No. 23-CV-1981

In the

Supreme Court of the United States

March Term 2024

NICHOLAS COOPER,

Petitioner,

v.

STATE OF DELMONT and DELMONT UNIVERSITY

Respondents.

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

BRIEF FOR THE RESPONDENT

TEAM 20

Counsel for Respondent

January 31, 2024

QUESTIONS PRESENTED

I. To bring attention to the University's world-class Observatory and advance scientific study of the "once-in-every-ninety-seven-year" appearance of the Pixelian Comet, the State and the University established a Visitorship in Astrophysics. To fund the Visitorship, the State approved an Astrophysics Grant which provides funds associated with the scientific study. The highly sought after State-Funded Grant required its sole recipient to "conform to the academic community's consensus view of science." Does the State's requirement impose an unconstitutional condition on speech?

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

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The United States District Court for the District of Delmont Mountainside Division issued its unpublished opinion on February 20, 2024. The United States Circuit Court of Appeals for the Fifteenth Circuit issued its opinion on March 7, 2024, and is also unpublished.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

The University of Delmont (the "University") opened the world-class GeoPlanus Observatory in the fall of 2020. R. at 4. In 2022, the University received money for an Astrophysics Grant (hereinafter, the "Grant" or the "State-Funded Grant"). R. at 5. The Grant provided funds for a "principle investigator," who would lead the study of the rare Pixelian Event (hereinafter, "Pixelian Event" or the "Event"). The study would document the Pixelian Comet's appearance, which only occurs once every ninety-seven years. The principal investigator would be responsible for observations that occur before, during, and after the Pixelian Event. R. at 5. The Grant would also cover the cost of publication in scientific, peer-reviewed journals. R. at 5. Finally, the Grant required that the study and conclusions "conform to the academic community's consensus view of a scientific study." R. at 5.

The Visitorship was highly coveted, and although there were many applicants, Dr. Cooper Nicholas ("Petitioner"), a well-respected astrophysicist and Delmont alum, was selected. R. at 5

Petitioner grew up in the Meso-American culture and adopted the Meso-Paganist faith. R. at 4. Petitioner's faith, a central tenet of which is the study of the stars, motivated him to pursue his studies in astrophysics. R. at 4.

In March 2022, Petitioner and his team began data collection. R. at 6. *Ad Astra*, the well-respected scientific journal, published Petitioner's pre-Pixelian Event observations. R. at 6. In the journal article, Petitioner stated his cosmic measurements indicated that something significant was happening in the universe leading up to the Event. R. at 6. Unsurprisingly, these findings were at the forefront of the scientific community's discussions. R. at 6.

In Spring of 2023, the Petitioner observed the Pixelian Event from the Observatory, and again contacted *Ad Astra* to publish his data. R. at 6. His findings included some standard data, but also added a "historical" portion in which he observed cosmic changes he thought particularly related to the Meso-American tribes' religious history. R. at 6-7. He stated he would further substantiate his conclusions with post-Pixelian Event study. R. at 7. Petitioner even surmised that the Event may have evidenced the "Charged Universe Theory," a "highly controversial" belief system which proports that charged particles, rather than gravity, produce cosmological changes in the universe. R. at 7. The Theory is not consistent with the scientific academy's consensus view of the cosmos or their beginnings. R. at 7.

The journal's editor was "deeply troubled" by Petitioner's support of the Theory. R. at 8. *Ad Astra* published the findings with a disclaimer stating the journal did not endorse Petitioner's conclusions because they could be regarded as "perilously close to the kind of quantum leaps and unsupported analogies of the early alchemists." R. at 8. *Ad Astra's* Board expressed concern that the Meso-Pagan texts referenced in Petitioner's conclusions were religious in nature. R. at 8.

Although Petitioner was known academically for his work in astrophysics, he had always maintained a personal goal of becoming a Meso-Paganist Sage. R. at 57. The Sages lead the Meso-Pagan faith. R. at 57. A scholarly pursuit is a prerequisite for the Sage application. R. at 57. Petitioner's theories, if confirmed, served to satisfy that requirement and make him a competitive candidate for designation as a Sage. R. at 9, 57. He posted on social media to express his intent to use the study in the application process. R. at 54.

