No. 23-CV-1981

In the
Supreme Court of the United States
March Term 2024

Cooper Nicholas,

Petitioner,

v.

State of Delmont and Delmont University,

Respondent.

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

BRIEF FOR THE PETITIONER

Team 7
Counsel for Petitioner
January 31, 2024

QUESTIONS PRESENTED

1) The Unconstitutional Conditions Doctrine prevents state actors from denying individuals a benefit on a basis that infringes on their constitutional rights. Cooper Nicholas had his research grant revoked when his studies led him to the Charged Universe Theory. Did the State of Delmont attach an unconstitutional condition to Nicholas's research grant?

2) The Establishment Clause prevents state actors from using funds to advance or interfere with a specific religion. The State of Delmont revoked Cooper Nicholas's Astrophysics Grant when he suggested the scientific data also supports future research connected with Meso-Pagan religious views. Nicholas expressed an interest in using his research to pursue personal religious goals, but has not participated in any religious vocational school. Did the State of Delmont and Delmont University violate the Establishment Clause by funding scientific research that Nicholas analyzed in connection with Meso-Pagan views on the universe?

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OPINION BELOW

The opinion of the United States District Court for the District of Delmont, Mountainside Division, is unpublished and may be found at *Nicholas v. State of Delmont*, C.A. No. 22-CV-1981 (D. Delmont Feb. 20, 2024). The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found at *Delmont v. Nicholas*, C.A. No. 23-CV-1981 (15th Cir. Mar. 7, 2024).

JURISDICTIONAL STATEMENT

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

STATEMENT OF THE CASE

Dr. Cooper Nicholas has dedicated his career to the scientific study of astrophysics. R. at 2–3. He specializes in observational astrophysics and has an astrophysics doctorate from the University of California, Berkeley. R. at 3. His accomplishments include academic appointments, visitorships, post-doctoral grants, and he has authored an authoritative treatise. *Id.* Most significantly, he served as the scholar in residence at The Ptolemy Foundation, an independent scientific research institution in Nevada. *Id.* In recognition of "his eminence in the field and his reputation as a wunderkind with intuitive, often ground-shifting observations," Delmont University awarded Dr. Nicholas its inaugural Astrophysics Grant. R. at 5–6.

Delmont University created the Astrophysics Grant Visitorship in 2021 to take advantage of the appearance of the Pixelian Comet from their renowned observatory. R. at 4-5. The Grant included a salary, use of the observatory, and funding for research assistants and incidental costs. R. at 5. The funding extended to all costs associated with publication of scientific, peer-reviewed articles related

to the event and a final summation of study to be published by the University of Delmont Press. *Id.* This Grant required that the study conform to the academic community's view of science. *Id.*

Nicholas spent the first months of the Visitorship in preparation for the Pixelian Event. R. at 6. Prior to the Pixelian Event, Nicholas published preliminary research in *Ad Astra*, the premier peer-reviewed journal in the field. *Id.* This publication generated a variety of responses from the scientific community that he followed up with his interim conclusions again in *Ad Astra*. *Id.* In his publications, he noted that the scientific data he generated had consistency with Meso-American indigenous tribes in their ancient religious history. R. at 6-7.

Nicholas adheres to the Meso-Paganist faith, a belief system of Meso-American tribes. R. at 4. Meso-Paganism stresses a study of the stars and celestial phenomena to better understand humanity. *Id.* While Nicholas credits his faith as an inspiration for his astrophysics interest, he focused on studying the Pixelian Event from a scientific perspective. R. at 8. He asserts that during research he remained open to findings regardless of their religious implications. *Id.* Nicholas maintains the value of his work to the scientific community at large and used widely accepted methods to carry out his research of the Pixelian Event. R. at 6.

Following publication of his findings in *Ad Astra*, Delmont University terminated Nicholas's grant on January 3, 2024. R. at 10. The university claimed that Nicholas's findings did not conform to the academic community's consensus view of a scientific study and that the research risked the appearance of endorsing religion. *Id.* Nicholas contests this termination, emphasizing that while his thesis and conclusion happen to comport with ancient religious thinkers, his methods comported with scientific standards. R. at 11. He further notes that pagan thinkers are referenced in publications from other fields at the university without penalty from the administration. R. at 58.

After terminating his grant, Nicholas commenced suit in the U.S. District Court for the District of Delmont for injunctive relief to continue his study under the grant under free speech

grounds. R. at 12. The District Court granted summary judgment in favor of Nicholas, noting his free speech rights had been violated by restricting his research to a single definition of science. R. at 30. The District Court rejected the university's Establishment Clause concern as too attenuated. R. at 30. The university appealed, and the U.S. Court of Appeals for the Fifteenth Circuit reversed the District Court's decision and granted summary judgment in favor of the University. R. at 51. Dr. Nicholas petitioned for a writ of certiorari and seeks a reversal of the Fifteenth Circuit's judgment. R. at 59. The matter is now before this Court.

