No. 23-CV-1981

In The

Supreme Court of the United States

March Term 2024

COOPER NICHOLAS

Petitioner,

v.

STATE OF DELMONT
AND DELMONT UNIVERSITY

Respondent.

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

BRIEF FOR THE RESPONDENT

TEAM 8

Counsel for the Respondent

January 31, 2024

QUESTIONS PRESENTED

I. Whether a state's grant requirement that a grant recipient conform his research and conclusions to the academy's consensus view of what is scientific is a constitutional condition on speech.

II. Whether a state-funded grant violates the Establishment Clause when its principal investigator suggests that the study's scientific data supports future research into the possible electromagnetic origins of the 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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The opinion of the United States District Court for the District of Delmont, Mountainside Division, is unpublished and may be found at *Cooper Nicholas, Ph.D. v. State of Delmont and Delmont University*, C.A. No. 23-CV-1981 (D. Delmont February 20, 2024). The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found at *State of Delmont and Delmont University v. Cooper Nicholas, Ph.D.*, C.A. No. 23-CV-1981 (15th Cir. March 7, 2024).

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. Procedural History

Petitioner filed a complaint against Delmont and Delmont University on February 5, 2024, alleging violations of his First Amendment rights. (R. 33.) The parties cross-moved for summary judgment, which the district court granted for Petitioner. (R. 3, 12.) On March 7, 2024, the Court of Appeals for the Fifteenth Circuit reversed the lower court and granted summary judgment for Respondents. (R. 51.) Petitioner timely appealed, and this Court granted certiorari. (R. 59–60.)

II. Statement of Facts

Delmont University ("the University") is the State of Delmont's public university and the home of the GeoPlanus Observatory ("the Observatory" or "GeoPlanus"). GeoPlanus is a world-class observatory situated atop Mt. Delmont, considered one of the best locations for viewing celestial events in the Northern Hemisphere. (R. 4.) To further Delmont University's goal for the

Observatory to become "one of the foremost centers for celestial study in the world" (R. 5, 52), it introduced a competitive and "sought-after" Visitorship in Astrophysics ("the Visitorship") funded by the Astrophysics Grant ("the Grant"). (R. 1, 3, 42.)

The Visitorship and Grant were created specifically to advance the scientific study of the world-renowned Pixelian Event using the Observatory's facilities. (R. 5, 52.) The Pixelian Event occurs once every ninety-seven years when the Pixelian Comet passes the Northern Hemisphere. (R. 1.) The Grant—which is state-funded and administered by the University (R. 10)—specifically serves to further inquiries into the Pixelian Event that conform to the academic consensus of the event's scientific foundation. (R. 5, 6.) The Grant dictates that the Principal Investigator must study the Pixelian Event "before, during, and after" the comet's appearance and derive conclusions that "conform to the academic community's consensus view of a scientific study." (R. 5.)

The Grant, scheduled from March 2022 through March 2024 (R. 5), funded one Principal Investigator's "salary; use of Delmont University's observatory facilities and equipment…research assistants; and incidental costs associated with the scientific study of the Pixelian Event." (R. 1.) The Grant also supported the University's Delmont Press for "all costs associated with the publication of scientific, peer-reviewed articles related to that event…a final summative monograph on the event, and the creation of a public dataset that [would] include the raw data upon which conclusions were reached." (R. 1, 2). Further, the University arranged specially with *Ad Astra*, the "premier peer-reviewed journal in the field," to publish the Visitorship's findings. (R. 6.)

The University awarded Dr. Cooper Nicholas ("Petitioner") the competitive and prestigious Visitorship due to his reputation for making ground-breaking observations and his eminence in the astrophysics field. (R. 5.) Petitioner is an alumnus of Delmont University, holds joint degrees in astronomy and physics, a Ph.D. in astrophysics from the University of California, Berkeley, and

prior to his appointment to the Visitorship, held a directorship with a different astrophysics institute. (R. 2–3.) Since Petitioner was a distinguished alumnus of the University and regarded as an expert in observational astrophysics, the University launched a media campaign announcing Petitioner's appointment. (R. 5.)

Petitioner is a believer in the Meso-Paganist faith, an ancient, Indigenous practice with a spiritual center in the study of stars. (R. 4.) Meso-Paganist studies of planets, celestial objects, significant interplanetary events, and celestial trajectories are intended to provide insight into human nature and human relations to the cosmos. (R. 56.) While Petitioner was focused on studying the science of the Pixelian Event, he was open to any findings, regardless of their religious implications, and hoped the Visitorship's research would confirm his Meso-Paganist beliefs. (R. 8.)

Additionally, Petitioner anticipated applying to a divinity program to become a Meso-Pagan Sage—a clerical position—using his scientific findings from the Pixelian Event to support his studies. (R. 8, 9, 57.) Petitioner attested that he received application materials from programs and was "seriously considering" applying, pending the results of the research. (R. 56–57.) Petitioner also announced his intentions to pursue the Meso-Pagan priesthood on social media. (R. 54, 57.)