University President, Meriam Seawall, contacted Petitioner and reminded him that per the terms of the state-funded Astrophysics Grant, his conclusions were to "conform with the academic community's consensus view of a scientific study." R. at 10. Petitioner responded that no one defined "science," and argued all his research would be lost if the study was stopped. R. at 2, 10. President Seawall explained to Petitioner that he remained free to "conclude and publish whatever he wanted on this subject, wherever he liked," just not under the auspices of the Astrophysics Grant and the terms he had accepted. R. at 10. She did not want the University to be seen as endorsing a specific religious view. R. at 10-11.

Unable to reach a consensus on the Grant's terms and Petitioner's continued use of the Observatory, Petitioner was denied further access. R. at 11. The University published a statement explaining the "fundamental disagreement" between the parties and the University's concern that it may further confuse science and religion by continuing to support the Petitioner. R. at 11.

In February of 2024, Petitioner filed for a permanent injunction against the State of Delmont and Delmont University and sought reinstatement under the Grant. R. at 12. He asserted his First Amendment rights had been violated by the Grant's terms. R. at 12. The University asserted both that their conduct was constitutional and that their continued support of Petitioner would violate the Establishment Clause. R. at 12.

Both parties moved for summary judgment. R. at 12. The district court granted the Petitioner's motion for summary judgment and the requested injunction. R. at 30. The University appealed and the Fifteenth Circuit reversed, granting summary judgment for the University. R at 32. Petitioner appealed the Fifteenth Circuit's ruling and this Court granted certiorari to resolve (1) whether the requirements of the Grant impose an unconstitutional condition on Petitioner's speech and (2) whether the state-funded study violates the Establishment Clause when its data is used to support religious symbolism and the Petitioner plans to use the study to further his religious vocation. R. at. 60

SUMMARY OF THE ARGUMENT

I. Question Presented 1.

This Court should affirm the decision of the Fifteenth Circuit because the Grant does not impose an unconstitutional condition on speech. The Grant's requirement—to conform the study of the Pixelian Event and the conclusions derived to the academic community's consensus view of a scientific study—permissibly defines the purpose of the Astrophysics Visitorship. Therefore, the Grant's requirements are in line with this Court's precedent distinguishing between unconstitutional conditions and selectively funded programs.

The Grant was not established to convey the individual views of its principal investigator, but instead to promote the University's world-class Observatory and advance the scientific study of the Pixelian Event. Rather than leveraging the Grant to regulate speech outside the scope of the Visitorship, the Petitioner remains free to publish his own conclusions. If the Petitioner disagreed with the University's definition of a scientific study, his recourse was to decline the funds. The University has both a right to and a compelling interest in conveying their own message through the Visitorship. This Court should defer to the academic decision-making of the University.

II. Question Presented 2.

When the principal investigator of a state-funded study uses the study as a platform to make conclusions based in religious history and also uses these conclusions to apply for a clerical position within his religion, the University has a heavy interest in preventing a violation of the Establishment Clause. The history of the Establishment Clause emphasizes the founder's intention of prohibiting the use of government funds to financially support religious endeavors such as the training of a clerical position. Further, universities have been

given significant deference in their decision-making of who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Additionally, precedent exists that tracks the facts of the present case very similarly. The doctrine of stare decisis requires this Court to rule in the same way that *Locke v. Davey* was ruled. For these reasons, the University correctly denied Petitioner's further use of the Grant to prevent an Establishment Clause violation.

ARGUMENT

I. THE STATE'S REQUIREMENT THAT THE ASTROPHYSICS GRANT'S RESEARCH AND CONCLUSIONS CONFORM TO THE ACADEMIC COMMUNITY'S CONSENSUS VIEW OF A SCIENTIFIC STUDY DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON SPEECH.

