No. 23-CV-1981

In The

Supreme Court of the United States

COOPER NICHOLAS,
Petitioner

vs.

DELMONT UNIVERSITY,
Respondent

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

BRIEF FOR PETITIONER

TEAM 33
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Does a state's requirement that a grant recipient conform his research and conclusions to the academy's consensus view of what is scientific impose an unconstitutional condition on speech?
2. Does a state-funded research study violate the Establishment Clause when its principal investigator suggests the study's scientific data supports future research into the possible electromagnetic origins of Meso-Pagan religious symbolism and that investigator has also expressed an interest in using the study to support his religious vocation?

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifteenth Circuit was entered on March 7, 2024. Petitioner filed a timely petition for a writ of certiorari, which this Court granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner, Dr. Cooper Nicholas, Ph.D., is a distinguished scientist and is highly regarded amongst his field of study. He possesses both a B.S. and Master's Degree in astronomy and physics from Delmont University, as well as a Ph.D. in astronomy from the University of California, Berkeley. (R. at 2, 55). He also identifies himself to be a believer in the Meso-Pagan faith, an ancient religion which values the study of the stars and other celestial objects. (R. at 55-56). Dr. Nicholas is devoted to his religion and has even considered the possibility of studying to become a First Order Sage in the Meso-Pagan faith; however, he currently has yet to apply to the Meso-Pagan seminary. (R. at 57).

Recently, the State of Delmont and Delmont University established a "Visitorship is Astrophysics," for the specific purpose of advancing the scientific study of an astrophysical phenomenon, known as the "Pixelian Event." (R. at 1, 4, 52). The University also had the motivation of promoting its GeoPlanus Observatory, which it opened in 2020. (R. at 1, 4, 52). To make the Observatory one of the foremost centers for the study of celestial phenomena, the University calculated a plan that would take advantage of the Pixelian Event. (R. at 1, 5, 52). The Visitorship was funded by an "Astrophysics Grant," which provided funds and resources to a

"Principal Investigator," who is tasked with the responsibility of observe and gather data before, during, and after the rare Pixelian Event, which only occurs every ninety-seven years. (R. at 1). Specifically, the funds covered, "a salary, use of Observatory facilities and equipment, funding of research assistants, and incidental costs associated with the study of what is commonly known as the Pixelian Event." (R. at 5). The funds also covered, "all costs associated with the publication of scientific, peer-reviewed articles related to that event, as budgeted, and a final summative monograph on the event along with the raw data upon which conclusions were reached to be published by The University of Delmont Press." (R. at 5).

Leading up to the Pixelian Event, Dr. Nicholas published his observations and preliminary conclusions in *Ad Astra*, the premiere peer-reviewed journal in the field, which is edited by Dr. Elizabeth Ashmore of the Massachusetts Institute of Technology. (R. at 6). The first publication concerned cosmic measurements concluding that something momentus was happening in the galaxy prior to the event. (R. at 6). Six months later, he, again, published standard data associated with the meteor showers and the changes in the Pixelian comet that transpired since his previous publication. (R. at 6). Additionally, Dr. Nicholas discussed how the Meso-American hieroglyphics found on the cave walls and rocks may be similar to other depictions of events that transpired in the Northern Hemisphere. (R. at 7). He further suggested the potential usefulness of studying the accepted data as compared to the images of the Pixelian Event when it occurred. (R. at 7). Lastly, Dr. Nicholas suggested that the occurrence demonstrated an interaction among electrical currents, filaments, atmospheres, and formations of matter that appeared consistent with the "Charged Universe Theory," a theory that is the subject of controversy within his field. (R. at 7).

Despite the controversial associations, Dr. Ashmore expressed how Dr. Nicholas' research was groundbreaking for both him as well as the field of astrophysics. (R. at 8). Following a month-long conversation with Dr. Nicholas about his research up to that point, Dr. Ashmore compromised her reservations by prefacing Dr. Nicholas' publications with an "asterisk" expressing that the interpretation of his observations did not have the endorsement of the publication, its editors, or staff. (R. at 8). Although he had his hopes concerning the religious implications of the study, Dr. Nicholas was indifferent to the "asterisk," as his primary focus was to study the Pixelian Event from a scientific perspective. (R. at 8).