During the first nine months of the Visitorship, Petitioner measured the celestial environment before the Pixelian Event using well-established analytical methods. (R. 6.) In Spring 2023, the Pixelian Event occurred in the Northern Hemisphere for a three-week period, leading to global press coverage and watch parties. (R. 6.) Petitioner and his team continued to conduct their research during the Pixelian Event and publish updates in *Ad Astra*. *Id.*

Six months after the Pixelian Event, Petitioner sought to publish additional observations and conclusions in *Ad Astra*. (R. 6.) Although this article did rely upon the standard data Petitioner collected previously, he also included historical dimensions that related his cosmic observations to

those observed by ancient Meso-American indigenous religions in ancient glyphs. (R 6–7.) In this article, Petitioner speculated that the energy interactions demonstrated during the Pixelian Event appeared consistent with the controversial "Charged Universe Theory," which proposed an alternative theory to gravity rooted in Meso-Pagan religious tenets and symbolism. (R. 6–7.)

Prior to publishing Petitioner's article, the *Ad Astra* editorial board was concerned about publishing information from Meso-Paganist foundational and archeological texts that were religious rather than empirical. (R. 8.) The board was particularly concerned because the scientific community lacked any consensus regarding the Charged Universe Theory. (R. 7.) Ultimately, Petitioner was allowed to publish his article with a prefatory essay explaining *Ad Astra* did not endorse Petitioner's conclusions. (R. 8.)

Publishing Petitioner's article opened the floodgates for academic and press responses to his research, discrediting Petitioner's unprovable scientific propositions with his use of medieval cave drawings and oral histories as grounds for mystical connections of matter. (R. 9.) Academic support for Petitioner's claims depended on future studies. (R. 9.) The publication of the *Ad Astra* proved an embarrassment to the University and Observatory. (R. 9.) The Observatory's debut was increasingly associated with "weird science," a sentiment reflected in a decrease in post-graduate studies applications and suggestions in online discussion fora that the Observatory was having trouble finding the next visiting scholar. *Id.*

Delmont University President Meriam Seawall ("President Seawall"), concerned about risking the substantial economic investments in the Observatory (R. 9), corresponded with Petitioner on behalf of the University. (R. 9-10.) She expressed concern that the University would "endors[e] a religious tenet" unless Petitioner "agree[d] to limit [his] research experiments and conclusions to those" conforming to the narrow goal of the Grant, namely scientific consensus

views of the Pixelian Event. (R. 10.) President Seawall also noted *Ad Astra*'s earlier concerns regarding the religious overtones of Petitioner's article. *Id.*

When Petitioner failed to agree to limit his research findings to nonreligious lines of inquiry pursuant to the Grant terms, the University rescinded their partnership and Petitioner's access to the Observatory. (R. 11.) The University issued a press release explaining that it took these measures following a fundamental disagreement over the meaning of science and its refusal to endorse the confusion of science and religion. *Id.* Petitioner subsequently commenced the instant action. *Id.*

SUMMARY OF THE ARGUMENT

I. Question Presented 1.

This Court should affirm the decision of the Fifteenth Circuit because Petitioner's speech is government speech which is shielded by the First Amendment. The speculative conclusions in Petitioner's *Ad Astra* article fall under his duties as a public employee. Further, the Grant conditions are narrowly tailored to promote the Government's interest, and Petitioner retains the ability to publish his findings outside the Grant's scope. The Grant is intended to promote a scientifically reputable study of the Pixelian Event, which is indicated by the competitive nature of the Grant. Also, the proper remedy for Petitioner was to decline the Visitorship. The Grant conditions were the reasonable price for Petitioner to pay to receive public support for his research. Therefore, the Court should not apply First Amendment protections to Petitioner's speech under the Grant.

II. Question Presented 2.

This Court should affirm the Fifteenth Circuit because the Establishment Clause forbids Delmont and its University to fund Petitioner's religious devotional study. Petitioner's intent to use the Visitorship to support his clerical journey is impermissible under the First Amendment. In

addition, Delmont and Delmont University may not promote Petitioner's religious speech under the Visitorship.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE FIFTEENTH CIRCUIT BECAUSE THE GRANT CONDITIONS ARE FACIALLY CONSTITUTIONAL.

The Free Speech Clause of the First Amendment to the U.S. Constitution requires that government "make no law…abridging the freedom of speech…." U.S. Const. amend. I. When raising a facial constitutional challenge to a government action under the Free Speech Clause, the proponent of that claim has a heavy burden in advocating their position. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). Constitutional facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). "To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *National Endowment for the Arts*, 524 U.S. at 580.

If a non-tenured University employee claims that they are no longer employed due to a First Amendment violation, they must prove (1) that their conduct was protected and (2) that said conduct was the motivating factor for their termination. *Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 (1977) (finding that a non-tenured professor "could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him"); *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989).