This Court should affirm the Fifteenth Circuit decision and hold that the Astrophysics Grant does not impose an unconstitutional condition on speech because the Grant's requirement is consistent with *Speiser* and its progeny. The State and University's status as state actors—whose grant-making and management activities are subject to First Amendment oversight—is not in dispute; nor is the Petitioner's compliance with the Astrophysics Grant at issue. Rather, the Petitioner asks this Court to declare that the Grant places an unconstitutional condition on his free speech and thereby violates his First Amendment rights. In doing so, the Petitioner is asking this Court to render numerous programs constitutionally suspect.

The First Amendment prohibits Congress from "abridging the freedom of speech" and is applicable to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). In *Rumsfeld v. F. for Academic and Institutional Rts. Inc.*, this Court reiterated an established principle of the First Amendment: "freedom of speech prohibits the government from telling people what they must say." 547 U.S. 47, 61 (2006). Freedom of speech, however, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose. *Gitlow*, at 667. Generally, if a party objects to conditions placed on government funding, its recourse is to decline the funds even if that condition may affect the recipient's First Amendment rights. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("*AOSI I*").

A. The Grant Permissibly Defines the Astrophysics Visitorship.

The unconstitutional conditions doctrine provides that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interest…in freedom of speech" even if he has no entitlement to that benefit. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This is because such a condition would allow the government to "produce a result which [it] could not command directly." *Id.* at 597; *see Speiser v. Randall*, 357 U.S. 513, 526 (1958). Here, however, the State and University are not denying a benefit to anyone; instead, they are insisting that the Grant be spent for the purposes it was authorized. *See Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

While the line between permissible conditions and impermissible conditions is "hardly clear," this Court has explained that the constitutionality of a condition depends on the relationship between the government program and the conditions imposed under it. *AOSI 1*, 570 U.S. at 215. Specifically, the *AOSI 1* Court distinguished between generally permissible conditions that "define the limits of the government spending program" with those generally impermissible "conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214–15.

Likewise, this Court has explained that "unconstitutional conditions cases involve situations in which the Government has placed a condition on the recipient of the subsidy, rather than on a particular program…effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the [government] funded program." *Rust*, at 197. Here, the condition imposed by the Grant seeks to define the Astrophysics Visitorship's limits. The Grant was created with the purpose of advancing scientific study of the Pixelian Event and bringing attention to the University's world class Observatory by publishing findings in peer-

reviewed astrophysics journals. Without requiring the Grant's research and conclusions to conform to the "academic community's consensus view of a scientific study," the State and the University's message may have been distorted.

The unconstitutional conditions doctrine "does not, however, give rise to a constitutional claim in its own right." *See All. for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 651 F.3d 218, 243–44 (Straub, J., dissenting) (2nd Cir. 2011). Rather, when the government implicates First Amendment issues through conditions on funding, *Speiser* and its progeny illustrate that unconstitutional conditions cases—in which a First Amendment violation occurs—fall into two categories: (1) those that operate as a coercive penalty on free speech, and (2) those that are aimed to suppress certain viewpoints. *See id.*

1. The Grant's Conditions Do Not Operate as a Coercive Penalty on Speech.

The Visitorship was not a generally available government benefit, but instead was a competitive program that awarded its sole recipient the choice to accept or decline the Grant. Therefore, the Grant's conditions do not operate as a coercive penalty. In *Speiser*, this Court explained that to deny property tax exemptions to claimants "who engage in certain forms of speech is in effect to penalize them for this speech." 357 U.S. 513, 518 (1958). Holding that the tax exemption's condition—an individual's oath promising not to advocate overthrowing the government by unlawful means—was unconstitutional, the *Speiser* Court explained that the condition "will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.* at 519. Put another way, "the government may not penalize those who exercise their constitutional rights by withholding a benefit that would otherwise be available." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1067 (6th ed. 2019).