Once the article was published, the University became the subject of criticism from both the academy as well as the American press. (R. at 9). This criticism sparked concern amongst the administration at the University, and, as a result, President Seawall communicated to Dr. Nicholas via a letter dated January 3, 2024, that his continued use of the grant's funds was conditioned upon the limitation of his research to the terms of the Astrophysics Grant, which involve "the study of science and the derivation of subsequent conclusions [that] conform to the academic community's consensus view of a scientific study." (R. at 8, 10). She cited a desire of the University to avoid being "seen as endorsing a religious tenet" and an avoidance of having the public conflate science and religion. (R. at 10). On January 5, 2024, Dr. Nicholas responded that he would not be told what to conclude, especially since Delmont has previously referenced and relied upon the writings of other pagans, such as the Greeks, Romans, Incas, and Phoenicians. (R. at 10). After further communication expressing their disagreement on whether Dr. Nicholas' findings constituted "science," President Seawall gave Dr. Nicholas a deadline by which to restate his agreement to the terms of the grant, to which he responded that his study and conclusions were scientific and that the school should recognize them as such. (R. at 11). The

very next day, Dr. Nicholas was denied admittance to the Observatory as a result of changed security protocol. (R. at 11).

Dr. Nicholas (hereinafter "Petitioner") immediately brought this suit, requesting injunctive relief to prevent the State of Delmont and the University (hereinafter collectively "Respondents") from excluding him and requiring his reinstatement under the Astrophysics Grant as to his salary, use of the facilities, and payment of research assistants through April of 2024. (R. at 12). His challenge is grounded in the argument that the exclusion violates his First Amendment right to Free Speech; Respondents' defense rests on the claim that continued publication and support of Dr. Nicholas' work would be a violation of the First Amendment's Establishment Clause. (R. at 11-12).

Both parties filed cross-motions for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure, asserting that there was no dispute as to the material fact. The Delmont Superior Court ruled in favor of the Petitioner, holding that the grant facially violated the First Amendment and granting Petitioner's motion for summary judgment as well as Petitioner's requested injunction. The United States Circuit Court for the Fifteenth Circuit reversed the District Court's decision, granting summary judgment in favor of the Respondents. Petitioner subsequently filed a petition to this Court for grant of writ of certiorari, which was granted by this Court.

SUMMARY OF THE ARGUMENT

I. A state's requirement that a grant recipient conform the conclusions of the research to the state's definition of what constitutes science promotes an unconstitutional limitation on the right to Free Speech, as it engages in viewpoint discrimination.

a. Content-Based Restriction is presumptively unconstitutional and must withstand strict scrutiny.

The government is limited in its ability to restrict an expression because of its message, its ideas, its subject matter, or its content, and thus it is subject to strict scrutiny. The restriction is content based because it limits what Petitioner is permitted to express in his conclusions about his observations of the Pixelian Event.

b. There is a difference between speech that is given on behalf of the government and the government selectively choosing which viewpoints it will provide funding to.

This Court has historically drawn a distinction between a program designed to facilitate private speech and a program designed to promote a governmental message. When hired to promote a governmental message, the actor can be limited in his or her speech by the government; however, when the speech is considered to be private, then the government has a higher burden of proving that it did not limit speech. Because the Respondent did not have a particular message that it wanted to send concerning the Pixelian Event, the Petitioner's comments concerning the potential religious implications of the glyphs were private speech, and thus, the government does not have the authority to limit it.

c. Viewpoint discrimination that targets a particular viewpoint or opinion violates the free speech clause of the First Amendment.

Viewpoint discrimination, an "egregious" form of content discrimination, occurs when, all other things being equal, the "government allows one message while prohibiting the messages of those who can reasonably be expected to respond." The government certainly has the right to limit its own speech; however, that right does not extend to limiting the speech of those who are speaking on behalf of themselves. Because the University consciously took the time to

distinguish the religious implications of Dr. Nicholas' research from the views of the institution, it is apparent that the research was the private speech of Dr. Nicholas and not of the University.

d. The government restriction cannot withstand strict scrutiny analysis because it neither serves a compelling government interest, nor is it narrowly tailored to achieve such an interest.

