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 11

Counsel for Petitioner

January 31, 2024

QUESTIONS PRESENTED

I. 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?

II. 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?

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

Delmont University's GeoPlanus Observatory was designed to establish the University's reputation as a prestigious academic institution. R. at 4-5. The facility allowed the University to establish a highly competitive visitorship to study the Pixelian Comet—a rare event occurring every ninety-seven years. R. at 4-5. The state-funded visitorship ("the Grant") included the hiring of a principal investigator, assistants, and other resources necessary for study prior to, during, and after the Pixelian Event. R. at 5. At issue here was the grant's requirement that all research and subsequent conclusions conform to the "academy's consensus view of a scientific study." R. at 5.

Dr. Cooper Nicholas (Dr. Nicholas), an astronomical "wunderkind," was selected through a competitive process for the visitorship. R. at 5-6. His selection brought substantial media attention and excitement from the academic community. R. at 5-6. Media coverage of the event, and the observatory's unique location, transformed the event into a global phenomenon. R. at 5-6. In accordance with the grant, Dr. Nicholas recorded and published celestial measurements,

generating additional academic interest to the pleasure of the state of Delmont and Delmont University (hereinafter "Delmont"). R. at 5-6.

Through special arrangement with the preeminent astrophysics journal *Ad Astra*, Dr. Nicholas's research was published shortly after the Event. R. at 8. Dr. Nicholas, alongside the objective measurements of the Event, offered commentary that ancient hieroglyphs seemed to depict the Pixelian Comet. R. at 7. Dr. Nicholas hypothesized that his observations and comparisons to historical texts were consistent with the Charged Universe Theory. R. at 7. The Charged Universe Theory proposes that charged particles are responsible for cosmological phenomena, not gravity. R. at 7. His comments were neither conclusive nor insistent, but instead suggested the connection was worth further study. R. at 7.

The Charged Universe Theory is essential to Dr. Nicholas' Meso-Pagan faith. R. at 7. Meso-Pagans believe that the Charged Universe Theory is proof of "the lifeforce," that keeps the universe in a constant and perpetual equilibrium. Nicholas Aff. ¶ 12-13. Dr. Nicholas believed that his observations revealed evidence of electrical interplay central to the Meso-Pagan faith. Nicholas Aff. ¶ 11-12.

Dr. Ashmore, editor of *Ad Astra*, expressed reservations about the subject matter of Dr. Nicholas' conclusions. R. at 8. Specifically, she was hesitant to publish the article because of its support for the Charged Universe Theory, a theory she admits cannot be disproven even though it is not generally supported by the scientific community. R. at 8. Because Dr. Nicholas' proposals were "groundbreaking," Dr. Ashmore agreed to publish them with a disclaimer at the beginning of the article to distance *Ad Astra* from Meso-Pagan views. R. at 8. Dr. Nicholas was unbothered by the disclaimer, as his only priority was to publish his findings. R. at 8.

Despite their groundbreaking nature, Dr. Nicholas' comments about the Charged Universe Theory were met with academic skepticism and media mockery. R. at 9. Delmont kowtowed to the blowback by attempting to bully Dr. Nicholas into adopting different views. R. at 10. In a letter to Dr. Nicholas, Delmont President Meriam Seawall demanded that he abandon further commentary about the Charged Universe Theory. R. at 10. Relying on Dr. Ashmore's qualifier, the University accused Dr. Nicholas of "coming perilously close" to the unempirical research practices of alchemists. R. at 10. Dr. Nicholas acknowledges that the Charged Universe Theory is a minority view but denies accusations of unscientific methodology. R. at 7.

Dr. Nicholas refused to adapt his commentary to non-scientific pressures and took umbrage with the University's claim that his findings violated the grant's requirement that "the study of the event and the derivation of subsequent conclusions conform to the academic community's consensus view of a scientific study." R. at 10. Dr. Nicholas replied that his findings were based on sound science, and the University's attempts to classify them otherwise were the product of academic arrogance and bigotry. R. at 11.

He was given a choice: conform or abandon the grant. R. at 11. Unwilling to sacrifice his academic integrity and deeply held spiritual beliefs, Dr. Nicholas refused the University's demands. Shortly thereafter, the University changed the locks to the GeoPlanus Observatory. R. at 11.

