No. 23-CV-1981

IN THE SUPREME COURT OF THE UNITED STATES

COOPER NICHOLAS,
Petitioner,

v.

STATE OF DELMONT and
DELMONT UNIVERSITY,
Respondent

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

BRIEF FOR Respondents, STATE OF DELMONT AND DELMONT UNIVERSITY

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Attorneys for the Respondents,
State of Delmont and
Delmont University

STATEMENT OF ISSUES PRESENTED

1. Did the State of Delmont and Delmont University, by requiring that the research of their state-funded fellowship's principal investigator conform to the academy's consensus view of scientific study, unconstitutionally abridge the Petitioner's right to freedom of speech under the First Amendment?
2. Does the State of Delmont and Delmont University have a constitutional duty to cease funding the Petitioner's research because continuing to do so would cause them to run afoul of the Establishment Clause of the First Amendment?

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CONSTITUTIONAL PROVISIONS

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

United States Constitution, Fourteenth Amendment, §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.

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JURISDICTIONAL STATEMENT

Federal District Courts have original jurisdiction over all civil disputes arising under the Constitution of the United States. 28 U.S.C. § 1331. In the interests of clear guidance for the operations of the university's research facilities, Delmont and Delmont University waived any sovereign immunity claim they may have brought. R. at 12. The State of Delmont and Delmont University are located in the Fifteenth Judicial Circuit of the United States.

The Plaintiff brought suit against the State of Delmont and Delmont University in the United States District Court for the District of Delmont, Mountainside Division, which granted Dr. Nicholas's motion for summary judgment. R. at 3. The Defendants timely filed their appeal in the United States Court of Appeals for the Fifteenth Circuit. The Court of Appeals reversed, granting Defendants' motion for summary judgment. R. at 34. Plaintiff petitioned this Court to hear his appeal, and this Court granted *certiorari*. R. at 60.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, the movant must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In ruling on a motion for summary judgment, the court inquires whether any reasonable juror could find that the nonmovant is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The judge does not weigh the evidence but determines whether there is a genuine issue of material fact for trial. *Id.* at 249.

This Court reviews a grant of summary judgment from the court below *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). As such, this Court's review is not limited to determining

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whether the trial court erred; the Court reviews the record independently to decide whether summary judgment was granted correctly.

STATEMENT OF THE CASE

Delmont University established the Astrophysics Grant to advance scientific study of the "Pixelian Event," procuring funding for the Grant from "local, state, and federal sources." R. at 4. Delmont used the grant money to fund the Observatory and establish a Visitorship, through which it selected a principal investigator to conduct research on the Pixelian Event and publish their findings. R. at 1. The Astrophysics Grant provides for the principal investigator to receive a salary, use the university's resources, and hire research assistants. *Id.* The selection process for the principal investigator was "rigorous" and "competitive," see R. at 2, and the University ultimately selected Dr. Nicholas as its principal investigator for his "reputation as a wunderkind with intuitive, often ground-shifting observations." R. at 5. Dr. Nicholas is a highly qualified scholar who took leave from his work at The Ptolemy Foundation to become the first principal investigator for the Visitorship. R. at 2. "He has published widely on observational astrophysics . . . and he has authored a leading treatise on the subject." R. at 3. As the headquarters for the major study of the Pixelian Event, the watch party at Delmont University "garnered substantial media attention." R. at 6. Because Dr. Nicholas is a "distinguished alumnus" of Delmont University, the school widely publicized his return to the University in its media campaign. *Id.*

The administration of the Astrophysics Grant was the first time the state of Delmont had funded a grant for such a specific purpose as studying an individual astrophysical event. R. at 5. Because the school has a troubled history of problems with researchers espousing "dubious religious positions," R. at 53, Delmont chose to set academic parameters for its principal

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investigator's research. Accordingly, the grant covered all costs associated with publication of the principal investigator's findings regarding the Pixelian Event, on the condition 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 5.