A. Petitioner's speech is government speech subject to the University's control.

The threshold question in evaluating First Amendment concerns for a public employee is whether the speech was made pursuant to their official duties. *Kennedy v. Bremerton Sch. Dist.*,

142 S. Ct. 2407, 2423 (2022). If so, "the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech." *Id*. However, if the employee's speech addresses a public concern, the court will attempt to balance those competing interests. *Id.* The dispositive question in making this determination is whether the speech is "ordinarily within the scope of an employee's duties." *Id*. (citing *Lane v. Franks*, 573 U.S. 228 (2014)).

In *Kennedy*, a school district prohibiting a football coach from praying on the field, preventing his engagement in religious conduct while on duty, violated his First Amendment rights because the policy sought to restrict the coach's religious actions. *Id*. at 2422–23. The Court held that because the coach's prayers were not pursuant to any of his duties as a public employee and were private speech, therefore, the school district could not restrict the speech. *Id*. at 2424.

Here, Petitioner's speech is government speech because his articles were written within the scope of his duties as a public employee. (R. 5, 10, 11). Unlike *Kennedy*, whose speech was outside his public employment duties, *Kennedy* 142 S. Ct. at 2424, Petitioner's speech was directly pursuant to the Visitorship. (R. 10, 11). Petitioner's duty as the Principal Investigator of the Visitorship was to collect data and draw conclusions before, during, and after the comet's appearance in the Northern Hemisphere that conformed to the academic community's consensus view of scientific study. (R. 5.)

Clearly, Petitioner acted within the scope of his duty as a public employee since his job was to perform research, unlike *Kennedy*, whose prayers fell outside his duties as a football coach. *Kennedy* 142 S. Ct. at 2424. Despite the fact that Petitioner intends to use his publication to advance his position in the Meso-Pagan religion, his situation is different from that of the football coach's prayer in *Kennedy*. *Id.*; (R. 57.) Scientific research is a part of Petitioner's Visitorship

responsibilities, and his religious motivation cannot be separated from his duties as a public employee. Therefore, Petitioner's speech falling under his duties as Principal Investigator is subject to the control and discipline of the University and is not shielded by the Free Speech Clause.

B. The Grant is permitted to restrict speech in this limited forum because it pursues a compelling government interest.

The government is permitted to restrict the contents of speech when such restrictions serve a "compelling government interest" while not discriminating based on viewpoint. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Further, a government entity can create a limited forum, used only by certain individuals, to discuss specific subjects. *Id.* at 470; *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) ("When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program.").

The government may specify funding conditions when these serve a legitimate objective to further a programmatic message. *Id*. at 548 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)). When evaluating content restrictions, this Court has held that the dispositive question is whether that restriction is "reasonably necessary to achieve [the government's] compelling interest." *R. A. V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992). The state may enforce content-neutral time, place, and manner restrictions on expression if they are (1) narrowly tailored to the government's interest and (2) leave alternate means of communication open. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983).

1. The Grant is constitutional because the Grant conditions are narrowly tailored and content-neutral.

Fund conditions are constitutional when narrowly tailored to promote a complete government interest. *R. A. V.*, 505 U.S. at 395–96; *FCC v. League of Women Voters of Cal*., 468 U.S. 364, 374 (1984); *see generally Rust*, 500 U.S. at 193; *Speiser v. Randall*, 357 U.S. 513, 519 (1958);

Maher v. Roe, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy"); *Liberty & Prosperity 1776, Inc. v. Corzine*, 720 F. Supp. 2d 622, 632 (D.N.J. 2010) ("[W]hen the government invites a private speaker to join it as it uses a limited public forum like a private speaker would, it exercises a degree of control over the content of the message that the Supreme Court has found important in distinguishing government from private speech.").

This Court held in *Rust* that attaching conditions to federal funding for family-planning services that limited abortion-related activity was constitutional because "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193. The Court further held that such conditions were content-neutral and that the government merely chose to fund one activity over another. *Id.*

On the other hand, the government cannot place funding conditions on specific ideologies or perspectives. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *League of Women Voters of Cal*., 468 U.S. at 374. In *League of Women Voters of California*, a statute restricting education broadcast stations from "editorializing" if they received grants from the Corporation for Public Broadcasting was unconstitutional because it did not promote a "compelling government interest." 468 U.S. at 381-85. The Court held that the statute was unconstitutional because the restriction was explicitly directed at a form of speech defined solely by the content of the suppressed speech and prohibited broadcasters from speaking out on public issues. *Id*.

Further, viewpoint discrimination cannot be reinvented as a condition of funding. *Legal Servs. Corp.*, 531 U.S. at 547. In *Legal Servs. Corp.*, the Court held that prohibiting Legal Services

Corporation funding recipients from challenging the validity of a welfare law was unconstitutional because it was discrimination based solely on a particular viewpoint. *Id*. The Court further explained that barring the lawyers receiving this funding from challenging welfare laws on behalf of their private clients could not be reframed as a condition of funding. *Id*. at 548. Moreover, clear penalties disfavoring particular speech to suppress ideas violate the First Amendment. *See generally R. A. V.*, 505 U.S. 377.