The University's own President acknowledges that reputational harm was the primary concern, as the University sought to distance itself from "religious-centered research." Seawall Aff. ¶ 7, 9-10. The University funded Dr. Nicholas until the scientific community rejected his religious views. Seawall Aff. ¶ 9-10. The University then hid behind a vague justification that his

idea to potentially use the research to apply for a position as a First-Order Sage constituted an Establishment Clause violation. Seawall Aff. ¶ 10.

The Meso-Paganist faith encourages scientific study of the universe. Nicholas Aff. ¶ 7. Sages in the faith observe the cosmos and compare their findings to foundational texts containing ancient hieroglyphs of what is believed to be the "lifeforce." Nicholas Aff. ¶ 7. Dr. Nicholas believed that ancient hieroglyphs, independently dated by archeological study, may have captured the same celestial event. Nicholas Aff. ¶ 12. Without access to the Observatory, Dr. Nicholas sued and was granted an injunction by the District Court, which was overturned by the Fifteenth Circuit. R. at 12, 30-31, 50-51.

SUMMARY OF THE ARGUMENT

I. Question Presented 1.

This Court should reverse the Fifteenth Circuit's decision and grant Dr. Nicholas' injunction. Previously awarded government benefits cannot be later denied on a viewpoint basis. Delmont discriminated against Dr. Nicholas' viewpoint on the Charged Universe Theory and took the least-narrowly tailored recourse possible in removing Dr. Nicholas from the research entirely. Manipulating the definition of science to attack Dr. Nicholas' conclusions amounted to impermissible government censorship under *Speiser v. Randall.* Dr. Nicholas is not advocating dangerous ideas worthy of censorship, nor advocating as a government actor under *Legal Services Corp. v. Velazquez.* Thus, the decision below must be reversed.

II. Question Presented 2.

This Court should reverse the Fifteenth Circuit because Delmont's establishment concerns do not excuse Delmont's violation of Dr. Nicholas' free exercise rights. According to historical realities, the boundary of the Establishment Clause is limited to government coerced or compelled religious acts. Delmont has not alleged either. The District Court correctly identified the historical Establishment Clause boundary with six indicia of laws and customs that early Americans repealed for disestablishment. Meanwhile, the Fifteenth Circuit misapplied *Locke v. Davey* to achieve an impermissible *Lemon v. Kurtzman* result: Dr. Nicholas can choose between his religious beliefs or public funds so that Delmont can avoid the appearance of favoring religion. This Court has condemned that choice. As such, the Fifteenth Circuit's decision should be reversed.

ARGUMENT

I. DELMONT'S REQUIREMENT THAT DR. NICHOLAS CONFORM HIS SPEECH TO WHAT THE UNIVERSITY DEEMS ACCEPTABLE "SCIENCE" TO CONTINUE ENJOYING THE BENEFITS OF THE GRANT IS AN UNCONSTITUTIONAL CONDITION ON HIS SPEECH.

The First Amendment of the United States Constitution requires that Congress and the states "shall make no law...abridging the freedom of speech." U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Delmont violated the First Amendment's protection against censorship, coercion, and compulsion when it censored Dr. Nicholas' scientific conclusions and coerced him to compromise his religious convictions.

Government may not, once it provides a benefit to the public, condition enjoyment of that benefit on a violation of the First Amendment. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Government conditioning of a public benefit on a First Amendment violation is akin to "produc[ing] a result [it] could not command directly." *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that the University acted unconstitutionally by withholding funds from certain student activity organizations). The Fifteenth Circuit erred when it held that Delmont's condition—fall in line with the academic consensus view or forgo funds—was permissible. Because of Delmont's blatant viewpoint discrimination, the decision below should be reversed.

A. Delmont Unconstitutionally Discriminated Against Dr. Nicholas' Viewpoint Regarding His Academic, Scientific Conclusions.

Delmont infringed Dr. Nicholas' free speech right when it required him to promote a government-approved message or give up his grant. That message amounted to a requirement that

Dr. Nicholas conform to a nebulous and subjective definition of science established by a "consensus" of the academic community. R. at 5. Such conditions are impermissible under this Court's precedent because First Amendment violations are presumed when government discriminates against content or viewpoints. *Rosenberger*, 515 U.S. at 828.

Viewpoint discrimination occurs where government operates a public forum but attacks an individual's particular expression and is considered a "more egregious form of content-based discrimination." *Id.* at 829. Delmont engaged in viewpoint discrimination when it prevented Dr. Nicholas from publishing his own academic commentary about the Pixelian Event.