This Court expanded on *Speiser*'s discussion of coercive penalties in *Regan v. Tax'n with Representation of Wash*. 461 U.S. 540, 545–46 (1983). In *Regan*, the Court upheld a federal tax law which conditioned nonprofit groups' tax-exempt status on the requirement that the organization did not participate in lobbying. *Id.* In upholding the requirement, the Court explained that a funding condition may be a coercive penalty on First Amendment rights if it restricts a recipient's speech outside of the scope of their participation in the government program. *Id.* at 549. In this case, the Astrophysics Grant does not restrict the Petitioner's speech outside the scope of his participation in the Visitorship. Unlike the tax exemption in *Speiser*, the Petitioner has the ability to publish his findings on the Charged Universe Theory outside of the Astrophysics Visitorship.

2. The Grant Does Not Define the Petitioner in the Eyes of the Global Audience.

The Grant does not force Petitioner to express beliefs at the price of later hypocrisy; nor is it a situation where the condition defines the Grant's recipient. Rather, this is a situation where the condition defines the Grant "in the eyes of the global audience." *AOSI 1*, 570 U.S., at 218. Recently, in *AOSI 1*, this Court held that the government violated the First Amendment when the government required as a condition of federal funding that organizations adopt a policy expressing opposition to prostitution and human trafficking. *Id.* at 218–19. Reasoning that a recipient cannot adopt the belief dictated by the condition and later turn around and "assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime," this Court explained that the condition did not define the program but instead defined the recipient. *Id.* Unlike the condition in *AOSI 1*, the Grant in the present case does not compel the Petitioner to adopt the University's or State's particular stance on the Pixelian Event. The Grant does not force the Petitioner to publish a statement disavowing the Charged Universe Theory.

Rather than telling the Petitioner what he must say, the Grant permissibly defines the limits of the Astrophysics Visitorship and allows the Petitioner to publish contrary findings in other publications on his own time and dime.

B. The Free Speech Clause Does Not Mandate a Viewpoint-Neutral Government When the Government Conveys its Own Message.

The First Amendment does not mandate a viewpoint-neutral government. *AOSI 1*, 570 U.S. at 222 (Scalia, J., dissenting); *see also Rosenberger*, 515 U.S. at 833. When the government "communicates its message, either through public officials or private entities, the government can-and often must-discriminate on the basis of viewpoint." *DKT Int'l, Inc. v. United States Agency for Int'l Dev.*, 477 F.3d 758, 761 (D.C. Cir. 2007). This Court has distinguished between impermissible viewpoint discrimination and selectively funded programs. *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). In *Rust*, the Court explained that when the "government disburses public funds to private entities to convey a governmental message," it is entitled to say what it wishes and may ensure "its message is neither garbled nor distorted by the grantee." *See Rosenberger* at 834. Thus, "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker," or instances in which the government uses private speakers to transmit information pertaining to its own program. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). By giving the Grant recipient the use of the University's Observatory and every resource at its disposal with the goal of its Observatory becoming a preeminent center for celestial study, the University was transmitting its own message.

1. The University and the State Did Not Create a Forum for Unfettered Private Speech.

In this case, as in *Rust* and *Finley*, the State and University have not created a program encouraging private speech. In *Rosenberger v. Rector & Visitors of Univ. of Va.*, a public

university declined to authorize disbursements from its Students Activities Fund to a student group that published a religious magazine despite making the funds available to all organizations that were "related to the educational purpose of the University." 515 U.S. 819, 834 (1995). The Court held that the University had created a limited public forum—by subsidizing the fund—which impermissibly excluded religious viewpoints because it expended funds to "encourage a diversity of views from private speakers." *Id.* at 837. Unlike *Rosenberger*, here the Grant was awarded to a sole recipient based on the Petitioner's perceived ability to promote Delmont University's Observatory through the publication of peer-reviewed articles in Astrophysics journals. Thus, effectiveness of the University's promotion of the Observatory hinges on the grantee's ability to publish studies that conform to the academic community's consensus view on what is scientific.

