at 48. But in so doing they ignore the clear dictate of the *Carson* Court: "*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from . . . public benefits on the basis of their *anticipated* religious use of

the benefits." 142 S. Ct. at 2002. In *Locke*, the Court upheld state scholarship program guidelines which prohibited awarding scholarships to student seeking theological education. 540 U.S. at 715. Because the scholarship program only excluded the funding of theological degrees and allowed students to choose to attend religious schools in other educational programs, it did not violate the Free Exercise Clause. *Id.* at 724. Its holding has been repeatedly narrowed to its vocational religious *degree* fact-pattern. *See e.g.*, *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2257-58 (2020). *Locke* is simply an example of a situation that fails the historical analysis for the Establishment Clause. *See* J. Madison, Memorial and Remonstrance Against Religious Assessments.

Here, the University violated Dr. Nicholas's Free Exercise rights in terminating the research grant and blocking his access to research facilities. *Locke* is not implicated because the University is funding study of the Pixelian event—not a vocational religious degree. Dr. Nicholas is only *considering* applying to become a Sage. The Fifteenth Circuit wrongly equated posting about mere interest on social media with the actual pursuit of a degree. By doing this, the lower court ignored *Carson*'s warning against denying benefits because of an anticipated religious use. And as *Espinoza* and *Trinity Lutheran* make clear, Dr. Nicholas cannot be disqualified from receiving a benefit simply because his research references religion.

Further, not only is washing science clean of all religion unconstitutional, it is also ahistorical and impossible. A great many scientists have been inspired and influenced by their religious beliefs. Ian G. Barbour, *Christianity and the Scientist* 67-68 (1960). Isaac Newton, "saw [his discoveries] as evidence of order and design" and the existence of a "purposeful Creator." *Id.* at 66. And many other brilliant scientists, including Nicholas Copernicus, Johannes Kepler, and Robert Boyle, have followed in Newton's footsteps. Diwakar Methil, *10 Famous Scientists Who*

Believe That God Exists, The Science Times (January 29, 2024, 11:46 AM), https://www.sciencetimes.com/articles/21024/20190502/10-christian-scientists-and-why-they-believe-that-god-exists.htm. For fundamental reasons of constitutional law and public policy, the Court should not countenance the University's Establishment Clause argument.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and grant Petitioner's requested injunctive relief to prevent Respondents from excluding him and requiring his reinstatement under the Astrophysics Grant until April 2024.

Respectfully submitted,

TEAM 27

/s/_____

Counsel for Petitioner, Dr. Cooper Nicholas, Ph.D.

BRIEF CERTIFICATE

I. All the work product contained in all copies of Team 27 is the work product of Team 27 members.

II. Team 27 members fully complied with the school Honor Code in completing the work product.

III. Team 27 members have complied with all Competition Rules.