Viewpoint discrimination is presumed to be unconstitutional. *Id.* at 828-29. A First Amendment violation is apparent when government seeks to discriminate against a viewpoint. *Id.* at 829. Government must remain neutral and avoid restricting or regulating speech, especially when "the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (citations omitted).

Attempts to compel speech are subject to strict scrutiny. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 653 (1994). To meet this standard, Delmont must show that its regulation of Dr. Nicholas' speech is narrowly tailored—that is, the least restrictive possible—to serve a compelling government interest. *Id.*; *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Overinclusive and underinclusive conditions fail strict scrutiny. *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 805 (2011). The condition in the grant fails strict scrutiny because it is both overinclusive and underinclusive. The condition is overinclusive by requiring only the Academy's consensus viewpoints on what is "science." The condition is also underinclusive in its selective approval of religious texts, especially considering the University has not objected to the use of other cultural

pagan religions—Greeks, Romans, Incas, and Phoenicians—in prior publications. Nicholas Aff. ¶ 18.

The University fails to show that Dr. Nicholas' conclusions pose any legitimate risk. The speech must be real danger in the form of an 'actual problem' for it to be restricted, and the restriction must be "actually necessary" to the solution. *Brown*, 564 U.S. at 799 (citations omitted). That is not the case here.

Delmont's proffered justification—a desire to prevent confusing the line between religion and science in the minds of the public—is not sufficiently compelling to justify censoring Dr. Nicholas. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 539 (2022) (holding suppression of a coach's prayers to avoid coercive appearance is an insufficient justification for censorship when students are mature enough to distinguish private views from government-sponsored activity). Controlling the public's perception of what counts as science or religion is not a compelling interest. It amounts to a naked censorship of thought that the First Amendment is specifically designed to guard against. Members of this Court have warned against First Amendment violations that may occur when states overzealously guard against other potential First Amendment violations. *Shurtleff v. City of Boston*, 596 U.S. 243, 276-80 (2022) (Gorsuch, J. concurring).

Even if the University's interest is compelling, the condition on Dr. Nicholas' speech is not narrowly tailored. Instead of first seeking disclaimers or qualifiers, as *Ad Astra* did, or simply clarifying that the grant funds could only be used for empirical analysis, Delmont University immediately cut off Dr. Nicholas's funding unless he accepted their compelled speech. Changing the locks and entirely removing Dr. Nicholas from the project is the least narrow means imaginable. Thus, Delmont's actions fail under strict scrutiny.

B. Delmont Placed an Impermissible Condition on Dr. Nicholas' Speech Before Punishing Him for Refusing to Surrender His Principles.

1. Delmont Penalized Dr. Nicholas for Refusing Its Attempt to Direct His Speech and the Fifteenth Circuit's Reliance on Rust is Misplaced.

Barring government benefits for unapproved speech amounts to a penalty on such speech. *Speiser v. Randall*, 357 U.S. 513, 518 (1958). Delmont cannot condition speech to "produce a result which [it] could not command directly." *Id.* at 526. Delmont cannot command Dr. Nicholas to abandon his conclusions about the Charged Universe Theory when he arrived at them through scientific analysis, per the grant requirements. Delmont penalized Dr. Nicholas by weaponizing a nebulous definition of "science" so that his conclusions were impermissible under the grant terms.

In this way, the Fifteenth Circuit's reliance on *Rust v. Sullivan* is misconstrued. *See* R. at 35-36, 40. The Fifteenth Circuit cites *Rust* to assert that conditions on government funded projects are constitutional. *Id.* However, *Rust* is distinguishable here. In *Rust*, the government provided health care organizations with benefits that could be used for various forms of family planning, excluding abortion. *Rust v. Sullivan*, 500 U.S. 173, 178 (1991). Despite the abortion carveout, this Court found this constitutional because government can condition a benefit based on policy preferences. *Id.* at 193. Delmont did not carve out a policy preference against academic religious commentary prior to awarding the grant; rather, it sought to silence Dr. Nicholas' commentary solely because of its religious nature. Therefore, *Rust* is not analogous.

2. The First Amendment Prevents Delmont From Compelling Dr. Nicholas Into Adopting Delmont's Discriminatory Definition of "Science."