Even if the University's limitation is not based on viewpoint, the limitation still needs to pass strict scrutiny, as content-based restrictions are subject to such a standard. To meet the standards of strict scrutiny, the restriction in question must both serve a compelling government interest and be narrowly tailored to achieve such an interest. Furthermore, because the restriction leaves the definition of "science" to be determined on a subjective basis by a large group of individuals' view on what science is, instead of using an objective standard, the restriction is overinclusive. Additionally, because the restriction only limits Dr. Nicholas' on the basis of his attention to the Meso-pagan faith in his conclusions, the restriction is underinclusive.

II. A state-funded research study does not violate the Establishment Clause when its conclusions suggest future implications concerning religious symbolism because the Establishment Clause does not require an absolute ban of contact between government entities and religious entities and because it would inhibit the Constitutional right to Free Exercise of religion.

Courts look to the history of religious organizations and establishments in determining whether the Establishment Clause is implicated, and this Court has long practiced drawing a distinction between providing funding toward an entity that has religious character and directly funding a religious activity. Attempting to limit the public's confusion between science and religion is not a compelling government interest. This Court has recently solidified the view that there is no distinction between status-based and use-based discrimination.

The University has failed to demonstrate exactly how the Dr. Nicholas' conclusions actually conflate science and religion. Also, in withholding the benefits of the grant from Dr. Nicholas, the University is effectively forcing Dr. Nicholas to choose between merely acknowledging his religious beliefs and participating in his role as the Principal Investigator of the Astrophysics Grant.

ARGUMENT

I. A STATE'S REQUIREMENT THAT A GRANT RECIPIENT CONFORM HIS RESEARCH AND CONCLUSIONS TO THE ACADEMY'S CONSENSUS VIEW OF WHAT IS SCIENTIFIC IMPOSES AN UNCONSTITUTIONAL CONDITION ON SPEECH BECAUSE THE CONDITION IMPOSES AN UNCONSTITUTIONAL LIMITATION ON GOVERNMENT FUNDING BASED ON VIEWPOINT DISCRIMINATION.

The first issue this Court muse decide is whether the condition imposed by the Respondents on the Petitioner's research is one that unconstitutionally violates the free speech rights of the Petitioner guaranteed to him by the First Amendment. The protection of "free speech" provided by the First Amendment, which is made applicable to the states through the Fourteenth Amendment, *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985), ensures that, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

This Court has historically recognized the university to be a "traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Rust v. Sullivan*, 500 U.S. 173, 199 (1991); *Keyishian v. Bd. of Regents, State Univ. N.Y.*, 385 U.S. 589, 603, 605-06 (1967). Although no individual has the unconditional right or entitlement to a valuable government benefit, and the government has the right to deny such a benefit to an individual for a multitude of reasons, "there are some reasons upon which the

government may not rely," and "it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 368 (1984). It is undisputed that the Respondents in this case are state actors, and therefore, the manner in which they administer their funding is subject to regulation by this Court. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 820 (1995); see also *Rust*, 500 U.S. at 199.

A. Content-Based Restriction is presumptively unconstitutional and must withstand strict scrutiny.

The government is limited in its ability to restrict an expression "because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Furthermore, government regulation of speech is considered by this Court to be content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It therefore follows that content-based laws, meaning those laws that target speech based on its content, are presumptively unconstitutional. *Id.*; *see also R. A. V. v. St. Paul*, 505 U. S. 377, 395 (1992). A content-based restriction can exhibit this characteristic either by drawing a distinction "on its face" or by circumstances which present no conceivable reason to enact legislation other than to regulate the speech. *Reed*, 576 U.S. at 163-64.

The restriction in this case is content-based because it requires the Petitioner to limit and conform his research experiments and conclusions to the school's consensus view of what is a scientific study. (R. at 10). To continue receiving the funds granted to him by the school, the Petitioner must alter what he expresses in his experiments and what he proposes in his

conclusions regarding the Pixelian Event to what the academic community deems to be scientific. (R. at 10-12).

B. There is a difference between speech that is given on behalf of the government and the government selectively choosing which viewpoints it will provide funding to.