Here, the Visitorship Grant is constitutional because Delmont selected content-neutral conditions enabling it to choose how to spend its money in a way that promotes a public interest. Like the family planning conditions in *Rust*, Delmont's Grant simply chooses to prioritize scientific research of the Pixelian event that conforms with the consensus of the academic community over alternative approaches. *Rust*, 500 U.S. at 193; (R. 10.) Further, unlike *League of Women Voters* and *Legal Servs. Corp*., the Grant is not targeting specific speech to be suppressed. *League of Women Voters of Cal*., 468 U.S. at 381-85; *Legal Servs. Corp.*, 531 U.S. at 547. The Grant requirements here differ from those in *League of Women Voters* and *Legal Servs. Corp.,* because the Grant does not directly discriminate based on viewpoint, but rather selectively funds the compelling government interest of reputable science. *League of Women Voters of Cal*., 468 U.S. at 381-85; *Legal Servs. Corp.*, 531 U.S. at 547; (R. 5, 9-10.)

Further, the Grant is unlike the grant in *R.A.V.,* which included clear penalties, proscribed views on disfavored subjects, and suppressed ideas to convey a particular message. *See generally R. A. V.*, 505 U.S. 377. The Grant neither promotes nor disfavors particular views or subjects, nor does it penalize visiting scholars. Moreover, the response to Petitioner's publication of controversial, nonconsensus, and unsupported science demonstrates the government's compelling interest in advancing reputable science. Petitioner's *Ad Astra* article resulted in a drop off in postgraduate

studies applications to the University and a struggle to find Petitioner's replacement. (R. 9.) The Grant conditions ensure that scientifically sound research is conducted to further develop an understanding of the Pixelian event while protecting the University's accreditation for supporting scientifically sound research.

Notably, the *League of Women Voters of Cal*. Court recognized that the new broadcasting medium, in that case, required an adjustment to the free speech analysis because broadcast frequencies were scarce and needed to be apportioned. 468 U.S. at 377. Similarly, the ability to study the Pixelian Event is rare and must be accounted for when analyzing Petitioner's claim. *Id*.; (R. 1.) While the Court in *League of Women Voters of Cal*. emphasized the necessity to have "an uninhibited marketplace of ideas" in media broadcasting, the necessity here is to preserve fact and evidence-based science that informs the public of tested theories of science before that opportunity is gone. 468 U.S. at 377 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

Although the State cannot discriminate against speech solely for its viewpoint, content discrimination is permitted when it "preserves the purposes of that limited forum." *Rosenberger v. Rector* 515 U.S. at 828–829. The *Rosenberg* Court held that it was unconstitutional for a state university to deny funding to a Christian publication because their denial was based solely on their religious viewpoint. *Id.* at 837. However, the Grant here is not discrimination against the Meso-Paganist faith, but rather is ensuring that the science used in Petitioner's research is in conformance with theories generally accepted in the scientific community. (R. 10, 11.) As expressed in the Grant conditions, Delmont is invested in publishing academically sound research and has the authority to exclude unsupported scientific theories, including the Changed Universe Theory, without violating the First Amendment.

As such, the government may award competitive funding based on criteria that would be impermissible as a direct speech regulation or subject to criminal punishment. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998). In *National Endowment for the Arts*, applicants to a government grant were judged on merit, and the judges considered the "general standards of decency and respect for the diverse beliefs and values of the American public." *Id.* at 576 (citation omitted). The Court held that this grant was not facially unconstitutional because the "decency and respect" provision did not preclude or punish the expression of particular viewpoints. *Id*. at 583.

In addition, content-based considerations in a grant result from the nature of arts and educational funding, where limited resources must endorse what the government determines is valuable to the public. *Id*. at 585; *see also United States v. Am. Libr. Ass'n, Inc*., 539 U.S. 194, 205 (2003) ("[P]ublic librar[ies] exercise…judgment in selecting the material it provides to its patrons [and] necessarily consider content in making collection decisions and enjoy broad discretion in making them."). By extension, the competitive nature of grant processes indicates that such grants are not to encourage a diversity of views. *National Endowment for the Arts*, 524 U.S. at 586; *Rosenberger*, 515 U.S. at 834.

The competitive nature of the Grant here indicates that the Grant is not intended to promote diverse viewpoints, but to promote the establishment of supported scientific research. The Grant is akin to that in *National Endowment for the Arts*, whose "decency and respect" criteria regarding grant applicants did not expressly censor ideals. 524 U.S. at 583. The Grant's language, which obliges the Principal Investigator to adhere to the scientific community's consensus view, aims to preserve the integrity of state-funded research, similar to the "decency and respect" language. *Id.*; (R. 5.) That intention is clearly indicated by the competitive process of receiving the Grant, like

the grant process in *National Endowment for the Arts* and *Rosenberger*. 524 U.S. at 586; 515 U.S. at 834.