A core tenet of the free speech right is that Government cannot direct speech. *Agency for Int'l Dev. v. All. for Open Soc'y, Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Rumsfeld v. F. for*

Acad. and Inst. Rts., Inc., 547 U.S. 47, 61 (2006)). That core tenant extends to conditioning benefits on an individual's willingness to surrender a religiously impelled status, and such conditioning amounts to a penalty. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017) (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)) [hereinafter *Trinity Lutheran*]. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc.*, 512 U.S. at 641. Delmont's actions contradict these bedrock principles.

Delmont compels Dr. Nicholas to speak by insisting that he conform his research and conclusions to the Academy's view. This Court finds it unconstitutional for conditions of a program to be redefined or else the "First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). This Court held in *303 Creative* that First Amendment violations occur when the state conscripts the speech of private individuals to accomplish a government end. *See 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). Similar to Colorado, Delmont is trying to "excis[e] certain ideas or viewpoints from the public dialogue." *Id.* (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 642). Dr. Nicholas cannot be forced into sacrificing his religious beliefs to meet Delmont's conditions.

Agency for International Development held that forced adoption of government views violates the First Amendment even where the individual was largely free to speak the opposite view "on their own time and dime." *Agency for Int'l Dev.*, 570 U.S. at 218. Dr. Nicholas' *Ad Astra* article generated substantial academic interest and Dr. Nicholas acknowledges some of that interest was undesirable to the University. R. at 10. Preferring a different message, however, does not make the University's demands permissible, even if Dr. Nicholas could independently publish opposite conclusions. *Agency for Int'l Dev.*, 570 U.S. at 218.

3. Dr. Nicholas did not Present a "Dangerous Idea" Worthy of Suppression.

In *Speiser*, this Court recognized that dangerous ideas may be punished or restricted, albeit under severe scrutiny. *Speiser*, 357 U.S. at 519. This Court concluded that under its own jurisprudence that forced speech can only occur when the individual regulated "could, if evilly motivated, create serious danger to the public safety." *Id.* at 527. Delmont has not even alleged Dr. Nicholas is dangerous, because doing so would be preposterous.

The Fifteenth Circuit's misapplication of *Harris* ignores the government's bar on conditioning government benefits on speech. *Harris v. McRae*, 448 U.S. 297 (1980). *Harris* held funding *some* medical procedures did not require the government to fund abortion. *Id.* at 317-18. Unlike *Harris*, where no benefit was originally provided, Dr. Nicholas was months into the grant that Delmont did provide. As such, *Harris* does not control.

Unpopular ideas are not automatically dangerous, even ideas that are "shabby, offensive, or even ugly." *U.S. v. Playboy Ent. Grp.*, 529 U.S. 803, 826 (2000); *see also Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943). The University's argument that it has an interest in avoiding negative press is baseless under the law. This Court does not allow suppression of ideas to prevent "discomfort and unpleasantness." *Playboy*, 529 U.S. at 817 (internal citation omitted). As such, the discomfort and unpleasantness the University incurred via the press does not justify its suppression of Dr. Nicholas, even if his ideas are "controversial" and "medieval." R. at 9.

C. The University Could Have Easily Included a Disclaimer Distancing Itself From Dr. Nicholas' Conclusions—A Far Less Restrictive Means Already Utilized by *Ad Astra.*

Dr. Nicholas had no right to the grant funds prior to being chosen to lead the research. However, once he attained that right, Delmont was bound to follow the dictates of the First

Amendment in any effort to control or influence his speech. Outright denial of continued use of the funds is not a constitutional recourse. Dr. Nicholas could choose to deny funds, *Rumsfeld*, 547 U.S. at 59, but Delmont cannot choose for him. Delmont's attempt to trade funds for censorship is beyond the pale of a "reasonable choice." *Id.*

Instead of using the least restrictive means necessary as required by our Constitution, Delmont resorted to the most severe action conceivable and removed Dr. Nicholas entirely from the research. *League of Women Voters of California* instructs that disclaimers are sufficient to allay any endorsement concerns. *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 395 (1984). Delmont should have known a disclaimer was an adequate recourse, because they could have followed *Ad Astra's* path by qualifying Dr. Nicholas' work with a disclaimer. If disclaimers work for public broadcasters, they would work for Delmont as well. *Id.* at 395.