The competitive nature and purpose of the Astrophysics Visitorship sets it apart from programs which are created to encourage diverse views from private speakers. In *Nat'l Endowment for the Arts v. Finley*, Congress directed the National Endowment for the Arts ("NEA") to consider "general standards of decency" in determining awards of federal art grants. 624 U.S. 569, 572 (1998). This Court explained that the competitive nature and purpose of the NEA grants set it apart from subsidies that "encourage a diversity of views from private speakers." *Id.* at 586 (quoting *Rosenberger*, 515 U.S. at 834). As explained above, the competitive nature of this Grant and its purpose set it apart from those funding decisions that encourage a diversity of views from private speakers. The University reviewed numerous Astrophysicists' applications and when awarding the Grant made it clear that the resources were intended to be used to render and publish conclusions aligned with the academic community's consensus view of "science." Thus, the University chose the Petitioner—not to make quantum

leaps similar to those of early alchemists—but rather to conform the study to the Grant's requirement in order to ensure its message was not distorted.

2. Even if the Court Finds the University Was Not Conveying Its Own Message, the Court Should Defer to the Academic Decision-Making of the University.

Because the University and the State were conveying their own message through the Astrophysics Grant, this Court should find that the Astrophysics Grant does not impose an unconstitutional condition on speech. The unconstitutional conditions doctrine is "riven with inconsistencies," causing courts to have difficulty in deciding what level of scrutiny applies in unconstitutional conditions cases. *See All. for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 678 F.3d 127, 132 (2nd Cir. 2011) (Pooler, J., *concurring in denial of reh'g en banc*); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415–17 (1989); *see also* Robert C. Post, *Subsidized Speech*, 106 YALE L. J. 151, 175 (1996). However, what can be extracted from a "careful parsing of the case law is that the level of scrutiny applied…under the unconstitutional conditions doctrine turns on the type and scope of the speech required or restricted, the speaker, whether the condition is viewpoint-discriminatory, its relationship to the Government program at issue, and other fact specific inquiries." *All. for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 678 F.3d 127, 132 (2nd Cir. 2011) (Pooler, J., *concurring in denial of reh'g en banc*).

As previously explained, the University has a right to assert its own ideas and message and must favor certain viewpoints to do so. Therefore, the Grant cannot be an unconstitutional condition because a condition cannot be unconstitutional if it could be constitutionally imposed. Assuming, arguendo, that the Grant is subject to strict scrutiny because it seeks to regulate the Petitioner's pure speech outside the scope of the Visitorship, the University and the State can

satisfy their burden under strict scrutiny. Generally, "[i]n the realm of private speech…government regulation may not favor one speaker over the other." *Rosenberger*, 515 U.S. at 828. Such viewpoint discrimination is subject to strict scrutiny, because "when the government targets not the subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* To satisfy strict scrutiny, the regulation or restriction must be (1) narrowly tailored to (2) serve a compelling state interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1984). The Astrophysics Grant is narrowly tailored. The Grant only regulates the conclusions and publications inside the scope of the Astrophysics Visitorship. The fact that the Grant allows the Petitioner to publish his own findings—on his own time and own dime—does not discount the validity of the State's interest. This requirement is necessary to serve the compelling interest of promoting the Observatory and study of the once-in-a-century Pixelian Event through peer-reviewed Astrophysics journals.

In that same vein, the Petitioner may argue that the University and the State have no right to dictate what is or is not "science." However, this Court has recognized that universities should be afforded great deference in their academic decision-making. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). Moreover, academic freedom does not impede a university's ability "to regulate the content of what is or is not expressed" when it is the university that is speaking, because "the public may judge their profession and their institutions by their utterances." *Rosenberger*, 515 U.S. at 833–44; *see also*, *AAUP, Policy Documents and Reports*, 3–4 (10th ed. 2006). As previously explained, because the University was conveying its own message through the Grant, this Court should find that the Astrophysics Grant's requirement—to conform to the consensus view of a scientific study—was not an unconstitutional condition.

II. A STATE-FUNDED RESEARCH STUDY VIOLATES THE ESTABLISHMENT CLAUSE WHEN ITS PRINCIPAL INVESTIGATOR SUGGESTS THE STUDY'S SCIENTIFIC DATA SUPPORTS FUTURE RESEARCH INTO THE POSSIBLE ELECTROMAGNETIC ORIGINS OF MESO-PAGAN RELIGIOUS SYMBOLISM AND THAT INVESTGATOR HAS ALSO EXPRESSED AN INTEREST IN USING THE STUDY TO SUPPORT HIS RELIGIOUS VOCATION.