This Court has also determined that the purpose of a grant is critical to determining whether the government has the right to condition its administration of funding. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542-43 (2001). This Court has historically drawn a distinction between a program designed to facilitate private speech and a program designed to promote a governmental message. *Id.*; *see also Rosenberger*, 515 U.S. at 833. When the government funds the projects of an individual to promote a message on behalf of the government, that individual's speech can be restricted. *Legal Servs. Corp.*, 531 U.S. at 542. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542-43 (2001), this Court held that an attorney hired through a Congressionally-funded organization for the purpose of speaking on behalf of private, indigent clients was a private actor, not a governmental actor, and thus his or her speech could not be limited by the Federal Government.

Clearly, the University understood the research of Dr. Nicholas to be attributable to him alone and not to the University. Dr. Ashmore specifically compromised with Dr. Nicholas to preface his conclusions with a statement declaring that the University journal as an organization did not promote or endorse the religious implications of his findings. (R. at 8). Furthermore, this decision was made after a month-long conversation concerning the direction of Dr. Nicholas' research. (R. at 8).

C. Viewpoint discrimination that targets a particular viewpoint or opinion violates the Free Speech Clause of the First Amendment.

Viewpoint discrimination, an "egregious" form of content discrimination, occurs when, all other things being equal, the "government allows one message while prohibiting the messages of those who can reasonably be expected to respond." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 894 (1995); *see also First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 675, 785-86 (1978). In other words, the governmental restriction does not target a particular subject matter, but rather particular views that are taken by speakers on a particular subject. Rosenberger, 515 U.S. at 829 (1995); *see also R.A.V. v. St. Paul* 505 U.S. 377, 391 (1992). Motivations, ideologies, opinions, or perspectives of the speaker should not be the rationale for government restrictions on speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 885 (1995), a student newspaper's funding request for payment to a private contractor for printing materials was denied because it promoted or manifested a particular religious belief. This Court found that because the terms of the provision through which funding for the student newspaper was granted did not exclude religion as a subject matter, but instead selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints, this constituted an exercise of viewpoint discrimination and imposed an unconstitutional limitation on free speech. *Id.* at 831. This directly contrasts with *Rust v. Sullivan*, 500 U.S. 173, 199 (1991), in which this Court upheld a restriction conditioning the receipt of government funds on an abstention from engaging in abortion-related activities.

The government certainly has the right to limit its own speech; however, that right does not extend to limiting the speech of those who are speaking on behalf of themselves. *Legal Servs. Corp.*, 531 U.S. at 542-43; *see also Rosenberger*, 515 U.S. at 885. Ensuring that a government's

own message is being delivered is well within a government's Constitutional authority, but the government first needs a message to ensure the delivery of. *See Legal Servs. Corp.*, 531 U.S. at 542-43; *see also Rosenberger*, 515 U.S. at 885.

It is apparent in this case that the University's restrictions engage in viewpoint discrimination. Here, the University's terms of the grant do not explicitly prohibit or exclude religion as a subject matter to be discussed in the conclusions or experiments of the grantee. (R. at 2, 9-11). More specifically, the purpose of the Astrophysics Grant, by its terms, was to give the Principal Investigator the opportunity to draw conclusions based on his or her observations and data gathered in relation to the Pixelian Event. (R. at 2, 52).

The University did not adopt a specific position or message that it wanted to promote concerning the Pixelian Event prior to the administration of the Astrophysics Grant. (R. at 2, 9-11). Dr. Nicholas was hired to use the resources provided to him by the University to draw conclusions based on the Pixelian Event. (R. at 5-9). The University did not impose a lens or through which he was supposed to observe the Pixelian Event, nor did it hire Dr. Nicholas to act on behalf of the University. (R. at 2, 9-11). The conclusions that Dr. Nicholas reached were based upon his own observations, which was what he was supposed to do according to the terms of the Astrophysics Grant. (R. at 56-57). Furthermore, it was not until the grantee expressed a religious viewpoint in his scientific conclusions that the University took restrictive action against Dr. Nicholas and withheld the benefits of the grant. (R. at 8-12). The condition is clearly one that is retroactively based upon the views of the recipient, not one that is preemptively imposed on the program as a whole. (R. at 8-12).

D. The government restriction cannot withstand strict scrutiny analysis because it neither serves a compelling government interest, nor it is narrowly tailored to achieve such an interest.