This condition on the grant funding notwithstanding, Dr. Nicholas relied on his research under the Visitorship to pen an article for the journal *Ad Astra* in which he surmised that Meso-American hieroglyphs may have depicted the current Pixelian Event, and that the occurrence of the event was consistent with the highly controversial Charged Universe Theory. R. at 7. Despite his broad renown in the scientific community and prior publication experience, Dr. Nicholas had never claimed to be a proponent of the Charged Universe Theory "in public or in private." R. at 8. While the Charged Universe Theory has its adherents, it is highly controversial and does not reflect the consensus view of the scientific academy. R. at 7. It is, however, consistent with the tenets of the Meso-Paganist faith.

Dr. Nicholas was raised in the Meso-American culture and adopted the Meso-Paganist religion. R. at 4. As studying the stars is a central aspect of his religion, Dr. Nicholas credits his spirituality as his sole inspiration to enter the field of astrophysics. R. at 56. Although he attested to his dedication to the objective scientific process, Dr. Nicholas does not dispute that he was hopeful that his research would confirm his personal beliefs. R. at 8. Moreover, Dr. Nicholas attested that "[i]f his theories did pan out, he was hopeful that his findings would support his application to become a Sage in the Meso-Pagan faith," R. at 9, an aspiration which he also proliferated on social media. R. at 54, 57. Dr. Nicholas has yet to formally enroll in Meso-Pagan seminary, but this academic study would comprise a critical part of his application, "as these sorts of scholarly pursuits are prerequisites to becoming a Sage." R. at 57.

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In a series of letters responding to this publication, the president of Delmont University, President Seawall, informed Dr. Nicholas that he was "free to conclude and publish whatever he wanted on the subject, wherever he liked, but not under the auspices of the grant-funded research, the terms of which he'd accepted as its principal investigator." R. at 10. Moreover, President Seawall expressed concerns about the connections that Dr. Nicholas was drawing with Meso-Paganism in his scientific study, stating that "the University could not be perceived as endorsing his particular religious belief system." R. at 11. Dr. Nicholas balked at the University's request to comply with the conditions of his grant, stating that "the University had not stopped other scientists on the Delmont faculty from referencing or relying upon writings of other pagans, such as the Greeks, Romans, Incas, and Phoenicians." R. at 10, 58. However, the University received a flurry of "[n]egative press about the Observatory's premier enterprise," which embarrassed donors and mortified the government supporters who had secured the Astrophysics Grant's funding. R. at 9. Concerned for its reputation for academic integrity and reluctant to align itself with the tenets of an individual religion, the University changed the security protocol of the Observatory to deny Dr. Nicholas admittance. R. at 11. In a public statement, the University explained that "this measure was taken because of a fundamental disagreement with Dr. Nicholas over the meaning of science itself, and that they could not countenance the confusion of science and religion." *Id*.

SUMMARY OF THE ARGUMENT

The Court of Appeals did not err in holding that the State of Delmont and Delmont University did not unconstitutionally abridge Dr. Nicholas's freedom of speech when it cut off his funding under the Astrophysics Grant and denied him access to the Observatory. Not only was Dr. Nicholas speaking in his official capacity as a university employee when he published his work

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under the grant's auspices, but the University did not create a public forum nor discriminate impermissibly based on viewpoint alone. Moreover, the limitations that the condition of conformance with the academy placed on Dr. Nicholas's speech in this case served the legitimate government interest of delineating between science and religion and was sufficiently narrowly tailored to pass muster under strict scrutiny.

Furthermore, requiring Delmont University to continue to fund Dr. Nicholas's research would lead it to shirk its responsibilities under the Establishment Clause. This Court has a longstanding history of ruling that it would be unconstitutional for the government to fund the devotional education and formation of the clergy. *See Locke v. Davey*, 540 U.S. 712 (2004). Because Dr. Nicholas intends to use his publications in favor of the Charged Universe Theory to support his continuing education toward becoming a Sage in the Meso-Paganist spiritual tradition, proffering state funding to aid him in this endeavor would be a direct violation of the Establishment Clause under this Court's jurisprudence. Summary judgment is appropriate in this case because there is no genuine dispute as to material fact and the Respondents are entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). As such, the Respondents respectfully urge this Court to find that *Locke* is the controlling precedent, and consequently, to affirm the decision of the Court of Appeals.