This Court should affirm the Fifteenth Circuit's decision because these facts implicate the Establishment Clause of the First Amendment to the United States Constitution. The Establishment Clause is implicated because Petitioner is effectively using the state-funded study to financially assist in his ability to become a Sage, a religious leader within his faith.

The First Amendment of the Constitution remains the foundation of American democracy because it acts as a safeguard to individual expression and fosters an environment of diverse viewpoints. The First Amendment states that "Congress shall make no law respecting an establishment of religion…" U.S. Const. amend. I. The Fourteenth Amendment has been interpreted to make the prohibitions of the First Amendment applicable to state action abridging religious freedom. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). The general principle deduced from the First Amendment as stated by the Supreme Court is that "the Court will not tolerate either governmentally established religion or governmental interference with religion." *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 669 (1970). The "establishment of religion" clause of the First Amendment as applied to these facts means that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson*, 330 U.S. at 16. In its essence, the

Establishment Clause prevents a State from enacting laws that have the purpose or effect of advancing or inhibiting religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002). Therefore, a central question in the inquiry of whether the Establishment Clause has been violated asks whether the government aid has the effect of advancing or inhibiting religion.

A. Historical Underpinnings Support a Finding that the Research Study Would Violate the Establishment Clause.

The history of the Establishment Clause reveals that the founders sought to prohibit government-funded financial support of religious endeavors especially in the training to become a religious leader. The history of substantial university deference supports a university's wide discretion when it comes to who will teach and what they may teach. These foundations suggest the University acted appropriately when they denied Petitioner further use of the Grant if he could not comply with the terms of the Grant.

1. The Study Would Allow an Element Which the Founders Sought to Prohibit.

To understand how the Establishment Clause is implicated in this case, it is essential to know the rationale behind it. When constructing the Establishment Clause, the founders had six categories in mind which they sought to prohibit legislation of: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (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. *See* M. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003) (Establishment and Disestablishment). Essentially, the Establishment Clause was intended to protect against three main evils: sponsorship, financial support, and active involvement of the sovereign in religious

activity. *Walz*, 397 U.S. at 668. An opportunity that assists in the training required to become a religious leader is an essentially religious endeavor. *Locke v. Davey*, 540 U.S. 712, 721 (2004). The Establishment Clause must be interpreted by reference to historical practices and understandings. *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014). It has been recognized that historical and substantial state interests against using taxpayer funds to support church leaders exist. *See Locke*, 540 U.S. 712.

Of these evils that the Establishment Clause was intended to protect against, our concern in this case turns to the financial supporting of religious leadership endeavors provided by government assistance. Here, Petitioner planned on using the state-funded study in hopes that it would confirm his personal beliefs and the theories he was entertaining about Meso-Paganism. Then, if his theories did pan out, he was hopeful that his findings would support his application to become a Sage in the Meso-Pagan faith. It is clear from these undisputed facts that Petitioner likely intended to use the study, which received its funding from taxpayers, as a platform to gain a clerical position within his religion. This is the exact type of government support to religion that the founders sought to prohibit. The Grant would be considered government aid that acts as funding and assistance for Petitioner to become a clergyman in his Meso-Pagan faith. Thus, the Grant would be government aid that has the effect of advancing a particular religion. Additionally, the Grant would oppose the historical and substantial state interest against using taxpayer funds to support religious leaders. Therefore, the University was justified in narrowly tailoring Petitioner's study and conclusions so as to not use government aid to advance Petitioner's religious leadership goals. Tailoring the study and conclusions allows the University to avoid the evils the Establishment Clause was intended to prevent.