Further the Fifteenth Circuit's reliance on *Regan* is misplaced. Indeed, *Regan* deals with the rejection of financial help from government based on a condition. *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 545 (1983). But a speaker's viewpoint was not an issue addressed by *Regan*. *Id.* at 548. Rather, *Reagan* was about the government's refusal to support an entire action with viewpoints aside. *Id.* at 550. Similarly, Delmont's *Rumsfeld* reliance fails because *Rumsfeld* was about University access when the University was not required to say or do anything. *Rumsfeld*, 547 U.S. at 60. The opposite is true here, as Delmont seeks to compel Dr. Nicholas' adherence to its proscribed viewpoint.

D. Government Funds Do Not Create Government Actors.

Even if viewpoint-based decisions are permissible when the government speaks, they are not permissible here because Dr. Nicholas is not a government actor. *See Velazquez*, 531 U.S. at 533. This Court has unequivocally rejected the notion that government funding automatically

creates a government actor. *See, e.g., id.* at 542; *Rosenberger*, 515 U.S. at 834. For Dr. Nicholas to be a government actor, the University should have been clearer that his conclusions were intended to be a government message. *Rosenberger,* 515 U.S. at 834. The record is silent as to Delmont's intent, and Delmont's name, seal, or stamp appear nowhere on Dr. Nicholas' work.

Simply funding someone's voice is not equivocal to endorsement or support. *Rosenberger*, 515 U.S. at 834-35. If the opposite were true, an official government position could be found in every classroom lecture, symposium debate, and scholarly article produced by every public college professor in this country. For this very reason, funding does not entitle the government to control what the speaker says. *Id.* at 833. Delmont's condition requiring Dr. Nicholas to set aside his viewpoint on the Charged Universe Theory or forego funding is brazen viewpoint discrimination. This discrimination does not survive strict scrutiny when far less intrusive measures were available to address Delmont's endorsement concerns. Delmont cannot likewise require Dr. Nicholas to dispel a message they did not enlist him to promote. *Rosenberger,* 515 U.S. at 835. As such, the Fifteenth Circuit's decision should be overruled.

II. DELMONT HAS NO ESTABLISHMENT CLAUSE CONCERN IN DR. NICHOLAS' SCIENTIFIC RESEARCH AND THE FIFTEENTH CIRCUIT'S DECISION SHOULD BE OVERRULED.

Delmont's establishment concerns do not trump Dr. Nicholas' free exercise rights. *See Kennedy*, 597 U.S. at 532-33. The core of historic Establishment Clause jurisprudence is preventing compulsion and coercion of religious acts. *Id.* at 537. Scholars define establishment as "the promotion and inculcation of a common set of beliefs through governmental authority." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). History informs what is—

and what is not—an Establishment Clause concern. *Kennedy*, 597 U.S. at 536. Delmont has never alleged that Dr. Nicholas' commentary on the Event coerced or compelled religious practice. Nevertheless, Delmont ignores this Court's pluralist traditions and seeks to compel Dr. Nicholas into conformity with a proscribed definition of science. *See id.* at 510; R. at 9-11.

History informs that the Establishment Clause protects "liberty of conscience." Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 398 (2002). Dr. Nicholas' academic commentary about the Charged Universe Theory is distinct from actual religious control prohibited by the Establishment Clause. Tangential benefits to one man's religion do not run afoul of the Establishment Clause and a state's desire to avoid establishment concerns is insufficient to deny funding. *See Trinity Lutheran*, 582 U.S. at 457-66. The Fifteenth Circuit's misapplication of *Locke v. Davey* achieved a *Lemon*-like result: a result this court has overtly rejected. Dr. Nicholas should be permitted to continue his state-funded research and the Fifteenth Circuit should be reversed.

A. The Framers Sought to Protect Liberty of Conscience by Preventing State-Sponsored Religious Coercion or Control.

In the past, this Court analyzed Establishment Clause issues on the basis of whether (1) the law has a secular purpose, (2) has a neutral effect, and (3) does not create excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). But *Lemon* and its progeny are no longer the law. *Kennedy*, 597 U.S. at 510. Today, historical practices and understandings guide Establishment Clause interpretation. *Id.* at 535. What the Framers counted as established religion was not legal abstraction, but actual, tangible, and forceful establishment. *See* McConnell, *supra*, at 2115-25.