SUMMARY OF THE ARGUMENT

I. Question Presented 1

In 2021, Delmont University ("University") awarded Dr. Cooper Nicholas ("Nicholas") a research grant to study the Pixelian Event. The university received an overwhelming number of applications but chose to award it to "Wunkerkind" Nicholas, a positive reputation noted by Delmont University's president. Nicholas's work concerns the intersection of science and the wisdom passed down by the Meso-Paganists. He published scientific work which considered "Charged Universe Theory," a theory that Meso-Paganists considered. The university then promptly terminated his grant without inquiring into the scientific nature of his work.

By terminating Nicholas's research grant, the university attached unconstitutional conditions to his speech. These conditions include viewpoint discrimination, penalties, coercion, and suppression. Longstanding Supreme Court precedents and philosophical justifications exist that make this revocation of the grant unconstitutional. By prescribing what ought to be orthodox in science, the university hindered free speech and adulterated the marketplace of ideas.

II. Question Presented 2

This Court should reverse the Fifteenth Circuit's decision and hold that Dr. Nicholas's research did not violate the Establishment Clause. Although the Establishment Clause created some

separation between Church and State, the Constitution permits limited interactions between the institutions. In particular, the Establishment Clause is not offended where religious institutions indirectly benefit from state programs, so long as all benefits to a religious institution result from private choice. States may restrict state funding from being used to pursue vocational theology degrees, but this is a narrow exception to the general rule that private choice breaks the connection between Church and State. States have a valid interest in promoting the separation of Church and State, but they may not overprotect that right at the expense of other rights, and a state educational institution is not owed deference where its decisions restrict an individual's rights without appropriate justification.

Here, the Court should hold that Nicholas's research did not violate the Establishment Clause and the Fifteenth Circuit's decision should be reversed because he conducted primarily scientific research, any religious implications resulted from private choice, he was not completing a degree in vocational theology, and the University limited Nicholas's rights without a valid justification.

ARGUMENT

I. By requiring Nicholas to speak a specific message or lose funding, the university imposed unconstitutional conditions on Nicholas's speech rights.

The Court's unconstitutional conditions doctrine prevents the government from denying individuals a benefit on a basis that infringes their constitutional rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This doctrine extends to all areas of government activity, from speech-related tax exemptions (*Speiser v. Randall*, 357 U.S. 513, 518 (1958)) to unemployment benefits (*Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963)). Unconstitutional conditions doctrine prevents the government from producing a result it could not command directly, and thereby hinder the exercise of freedoms. *Perry*, 408 U.S. at 597, (quoting *Speiser*, 357 U.S. at 526).

In the First Amendment context, the Court has recognized that not all government limitations on speech amount to unconstitutional conditions. The government retains the ability to fund some programs at the exception of others without imposing unconstitutional conditions. *Rust v. Sullivan*, 500 U.S. 173, 198 (1991). Also, the government may limit speech if it is the speaker. *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235 (2000). But the government may not limit speech if it not itself the speaker or chooses to expend funds to encourage diverse views from private speakers. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (quoting *Rosenberger v. Rector and Visitors of Univ. of VA*, 515 U.S. 819, 834 (1995)).

By rescinding Nicholas's grant, the university imposed multiple unconstitutional conditions on Nicholas's speech. R.11. These unconstitutional conditions include:

- Viewpoint Discrimination (*Rosenberger*, 515 U.S. at 828-29)
- Conditions that served as speech penalties (*Speiser*, 357 U.S. at 526)
- Coercion (*Id.* at 519)
- Suppression (*Id.* at 538)

While the government can regulate certain speech, the government cannot use state action to prescribe orthodoxy in any field. *See W. Va. Board of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

A. Restricting Nicholas's research to only allow certain conclusions is a form of viewpoint discrimination that fails strict scrutiny.

Viewpoint discrimination occurs when government action prevents a specific viewpoint from being expressed. *Rosenberger*, 515 U.S. at 828-29. In *Rosenberger*, the Court wrote that viewpoint discrimination is a presumptively unconstitutional egregious form of content discrimination. *Id.* Viewpoint discrimination can only be constitutional if it satisfies strict scrutiny: the action must be narrowly tailored to achieve a compelling state interest. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992). This standard requires showing an actual problem in need of solving. *United States v. Playboy Entertainment Group*, 529 U.S. 803, 822-23 (2000). Also, the government must show that the restriction on speech is necessary to solve that problem. *See generally R.A.V.*, 505 U.S. at 395; *Brown*

v. Entertainment Merchs. Ass'n. 564 U.S. 786, 799. This standard prevents government officials from prescribing what should be orthodox in politics, nationalism, religion, or other matters of opinion. *Barnette*, 319 U.S. at 642. This prohibition allows the marketplace of ideas to flourish as individuals can speak freely to contest the truth and decide for themselves. *See id.*; *Speiser*, 357 U.S. at 536.

