No. 17-698

In The
Supreme Court of the United States

DUSTIN BUXTON,

Petitioner,

v.

SANDRA KURTINITIS, individually and
in her official capacity as President of
The Community College of Baltimore County, et al.,

Respondents.

**On Petition For a Writ Of Certiorari
To The United States Court Of Appeals
for the Fourth Circuit**

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Was the Fourth Circuit correct to affirm that the Free Speech Clause of the First Amendment allows public college officials the discretion to evaluate an applicant's interview answers in a competitive admissions process?

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INTRODUCTION

At first glance, the Petition reads as though this Court is being asked to take on a *religious* discrimination issue of constitutional proportion. In reality, however, Mr. Buxton's Establishment Clause and Equal Protection Clause claims have failed and been abandoned. Only the Free Speech Clause remains in play, and there is no reason for that claim to be before this Court.

In search of judicial life support for a case in terminal condition, Petitioner Dustin Buxton overstates the holding of the Fourth Circuit, the nature of the matter, and the effect of this case on settled law. The Community College of Baltimore County ("CCBC" or the "College") does not have or follow a policy of violating any person's right to free speech. Indeed, Petitioner identifies no statute, regulation, or written policy to that effect applied by the College, because none exists. In that respect, this matter is unlike every case cited by Petitioner in that there is no substantive wrong to attack.

As Petitioner acknowledges, there is a "dearth of cases involving Free Speech challenges in the specific context of college admissions processes." Pet. 7. This undoubtedly is because, as the Fourth Circuit held, "the Free Speech Clause is not implicated" by allegations that a college did not appropriately evaluate an applicant's interview answers in a competitive selection process. App. 18. This is because "for an interview process to have an efficacy at all, distinctions based on

the content, and even the viewpoint, of the interviewee's speech is required." *Id.* The result that Petitioner logically urges – that the existence of interviews themselves (or perhaps even college essays) violate the Free Speech Clause – simply defies common sense and all practicality.

To be clear, this case has nothing do to with any effort by CCBC to drive certain ideas or viewpoints from the marketplace. Notwithstanding Petitioner's continued attempt to apply forum analysis and principles, this is not a public forum case and Petitioner was not speaking on any matter of public concern. There is no statute, regulation, or identified policy restricting speech at issue here, and the only speech in question took place in a closed door interview process. Instead, this is a case about one disappointed prospective student who was not admitted to the Radiation Therapy Program at CCBC for a myriad of reasons, including a poor score when he worked with radiation therapists to "observe" his demeanor on the job and unsatisfactory interpersonal skills, unrelated to the one interview question and answer that formed the basis of the Complaint.

Unremarkably, and consistent with other circuits and this Court's precedent, CCBC has the ability and the academic freedom to select those students who may be admitted to study based, in part, on their answers in a competitive interview setting, without violating an applicant's Free Speech rights. There is

no reason, never mind a compelling one, for this Court to review this case.

CONSTITUTIONAL PROVISIONS

Relevant to this matter, the First Amendment provides: "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech. . . . " U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE[1]

A. Buxton Was Not Among The Best Qualified Candidates To Apply To CCBC's Radiation Therapy Program.

The Community College of Baltimore County is a public community college located in the State of Maryland. App. 58 at ¶ 14. The College offers a selective admissions radiation therapy program for qualified

[1] The Fourth Circuit's analysis of Mr. Buxton's Free Speech claim was appropriately limited to the facts as alleged in his Complaint and the attachments thereto. App. 8 n.1.

students. App. 60 at ¶ 19. The Radiation Therapy Program is space-limited to fifteen (15) students each year, based on the availability of clinical placement opportunities. App. 3. The Program is designed to train students to treat clinical patients suffering from cancer and other malignant and non-malignant diseases, including localizing tumors, implementing treatment plans often involving radiation and radioactive isotopes, and observing and evaluating patients' clinical progress. App. 59 at ¶ 18.

Students who want to participate in the Program must apply for admission, a highly competitive process. App. 60 at ¶¶ 19, 20, 23. Admissions decisions are based on a weighted, three-part point system: (1) Prerequisite GPA, worth 30% of the applicant's overall score; (2) Interview & Observation Day, worth 40%; and (3) Writing Sample and Critical Thinking Exam, worth 30%. App. 60 at ¶ 22.