Moreover, the Grant is unlike the denial of funds in Rosenberg because Petitioner's denial of funds is based on the content of his articles, which conflicts with the conditions of the Grant rather than his religious viewpoint. *Rosenberger* 515 U.S. at 837; (R.10.) The University has chosen to frame the Observatory as a purely scientific institution free from religious influences, similar to the decency and respect criteria in *National Endowment for the Arts*. 524 U.S. at 583; (R. 53.) The Grant is not aimed at suppressing ideas, nor does it have a manipulative or coercive effect for which relief could be granted. Therefore, the grant is not facially unconstitutional.

2. The Grant is constitutional because Petitioner can publish his research outside the Grant's scope.

Conditions on grant funding that require a grantee or their employee to keep prohibited activities separate from funding are constitutional so long as alternate channels for prohibited speech remain open. *See generally Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013); *Rust* 500 U.S. at 196-97 (finding that grant fund conditions were constitutional because they protected a public interest, and recipients were free to engage in prohibited activities so long as they were "separate and distinct" from the grant); *Perry Educ. Ass'n*, 460 U.S. at 53. For example, in *Perry*, methods of communication ranging from bulletin boards to meeting facilities constituted proper alternatives to restricted communication. *Id*.

Further, in *Agency for International Development*, the Court distinguished funding programs that specify which activity the government wants to subsidize versus funding conditions that regulate speech outside the funded program's scope. 570 U.S. at 214-15. The Court held that the conditions in *Agency for International Development* did violate the First Amendment because

the grant conditions restricted free speech outside the scope of the grant. *Id.* at 217. Additionally, conditions cannot have the effect of coercing the recipient to refrain from proscribed speech, which would only be aimed at the suppression of ideas. *Speiser v. Randall*, 357 U.S. at 519.

The Grant conditions here are constitutional because the University has encouraged Petitioner to publish his research regarding the Charged Universe Theory so long as it remains separate from his Grant-funded work. (R. 57.) Like *Perry*, a wide range of alternatives are available for Petitioner if he wishes to publish speculations about the connection between the Pixelian Event and the Charged Universe Theory. *Perry Educ. Ass'n*, 460 U.S. at 53 (1983); (R. 6.) Petitioner is only barred from publishing in *Ad Astra* due to the special arrangement with the publications to publish the Pixelian Event findings. (R. 6.) For example, Petitioner is free to publish his opinions in any anthropological or theological publication without violating the Grant conditions.

The requirements for Visitorship here differ from those in *Agency for International Development* because Petitioner has the right to publish his opinions on the Charged Universe Theory, therefore not compelling his speech outside the Grant setting. 570 U.S. at 217; (R. 6, 10, 57.) In fact, even while employed under the Grant, Petitioner was encouraged to publish his opinions on the Charged Universe Theory outside of his work under the Grant funding. (R. 10, 57.) Because Petitioner has alternative channels for expressing his opinions freely, the Grant conditions do not violate his First Amendment rights.

C. The proper remedy for Petitioner was for him to decline the Visitorship position.

When a recipient of government funding can freely decline funds, it is presumed that there is no violation of the First Amendment. *Rumsfeld v. F. for Acad. & Inst. Rts.*, 547 U.S. 47, 59 (2006) (citing *Grove City College v. Bell*, 465 U.S. 555, 575–576 (1984)); *Agency for International*

Development, 570 U.S. at 219. In *Agency for International Development*, the Court addressed government funding that placed conditions on HIV/AIDS related speech. 570 U.S. at 214. The Court explained that "[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Id*. In his dissent, Justice Scalia expanded on this concept by explaining that conditions on funding are "the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject." *Id*. at 226 (Scalia, J. dissenting).

In addition, non-tenured faculty members are subject to termination without violating the First Amendment when their methodology does not conform with the institution's standards. *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) ("The First Amendment concept of academic freedom does not require that a nontenured professor be made a sovereign unto himself."); *Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 (1977). Further, the Court is reluctant to interfere with the academic freedom of universities. *Epperson v. Arkansas*, 393 U.S. 97, 104 L.Ed.2d 228 (1968) ("Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

The Grant here is constitutional because Petitioner could have declined the Grant funding and retained his right to speculate freely regarding the Pixelian event. As Justice Scalia explained in his dissent for *Agency for International Development*, the conditions on the Visitorship funding are the price Petitioner has paid to access the opportunity to research the Pixelian event. 570 U.S. 205 at 226 (Scalia, J. dissenting). Moreover, Petitioner's Visitorship position does not award him the privileges of a tenured professor. Petitioner is subject to termination if he violates the terms of

the Visitorship, which he has done here by attempting to publish research that conflicts with the scientific community's consensus. *Parate*, 868 F.2d at 827; (R. 10, 11.) Therefore, the Grant conditions are presumptively constitutional since Petitioner has an available remedy outside the Court, and the Court does not often interfere with academic freedom.