1. The government presents no compelling state interest.

The Court reluctantly finds compelling state interests that justify hindering speech. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). Even when the Court does find compelling interests, the decisions split closely. *See generally id.*; *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). *Williams-Yulee* found a compelling state interest in limiting speech to support judicial election integrity in a 5-4 decision. 575 U.S. at 444. The dissent disagreed, stressing that "[t]he First Amendment is not abridged for the benefit of the Brotherhood of the Robe." *Id.* at 473 (Scalia, J. dissenting). A compelling state interest may have also been found for national security purposes, but even that case split 6-3. *See Holder* 561 U.S. at 34-35. In *Holder*, the dissent worried that the government failed to meet its burden that prohibiting speech to terrorist groups served a compelling interest. *Id.* at 41 (Ginsburg, J. dissenting). Both cases represent the Court's reluctance to find compelling state interests in speech regulation. *See id.* at 34-35, 41; *Williams-Yulee*, 575 U.S. at 444.

Limiting speech on campus does not fit into these narrow exceptions. In fact, this Court wrote in *Sweezy v. New Hampshire* that the essentiality of free speech on campus is almost self-evident, and that no field of education is so thoroughly comprehended that new discoveries cannot be made. 354 U.S. 234, 250 (1957). *Keyishian v. Bd. Of Regents* reiterated this dedication to the safeguarding of academic freedom, and stated unequivocally that the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom. 385 U.S. 589, 603 (1967). These conclusions fit with

John Stuart Mill's observations a century earlier that only by rigorously analyzing opinions can truth be reached. *See* JOHN STUART MILL, ON LIBERTY, 20 (Hackett Publishing Company, 1978).

The university presents no compelling state interest to limit Nicholas's speech. The precedents all indicate that the only compelling state interest would be in protecting, rather than prohibiting, speech. *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603. No case indicates that alleviating the public's confusion or avoiding reputational harm rises to the level of a compelling state interest. R. at 53–54, Seawall Aff. ¶ 9; *See Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603. This restriction functions similarly to an abridgement of speech rights for academia generally, a group-based distinction the Court views skeptically. *See William-Yulee*, 575 U.S. at 473 (Scalia, J. dissenting). Since the university failed to identify a problem in need of solving, the university's action fails to satisfy strict scrutiny. R. at 53–54, Seawall Aff. ¶¶ 9-10; *Playboy Entertainment Group*, 529 U.S. at 822-23.

2. The restriction is not narrowly tailored.

Even if this Court found a compelling state interest, this speech restriction is not narrowly tailored. To be narrowly tailored, the government must make a showing that regulation is neither overinclusive (*Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd*., 502 U.S. 105, 121 (1991) nor underinclusive (*Williams-Yulee*, 575 U.S. at 448). The Court reiterated in *Rust* that,

> [T]he *university is a traditional sphere of free expression* so fundamental to the functioning of our society that the *Government's ability to control speech* within that sphere by means of conditions attached to the expenditure of Government funds *is restricted by the vagueness and overbreadth* doctrines of the First Amendment.

500 U.S. at 200 (referencing *Keyishian*, 385 U.S. at 589) (emphasis added). This speech restriction fails both the overinclusive and underinclusive prongs. *See id.*; *Williams-Yulee*, 575 U.S. at 448.

First, this speech restriction presents overinclusive obstacles. *See Gooding v. Wilson*, 405 U.S. 518, 530-31 (1972). Over-inclusiveness, or overbreadth, allows the Court to invalidate statutes because their language demonstrates their potential for sweeping improper applications posing a significant likelihood of deterring important First Amendment Speech. *Gooding*, 405 U.S. at 530-31. The university's interpretation of this grant demonstrates significant likelihood of deterring protected speech. R. at 53-54; *see id.* By prescribing what ought to be orthodox in scientific studies, the government here creates a subjective standard that contradicts this Court's free speech precedents. *See Gooding*, 405 U.S. at 530-31; *Barnette,* 319 U.S. at 642.

This specific dispute concerns the definition of science. R. at 52–53, Seawall Aff. ¶¶ 5-6; R. at 57–58, Nicholas Aff. ¶¶ 12, 16-17. Both parties claim that their actions were guided by adherence to the scientific process. R. at 53-54, 55-58. This Court has heard cases that involve internal inconsistencies in government regulation, most notably in *NAACP v. Button*. 371 U.S. 415, 438 (1963). In that case, the Court emphasized that when there is an internal tension between proscription and protection in a statute, the Court will not assume that the government will resolve ambiguities in favor of free speech. *Id.* Instead, the Court emphasized that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. *Id.*

Nothing in the scholarship award indicated that the Nicholas's conclusions were out of the scope of the grant. This grant possesses no precision of regulation that indicates a compelling state interest, nor does the university effectively explain why the internal proscription versus protection tension ought to be resolved in their favor. R. at 5; s*ee Button*, 371 U.S. at 438. Science is an evolutionary process of trial and error which relies on constant challenges to orthodoxy. John Stuart Mill considered the dangers of scientific orthodoxy in ON LIBERTY. He wrote that even if a topic as settled as Newtonian philosophy was not permitted to be questioned, then mankind could not feel as complete assurance of its truth as they now do. MILL, 20. Our First Amendment relies on a robust

marketplace of ideas where the government must refrain from prescribing viewpoint orthodoxy, and this limitation extends to the scientific realm in a public university setting. *See id.*; *Barnette*, 319 U.S., 642; *Keyishian*, 385 U.S. 589, 603. Since the university's application of an imprecise definition of science presents significant risks of abuse, it fails the overbreadth prong. *See Button*, 371 U.S. at 438.