Mr. Buxton applied for admission to the College's Radiation Therapy Program for Fall 2013. App. 59 at ¶ 17. During the selection process, for which he participated in a panel interview in a closed-door setting, Mr. Buxton did not present himself as someone who had strong interpersonal skills and other relevant qualifications to be a successful radiation therapist. App. 29-30. Concerning his performance, Program Director Adrienne Dougherty described the many reasons Mr. Buxton was not admitted into the Program, from which Petitioner plucked out two sentences with surgical litigation precision. The whole description bears reading:

The student did not receive very good feedback from his observation day. He told one of the therapists that he assumed he was guaranteed a spot in the program. He did state that he seemed like a bother to some of the therapists; however they felt he asked questions at inappropriate times, interrupted them at times, and were related to the engineering aspect of the field. In addition, the therapists said that he wrote down/typed everything they said. It was also noted that during a simulation procedure in which IV contrast was injected, he stated something along the lines of that he did not sign on for this. This is minor, but the student did not follow directions when asked to initial the admissions process. When responding to questions in the written sample, he did not fully read the questions and respond to them in the role of a student. The interview committee felt he was not a good fit for this field. His answers to several of the questions were very textbook and lacked interpersonal skills. When asked about important characteristics that a therapist should have he responded 'not to socialize or fraternize' and then in the next sentence he brought up a sense of levity and that it is good to laugh. He also brought up religion a great deal in his interview. Yes, this is a field that involves death and dying; but religion cannot be brought up in the clinic by therapists or students. He mentioned plans to go onto complete a Dosimetry Program, but I do not think he has researched this career path fully. University of Maryland does offer a 1-year program, but

> they receive approximately 100 applicants and have only 2 seats available. Physics and Dosimetry may be a possible career path for him, but he lacks the interpersonal skills for this field. If this is something he wants to continue to pursue, I would suggest at least a full week of observation at another facility. His pre-requisite grades could be more competitive (18/30). Linda Brothers may be able to assist with his interpersonal skills.

App. 29-30.[2] This is the document that Mr. Buxton claims screams out a violation of his right to free speech. App. 61 at ¶ 28.

Mr. Buxton was not offered a seat in CCBC's 2013 Radiation Therapy Program. App. 60 at ¶ 24. He submitted another application for the 2014 program, but did not qualify for an interview that year. App. 63 at ¶¶ 34-36. All of those selected for the Radiation Therapy Program (15 of 44 applicants in 2013; and 15 of 72 in 2014) may have held the same religious beliefs as Mr. Buxton.[3] App. 3-4, 6. No Muslims, Jews, atheists or pagans were identified as being admitted over him. App. 54-78. Although full discovery was conducted, there is no evidence, or available fact, about the religion of any students who were admitted to the Radiation Therapy Program for the years that Mr. Buxton applied.

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[2] The review was included as an exhibit to Mr. Buxton's Complaint. *See* App. 29 (quoting ECF 1-3).

[3] During discovery, Mr. Buxton identified himself to the College for the first time as a Christian.

B. The District Court's Dismissal Of Buxton's Free Speech Claim Was Affirmed By The Fourth Circuit.

Rather than accept the outcome of the selective admissions process, Mr. Buxton sued Ms. Dougherty and a number of other College employees, claiming his program rejection was retaliation for expression of his religious views in violation of the Free Speech Clause. App. 54-78.[4] Mr. Buxton's Complaint, however, did not identify any policy by the College against the admission of candidates to the Radiation Therapy Program who expressed the same (or different) religious beliefs as Mr. Buxton (whatever those might be). *Id.* Rather, his Free Speech claim was bottomed upon an allegation that one of several selectors wrote two sentences indicating that she did not think presenting religion as a qualification during an interview for a radiation therapy program was the best answer.[5] App. 61 at ¶ 28.

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[4] The Complaint also sought relief under the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. App. 73-76 (Counts II and III of the Complaint). The District Court permitted discovery on these claims against Ms. Dougherty and dismissed the claims with respect to all other defendants. App. 35-49. After exhaustive discovery by Mr. Buxton, the District Court granted summary judgment on these claims in Ms. Dougherty's favor, which the Fourth Circuit affirmed. App. 7, 18-21. Mr. Buxton has abandoned these claims before this Court, analyzing only the Free Speech claim. *See* Pet. 5 n.2.

[5] Mr. Buxton's Complaint includes a partial recitation of an email from Ms. Dougherty to another student applicant whom Mr. Buxton alleges was not admitted to CCBC's 2013 radiation therapy program; however, Mr. Buxton's Complaint does not include

The District Court determined that Mr. Buxton's Complaint failed to state a Free Speech claim. App. 31-35. A three-judge panel for the Fourth Circuit unanimously affirmed this ruling. App. 1-24. The Fourth Circuit then denied Mr. Buxton's petition for rehearing and rehearing *en banc*. App. 52-53.