Even if the University's limitation is not based on viewpoint, the limitation still needs to withstand strict scrutiny, as content-based restrictions are subject to such a standard. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007). To meet the standards of strict scrutiny, the restriction in question must both serve a compelling government interest and be narrowly tailored to achieve such an interest. *R.A.V.*, 505 U. S. at 395. In determining whether the regulation imposes an unconstitutional limitation on free speech, the subjective motive of the legislature in imposing such a restriction is irrelevant. *Reed*, 576 U.S. at 156; *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

With respect to what this Court deems to be a compelling government interest for the purposes of free speech, this Court has previously held that a compelling government interest is one in which the government is not motivated by the intent to control speech, but rather, to "protect from an evil shown to be grave." *Speiser v. Randall*, 357 U.S. 513, 527 (1958). The legislation or governmental restriction should pertain to "some interest clearly within the sphere of governmental concern." *Id.* Preventing the disruption of interstate commerce by discouraging the election of members of the Communist Party to Union office, *American Communications Ass'n v. Douds*, 339 U.S. 382, 391 (1950), ensuring the preservation of governance by having political candidates take oaths not to forcefully overthrow the government, *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56, 56 (1951), and promoting respect for government by qualifying State employment on taking an oath of loyalty to the State and the United States, *Garner v. Board of Public Works*, 341 U.S. 716, 721-22 (1951), have been deemed by this Court to be examples of such evils. Subjective determinations of a grant's terms have previously been allowed by this Court. *Nat'l Endowment for the Arts v. Finley*, 524, U.S. 569, 582 (1998) (holding that a consideration of "decency and respect" in administering a government grant is

neither facially invalid nor constitutionally vague). In doing so, however, this Court has drawn the distinction between a reform of process and a preclusion of speech. *Id.* When the government's aim in restriction is toward "the suppression of dangerous ideas," and the prevention of "unlawful action," this Court has validated that aim. *Speiser*, 357 U.S. at 519, 537.

Delmont University cannot satisfy its constitutional burden of proving that the limitation withstands strict scrutiny. Attempting to limit the public's confusion between science and religion is not a compelling government interest. Preventing public confusion between science and religion is hardly at the level of dangerous that an attempt to overthrow the government or having disloyal public servants in office might be. This is especially true when the speech that the government attempts to limit comes from a private actor and not on behalf of the government.

In deciding to withhold the benefits of the Astrophysics Grant from Dr. Nicholas, the University publicly reasoned that it could not countenance the confusion of science and religion if it were to continue providing Dr. Nicholas with the Grant funds. (R. at 8-11). Despite this rationalization, the University has failed to demonstrate exactly how the Dr. Nicholas' conclusions actually conflate science and religion. (R. at 9-10). Associations with "weird science" and a couple of quirky jabs on late night television do not prove that a number of people, let alone a significant number, have adopted Dr. Nicholas' conclusions to be scientific proof that Meso-Paganism is the one true religion. (R. at 9-10). "Science," though characterized as "weird," is still a "science" nonetheless. (R. at 9). Unlike all the aforementioned cases, which were responding to pre-existing and relevant concerns about the American people's political affiliations and loyalties, the record shows no political or cultural conflation between science and religion that was prevalent before the publication of Dr. Nicholas' findings. (R. at 6-12).

Even if the preserving the distinction between science and religion is considered to be a compelling government interest, the University's restriction imposed upon Dr. Nicholas is not narrowly tailored, as it is both overinclusive and underinclusive. Because the restriction leaves the definition of "science" to be determined on a subjective basis by a large group of individuals' view on what science is, instead of using an objective standard, the restriction is overinclusive. This approach could mean that the University could still interpret results that a reasonable person would otherwise find to be scientific not to fall within its own definition. Additionally, because the restriction only limits Dr. Nicholas on the basis of his attention to the Meso-pagan faith in his conclusions, the restriction is underinclusive. (R. 7). This is not a narrowly tailed approach to solve the problem of the public's conflation between science and religion, since the University has not stopped other scientists on the Delmont faculty from referencing or relying upon the writings of other pagans, such as the Greeks, Romans, Incas, and Phoenicians. (R. 10). If the University were truly interested in ensuring that public did not receive an opportunity to confuse what is science with what is religion, then it would have limited its faculties' associations with those other pagan religions as well.

For the reasons stated above, the government, in removing Dr. Nicholas' access to the benefits of the Astrophysics Grant, placed an unconstitutional condition on speech and engaged in viewpoint discrimination.