2. University Decision Making Has Historically Been Entitled to Significant Deference.

In the present case, the University made a judgment call to limit Petitioner's study and conclusion to the academic community's consensus view of scientific study. The University's judgment on matters such as this should be given great deference by this Court to honor the traditional "reluctance to trench on the prerogatives of state and local educational institutions and [the Court's] responsibility to safeguard [a university's] academic freedom" which is a special concern of the First Amendment. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also…on autonomous decision-making by the academy itself. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). This Court has previously stated that universities have a right to make academic judgments regarding the best way to allocate scarce resources. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Further, in *Widmar*, this Court recognized the right of universities "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.* Many past cases affirm a university's right to exclude even First Amendment activities that violate reasonable campus rules. *See, e.g., Healy v. James*, 408 U.S. 169 (1972).

In the present case, the State-Funded Grant can definitely be considered a scarce resource because it was awarded to one principal investigator to observe and study the Pixelian Event which only occurs once every ninety-seven years. Since this event is so rare, the University is entitled to substantial deference when it comes to tailoring the study and the conclusions and requiring them to be neutral in regard to religion.

If the University were to allow Petitioner to publish the studies with a religious focus, that study would not just be representative of Petitioner's views and findings, but it would also

speak on behalf of the University. The effect of a challenged action should be assessed by asking whether a "reasonable observer" would conclude that the action constituted an "endorsement" of religion. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989). Furthermore, to determine whether the government intends to speak for itself, this Court has looked to the history of the expression at issue, the public's likely perception as to who is speaking, and the extent to which the government has actively shaped or controlled the expression. *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1589–90 (2022). In previous cases where courts had to determine if a teacher's speech was protected, they reasoned that a student's expression can be more readily identified as a thing independent of the school. *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991). Whereas a teacher's speech can be taken as directly and deliberately representative of the school. *Id.*

To safeguard the University's academic freedom, it was imperative for them to be allowed to condition the Grant itself on conclusions that conform with the academic community's consensus view of a scientific study. Without this deference in their decision-making, they would be forced to publish a study with religious history and conclusions which the general public would then perceive as the University endorsing that religion. The University in this case wishes to remain neutral in regard to religion, as opposed to inhibiting or advancing the goals of any religion. The principal investigator in this case is more akin to a teacher speaking on behalf of the University than he is a student speaking independently of the University. Therefore, since a principal investigator will likely be seen as speaking on behalf of the University, and because the public and a reasonable observer would likely conclude that Petitioner's findings speak on behalf of the University, the University should have significant deference when they choose not to endorse the study in an effort to remain religiously neutral.

B. This Court Should Follow the Precedent of *Locke v. Davey.*

If courts are to follow the doctrine of stare decisis, then this case should be ruled as *Locke v. Davey* was ruled. The facts in the present case and *Locke* are strikingly similar and *Locke's* reasoning further reinforces what the founders sought when creating the Establishment Clause. Recent cases such as *Trinity Lutheran*, *Carson*, and *Espinoza* can be helpful to understanding the Establishment Clause, but they are easily distinguishable from the present case.

1. The Facts Presented in this Case are Extremely Similar to Locke v. Davey.

Conditions on government aid that impose penalties on the free exercise of religion must be subject to a stringent standard of scrutiny in which only a state interest of the highest order may justify. *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 466 (2017). However, this Court has long recognized that there is "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause compels. *Walz*, 397 U.S. at 669. This "play in the joints" can be seen when comparing *Locke* to *Trinity Lutheran*.

In *Trinity Lutheran*, the Trinity Lutheran Church Child Learning Center applied for a state grant provided by the Missouri Department of Natural Resources which would provide the learning center with funds to purchase playground surfaces made from recycled tires. Having applied for the grant, the learning center would have received it but for the fact that the learning center is a church. The Department had a policy of automatic disqualification for churches and other religious organizations from receiving grants under its playground resurfacing program. This policy would effectively give the learning center the choice of participating in an otherwise available benefit program or remain a religious institution. This Court held that withholding the benefit solely because of the learning center's religious status acted as a penalty on the free exercise of religion that could not survive strict scrutiny.