REASONS THE PETITION SHOULD BE DENIED

This case should end now. It does not involve a split among federal courts of appeals or state supreme courts, it does not involve a decision regarding the constitutionality of any state or federal statute, and the Fourth Circuit's opinion is consistent with this Court's decisions dealing with situations "where the competitive nature of the process in question inherently requires the government to make speech-based distinctions." App. 11. This case is an unexceptional instance of Mr. Buxton's unhappiness that he was not selected for admission to a competitive college program. His Complaint alleges that he was discriminated against because of the religious nature of one of his interview answers and such could, in appropriate circumstances, state some sort of a claim. But, as the Fourth Circuit and the district court recognized, "[c]onstitutional protection against arbitrary government decisionmaking, and against invidious discrimination,

any information about the student's qualifications for the Radiation Therapy Program as compared to those selected for the Program. App. 61 at ¶ 30.

flows from the Equal Protection Clause of the Fourteenth Amendment, not the Free Speech Clause of the First Amendment." App. 16.

The Petitioner's Free Speech claim was dismissed, but his Equal Protection claim and Establishment Clause claim survived through discovery. The District Court granted summary judgment on both of those claims, and neither is the subject of the Petition. Petitioner misses the mark by continuing to pursue his claim as one under the Free Speech Clause, and that makes this case unworthy of this Court's attention.

A. CCBC Has The Academic Freedom To Admit Applicants To Its Radiation Therapy Program Whom It Determines Are The Best Qualified To Succeed.

"[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Raising faith as a qualification during a competitive admissions interview for an academic radiation therapy program does not, as Mr. Buxton would have it, entitle this Court to substitute its judgment of his Program credentials for that of the College. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Bishop v. Wood*, 426 U.S. 341, 349 (1976)) (Federal courts simply are "'not the appropriate forum' . . . to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of

public educational institutions[.]"); *Epperson v. Arkansas*, 393 U.S. 97, 104 (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[.]").

Just as students "are entitled to freedom of expression of their views," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969), so too is CCBC entitled to freedom in its evaluation of which applicants are best-qualified for success in the Radiation Therapy Program. *See Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (One of the "'essential freedoms' of a university [is] to determine for itself on academic grounds . . . who may be admitted to study.") (citation omitted); *see also Ass'n of Christian Schs. Int'l v. Stearns*, 362 F. App'x 640, 643 (9th Cir.), *cert. denied*, 131 S. Ct. 456 (2010) (same). That Program selectors concluded Mr. Buxton did not demonstrate the relevant qualifications the College was looking for in Program candidates compared to many of the other 2013 and 2014 applicants is not cause for this Court to review his claim.

B. There Is No Conflict Between The Panel's Decision And This Court's Precedent.

Mr. Buxton's Petition attempts to generate conflict where none exists. The Constitution states that "Congress shall make no *law* . . . abridging the freedom of speech. . . ." U.S. Const. amend. I (emphasis added).

This First Amendment freedom applies with equal force to the States. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). In either case, however, there must be a law, regulation, or policy that restricts speech and is subject to scrutiny.

Unlike in *Matal v. Tam*, 582 U.S. ___, 137 S. Ct. 1744 (2017), and every single precedent identified in the Petition, Mr. Buxton's Complaint identifies none. *See* App. 54-78.[6] Mr. Buxton's claim is premised solely upon an allegation that amidst a myriad of reasons for

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[6] *Cf. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822-25 (1995) (Student Activities Fund University Guidelines prohibiting student publications that "primarily promote[ ] or manifest[ ] a particular belief in or about a deity or an ultimate reality"); *Matal*, 137 S. Ct. at 1751 (Lanham Act, 15 U.S.C. § 1052(a)); *United States v. Am. Library Ass'n*, 539 U.S. 194, 199 (2003) (Children's Internet Protection Act, 114 Stat. 2763A-335); *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 670 (1998) (Statement of Principles of Editorial Integrity in Public Broadcasting); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572 (1998) (National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. § 954(d)(1)); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 626 (1994) (Cable Television Consumer Protection and Competition Act of 1992); *R.A.V. v. St. Paul*, 505 U.S. 377, 379 (1992) (St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)); *Leathers v. Medlock*, 499 U.S. 439, 441-42 (1991) (Arkansas Gross Receipts Act); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (New York "Son of Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982 and Supp. 1991)); *Texas v. Johnson*, 491 U.S. 397, 399-400 (1989) (Texas Penal Code § 42.09(a)(3) (1989)); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969) (FCC "fairness doctrine"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (school principals' policy that "any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband").