II. A STATE-FUNDED RESEARCH STUDY DOES NOT 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 BECAUSE THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE AN ABSOLUTE

SEPARATION BETWEEN CHURCH AND STATE, AND IT PROHIBITS THE PRINCIPAL INVESTIGETOR'S FREE EXERCISE OF RELIGION.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion . . . . " U.S. Const. amend. I. The essential function of the Establishment Clause has been to maintain the wall of separation between government entities and religious entities. *Edwards v. Aguillard*, 482 U.S. 578, 587; *see also Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). It ensures that the "Government [does] not intentionally endorse religion or a religious practice." *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring). This separation of entities is not absolute, however, and it does not require the "absence of all contact" between the government and religious organizations. *Walz v. Tax Com. of N.Y.*, 397, U.S. 664, 675-76 (1970). To prevail on proving that government funding would violate the Establishment Clause, the government should establish an "arguable quantitative correlation" between the payment of the funds and the received benefit. *Id.*

As recently determined by this Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), and *Town of Greece v. Galloway*, 572 U.S. 565, 578-80 (2014), courts should look to the history of religious organizations and establishments in determining whether the Establishment Clause is implicated. This Court has long practiced drawing a distinction between providing funding toward an entity that has religious character and directly funding a religious activity, only the latter of which would violate the Establishment Clause. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *see also Carson v. Makin*, 596 U.S. ___ (2022).

The attenuation between the religious characteristic of the activity that is being funded and the appearance of the government's promotion of is an important factor in determining an Establishment Clause violation. *Espinoza v. Montana Dep't of Revenue*, 591 U.S. ___ (slip op.,

at 9) (2020); *see also Carson v. Makin*, 596 U.S. ___ (2022). Specifically, this Court has ruled that "[a] public university does not violate the Establishment Clause when it grants access to its facilities on a religion-neutral basis to a wide spectrum of student groups, even if some of those groups would use the facilities for devotional exercises." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

Furthermore, this Court has repeatedly held that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017). Such a policy, this Court has held, "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 462; *see also Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 546 (1993).

Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017), saw a Church which also operated a daycare center being denied state funding for a grant that gave qualifying organizations the resources to purchase recycled tires to resurface playgrounds. The Missouri Department of Natural Resources denied the Church funding specifically because of the religious character of the Church. *Trinity Lutheran*, 584 U.S. at 466. This Court held that the disqualification of the Church violated the Free Exercise clause of the First Amendment, which limits the state interest asserted: achieving greater separation of church and State. *Trinity Lutheran*, 584 U.S. at 466; *see also Widmar*, 454 U.S. at 276.

While separation of Church and State is certainly a principle that is worthy of preservation, it is not one that can be used as "government interest" for the purposes of denying religious organizations and individuals government benefits for which they are otherwise qualified. *Trinity Lutheran*, 584 U.S. at 466; *see also Espinoza*, 591 U.S., at ___ (slip op., at 9). *Espinoza v.*

Montana Department of Revenue, 591 U.S. ___ (2020), involved a provision of the Montana State Constitution that barred government aid to any schools "controlled in whole or in part by any church, sect, or denomination." It was this provision that prevented families form using scholarship funds provided through a program that gave tax benefits to donors who sponsored scholarships for private school tuition. *Espinoza*, 591 U.S., at ___ (slip op., at 9). As was the case with *Trinity Lutheran*, these benefits were otherwise available at the religious schools of their choosing. *Espinoza*, 591 U.S., at ___ (slip op., at 9).

This Court held that the program's specific carving out of religious schools from eligibility effectively punished certain private schools because of their religious character. *Espinoza*, 591 U.S., at ___ (slip op., at 11-12). In considering the nature of the benefit offered, this Court responded to the argument that the scholarship money could be used by the organizations to fund religious ends, since religion "permeates everything that they do." *Espinoza*, 591 U.S., at ___ (slip op., at 11). In doing so, this Court the skepticized the distinction between status-based discrimination and use-based discrimination, noting that no lesser degree of scrutiny was to be applied to use-based discrimination. Both necessitate the application of strict scrutiny. *Espinoza*, 591 U.S., at ___ (slip op., at 12). As such, the need to balance the secular and religious characters of the program or activity becomes categorically irrelevant. *See Espinoza*, 591 U.S., at ___ (slip op., at 11).