ARGUMENT

The Free Speech Clause of the First Amendment dictates that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The States are bound by the First Amendment through incorporation by the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). When two bedrock constitutional principles appear to

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run counter to one another, as in the instant clash between free speech and establishment of religion, the Court often turns to drawing lines "based on the particular facts of each case." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). To decide if a state actor is within its rights to regulate the content of speech, the court has distinguished between content discrimination that "preserves the purposes of [a] limited forum," which is permissible, and "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 829–30.

In determining whether a government restriction on free speech passes constitutional muster, the Court applies a strict scrutiny standard of review by asking whether the regulation is (1) sufficiently narrowly tailored to (2) further a substantial government interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). *See also Widmar v. Vincent*, 454 U.S. 263, 270 (1981) ("[T]he University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

Under the Establishment Clause, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings."" *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 535 (2022) (citing *Town of Greece v. Gallowy*, 572 U.S. 565 (2014)). In *Kennedy*, the Court applied a two-part inquiry: (1) whether the "nature of the speech at issue" was pursuant to the speaker's official duties and was therefore the government's own or was private; and (2) a balancing of competing interests. *Id.* at 527–28.

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"Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion." *Locke*, 540 U.S. at 722. For the purposes of the Establishment Clause, *Locke* remains good law. The Court has construed *Locke* narrowly to mean that the State is not permitted to fund the devotional education of a member of the clergy under the Establishment Clause. *Carson v. Makin*, 596 U.S. 767, 789 (2022) ("*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."). The State may "merely [choose] not to fund a distinct category of instruction" if it does not discriminate against a particular set of people. *Locke*, 540 U.S. at 721. Furthermore, this Court has held that "the link between government funds and religious training is broken by the independent *and private* choice of recipients." *Id.* at 719 (emphasis added).

In this case, Delmont University did not violate Dr. Nicholas's freedom of speech when it withdrew grant funding from his contentious research. Because Dr. Nicholas was hired by the University to present his research as part of his official role, the University did not create a public forum nor discriminate impermissibly based on viewpoint alone. Even if the University had abridged his speech, the restrictions upon Dr. Nicholas and his work would pass muster under strict scrutiny. Furthermore, to continue to fund Dr. Nicholas's religious formation would cause the University to run afoul of the Establishment Clause.

I. DELMONT UNIVERSITY DID NOT UNCONSTITUTIONALLY ABRIDGE DR. NICHOLAS'S RIGHT TO FREE SPEECH UNDER THE FIRST AMENDMENT BY REQUIRING THEIR PRINCIPAL INVESTIGATOR TO CONFORM TO THE ACADEMY'S DEFINITION OF SCIENTIFIC STUDY.

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A. Delmont University did not infringe upon Dr. Nicholas's right to free speech under the First Amendment because Dr. Nicholas was speaking in his official capacity; Delmont did not create a public forum; nor did Delmont impermissibly discriminate based on viewpoint.

The Court has time and again drawn a clear distinction between government regulation of private expression and instances in which the government speaks for itself. *See, e.g., Rosenberger*, 515 U.S. at 833; *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). To determine whether the government is speaking for itself or regulating private expression, the Court undertakes a "holistic inquiry" guided by factors like "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Shurtleff*, 596 U.S. at 252. In *Shurtleff*, the city of Boston prohibited Camp Constitution from raising a religious flag outside the city hall on a flagpole designated for use by private organizations. *Id.* at 248. The Court held that Boston's refusal to allow Shurtleff and Camp Constitution to raise their flag abridged their freedom of speech because "Boston did not make the raising and flying of private groups' flags a form of government speech." *Id.*

Similarly, the Court in *Velazquez* held that the government could not impose a rule prohibiting attorneys who received government funding from raising claims that "involve[d] an effort to amend or otherwise challenge existing welfare law." *Velazquez*, 531 U.S. at 536–37. The Court determined that the speech in *Velazquez* was private speech because the attorney spoke on behalf of his client rather than the government. *Id.* at 542 ("[T]he LSC program was designed to facilitate private speech, not to promote a governmental message."). However, the Court in *Velazquez* was more perturbed by the way in which the law in question signified an attempt by Congress to "insulate its own laws from legitimate judicial challenge." *Id.* at 548–49.