Second, this restriction underinclusively regulates speech. Under-inclusiveness allows the Court to invalidate statutes on First Amendment grounds as it can raise doubts about whether the government is pursuing the interest it invokes rather than disfavoring a particular speaker of viewpoint. *Williams-Yulee*, 575 U.S. at 448*, (*quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011)). Underinclusivity is a fact-intensive inquiry as the First Amendment does not impose a freestanding "underinclusive limitation." *Williams-Yulee*, 575 U.S. at 449, (quoting *R.A.V.* 505 U.S. at 387). Nor does the First Amendment require a government actor to address all parts of a problem in one fell swoop. *Williams-Yulee*, 575 U.S. at 449. Instead, it creates a rebuttable presumption for the government to show the justification for the underinclusivity. *See id.*

This case presents underinclusive concerns as the university allows research on other pagan thinkers in various disciplines. R. at 58, Nicholas Aff. ¶¶ 18; *see id.* at 448-49. Only in awarding this grant does the university seek to limit pagan arguments. R. at 58, Nicholas Aff. ¶¶ 18. While pagan thoughts are acceptable for other fields within the university, the restriction against Nicholas in the scientific field strongly suggests that the university disfavors his viewpoint. *See Williams-Yulee*, 575 U.S. at 449. The university's argument that they want to avoid negative press therefore fails to rebut the presumption of unconstitutionality. *See id.* at 449.

Even with the overinclusive and underinclusive concerns, the university retains the ability to fund one program at the expense of another. *Rust*, 500 U.S. at 194. The Court has long recognized this discretion as a necessary government purpose. *Id.* However, the Court has warned that

government may not use this as an end-run around protected speech. *Id.* at 197-98. In Nicholas's case, the university attempts to circumvent speech protections by attaching unconstitutional conditions to Nicholas's speech. *See id.* at 199-200. While the government could have created an alternate funding mechanism, it could not do so in a way that restricts speech as it does here. *See id.* at 198.

B. The conditions against Nicholas cannot serve as penalties, coerce the speaker, or suppress his speech.

Even if the Court finds that the regulation satisfies strict scrutiny, there are multiple other unconstitutional conditions. Government actors may only place conditions on speech provided they do not serve as penalties, coerce the speaker, or attempt to suppress his free speech. *See Speiser*, 357 U.S. at 519, 526. A penalty is any condition that produces a result the government could not command directly. *Id.* at 526. Coercion occurs when the government action has the power to compel speakers to refrain from certain speech. *Id.* at 519. Suppression occurs when a condition is used to prevent the spread of a certain idea. *Id.* (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 402). The Court in *Speiser* emphasized that the line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed, or punished is finely drawn. *Id.* at 525 (referencing *Thomas v. Collins*, 323 U.S. 516 (1945)). This requires a fact intensive inquiry best left to a finder of fact. *See id.*

Since the university cannot command Nicholas to speak a specific message about the Pixelian event without losing funding, this condition serves as an illegal penalty. *See id.* at 526. *Speiser* considered whether a loyalty oath to receive a tax exemption served as an illegal penalty. *Id.* at 515. The Court rejected the requisite loyalty oath because even if the benefit is a privilege, its denial may not abridge speech. *Id.* at 518. The Court also noted that denials of funding act as penalties that have the same deterrent effect as fines. *Id.* The university similarly penalizes Nicholas by conditioning his grant on prescribing to orthodoxy in a manner they could not directly command. *See id.* at 526.

Forgoing the funding would be unconstitutional as he would essentially be fined for his ideas by being denied the right to speak freely about the Charged Universe Theory. *See id.* at 518.

The university also coerces Nicholas by attempting to compel him not to speak about the Charged Universe Theory. *See id.* at 519. By removing his funding because he spoke in a certain manner, the university runs squarely into the *Barnette* problem. 319 U.S. at 642. In that case, the school board threatened punishment to any student who refused to say the pledge of allegiance. *Id.* at 626. The Court struck down this regulation, emphasizing that the government lacks the ability to prescribe what shall be orthodox viewpoints. *See id.* at 642.

Just as in *Barnette*, Nicholas here faces a choice so constrained as to be required to speak what the university claims is the orthodox position. *See id.* at 626, 642. He could have either given up his unorthodox position to continue receiving the grant or could have adhered to what the government claims is the orthodox position to continue to receive funding. *See id.* While one can argue that a suspension from school is more coercive than removal of grant funding, that argument fails to consider the reliance interests of Nicholas once he accepted the grant or the opportunities he forwent to pursue the grant. *See id.*

The government's conditions against Nicholas also serve to unconstitutionally suppress ideas. *See Speiser*, 357 U.S. at 519. By preventing Nicholas from reporting his findings, the government seeks to prescribe what ought to be orthodox in science, running headlong into issues with *Barnette* and the marketplace of ideas in scientific inquiry. *See* 319 U.S. at 64; MILL, 20. Further, the government admitted that they were concerned about the sharing of Nicholas's views regarding the Charged Universe Theory. R. at 53–54, Seawall Aff. ¶¶ 9-10. This concern, and subsequent prohibition of the Nicholas's funding, clearly demonstrate an attempt to suppress Nicholas's speech. *See Speiser*, 357 U.S. at 519.