This Court solidified the view that there is no distinction between status-based and use-based discrimination in *Carson v. Mankin*, 596 U.S. ____ (2022). In *Carson v. Mankin*, 596 U.S. ____ (2022), the Court a state law that prohibited students who were participating in a school-funding program from choosing to use the funds to attend religious schools. Even though a school or program might have a religious aspect to it, that does not mean that the government can deny

benefits to it based on a religious affiliation. *Carson v. Mankin*, 596 U.S. ____ (slip op., at 11). In other words, the school or program is not required to be entirely secular in its character or use in order to receive government funding. *Carson*, 596 U.S. ____ (slip op., at 11, 17). A situation in which a neutral benefit program offering public funds may have public funds eventually reach religious organizations because of the independent choice of the private benefit recipients does not violate the Establishment Clause. *Carson*, 596 U.S. ____ (slip op., at 11, 17); *see also Zelman v. Simmons-Harris* , 536 U.S. 639, 652 (2002).

Religion is only a portion of what these organizations do; they can engage in secular activities as equally as non-religious organizations do, and the government's funding of those organizations does not inherently violate the Establishment Clause of the First Amendment. *Trinity Lutheran*, 584 U.S. at 466; *see Widmar*, 454 U.S. at 276; *see also Espinoza*, 591 U.S., at ___ (slip op., at 9). This line of cases is not forcing the government to fund religious activities. *Trinity Lutheran*, 584 U.S. at 466; *see Widmar*, 454 U.S. at 276; *see also Espinoza*, 591 U.S., at ___ (slip op., at 9). Instead, it merely asks the government to treat both religious and non-religious organizations the same when it comes to providing opportunities for them to receive government funding and benefits. *Trinity Lutheran*, 584 U.S. at 466; *see Widmar*, 454 U.S. at 276; *see also Espinoza*, 591 U.S., at ___ (slip op., at 9).

The case of *Locke v. Davey*, 540 U.S. 712 (2004) is of no avail to the Respondents, as that case can be distinguished from the facts at hand. In *Locke v. Davey*, 540 U.S. 712, 725 (2004), this Court upheld the constitutionality of a college scholarship created by the Washington state legislature that prohibited its funds to be used toward religious instruction. It was specifically because the student planned to use the scholarship funds for the purposes of obtaining a vocational degree that the state legislature possessed an interest in ensuring the separation of

governmental and religious entities. *Locke*, 540 U.S. at 725. If the Washington state legislature had funded the vocational degree, it would have been promoting the study of a particular religious degree, and thus violating the Establishment Clause. *Id.*

This case provides the obvious fact that the State of Delmont offers a benefit: funds for a "Principal Investigator" to receive salary, use Delmont University's facilities and equipment, funding for research assistants, and incidental costs associated with the scientific study of the Pixelian Event. (R. 1). By these terms, a wide range of scientists are eligible to receive the benefits of the grant. (R. 1). Additionally, as previously mentioned, the terms of the Astrophysics Grant do not explicitly condition receipt of the grant on denying any affiliations to a religion, nor do they explicitly disallow a discussion of religion in the published studies of the Pixelian Grant. (R. 1). However, because Dr. Nicholas expressed how his findings relate to the Meso-Pagan religion in his conclusions, the University decided to limit his access to the benefits of the grant. (R. at 9-11).

Similar to the facts of *Trinity Lutheran*, the University, in withholding the benefits of the grant from Dr. Nicholas, is effectively forcing Dr. Nicholas to choose between merely acknowledging his religious beliefs and participating in his role as the Principal Investigator of the Astrophysics Grant. (R. at 9-11). In order to receive the government benefit to which he is otherwise qualified, Dr. Nicholas would have to disavow his religion and deny that fundamental characteristic of his personhood. (R. at 9-11). Even if the discrimination is use-based and not status-based, the arguments separating the two do not matter because the government is nevertheless discriminating against religion, since it is not allowing Dr. Nicholas to express his personal religious views. (R. at 9-11). Again, Dr. Nicholas can only have the grant if he does not practice his religion, which is a violation of his right to Free Exercise. (R. at 9-11).