his program rejection, one of multiple selectors wrote that volunteering faith as a qualification during the interview portion of a competitive admissions process is not the best answer.[7] That the Fourth Circuit affirmed that Mr. Buxton's case is not the Free Speech violation case he wants it to be does not place the panel's holding in "direct conflict with the longstanding precedent of this Court." Pet. 9. Other circuit courts agree. *See Griswold v. Driscoll*, 616 F.3d 53 (1st Cir. 2010) (Souter, J., sitting by designation) (affirming motion to dismiss on grounds that school board's revision of curriculum did not implicate the First Amendment); *see also Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 158 (6th Cir. 1995) (Batchelder, J., concurring) ("It is not necessary to try to cram [a situation where a student complained about a teacher's refusal to accept a research paper about Jesus Christ] into the framework of constitutional precedent, because there is no constitutional question.").

Mr. Buxton argues that none of the cases relied upon by the Fourth Circuit "indicates a departure from the prohibition against viewpoint discrimination against private speech invited by the government." Pet. 7. The key phrase, however, is "invited by the

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[7] The Fourth Circuit panel explained that, even if there were a First Amendment-based prohibition on "invidious viewpoint discrimination" in the context of a competitive admissions educational program, it would be of no help to Mr. Buxton because Ms. Dougherty's evaluation of his speech was related directly to the purpose of the interview process intended to identify candidates with strong interpersonal skills and other relevant qualifications rather than impose "a penalty on disfavored viewpoints." App. 17 n.5.

government," because that applies to public forum analysis, *i.e.*, cases in which the government designated a place or opened a program to encourage the exchange of ideas.

It is true that none of the cases relied upon by the Fourth Circuit altered public forum analysis. Indeed, those cases all found public forum analysis inapplicable. *Forbes*, 523 U.S. at 673-75 (nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination); *Am. Library Ass'n*, 539 U.S. at 213 n.7 (reliance on public forum analysis misplaced); *Finley*, 524 U.S. at 586 (rejecting public forum analysis as conflicting with NEA's discretion to make aesthetic judgments and content-based evaluations). Thus, none of those cases involved circumstances in which the government sought to create a public forum.[8]

In the same vein, Mr. Buxton cannot seriously claim that the application process for CCBC's Radiation Therapy Program constituted a public forum. "'The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse.'" *Am. Library Ass'n*, 539 U.S. at 206

[8] The line of cases Mr. Buxton cites pertaining to differential taxation or financial penalties are of no moment in this case, where the College is not alleged to have withheld subsidies or imposed any monetary sanction against him. *See* Pet. 9 (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); and *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 395-96 (1969)).

(quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985)). By conducting closed-door academic admissions interviews in this case, the College, at most, "permitt[ed] limited discourse" between evaluators and selected applicants only, not the greater College community at large or the general public. *Id.* Therefore, forum analysis is simply incompatible with the academic freedom and discretion that the College has when administering its admissions process. *See id.* at 204-05 (citing *Forbes* and *Finley* and explaining why forum analysis is inapplicable in traditionally discretion-laden settings).

Mr. Buxton then cites *Matal* for the Court's recent affirmance of the "bedrock principle" that " 'the government may not prohibit the expression of an idea simply because society or the government finds the idea offensive or disagreeable.' " Pet. 8 (quoting *Matal*, 137 S. Ct. at 1763 (internal citation omitted)). Mr. Buxton is correct that the Lanham Act's disparagement clause, like other laws governing trademark and other government registration schemes, could not be saved in that case "by analyzing it as a type of government program in which some content and speaker based restrictions are permitted." Pet. 8 (citing *Matal*, 137 S. Ct. at 1763). This quote, however, comes from the *Matal* Court's discussion of whether to apply public forum analysis. *Id.* Again, there is no public forum at issue here.

C. The Fourth Circuit Carefully Limited Its Holding.

Petitioner argues that the Fourth Circuit's holding means that "any state or local government within the Fourth Circuit will be free to discriminate against any job applicant based on that applicant's viewpoint on any number of subjects of public concern." Pet. 2. This statement once again is an erroneous attempt to apply forum analysis to a private interview and misses entirely the point of the Fourth Circuit's holding.