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In this case, Dr. Nicholas's speech is too easily construed as that of the University to fall outside the appropriate scope of regulation by the University. The public's perception that the University is speaking through Dr. Nicholas's publications is evidenced by the backlash that the University has suffered in response to the *Ad Astra* article. R. at 9. Dr. Nicholas's association with Delmont University is sufficiently strong that publishing a controversial piece under its auspices caused critics to target the University, rather than only Dr. Nicholas as an individual, as the object of their skepticism. Unlike in *Shurtleff*, then, the government actor in this case bound itself to the speech of its individual beneficiary when it allowed him to use its resources. Whereas it was common in Boston for private groups to use the flagpole outside City Hall to hoist their own flags, as the pioneer private investigator, Dr. Nicholas has the sole endorsement of the University under the Astrophysics Grant and is inevitably associated with the University's Observatory in the mind of the scientific public. *See Shurtleff*, 596 U.S. at 248, 252.

Moreover, this case is distinguishable from *Velazquez* because the government actor involved has not tried to insulate itself from scrutiny. Quite to the contrary, Delmont University was aware of the stakes when it chose Dr. Nicholas as its principal investigator. It was precisely *because* the University knew that it would be perceived as aligning itself with the views of its investigator that it included the contested provision in their agreement. As such, it is clear that the University anticipated becoming subject to scrutiny from the public and, as a state actor, aimed to guard against the appearance of advocating for a particular religion. The implementation of this provision is thus inherently distinct from the one at issue in *Velazquez*, where the court's concern was that Congress was attempting to quash challenges to its legislation altogether. *Velazquez*, 531 U.S. at 548–49.

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"[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). This Court has stated that "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. *See also Velazquez*, 531 U.S. at 543 ("When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program. The same is true when the government establishes a subsidy for specified ends."); *Widmar*, 454 U.S. at 267–68 ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.").

A state actor impermissibly infringes upon an individual's right to free speech where the State creates a public forum for the purpose of allowing diverse expression and subsequently excludes a specific viewpoint from that forum. "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. . . . [and] may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum."" *Rosenberger*, 515 U.S. at 829. Moreover, the Court in *Rosenberger* held that viewpoint-based restrictions are improper when a state actor "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834. In *Rosenberger*, a Christian student organization sued the University of Virginia for refusing to pay outside contractors for their printing costs on the basis that their publication promoted Christian beliefs. *Id.* at 822–23. The Court held that the University had impermissibly infringed the student group's freedom of speech through the "viewpoint discrimination inherent in the University's regulation." *Id.* at 845. Such viewpoint discrimination, according to the Court in *Rosenberger*,

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"would risk fostering a pervasive bias or hostility to religion which could undermine the very neutrality the Establishment Clause requires." *Id.* at 846.

Similarly, in *Board of Regents of University of Wisconsin System v. Southworth*, the Court held that "[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000). In *Southworth*, students brought a First Amendment claim against the University to challenge a mandatory student activity fee that was used, in part, to fund student organizations that engaged in political and ideological speech. The Court held that "[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral." *Id.* at 221. In *Southworth* the Court specified, however, that the university itself was not the speaker. *Id.* at 229. Furthermore, the Court observed that the speech of the university's faculty or officers would be subject to an entirely different analysis. *Id.* at 235 ("Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different."). There is also a higher degree of deference regarding an educational institution's right to control its curriculum and thereby preserve the academic integrity of the ideas it purports to espouse. "It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning." *Id.* at 232.