Even if the distinction between status and use-based discrimination is necessary, the connection between the funding and the religious activity is far too attenuated to be construed as funding a religious purpose. First, the conclusions of Dr. Nicholas' study could possibly, eventually shed light on the Meso-Pagan claim regarding electromagnets and symbolism. (R. at 25). Dr. Nicholas himself was motivated by the advancement of science and focused on studying the Pixelian event from a scientific perspective, and he was open to whatever the results of his findings were, regardless of their religious implications. (R. at 8). He did not allow religion to impact how he conducted his studies, and he ensured the conclusions were based on accurate research. (Nicholas Aff. ¶ 11). Second, at the time that he was conducting his observations, Dr. Nicholas did not express an intention to apply to study to become a First Order Sage in the Meso-Pagan faith. (Nicholas Aff. ¶ 15). He also was not certain that he would even apply to the study even if his observations concluded that the glyphs memorialized the lifeforce that is central to the Meso-Pagan religion. (Nicholas Aff. ¶ 12).

The Astrophysics Grant, and, by implication, the State of Delmont, is not providing Dr. Nicholas with the funding for the purpose of furthering his studies and practice of Meso-Paganism. (R. at 7). Instead, the State is providing funding for the purpose of promoting the advancement of science, the Observatory, and to ensure that the Pixelian Event was accurately researched. (R. at 52-53). Dr. Nicholas, in conducting his study, during which he developed widely accepted parameters, published cosmic measurements in accordance with a peer-reviewed journal, and collected and relayed standard data, he did just that. (R. at 5-6). Furthermore, the University prefaced the publication of Dr. Nicholas' findings with a statement attributing the Dr. Nicholas' observations to him and to him alone. (R. at 8). In publishing Dr.

Nicholas' conclusions, the University explicitly expressed that doing so did not serve as an endorsement on the part of the University's publication, editors, or staff of his findings (R. at 8).

It is not clear that Nicholas intended to use his study of the Pixelian Event to further his religious devotion and become a First Order Sage of the Meso-Pagan Faith. (Nicholas Aff. ¶ 11-15). Furthermore, for the reasons states above, even if Nicholas were to actually declare his intention to use the conclusion of his study to gain acceptance to study to be a First Order Sage, the characteristics of the benefit, and the purpose of the Astrophysics Grant were neither designed not used for that purpose. (Nicholas Aff. ¶ 11-15; Seawall Aff. ¶ 4-7). The conclusions that Dr. Nicholas reached might have a religious character to them and that might be used to further a religious purpose, but that does not mean that the government's funding of the study could be construed as an official endorsement of the Meso-Pagan religion. The potentially religious implications of Dr. Nicholas' study and observation of the Pixelian were just that: implications.

Either way, status-based and use-based discrimination are not constitutionally permissible, and the facts of this case demonstrate that. If the discrimination is framed as status-based, it is clear from case law that the University cannot provide general grant funding to every other type of scientific study, except for religious ones. If viewed as use-based, then the discrimination effectively forces Dr. Nicholas to choose between his religion and his science, which violates the Free Exercise clause.

For the reasons stated above, the Respondents' funding of the Astrophysics Grant did not constitute a violation of the Establishment Clause. Furthermore, the Respondents' limitation against the Petitioner inhibited his right to Free Exercise.

CONCLUSION

First, the Respondent's withholding of funds from the Petitioner imposed an unconstitutional limitation on Petitioner's right to free speech by engaging in viewpoint discrimination. Second, the Respondent's grant of funds to the Petitioner did not violate the Establishment Clause of the First Amendment, but it did impose a limitation on his right to Free Exercise. For the foregoing reasons, the Court should reverse the Fifteenth Circuit's grant of summary judgment in favor of the respondent and reaffirm the decision of the District Court, granting summary judgment in favor of the Petitioner and an injunction.

APPENDIX: RELEVANT CONSTITUTIONAL PROVISION

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

CERTIFICATE OF COMPLIANCE

In accordance with Rule III(C)(3) of the Seigenthaler-Sutherland Competition rules, Team 33 hereby submits this certificate of compliance to testify that:

1. The work product contained in all copies of Team 33's brief is in fact the work product of the team members, and only the team members;
2. Team 33 has complied fully with their law school's governing honor code; and
3. Team 33 has complied with all Competition Rules.

Respectfully submitted,

/s/ Team 33

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