Mr. Buxton failed to state a claim because "the Free Speech Clause does not protect speech expressed in an admissions interview from admissions consequences in a competitive process." App. 18. This is unremarkable, and it is common sense. To hold otherwise would be to hold that competitive interviews themselves violate the Constitution merely because they involve subjective, content-based considerations by the interviewer(s). That, of course, would be contrary to this Court's opinions. *See Finley*, 524 U.S. at 585-86 ("[A]bsolute neutrality [in the awarding of grants by the NEA was] simply 'inconceivable'" because the "'very assumption' of the NEA [was] that grants [would] be awarded according to the 'artistic worth of competing applications.'"); *accord Pompeo v. Bd. of Regents*, 852 F.3d 973, 983-84 (10th Cir. 2017) (recognizing that academic professionals have "broad discretion" to make evaluations "based on the content of speech" by, among other things, "encourag[ing] speech germane to the topic at hand and discourag[ing]

speech unlikely to shed light on the subject") (citations omitted).

Mr. Buxton's hypothetical derived from *Finley* is untethered from the reality of this case. *See* Pet. 11-12. Assuming that an entity's disregard of its own legitimate neutral criteria and denial of an award to an applicant *who would otherwise have received the award solely because of* a spiritual comment could be unconstitutional,[9] that is neither what is alleged to have happened, or what did happen, here. Ms. Dougherty's concerns with Mr. Buxton's answer to the interview question that he highlights in the Petition were legitimately related to the essential purposes of the Radiation Therapy Program because she was concerned about Mr. Buxton's interpersonal skills with the wide array of clinical patients he would encounter if admitted into the Program. *See* App. 29; *see also* App. 20. Furthermore, Mr. Buxton's pleading confirms that this one interview answer was far from determinative: he also received specific negative feedback from clinical therapists during his observation day, had lower prerequisite grades than many other applicants, and scored poorly on the writing sample. *See* App. 29. In other words, the other components of Mr. Buxton's score under the College's admissions criteria were indisputably lacking in their own right.

[9] Such an act, however, would give rise to a Due Process or Equal Protection (or possibly Establishment Clause) claim, rather than a Free Speech claim.

Moreover, as the Fourth Circuit appropriately recognized, its narrow holding does not preclude future students or public-sector job applicants from alleging unconstitutional discrimination in appropriate circumstances, even in the context of a competitive application and interview process. App. 15-18 & n.6. Other protections continue to limit arbitrary, capricious, and/or discriminatory action by government actors. In the context of employment decisions, which Mr. Buxton no doubt invokes because it is a much more common issue, Mr. Buxton ignores the panoply of laws relating to employment decisions (*e.g.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*.; the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*.; and the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq*.), as well as the constitutional protections that apply, including at least the Due Process Clause, Equal Protection Clause, Free Exercise Clause, and Establishment Clause. Thus, Mr. Buxton's fears that future plaintiffs will never have any "recourse under the First Amendment," Pet. 2, are overstated and directly contradicted by the Fourth Circuit's holding.

Mr. Buxton further protests that if, for example, "CCBC were to exclude (or otherwise punish) an applicant seeking admission to its Radiation Therapy Program because he or she made statements favoring (or disfavoring) abortion, or gun rights, or climate change, or capitalism, such decision making would not necessarily implicate any of the constitutional provisions

identified by the panel except for the Free Speech Clause." Pet. 12. He is flat wrong for two reasons.

First, these hypotheticals are fairly construed as examples presenting political beliefs, and federal law prohibits discrimination based on political affiliation or belief. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 68-79 (1990) (First Amendment generally prohibits a state from basing hiring decisions on political beliefs or associations). Second, the Due Process Clause and Equal Protection Clause provide constitutional protection against arbitrary and capricious state action. *See, e.g.*, *Village of Willowbrook v. Olech*, 528 U.S. 562, 584-85 (2000) ("class of one" equal protection claim may be based on arbitrary and capricious discrimination against an individual); *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 238-39 (1957) (excluding an otherwise qualified individual from practice of law without rational basis violates the Due Process Clause or Equal Protection Clause of Fourteenth Amendment). That Buxton's now-abandoned Establishment Clause and Equal Protection Clause claims failed after discovery does not mean that his perceived mistreatment merits a rewriting of Free Speech jurisprudence. App. 21.

CONCLUSION

Rather than opening the floodgates to unfettered government discrimination, the Fourth Circuit's unanimous panel decision appropriately prevents every

disagreement over the substance of an interview answer from becoming a constitutional question of viewpoint discrimination for judicial review. Other statutory and constitutional protections exist for victims of arbitrary or capricious state action and invidious discrimination in the context of an interview. When making decisions among candidates in a competitive application process, which includes an interview, government actors must have the discretion to evaluate interview answers (*i.e.*, speech) and in this particular case select the best qualified candidates for a competitive academic program. As the Fourth Circuit recognized, this exercise of judgment, which ultimately includes favoring one applicant's speech over another's, is inherent in any interview process.

Mr. Buxton's petition should be denied.

Respectfully submitted,

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