Here, the creation of the Astrophysics Grant did not amount to the creation of a public forum. Unlike the funding of student organizations in *Rosenberger*, the purpose of the Astrophysics Grant was not to create a broad forum for public discourse but to subsidize the research of one event by a designated individual scholar. See R. at 5. In this situation, Delmont

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University merely sought to "confin[e] a forum to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. The narrow confines of this academic forum justify the University in regulating the content proliferated using its resources. Moreover, the fact that the University only seeks to regulate the activities of an individual employee in his official capacity distinguishes this case from *Southworth.* Whereas in *Southworth*, viewpoint neutrality was necessitated by a program in which the University provided funding to a multiplicity of student groups, *Southworth*, 529 U.S. at 221, the funding of a specific individual in this case renders viewpoint neutrality impossible to practice. Because the University only funds one individual as the principal investigator, it is unable to extract itself from the views that the investigator proliferates under its auspices. As such, the University did not create a public forum through the Astrophysics Grant, and the doctrine of viewpoint neutrality does not apply in this case.

Even if viewpoint neutrality was required, however, Delmont University did not impermissibly discriminate based on viewpoint when it withdrew grant resources from Dr. Nicholas. The Court in *Rosenberger* distinguished the case from one in which it is the University's own speech being regulated. *Rosenberger*, 515 U.S. at 834 ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles."). However, Dr. Nicholas is effectively a public employee of the University—the Astrophysics Grant provides him with a salary, use of the university's resources, and research assistants. R. at 1. This case is thus distinguishable from *Rosenberger* on the grounds that because Dr. Nicholas is effectively employed by the University and acting in his capacity as a public employee, his speech presents as that of Delmont University. Contrary to the situation in *Rosenberger*, in this case the neutrality demanded by the Establishment Clause necessitates that the University clearly delineate between

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Dr. Nicholas's private belief system and the scientific research proliferated by and through the University's own platform. Moreover, unlike in *Southworth*, here the University is not presented with a plethora of viewpoints among which the University may remain neutral. Rather, only the viewpoint of one individual is at issue; the decision whether to espouse or disclaim Dr. Nicholas's personal beliefs should be left to the University's discretion.

B. Notwithstanding a finding that Delmont abridged Dr. Nicholas's protected speech, the grant restriction is constitutional under strict scrutiny because Delmont has a substantial interest in distinguishing between science and religion, and the restriction is sufficiently narrowly tailored to avoid undue burden on the principal investigator.

Where content-based restrictions are at issue, the University "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270. In *Widmar*, a religious student group sued the University of Missouri at Kansas City for enforcing a policy that prohibited religious student organizations from using university facilities for worship purposes. *Id.* at 265–66. The Court held that the state interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" was not sufficiently compelling to overcome the limitations imposed by the Free Exercise and Free Speech Clauses. *Id.* at 276. Despite holding for the petitioners, however, the Court reaffirmed "the right of the University to make academic judgments as to how best to allocate scarce resources." *Id.*

Similarly, the Court in *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 213 (2013), stated that although enacting conditions on grants as direct regulations of speech plainly violate the First Amendment, the analysis is "whether the Government may nonetheless impose that requirement as a condition of the receipt. Of federal funds." In *Agency for International Development*, the respondents challenged a provision of a

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government program funding NGOs to fight against HIV/AIDS that conditioned such funding upon "a policy explicitly opposing prostitution and sex trafficking." *Id.* at 208. The Court ultimately held that the condition constituted "an unconstitutional burden on First Amendment rights." *Id.* at 214. Dispositive to the Court's decision was the Court's interpretation of the condition as "compel[ling] as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *Id.* at 221. In other words, the Court was perturbed by the understanding that the plaintiff would not be able to assert the necessary belief when spending government funds, "and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime." *Id.* at 218. Such a condition was too unduly burdensome upon the funding recipient to be sufficiently narrowly tailored to survive strict scrutiny.