Declining the grant would not have resolved the penalty, coercion, and suppression issues. This declination argument violates the First Amendment because government action cannot deny a benefit that infringes constitutionally protected freedom of speech. *Agency for Int'l Dev.* v. *Alliance for Open Society Int'l, Inc.* 570 U.S. 205, 214 (2013) (citing *Rumsfeld v. F. for Acad. & Inst. Rts.*, 547 U.S. 47, 59 (2006)). The university's best recourse would be either to not have offered a grant or to offer multiple grants to ensure a diversity of viewpoints. *See id.*

C. Since Nicholas does not speak a governmental message, the government may not limit his speech.

Governmental entities are free to regulate speech if the speaker presents a governmental message. *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235. To determine government speech, the Court looks to see whether the regulation conveys a governmental message or if it is designed to facilitate private speech. *Velazquez*, 531 U.S. at 548-49. This test does not consider how third parties will view the speech. *See id.* If the regulation is designed to facilitate private speech, then the government must respect the First Amendment rights of the speaker. *See id.*

The grant provided by the university clearly intended to facilitate private speech. *See id*. Nowhere did the university declare that this research would represent its own message, nor did it convey that idea to Nicholas. *See id*. Instead, the grant sought to facilitate private speech by selecting the most qualified scientist to study the Pixelian Event. R. at 5; *see id*. While the university may experience unease with Nicholas's findings, the university cannot exclude certain theories and ideas from funding decisions if they infringe free speech rights. *See Velazquez*, 531 U.S. at 548.

II. Dr. Nicholas's Scientific Research Through the State-Funded Astrophysics Grant Does Not Violate the Establishment Clause.

The Court should reverse the Fifteenth Circuit and hold that Nicholas's research did not violate the Establishment Clause because Nicholas benefited from a neutral government program to engage in scientific research. *See, e.g. Zelman v. Simmons-Harris*, 536 U.S. 639, 644–53 (2002). His

private religious beliefs do not make him an impermissible state-supported clergy. *See, e.g.*, *Carson v. Makin*, 596 U.S. 767, 789 (2022). Because there is no Establishment Clause violation, the school had no lawful reason to restrict Nicholas's speech and is not owed deference. *See id.* at 781–89; *Widmar v. Vincent*, 454 U.S. 263, 270–77.

A. The Establishment Clause's History Indicates that the Constitution Permits Some Interaction Between Church and State.

As noted by the District Court below, recent opinions of this Court "look[] to history for guidance" in determining whether a particular situation under review implicates an Establishment Clause concern. *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2087 (2019); *see Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535–36 (2022); R. at 23. In assessing a potential Establishment Clause violation, the Court considers whether its assessment "'accords with history and faithfully reflects the understanding of the Founding Fathers.'" *Kennedy*, 597 U.S. at 535–36 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014)).

The Establishment Clause of the First Amendment to the U.S. Constitution stipulates that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. As the Court reviewed in *Everson v. Board of Education of Ewing Township*, the First Amendment was created in response to Colonial America's government-sponsored churches that required attendance and financial support from believers and non-believers alike. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 9–11 (1947). Thomas Jefferson expressed the need for a constitutional "'wall of separation between Church and State.'" *Everson*, 330 U.S. at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)); R. at 22. However, this Court has since elaborated that the separation need not be "an absolutely straight line" preventing any and all interaction between Church and State. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970); R. at 24. In *Walz v. Tax Commission of City of New York*, this Court announced that it "will not tolerate either governmentally established religion or governmental interference with religion." *Walz*, 397 at 669. So long as

government refrains from establishing or interfering with religion, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* In analyzing alleged Establishment Clause violations, the Court considers "whether [the] acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*, 397 U.S. at 669.

B. The Establishment Clause is Not Offended Where an Individual Benefits from a Neutral Government Program and Any Religious Implications Result from Private Choice.

This Court should hold that Nicholas's study does not violate the Establishment Clause because the Astrophysics Grant is a secular program, and any religious use of the scientific research findings would be incidental and the result of Nicholas's private choice. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 649–52 (2002); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993). In exploring the bounds of the "play in the joints" between free religious exercise and antiestablishment interests, this Court "ha[s] repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Walz*, 397 U.S. at 669; *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2254 (2020); *Zelman*, 536 U.S. at 649; *see Everson*, 330 U.S. at 17. A government program is neutral with respect to religion where it neither favors nor interferes with religious exercise. *See, e.g.*, *Walz*, 397 U.S. at 676–77. Neutral government programs do not give rise to an Establishment Clause violation even if the program indirectly benefits religious entities. *Walz*, 397 U.S. at 674–77; *Carson v. Makin*, 596 U.S. 767, 781 (2022).

In *Zelman v. Simmons-Harris*, the Court held that an Ohio program that provided tuition aid to attend a school of the family's choice—including religious schools—did not violate the Establishment Clause. 536 U.S. at 644–45. In *Zelman*, Ohio established this tuition aid program "for the valid secular purpose of providing educational assistance to poor children." *Id.* at 634–45, 649.