This Court's first Establishment Clause interpretation analyzed the historical arguments surrounding the adoption of the Establishment Clause. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 13-16 (1947). The *Everson* court recognized that early Americans had "a vivid mental picture" of persecution, fines, and jailtime for dissenters that they wanted to stamp out on American soil. *Id.* at 8-9. Established sects' maintenance of "absolute political and religious supremacy" through government was the Framers' concern, not commentary about the religious implications of an asteroid. *Id.*

In fact, bars on established religion evolved from religion itself. *See* Feldman, *supra*, at 346-54. Disestablishment was a theological idea by Martin Luther, who believed it sinful to act against one's conscience, and John Calvin, who believed "the conscience of believers…should rise above and beyond the law." *Id.* at 357-59 (quoting John Calvin, *Institutes of the Christian Religion* 58-59 (1536)). Luther and Calvin's ideas influenced John Locke, who concluded that worship contrary to one's conscience was sinful hypocrisy towards God. *Id.* at 369. Eventually, James Madison would introduce to Congress a constitutional amendment declaring "nor shall any national religion be established, or shall the full and equal rights of conscience be…infringed." Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm. & Mary Bill Rts. J. 73, 133 (2005).

Disestablishment was necessary to achieve true liberty of conscience. Early Americans knew precisely what the Establishment Clause meant because they had actually experienced religious control and coercion. McConnell, *supra*, at 2017. Open and obvious endorsement of a particular religion made establishment easily identifiable. No single dispositive indicia defined 'established' religion, but actual establishment is easily identifiable compared to the confusion caused by *Lemon*. *See Kennedy*, 597 U.S. at 535-36.

A more precise definition of established religion can be elicited from what needed to change to achieve *disestablishment*. McConnell, *supra*, at 2131. Disestablishment required rooting out government control over official scripture, appointment of church officials, prohibitions on unlicensed religious meetings, and oaths of supremacy. *Id.* at 2112-16. Laws that needed to be repealed were not uniform, but fell into six categories:

> (1) Control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support [of the church from the state]; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.

Id. at 2131. These six indicia have been recognized by members of this Court as an accurate description of a historical understanding of established religion. *See Shurtleff*, 596 U.S. at 285-86 (Gorsuch, J., concurring); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2264 (2020) (Thomas, J., concurring). Each of these six indicia were exercised through statutes passed by legislatures that granted government actual control over religious activities. McConnell, *supra*, at 2131-76.

These six criteria of established religion together amount to the most salient aspect of historical establishment: government control over religion. *Id.* at 2207. To the founding generation, established religion was not abstract religious advancement, entanglement, coercion, or endorsement; but tangible church control, compulsory attendance, financial support, dissenter prohibitions, civic use, and political restrictions were the means to an end of established religion. *See id.* at 2205-07. Repealing these laws was the actual requirement for disestablishment.

Despite history's central role in Establishment Clause interpretation, the Fifteenth Circuit's decision devotes two mere paragraphs to historical analysis. R. at 45-46. All but one of the six indicia of established religion—religious funding—are entirely ignored. *Id.* Dr. Nicholas' research

does not come close to any of the six indicia. His commentary creates no control over doctrine, governance, or church personnel. His work does not compel church attendance or prohibit dissenters from worshiping the religion of their choice. He is not a church minister fulfilling a civic role, nor is he prohibiting dissenters from participating in government. The Fifteenth Circuit hangs its hat on the theory that Delmont is somehow constructively funding a devotional degree, R. at 46, even though doing so is plainly permissible under the Establishment Clause, *Locke v. Davey*, 540 U.S. 712, 719 (2004) ("there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology."). As such, funding Dr. Nicholas' grant would fall far from the ambit of actual established religion.

B. State Funding With Tangential Benefits to One Man's Religion Does not Rise to an Establishment Clause Concern.

The *Espinoza*, *Trinity Lutheran*, and *Carson* (hereinafter, collectively, the "*Trinity Line*") decisions each demonstrate that state funding for a legitimate public interest does not raise an Establishment Clause concern when that funding results in tangential religious benefits. In *Trinity Lutheran*, the State of Missouri faced an Establishment Clause concern when it offered grants for resurfacing playgrounds. *Trinity Lutheran*, 582 U.S. at 453. Recycling scrap tires for use as resurfacing material on school playgrounds was the public interest. *Id.* at 453-55. The grant explicitly excluded "any applicant owned or controlled by a church, sect or religious entity." *Id.* at 455. Missouri maintained it could deny funding because of its state-constitutional interest in "skating as far as possible from religious establishment concerns." *Id.* at 466.