II. THE COURT SHOULD AFFIRM THE FIFTEENTH CIRCUIT BECAUSE RESPONDENTS' SUPPORT FOR PETITIONER'S RELIGIOUS RESEARCH OFFENDS THE ESTABLISHMENT CLAUSE.

The First Amendment Establishment Clause, applicable to the states via the Fourteenth Amendment, *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943), prohibits states from "mak[ing any] law respecting an establishment of religion…." U.S. Const. amend. I. The Supreme Court interprets the Establishment Clause consistently with its "original meaning and history," *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 536 (2022), to ensure the establishment test "withst[ands] the critical scrutiny of time and political change," *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014). Therefore, whether a government action offends the Establishment Clause depends on the historical context of such actions.

Requiring a state and its state university to publicly fund and publish research to fulfill a religious purpose, including the pursuit of religious ministry and promotion of religious views, meets this contextual burden. First, public universities offend the Establishment Clause if they direct their funds toward a student's devotional religious study. *Locke v. Davey*, 540 U.S. 712, 722 n.6 (2005). Second, Establishment Clause violations may arise where government entities endorse or promote religious views through funding and other conduct. *See Larson v. Valente*, 456 U.S. 228, 244 (1982).

This Court should affirm the Fifteenth Circuit's decision granting summary judgment to the State of Delmont and Delmont University because the Establishment Clause requires

Respondents to suspend Petitioner's publicly funded Meso-Pagan research. First, Petitioner cannot use publicly funded research to support his ambitions to become a Meso-Paganist priest. Second, the Establishment Clause does not require Delmont and Delmont University to promote Meso-Pagan religious speech under its grant program.

A. Continuing Petitioner's affiliation with the Grant would impermissibly fund his devotional study with public dollars.

The Establishment Clause does not tolerate public funding for devotional study. The Court views publicly "funding religious training of the clergy," *Locke v. Davey*, 540 U.S. 712, 722 n.6 (2005), as "one of the hallmarks of an 'established' religion" contemplated within the Establishment Clause's original meaning. *Id.* at 722 ("Most 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."); *see Everson v. Bd. of Educ.*, 330 U.S. 1, 10 (1947) (noting compulsory "taxe[s] to support a religious institution of any kind" were among the Establishment Clause's original motivating concerns).

In *Locke v. Davey*, the Court upheld Washington state's refusal to fund a scholarship for a student intending to use it to pursue a devotional theology degree. 540 U.S. at 717. The *Locke* respondent "had 'planned for many years to…prepare [himself]…for a lifetime of ministry'" while in college. *Id.* (citation omitted). The scholarship program itself permits students to take courses of religious study that are not intended for devotional professions. *Id.* at 724. Chief Justice Rehnquist, writing for the majority, argued there are "few areas" outside of funding for religious training in which "a State's antiestablishment interests come more into play." *Id.* at 722. He also rebuffed Justice Scalia's dissent, which claimed state scholarships must fund both secular and religious training, *id.* at 727–28 (Scalia, J., dissenting), for incorrectly treating these as "fungible,"

Id. at 721. Finally, the Chief Justice noted the scholarship program was neutral toward religion and did not demonstrate unconstitutional antireligious animus where it allowed students to attend religious schools and programs without pursuing the ministry, *Locke*, 540 U.S. at 724–25; *see also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993).

Since *Locke*, the Court continues to distinguish the uses of public programs in that case—devotional religious education—from uses unrelated to religious study when conducting its Establishment Clause inquiry. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that Missouri was required to provide scrap rubber to a religious school where the program was not being used to further devotional religious study. 582 U.S. 449, 465 (2017). *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), and *Carson v. Makin*, 142 S. Ct. 1987 (2022), both concerned state restrictions on public tuition assistance at religious schools. The Courts in *Espinoza* and *Carson*, employing the same reasoning, held restrictions that "carve[] out private religious schools from those eligible to receive such funds" *because* they are religious are impermissible. *Carson*, 142 S. Ct. at 1997.

Here, Petitioner used the Grant for the purpose of devotional religious study, falling squarely within the restrictions allowable under *Locke*. Petitioner announced on social media and attested that he intended his Grant research to constitute part of the process of becoming a Meso-Pagan priest. (R. 57.) Indeed, Petitioner asserted his interest in continuing his research under the Grant *because* he "strongly believe[d] it would be useful…to [his] Meso-Pagan faith." *Id.*

Further, Petitioner indicated that he had already received application materials to a Meso-Pagan seminary and was "strongly considering applying." *Id.* This is akin to the student in *Locke*, who also intended to use the public program to pursue the ministry. *Locke*, 540 U.S. at 717.

Petitioner here is merely a brief step behind the *Locke* student, who was already admitted to a seminary program, but no less violative of the *Locke* doctrine based on his use of the funds.