The Court found the program was neutral because aid was allocated based on purely secular criteria. *Id.* at 653–54. Even though religious schools indirectly received a government benefit in the form of tuition aid, the government did not provide the benefit to the schools directly. *Id.* at 648–49. Any benefit to a religious entity was the result of a "true private choice" *Id.* at 649–53, 662. As this Court explained in *Zelman*, the distinction between direct and indirect aid informs the Court's Establishment Clause analysis. *Id.* at 649. The *Zelman* court cited to its prior decision *Zobrest v. Catalina Foothills School District*, where it "reject[ed] an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools." *Id.* at 651. Because "[d]isabled children, not sectarian schools," were the "primary beneficiaries" of the program, it did not create an Establishment Clause violation. *Zobrest*, 509 U.S. at 12; *Zelman*, 536 U.S. at 651–52.

Here, the Court should find that Nicholas's research does not violate the Establishment Clause because the Astrophysics Grant is a neutral government program, with a secular primary beneficiary. *See Zelman*, 536 U.S. at 644–45, 649; *Zobrest*, 509 U.S. at 12. Like the program in *Zelman*, the Astrophysics Grant did not reference religion in its terms. R. at 4–6; *see* 536 U.S. at 653–54. The primary beneficiary of the Astrophysics Grant is the scientific community. *See Zobrest*, 509 U.S. at 12; R. at 4–6. The GeoPlanus Observatory was uniquely positioned for observation of a comet that only occurs once every ninety-seven years. R. at 4–5; R. at 52, Seawall Aff. ¶¶ 4–5. Nicholas had access to extensive resources and was positioned to make a singular contribution to the scientific community. R. at 5; R. at 56–57, Nicholas Aff. ¶¶ 10–12. Any benefit to Meso-Paganism and Nicholas's religious goals would be the result of his private choice and merely incidental to the research grant. *See Zelman*, 536 U.S. at 649–53. While Nicholas may be able to use his research to apply for a Meso-Pagan Sage position, and he has discussed Meso-Pagan beliefs in connection with his research, these are the result of his private choices. R. at 57, Nicholas Aff. ¶¶ 13–15; *see Zelman*,

536 U.S. at 649–53. In conducting his research under the Astrophysics Grant, Nicholas focused "on studying the Pixelian event from a scientific perspective." R. at 8. Just as there was no Establishment Clause concern in *Zelman* where state aid went to religious schools, Nicholas's independent exploration of religious themes does not raise an Establishment Clause concern. *See Zelman*, 536 U.S. at 649–53.

Any argument that Nicholas's research raised an Establishment Clause concern because his research led others to believe his religious views carried the imprimatur of the school is inapposite. *See Kennedy*, 597 U.S. at 514–20, 537–38. In *Zelman*, this Court stated that it has "repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reache[d] religious schools solely as a result of the numerous independent decisions of private individuals, carrie[d] with it the imprimatur of government endorsement." 536 U.S. at 654–55. In *Kennedy v. Bremerton School District*, the Court rejected a school district's concern that it could be perceived as endorsing religion when its high school football couch engaged in private religious exercise by praying on the football field after games. *Id.* at 512, 525, 533–39. The Court "has long recognized . . . that 'secondary school students are mature enough . . . to understand that a school does not endorse' . . . 'speech that it merely permits on a nondiscriminatory basis.'" *Kennedy*, 597 U.S. at 514–20, 537–38 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990)). The Court has even suggested that children as young as age six to twelve can recognize some distinction regarding whether an activity bears the school's imprimatur. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115, 117–18 (2001).

Here, Nicholas is conducting his research for the benefit of the scientific community, which is primarily an educated, adult audience. R. at 5–9. If elementary and high school students have the capability to understand that merely allowing speech does not constitute endorsement, the scientific community should be able to reach a similar conclusion. *See Kennedy*, 597 U.S. at 538; *Good News*

Club, 533 U.S. at 115, 117–18. For the purposes of the Constitutional analysis, Delmont University's contention that it is "becoming associated with 'weird science'" does not require the Court to conclude that Nicholas's speech is endorsed by the University and therefore must be suppressed to comply with the Establishment Clause. R. at 9; *Kennedy*, 597 U.S. at 535 ("[The Establishment Clause does not] 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'") (quoting *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment). As the Court held in *Good News Club v. Milford Central School*, mistaken and erroneous perception of endorsement does not allow proscription of protected religious activity. 533 U.S. at 119. Moreover, "'the government has not fostered or encouraged' any mistaken impression that [Nicholas] speak[s] for the University. The University has taken pains to disassociate itself from [Nicholas's] private speech." *Rosenberger*, 515 U.S. at 841 (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)). By terminating Nicholas's grant, Delmont University has made it clear that it does not endorse Nicholas's views. R. at 9–10; *see id.* The notation in *Ad Astra* stating that the journal did not endorse Nicholas's views further emphasizes the private nature of his religious convictions. R. at 8–9; *see Rosenberger*, 515 U.S. at 841. For these reasons, any argument that Nicholas's research carried the University's imprimatur and gave rise to an Establishment Clause violation is unpersuasive.