This Court rejected Missouri's argument. *Id.* Even though Missouri's Constitution contained a no-aid provision, this Court found that the neutral government program at issue could not be denied solely on the basis of religious character. *Id.* at 466. The benefit itself, rubber

playground surfacing, had no bearing on religion, thus the states disestablishment interest could not justify denying Trinity Lutheran the grant. *Id.* at 467. Only the "highest order" of state interests could justify such discrimination, and a preference of avoiding the issue was wholly insufficient. *Id.* at 466.

Espinoza and *Carson* instruct that there is no Establishment Clause violation when a state provides general funds for a public interest, and private action directs them to a religious end. *Espinoza*, 140 S. Ct. at 2255, 2262; *Carson as next friend of O.C. v. Makin*, 596 U.S. 767, 769 (2022). In *Espinoza*, Montana established a scholarship program to assist parents that wanted to send their children to private school. *Espinoza*, 140 S. Ct. at 2252. The Department of Revenue interpreted the Montana Constitution's "no-aid" provision to mean that the scholarship funds could not be used towards tuition at religious schools. *Id.* at 2252-53. This Court, notwithstanding the Constitutional provision, held that "the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Id.* at 2254. Further, this Court held that Montana's interest in "creating greater separation of church and State than the Federal Constitution requires," yields to the Free Exercise Clause. *Id.* at 2260. *Carson* bolstered *Espinoza*, holding that antiestablishment interests could not outweigh an individual's religious exercise in the context of generally available public benefits. *Carson*, 596 U.S. at 781.

The *Trinity Line* prevents the state from denying grant applicants or recipients from awards solely on the basis of their religious character. Delmont's only complaint against Dr. Nicholas is that his faith conflicts with Delmont's proscribed scientific consensus. *See* R. at 28-29. The parallel between *Trinity* and the case before this Court is unmistakable. Trinity Lutheran could choose "between being a church and receiving a government benefit," and Dr. Nicholas can choose between voicing his conscience and receiving government funding. *Trinity Lutheran*, 582 U.S. at

465. The government, however, does not get to force that choice. *Id.* Astronomical study is an essential calling of the Meso-Pagan faith. Nicholas Aff. ¶ 7. A core tenet of that faith is that studying the cosmos "will provide critical insights into the biggest questions the universe has to offer." *Id.* Just like Missouri, the University's sole basis for denying funds is Dr. Nicholas' religious nature. The conditioning of a government benefit on making the approved choice is not constitutionally supportable.

C. The Fifteenth Circuit Misapplied *Locke* to Achieve a *Lemon* Result.

The Fifteenth Circuit's reasoning turns entirely on disregarding the *Trinity Line* in favor of *Locke v. Davey* as if they are mutually exclusive. *See* R. at 45. They are not. *Locke* is distinguishable on multiple levels. Further, Delmont is not entitled to deference as the Fifteenth Circuit held because deference does not extend to unconstitutional state action. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 217 (2023). Correctly applied, the *Trinity Line* and *Locke* overcome any deference to which Delmont is entitled.

The first dispositive distinction from *Locke* is that Delmont's constitution does not include no-aid provisions that were indispensable to *Locke*'s holding. *Locke* held that the Establishment Clause does not prohibit state funding of devotional degrees. *Locke*, 540 U.S. at 719 ("there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology."). However, when a state's constitution mandates that "[n]o money or property shall be appropriated for or applied to any religious…instruction," that state can deny funding without violating the First Amendment. *See id.* at 719 n.2. The Fifteenth Circuit reasoned that Delmont's choice to deny funding was within the ambit of actionable state interest. *See* R. at 46-48. *Trinity Lutheran* clarifies that avoiding establishment concerns is an insufficient basis to exclude funding unless that interest is one of the "highest order." *Trinity*

Lutheran, 582 U.S. at 457, 458. Absent a no-aid constitutional provision, Delmont lacks the "highest order" interest necessary to exclude funding. *Id.*

The second dispositive distinction from *Locke* is that Dr. Nicholas is not pursuing a "degree in devotional theology." *Locke*, 540 U.S. at 715. Instead, any benefit Dr. Nicholas gains in someday pursuing a devotional degree is the sole result of his "private and independent choice." *See Carson*, 596 U.S. at 775. The University argues that it had to discontinue funding of the grant after learning—through a personal social media post—that Dr. Nicholas *may someday* use his findings to support an application to attain the status of "first-order sage." Seawall Aff. ¶ 10; Nicholas Aff. ¶ 14. That is far more attenuated than Washington's direct funding of a devotional degree in *Locke*. In any event, this Court has more recently instructed that *Locke* only applies in settings where states directly fund devotional degrees. *Trinity Lutheran*, 582 U.S. at 456-57 ("In [*Locke*], we upheld against a free exercise challenge…not to fund devotional theology") (internal citations omitted).