Additionally, the *Trinity–Espinoza–Carson* line of cases is inapplicable to these facts. The *Trinity* petitioner sought to use the funds solely to resurface its playground area. *Trinity*, 582 U.S. at 454–55. There, the Court dismissed any suggestion that the rubber tire recycling program could ever effectuate devotional religious study. *Id.* Likewise, in *Espinoza* and *Carson*, the Court emphasized that the restrictions on tuition assistance were unconstitutional because they were not designed to restrict the *use* of the funds for religious devotional study. *Espinoza*, 140 S. Ct. at 2256; *Carson*, 142 S. Ct. at 1997. By contrast, here, Petitioner planned to use the results of his Delmont-funded Grant for devotional religious study in the hopes of becoming a priest. (R. 8–9, 57.) Thus, Delmont University's restriction arises from its legitimate desire to regulate the *use* of its public funds to prevent public support for devotional study.

B. Continuing Petitioner's Visitorship would amount to impermissible government endorsement of Meso-Paganism.

The Establishment Clause prohibits government entities, including public universities, from promoting or endorsing religious views. *See, e.g., Larson v. Valente*, 456 U.S. 228, 244 (1982); *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (finding "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion" (emphasis original)); *Kumar v. Koester*, 2023 WL 4781492, at *4 (C.D. Cal. July 23, 2023) ("The Establishment Clause ensures that the government does not endorse a specific religion or religious practice.").

Though the Court dispensed with its formal "endorsement" test in *Kennedy v. Bremerton*, 597 U.S. at 535, it left undisturbed the guidance of prior precedent in determining whether a

government act constitutes an offense against the Establishment Clause within its "original meaning and history." *Id.* at 536, 536 n.5. In relevant part, the Court's post-*Kennedy* Establishment Clause jurisprudence requires public institutions to tolerate "*private* religious speech," *Kennedy*, 597 U.S. at 534–35 (emphasis added), that "occur[s] in a public forum." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (reasoning that "[p]rivate religious speech cannot be subject to veto by those who see favoritism when there is none").

Kennedy provides the doctrinal basis for restrictions on publicly endorsed or promoted religious conduct. In that case, the petitioner was removed from his job as a football coach at Bremerton High School after he refused to cease private prayers following games on the field. *Kennedy*, 597 U.S. at 537. Justice Gorsuch, writing for the majority, held that this disciplinary action was unconstitutional, and reasoned that the Establishment Clause requires more evidence of establishments rooted in the clause's "original meaning and history" than mere exposure to "private religious exercise." *Id.* at 536–38. Justice Gorsuch emphasized the absence of coercion that would compel other students or observers into participating in the religious exercise and rejected the notion that "*any* visible religious conduct by a teacher or coach should be deemed…impermissibly coercive on students." *Id.* at 540 (emphasis original).

In the context of religious publications in higher education, the Court allows public universities to support and publish students' religious editorial viewpoints without implicating the Establishment Clause. In *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 841 (1995), the Court addressed the question of whether the University of Virginia properly withheld funds to a religious student organization to print its publications with a third-party printing company, where the funds were available to nonsectarian groups. *Id.* at 825–27. In holding that the university's restrictions were unconstitutional, Justice Kennedy, writing for the majority,

found that the university, via the printing funds program, was not "making direct money payments to an institution…engaged in religious activity." *Id.* at 842. Therefore, the Court held that the university was not endorsing religious opinions contained in its student publications. *Id.* at 841–42.

Importantly, the *Rosenberger* Court limited the breadth of its holding by emphasizing that the printing funds could not be employed to "support[] one religion." *Id.* at 841. Justice Kennedy recognized that the university was insulated from Establishment Clause claims by outsourcing the printing of publications to third parties. *Id.* at 844. The Court also noted the value of maintaining the editorial integrity of the student publication, which it reasoned was "involved in a pure forum for the expression of ideas. . . ." *Id.*

Some federal courts have reaffirmed the *Rosenberger* Court's idea of an unfettered public forum for religious and secular ideas. For instance, in *Roman Catholic Foundation, UW-Madison, Inc. v. Regents of University of Wisconsin System*, 578 F. Supp. 2d. 1121 (2008), the district court rejected the University of Wisconsin–Madison's effort to restrict the availability of certain funds for sectarian organizations. *Id.* at 1132. The court reasoned that previous Supreme Court precedents, including *Rosenberger*, make clear that the "admission of religion into the University's public forum does not create the appearance that the state endorses the religious messages expressed." *Id.* at 1133.

Here, Delmont University would effectively promote and endorse Meso-Pagan religious messaging in violation of the Establishment Clause if it did not terminate its Visitorship with Petitioner. As an initial matter, continuing to fund the publication of Petitioner's religious arguments with the frequency he demanded would impermissibly prioritize Meso-Paganism, in contravention of the *Rosenberger* Court's instruction that school funds not be applied to the benefit of one religion. *Rosenberger*, 515 U.S. at 841. Petitioner's religious messaging, which is overt throughout

his research with the Grant and calculated to comport with his religious faith (R. 56–57), is far more obvious and public than the *Kennedy* petitioner's private, silent, and often solitary post-game prayers, *Kennedy*, 597 U.S. at 537.