C. Nicholas's Potential Interest in Pursuing a Meso-Paganist Sage Position Does Not Create a State-Supported Clergy Concern Because His Pixelian Event Research Is Primarily Scientific in Nature.

Any argument that Delmont University's support of Nicholas rose to the level of state-supported clergy misapplies Supreme Court precedent and fails to appreciate the scientific nature of Nicholas's research. *See, e.g.*, *Espinoza*, 140 S.Ct. at 2257–59. The Fifteenth Circuit erroneously held that Nicholas's research created an Establishment Clause violation under *Locke v. Davey*, a case where this Court upheld a state's refusal to financial support students pursuing devotional theology

degrees. R. at 46–48; 540 U.S. 712, 715–18, 722–25 (2004). However, as this Court held in *Carson*, and the District Court correctly determined below, *Locke*'s applicability is limited to contexts where a state seeks to avoid funding vocational ministerial training and state-supported clergy. R. at 28–29; *Locke*, 540 U.S. at 719, 722-25; *Espinoza*, 140 S.Ct. at 2259; *Carson*, 596 U.S. at 789 ("*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.").

In *Locke*, student Joshua Davey brought an action against Washington state officials when the state prohibited Davey from using a state-funded scholarship to pursue a devotional theology degree. *Locke*, 540 U.S. at 715–18. Davey stated that "his 'religious beliefs [were] the only reason for [him] to seek a college degree.'" *Id.* at 717, 721 (quoting Joint Appendix at 40). Upon learning he could not use the scholarship to pursue the devotional theology degree, he refused to sign a form certifying that he would not pursue such a degree and did not receive any scholarship funds. *Id.* at 717. This Court held that under its Establishment Clause precedent "there [wa]s no doubt that the State could, consistent with the Federal Constitution, permit [scholarship recipients] to pursue a degree in devotional theology." *Id.* at 719. Because "independent and private choice" breaks "the link between government funds and religious training," the Federal Constitution would have allowed Davey to pursue a devotional theology degree without offending the Establishment Clause. *Id.* However, the Court held that the state of Washington could prohibit recipients of a state-sponsored scholarship from pursuing devotional degrees. *Id.* at 719, 722–25. In this instance, Washington's refusal to fund devotional degrees did not violate Davey's Free Exercise rights. *Id.* at 715, 725. Although Davey could not use the scholarship to pursue "religious instruction that w[ould] prepare students for the ministry," the scholarship program still permitted students to attend religious schools and take courses in devotional theology. *Id.* at 724–25. On those facts, Washington's

antiestablishment interest in refusing to pay for the education of ministers—while stricter than the Constitution's requirements—did not violate the First Amendment. *Id.* at 722–25.

Here, *Locke* does not apply. *See id.* at 722–25. As the District Court found below, Nicholas's situation differs from Davey's because Nicholas is not pursuing a vocational religious degree. *See* R. at 29; *id.* at 717; *see Carson*, 596 U.S. at 789. As this Court determined in *Carson*, *Locke*'s applicability is cabined to its "narrow focus on vocational religious degrees." *Carson*, 596 U.S. at 789. Also unlike Davey, Nicholas's religious beliefs were not the only reason he pursued the Astrophysics Grant. *See Locke*, 540 U.S. at 721 (quoting Joint Appendix at 40); R. at 8. Although his religious beliefs inspire his work, nothing in the record indicates that his beliefs are the sole reason for his interest in astrophysics. *See* R. at 55–56, Nicholas Aff. ¶¶ 3–6; R. at 3, 8. Moreover, Nicholas has not been formally accepted into any Meso-Pagan seminary. R. at 57, Nicholas Aff. ¶ 15. As the District Court determined below, "this scenario would be much too attenuated to raise a genuine Establishment Clause concern," even if Nicholas did apply to become a Meso-Pagan Sage. R. at 29. Because Nicholas is not pursuing a theology degree and his interest in the Pixelian Event focused on its scientific implications, this Court should overturn the Fifteenth Circuit's decision and hold that *Locke* is irrelevant to Nicholas's case. R. at 8, 30; *see Carson*, 596 U.S. at 789.

D. States Cannot Overprotect Antiestablishment Interests at the Expense of Other Constitutionally-Protected Rights.

The Constitution "sets the floor" for individual rights. *Am. Legion*, 139 S.Ct. at 2094 (Kavanaugh, J., concurring). States are generally free to overprotect Constitutional rights. *Id.* However, states seeking to comply with the Establishment Clause may run the risk of violating the Free Exercise Clause. U.S. CONST. amend. I; *see, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). As this Court stated in *Trinity Lutheran Church of Columbia v. Comer*, "'[a state's interest] in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution . . . is limited by the Free Exercise Clause.'" 582 U.S. 449, 466

(2012) (quoting *Widmar*, 454 U.S. at 276). Asserting the state's interest in maintaining the separation of church and state does not automatically remedy a constitutional violation where the state impermissibly discriminates on the basis of religious use or status. *Espinoza*, 140 S.Ct. at 2260–61; *Carson*, 596 U.S. at 786–87.