Unlike the student in *Locke*, Dr. Nicholas has not proposed to use state funds to pay for his tuition at any Meso-Pagan seminary. His enjoyment of the Grant is entirely restricted to research of a celestial event, the conclusions of which *might* be used to *someday* enter a seminary. A benefit so far removed from the purpose and use of the Grant is not the type of Establishment Concern present in *Locke. Locke*, 540 U.S. at 715.

The *Trinity Line* makes clear exactly what *Locke* allows. *Locke* authorized states, consistent with their own constitutions, to refuse to fund certain types of educational paths. *See Trinity Lutheran*, 582 U.S. at 456-57; *Carson*, 596 U.S. at 788 ("the funding in Locke was intended to be used 'to prepare for the ministry' … Funds could be and were used for theology courses; only

pursuing a 'vocational religious' degree was excluded.") (internal citations omitted). Any attempt to bootstrap the *Locke* holding further would be to misunderstand the limits of the case.

Where *Locke* fails to control, *Rosenberger* does. *See Rosenberger*, 515 U.S. 819. There, a university maintained a student activity fund for non-religious student group activities. *Id.* at 824-25. Wide Awake Productions, a student organization, was denied funding for its newsletter centered on Christian perspectives. *Id.* at 826. The University argued that the Establishment Clause prohibited funding to groups with a religious purpose. *Id.* This Court disagreed, however, holding that "the Establishment Clause [does not] even justif[y], much less require…a refusal to extend free speech rights to religious speakers who participate in broad-reaching government program neutral in design." *Id.* at 839. There is no argument that the University "created [the grant] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause." *Id.* at 840. Under this reasoning, Delmont's refusal to provide funding to Dr. Nicholas under the auspices of the Establishment Clause is itself an Establishment Clause violation because the visitorship is neutrally designed and broad reaching in its competitive nature.

When history is the lodestar of Establishment Clause analysis, violations generally occur when government takes compulsory or coercive action. *Kennedy*, 597 U.S. at 536-37. Delmont has not proven, nor even alleged, that Dr. Nicholas' commentary about the Charged Universe Theory has either a compulsory or coercive effect. Further, the Fifteenth Circuit erred when it misapplied *Locke* as the only controlling authority, entirely ignoring the *Trinity Line's* substantive holdings about tangential religious benefits from public funding. Relying on *Locke* achieved a *Lemon v. Kurtzman* result: Delmont can condition Dr. Nicholas' funding on casting aside his conscience so that Delmont can avoid the appearance of endorsing his religion to its donors, the academic community, and the broader media. Delmont is not entitled to any level of deference beyond what

the Constitution requires. *Students for Fair Admissions, Inc.*, 600 U.S. at 217. Because Dr. Nicholas must now choose between his religious convictions and continued funding, the Fifteenth Circuit's decision must be reversed.

CONCLUSION

For the above-stated reasons, the Fifteenth Circuit's ruling should be overruled. Delmont violated Dr. Nicholas' First Amendment free speech right through viewpoint discrimination when attempting to condition his speech. Dr. Nicholas' speech does not violate the Establishment Clause of the First Amendment because it does not compel or coerce Delmont to adopt his view.

Respectfully Submitted,

Team 11
Counsel for Petitioner

APPENDIX A

Constitutional Provisions

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.

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

28 U.S.C. § 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;…

CERTIFICATE OF COMPLIANCE

Team 11, Counsel for the Petitioner, following Rule IV(C)(3) of the 2024 Seigenthaler-Sutherland Cup Moot Court Competition confirm compliance with the following:

1. The work product contained in all copies of Team 11's brief is the work product of all team members.
2. Team 11 complied fully with our law school's governing honor code.
3. Team 11 has complied with all Seigenthaler-Sutherland Cup Competition Rules.