Additionally, unlike the *Kennedy* prayer sessions, which were never extended to other school personnel, game attendees, or students, *id.* at 540, here, Petitioner's research was being published "under the auspices" of Delmont University and the GeoPlanus Observatory (R. 53). The Grant and its attendant publications imbued Petitioner's research conclusions with an air of officiality unmatched by the overwhelmingly private, brief, and quiet prayers in *Kennedy*. 597 U.S. at 519.

Additionally, Delmont University's Astrophysics Grant is hardly cognizable as a "public forum" within the Court's understanding, and thus not subject to the obligations this status imposes. President Seawall attested that the University's esteemed Observatory was staffed and equipped with the intent that it "become one of the foremost centers for celestial study in the world." (R. 52.) The GeoPlanus Observatory at Delmont University was not hosting a number of visiting scholars to provide multiple scholarly viewpoints. (R. 5, 53.) Instead, it undertook a rigorous selection process to identify the best-qualified astrophysicist to produce groundbreaking research. (R. 53.) In other words, unlike the football game in *Kennedy* or public fora identified in *Rosenberger* and *Roman Catholic Foundation*, the Astrophysics Grant was conceived not as a public forum of ideas concerning the Pixelian Event, but rather as a specific, narrow body of *scientific* research addressing the Pixelian Event.

The goal of the Astrophysics Grant was equally narrow in scope, to "ensur[ing] that the Pixelian Event was accurately researched." (R. 53.) The purpose of Delmont University's astrophysics institutions—to develop a "purely academic institution" (*id.*)—is an altogether different

proposition from those of the student publications in *Rosenberger* and the student organizations in *Roman Catholic Foundation*. In the former, the Court emphasized the nature of student publications as fora for free expression, *Rosenberger*, 515 U.S. at 844, and in the latter, the district court considered the existence of a diverse public forum, *Roman Catholic Foundation*, 578 F. Supp. 2d at 1133.

Petitioner's circumstances are further distinguished from *Rosenberger* by the intimate connection between *Ad Astra*, the Observatory, and Petitioner. Here, the Grant funded all publication expenses arising from the Visitorship, including from the final monograph to be published by Delmont University Press and intermediate publications in *Ad Astra*, the latter dubbed a "special arrangement." (R. 6.) The history of the Visitorship reflects that *Ad Astra*'s editorial decisions concerning the research, as a leading astrophysics publication, were entirely dependent on Petitioner's novel research with the Observatory (R. 6–7) (noting the "series of cosmic measurements" Petitioner published in *Ad Astra* and describing the intense scrutiny of Petitioner's Visitorship work by *Ad Astra* readers).

In this way, the Grant's structure contemplated that *Ad Astra* would be a primary conduit of conclusions from the Visitorship at various points throughout the program, akin to the University publishing the findings directly. By contrast, the *Rosenberger* Court noted the University of Virginia's third-party publishing company was far more separate from the speech it printed. *Rosenberger*, 515 U.S. at 844. Indeed, the third-party publishing arrangement in *Rosenberger* only existed to help the University of Virginia "avoid[] the duties of supervision[and] escape[] the costs of upkeep, repair, and replacement attributable to student use" of school-owned printing equipment." *Id.* There is no indication from the record here that the University intended its Grant funds solely to defray the costs of University-owned printing equipment used by student organizations.

In conclusion, the Establishment Clause forbids Delmont and Delmont University to fund what amounts to Petitioner's Meso-Pagan devotional training with the Astrophysics Grant under the Court's *Locke* precedent. It also cannot publish, and thereby endorse and promote, Petitioner's Meso-Pagan religious messages under the auspices of its Astrophysics Grant and institutional affiliations.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the Fifteenth Circuit's decision because (1) the University's Grant conditions are facially constitutional under the First Amendment Free Speech Clause; and (2) the First Amendment Establishment Clause prohibits government funding of religious devotional study and public endorsement of religious views.

Respectfully submitted,

TEAM 8

Counsel for the Respondent

APPENDIX A

I. CONSTITUTIONAL PROVISION

U.S. Const. amend. I reads in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

II. STATUTORY PROVISION

28 U.S.C. § 1254(1) states: "Cases in the courts of appeals may be reviewed by the Supreme Court…[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

III. CERTIFICATE OF COMPLIANCE

Per Rule IV.C.3 of the Official Rules of the 2024 Seigenthaler-Sutherland Moot Court Competition, we, Counsel for Respondent, certify that the work product contained in all copies of the team's brief is in fact the work product of the team members; the team has complied fully with our school's governing honor code; and the team has complied with all Rules of the Competition.

TEAM 8

Counsel for Respondent