Here, the State of Delmont has a substantial interest in preventing the conflation of science and religion among members of the public. This case is distinguishable from the situation in *Widmar* because rather than simply providing space for Dr. Nicholas to conduct his research, the University's funding of his publications amounts to an "academic judgment." *Widmar*, 454 U.S. at 276. The University specifically hired Dr. Nicholas to conduct scientific study of the Pixelian Event; the Astrophysics Grant pays his salary; and the University provides the resources for his work. R. at 1. Principal investigator was the first position of its kind created by Delmont University, and the University publicized the Observatory and its operations broadly as a testament to its academic accomplishments. R. at 6. The proliferation of scientific findings enabled by its Observatory and other resources is significantly more integral to the academic mission of the University than is allowing independent student groups to use its facilities for meeting spaces. As

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such, the government interest asserted in the case at bar is definitively more compelling than that in *Widmar*.

Furthermore, the conditions that the University included in the Astrophysics Grant are sufficiently narrowly tailored to pass muster under strict scrutiny. In this case, unlike in *Agency for International Development*, the strictures of the Astrophysics Grant are narrowly tailored enough to avoid undue burden to the principal investigator. Whereas in *Agency for International Development* the Court determined that the condition on the funding would preclude the plaintiff from proliferating their own beliefs on their own "time and dime," 570 U.S. at 218, Dr. Nicholas is free to publish on his support of the Charged Universe Theory as long as he does not do so under the auspices of government funding. President Seawall informed him of this fact in no uncertain terms, writing that he was "free to conclude and publish whatever he wanted on the subject, wherever he liked, but not under the auspices of the grant-funded research, the terms of which he'd accepted as its principal investigator." R. at 10. Put another way, because the condition imposed here only limits Dr. Nicholas's utilization of the University's resources, the condition of conformance with the scientific academic community is sufficiently narrowly tailored to pass strict scrutiny.

II. UNDER *LOCKE*, WHICH SHOULD CONTROL IN THIS CASE DUE TO THE STATE'S INTEREST AGAINST FUNDING THE EDUCATION OF CLERGY, REQUIRING DELMONT TO SUBSIDIZE DR. NICHOLAS'S RELIGIOUS STUDY WOULD RUN AFOUL OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

Since the Court rang the death knell of the *Lemon* test, "this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings."" *Kennedy*, 597 U.S. at 510 (quoting *Town of Greece v. Galloway*, 572 U.S. 565

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(2014)). The history of this Court's Establishment Clause jurisprudence reflects a clear stance that the State ought not to fund the ministerial education of individual members of the clergy. *See, e.g., Locke*, 540 U.S. at 722 ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion."). *See also Espinoza v. Montana Dept. of Rev.*, 140 S. Ct. 2246, 2259 (2020) (recognizing a "historic and substantial tradition . . . against state-supported clergy."). In *Locke*, the Court held that it is constitutional for a state to forbid a student from using a state-sponsored scholarship to pursue a degree in devotional theology. *Id.* at 725. The Court in *Locke* conducted a historical analysis and reasoned that because "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry," there are "few areas in which a State's antiestablishment interests come more into play." *Id.* at 722–23. Consequently, the Court held that Washington's prohibition on the use of the Promise Scholarship to pursue a degree in ministry passed muster under strict scrutiny. *Id.* at 725 ("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.").

The Court has threaded the needle carefully between allowing government funding to fall into the hands of religious schools and providing government funding for the formation of members of the clergy. In *Carson v. Makin*, the Court held that withholding scholarship funding from religious schools did not violate the Establishment Clause but rather offended the Free Exercise Clause. *Carson v. Makin*, 596 U.S. 767 (2022). However, the Court in *Carson* clarified that *Locke* remains good law; it simply distinguished *Locke* from *Carson* on the basis that *Locke* applies narrowly to prohibit government funding of ministerial education and formation. *Id.* at

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788–89 ("*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 use of the benefits.").