In *Locke*, the State of Washington established the Promise Scholarship Program to assist students with postsecondary education expenses. To abide by the State's Constitution however, students who were otherwise qualified were not awarded the scholarship if they intended to use it to pursue a degree in devotional theology. Davey, who stated that his religious beliefs were the only reason for him to seek a college degree and who wanted to use the scholarship to fund his training as a church pastor, challenged the program. He argued that the denial of the scholarship violated the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment. This Court's reasoning expressly turned on what it identified as the historic and substantial state interest against using taxpayer funds to support church leaders. This Court held that Davey's claim must fail because the State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars.

Although *Trinity Lutheran* is helpful to understand the bounds and rationale of the Establishment Clause, the holding in *Locke* should control the present case because the facts of this case are substantially similar to those in *Locke*. Like in *Locke*, Petitioner here is claiming a right to use state funds to advance his goals of becoming a Sage, which is a clerical title in the Meso-Pagan faith. The University's condition on the study and its conclusions are not "status-based religious discrimination" like the Department's condition was in *Trinity Lutheran*. Petitioner was not denied the Grant because of his status as a Meso-Paganist, but instead was denied because of his refusal to publish conclusions of the study that conformed to the academic community's consensus view of a scientific study. The University has a right to condition this tailoring of the study in an effort to remain religiously neutral. In fact, Petitioner was told by the University that he remained free to "conclude and publish whatever he wanted on this subject,

wherever he liked," just not under the auspices of the Astrophysics Grant and the terms he had accepted. This demonstrates further that the University was not prohibiting him from the study solely based on his religious status as a Meso-Paganist. Petitioner was encouraged to publish his religious findings elsewhere; however, the University has a right to not be associated with and to not be seen as endorsing Petitioner's religious views. Because of the substantial similarities in facts between *Locke* and the present case, this Court should follow precedent and find that allowing Petitioner to use the state-funded study to pursue his goals as a religious leader would violate the Establishment Clause. Therefore, the University correctly denied Petitioner's further use of the Grant when his use of the Grant did not conform to the conditions placed on it.

2. This Case Can Be Easily Distinguished from Carson and Espinoza.

The present case can be distinguished from *Carson* and *Espinoza*. In *Espinoza v. Montana Department of Revenue*, this Court ruled that once a state decides to subsidize private education, the state may not disqualify some private schools solely because they are religious. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020). In *Carson v. Makin*, this Court held that Maine violated the Free Exercise Clause by excluding certain religious schools from a program that allowed parents to direct state funds to non-public schools. 142 S. Ct. 1987 (2022). To resolve *Carson*, the Court used the principle applied in *Trinity Lutheran* and *Espinoza* which stated that religious and secular private institutions are fully entitled to equal treatment under the Free Exercise Clause. The facts in both *Carson* and *Espinoza* involve state-funded programs that are available to all schools except those that are affiliated with a religion. Because the Grant in the present case is not generally available to all schools minus those affiliated with a religion, the holding from *Carson* and *Espinoza* is not applicable to the present case. Instead, the present case deals with a sole grantee who does not have to choose between his faith and the Grant. Rather,

Petitioner is encouraged to practice his faith as a Meso-Paganist so long as his scientific conclusions under the State-Funded Grant are not rooted in his faith. Petitioner was expressly told he may still make these observations and can even choose to publish them elsewhere. But the University has the right to have the study published in a lens that conforms with the academic community's consensus view of a scientific study. Therefore, the University correctly denied Petitioner's further use of the Grant when his use of the Grant did not conform to the conditions placed on it. This denial of the Grant protected the University from a likely Establishment Clause violation – and the University has a heavy interest in avoiding this type of violation.

CONCLUSION

For the foregoing reasons, this Court should find that the Grant's requirements are consistent with this Court's precedent and were not leveraged to impose an unconstitutional condition on the Petitioner. The history of the Establishment Clause, Universities' rights to substantial deference, and established precedent all confirm that the University correctly denied Petitioner's further use of the Grant to prevent an Establishment Clause violation.

Respectfully submitted,

Team 20

Counsel for Respondent

CERTIFICATE OF COMPLIANCE

To comply with Rule IV(C)(3) of the Official Rules for the 2023-2024 Seigenthaler-Sutherland Moot Court Competition, we, Counsel for Respondent, certify that:

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

Team 20
Counsel for Respondent