In *Carson v. Makin*, the state of Maine established a tuition assistance program where the state would send a payment to a public or private school of the family's choice. 596 U.S. at 771–73. To participate in this program, the state prohibited families from selecting a religious school. *Id.* at 773. The *Carson* Court struck down this requirement, determining that it violated the Free Exercise Clause. *Id.* at 789; U.S. CONST. amend. I. Reaffirming its reasoning from *Trinity Lutheran* and *Espinoza*, the *Carson* court stated that "[a] State's antiestablishment interest" cannot justify religious discrimination or excluding certain individuals "from an otherwise generally available public benefit because of their religious exercise." *Carson*, 596 U.S. at 781. Because Maine denied the benefit to families seeking to send their children to religious schools, Maine impermissibly infringed upon the families' First Amendment right to free religious exercise. *Id.* at 789. Claiming an interest in enforcing the Establishment Clause does not give states a free pass to trample on an individual's Free Exercise rights. *See Trinity Lutheran*, 582 U.S. at 466.

This Court also determined that states may not discriminate on the basis of religious status or religious use of state funds. *Carson*, 596 U.S. at 787–89. The lower court in *Carson* had erroneously reasoned that Maine could place a use-based restriction on funds that limited where families could apply the state tuition assistance. *Id.* at 773, 786. However, this Court found that its relevant precedent—*Trinity Lutheran and Espinoza*—"never suggested that use-based discrimination is any less offensive to the Free Exercise Clause." *Id.* at 787. The Court determined that use-based restrictions like Maine's could risk *creating* Establishment Clause concerns, because a state's practice of scrutinizing "whether and how a religious school pursues its educational mission [could]

raise serious concerns about state entanglement with religion and denominational favoritism." *Carson*, 596 U.S. at 787.

Here, the Court should follow its reasoning from *Carson* and determine that Delmont University's cannot hide behind its antiestablishment interests to justify the sacrifice of Nicholas's constitutional rights. *Id.* at 781–89. Similar to the state of Maine in *Carson*, the University restricted Nicholas's access to a benefit simply because his scientific research may have religious implications. *See Carson*, 596 U.S. at 773, 781; R. at 10. Additionally, Nicholas's colleagues at Delmont University "have relied on and referenced in their own publications the writings of other pagans, such as the Greeks, Romans, Incas, and Phoenicians. R. at 58, Nicholas Aff. ¶ 18. This indicates the discriminatory nature of the restriction Delmont University imposed on Nicholas. *See Carson*, 596 U.S. at 781. Thus, the Court should overrule the Fifteenth Circuit and reject the University's argument that its antiestablishment interest justified its revocation of Nicholas's grant.

E. The Court Should Not Defer to the University's Judgment Because Nicholas's Research Did Not Violate the Establishment Clause and the University Lacked Justification to Revoke His Grant.

Any argument that the Court must defer to Delmont University's judgment in revoking Nicholas's grant is unpersuasive because Nicholas's research did not violate the Establishment Clause and Delmont University consequently had no lawful rationale for revoking the Grant. *See Widmar*, 454 U.S. at 276–77. The Fifteenth Circuit misapplied this Court's decision in *Widmar v. Vincent* when it erroneously held that the judiciary should defer to Delmont University's judgment. R. at 48; *see Widmar*, 454 U.S. at 270–77. In *Widmar*, the Court determined that a religious student group, Cornerstone, could conduct meetings in university facilities without violating the Establishment Clause. 454 U.S. at 264–68. When the university excluded Cornerstone students from meeting in university buildings, the Court affirmed the Eighth Circuit's decision that the university unlawfully discriminated against the students' religious speech. *Id.* at 265–67. The Court also

affirmed the Eighth Circuit's determination that "the Establishment Clause d[id] not bar a policy of equal access, in which facilities [we]re open to groups and speakers of all kinds." *Id.* at 267.

The *Widmar* Court stipulated:

> [*Widmar*'s] holding . . . in no way undermine[d] the capacity of the University to establish reasonable time, place, and manner regulations. Nor d[id] [it] question the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Id. at 276 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in result)). Even though the Court recognized that that the judiciary may defer to a university's judgment in certain situations, this did not disturb the Court's determination that Cornerstone's use university facilities did not violate the Establishment Clause. *See id.* at 276–77. Here, the Court should follow *Widmar* and reject any argument that this Court should defer to Delmont University's judgment in revoking Nicholas's grant. *See id.* at 270–77.

CONCLUSION

For the Foregoing Reasons, the Court of Appeals for the Fifteenth Circuit should be **OVERRULED** and the District Court for the District of Delmont's decision should be **AFFIRMED**.

Respectfully Submitted,

Team 7
Counsel for Petitioner

APPENDIX A

Constitutional Provision

U.S. Const. amend. I.

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

CERTIFICATE OF COMPLIANCE

Following the requirements of Rule IV(C)(3) of the Official Rules of the 2023-2024 Seigenthaler-Sutherland Moot Court Competition, we, Team 7, Counsel for Petitioner, certify that:

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

2) Our team has complied fully with our law school's governing honor code, and

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

Team 7
Counsel for Petitioner