In *Trinity Lutheran*, the Court distinguished that instant case from the situation presented in *Locke* by differentiating between the use and the status of recipients of state funding: "Davey was not denied a scholarship because of who he *was* [but] because of what he proposed *to do*—use the funds to prepare for the ministry. Here, there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 464 (2017). *See also Locke*, 540 U.S. at 721 (holding that a state program's refusal to fund a theology degree was acceptable because the state had "merely chosen not to fund a distinct category of instruction" rather than a particular set of people). The Court has recently specified that in the context of state tuition assistance for private schools, discrimination against both the religious status of the recipient and the religious use of state funds violates the Free Exercise Clause. "In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Carson*, 596 U.S. at 788. It is reasonable to conclude that the Court may apply an analogous rationale to the analysis of whether the denial of state funding violates the Free Speech Clause. However, the Court in *Carson* also recognized the continuing validity of *Locke*, specifying that "*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." *Id.* at 789. Essentially, the Court upheld *Locke* but construed its holding narrowly by distinguishing between funding religious schools and funding the education of a specific member of the clergy.

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Providing funding here is more analogous to funding a divinity degree for a member of the clergy than funding a broad public program. As such, *Locke* is the controlling precedent in this case. It is appropriate for the Court to distinguish between use and status in this case because the case at bar falls squarely within the narrow exception that the Court carved out in *Locke*. Unlike in *Carson*, the strictures on the grant recipient in this case specified that the principal investigator was to conduct and present their research in a manner consistent with the consensus of the scientific community. Rather than a neutral, "generally available benefit," the Astrophysics Grant was a selective honor intentionally awarded to serve a specific purpose—to provide for the academic study of the Pixelian Event. Moreover, because Dr. Nicholas intends to use his publication on the Charged Universe Theory to further his own formation as a cleric within his faith tradition, the ostensible use of government funds for religious purposes falls within *Locke's* "narrow focus on vocational religious degrees." *Carson*, 596 U.S. at 789. Here, if Delmont were to continue to fund Dr. Nicholas's research, he would effectively be allowed to pursue religious vocational formation under the auspices of a government program. The use of taxpayer dollars to fund the spiritual formation of a Sage in a specific faith tradition would offend the Establishment Clause and fly in the face of one of its most fundamental historical bases.

This Court has held that the actions of *private* individuals may break the chain between government action and the establishment of religion. *See Locke*, 540 U.S. at 719 ("Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients."). *See also Espinoza*, 140 S. Ct. at 2261 (2020) ("As noted, this Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices."). In *Espinoza*, the petitioners

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sought to use a state funded scholarship program in Montana to send their children to religious private schools. *Id.* at 2251. The Montana Supreme Court struck down the program on the grounds that it violated the Establishment Clause by providing state funding to religious institutions. *Id.* The Supreme Court reversed, ruling that the scholarship program was permissible under the Establishment Clause but violated the Free Exercise Clause by discriminating against religious schools, even if such discrimination was conducted with anti-establishment concerns in mind. *Id.* at 2254. Furthermore, "[a]ny Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools." *Id.*

Here, due to Dr. Nicholas's affiliation with the University and position as a public employee, the connection between the state actor and the individual is not sufficiently attenuated to break the link between public funding and religious expression. The funding in this case, rather than making its way to religious beneficiaries through the independent choices of a third party, is provided directly to the beneficiary to fund his research, which is ultimately in furtherance of his formation as a religious Sage. In fact, *Espinoza* would be significantly more analogous to the instant case if the State of Montana had been subsidizing religious private schools directly. Here, the government funding passes directly from the government actor, Delmont University, to the beneficiary, Dr. Nicholas. Thus, there is no private action by an individual that suffices to break the link between government funding and religious expression in this case. Moreover, unlike the plaintiffs in the aforementioned cases, Dr. Nicholas cannot be clearly classified as a private individual for the purposes of his use of Delmont's assets. Dr. Nicholas's status as a public employee of the University leaves little question regarding the closeness of his relationship to

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Delmont and exacerbates the risk of the University running afoul of the Establishment Clause by continuing to fund his publications.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit and enter summary judgment in favor of the Respondents.

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CERTIFICATION

We hereby certify that the work product contained in this brief is the sole work product of the team members of Team 24. We further certify that the team has complied fully with the honor code of Team 24's law school, and that Team 24 has complied with all Competition Rules.

/s/ Team 24, Counsel for Respondents

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