No. 17-698

# In the Supreme Court of the United States

DUSTIN BUXTON,

*Petitioner*,

v.

ADRIENNE DOUGHERTY, individually and in her official capacity as Program Director and Coordinator of Radiation Therapy at 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*

## REPLY BRIEF FOR PETITIONER


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## INTRODUCTION

In their "nothing to see here" approach to this case, Respondents have attempted to downplay the egregious error by the Fourth Circuit and the significance of its harmful implications for free speech. In fact, Respondents take such pains to divert this Court's attention from the Fourth Circuit's erroneous holding that they fail to mention it at all. It takes no legal craning of the neck, however, to plainly see the dangers inherent in the appellate court's express "hold[ing] that the Free Speech Clause has no application in the context of speech expressed in a competitive interview." App. 15.

In short, as Petitioner has previously explained, Pet. at 2, the Fourth Circuit's holding grants government actors unfettered discretion to penalize, and even eliminate entirely from all manner of government positions and programs, applicants who express disfavored content and/or viewpoints—regardless of whether the expression has any bearing on the qualifications necessary to the position sought. Respondents concede that it would be unconstitutional to disqualify an otherwise eligible candidate "solely because of a spiritual *comment*," Opp. at 16 (emphasis added), but take the bizarre position that such a constitutional violation would only arise under the Due Process and Equal Protection Clauses, not the Free Speech Clause, Opp. at 16, n.9. *See also id.* at 17. Quite to the contrary, however, such discrimination is anathema to the rights secured by the Free Speech Clause of the First Amendment, as confirmed by longstanding precedent of this Court.

## ARGUMENT IN REPLY

### I. Respondents' Reliance on Academic Freedom Cases is Misplaced.

The decision below conflicts with decisions of this Court confirming that government action penalizing private speech based on content and/or viewpoint is subject to proper analysis under the Free Speech Clause of the First Amendment. *See generally*, Pet. at 6-13. Rather than addressing this clear conflict, Respondents first attempt to sidestep the issue by mischaracterizing this as a case about a public school's academic freedom.

Contrary to Respondents' contentions, however, Mr. Buxton is not asking "this Court to substitute its judgment of his Program credentials for that of the College." Opp. at 9. Nor has he taken issue with the holdings of the academic freedom cases on which Respondents erroneously place their reliance. *Id.* at 9-10. While CCBC may "determine for itself *on academic grounds* . . . who may be admitted to study," *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted) (emphasis added), because CCBC is a public college, there are other grounds on which its officials may not permissibly make such determinations, including the religious nature of an applicant's speech. Far from being a novel principle, this Court has repeatedly affirmed that

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons

> upon which the government may not rely. 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. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

*Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Respondents assert that Petitioner's position would necessitate the result that "the existence of interviews themselves . . . violate the Free Speech Clause." Opp. at 2. This hyperbolic contention ignores the actual argument set forth in the Petition, which takes no issue with appropriate governmental consideration of content and/or viewpoint in such contexts (*i.e.*, where reasonably related to the qualifications necessary to the position sought). Pet. at 8, 10-12. Rather, Mr. Buxton has clearly identified the constitutional infirmity at issue here: contrary to settled precedent, the Fourth Circuit's decision expressly condones—and immunizes from proper analysis under the Free Speech Clause—government action that penalizes speakers based on the expression of disfavored content and/or viewpoints (here, religious in nature).

Whatever the proper scope of a public school's academic freedom, it does not encompass such content- and/or viewpoint-discriminatory governmental conduct,

and, according to this Court's prior decisions, Mr. Buxton's claim alleging this type of "substantive wrong," Opp. at 1 (including as applied to his "answers in a competitive interview setting," *id.* at 2), is properly analyzed under the Free Speech Clause of the First Amendment.

## II. The Free Speech Clause Forbids Viewpoint-Based Discrimination Even in the Absence of a Formal Policy or a Public Forum.

Respondents posit two primary arguments against Mr. Buxton's ability to state a Free Speech claim. Both are incorrect as a matter of law.

First, claiming reliance on the text of the First Amendment, which prohibits Congress from making any "*law* . . . abridging the freedom of speech," *id.* at 10 (quoting U.S. Const. amend. I) (emphasis added by Respondents), Respondents assert that Mr. Buxton cannot state a claim under this clause because he has not identified "a law, regulation, or policy that restricts speech and is subject to scrutiny." Opp. at 11. While claims under the Free Speech Clause often do involve such formal governmental pronouncements, *see, e.g., id.* at 11, n.6, it is beyond dispute that this constitutional provision likewise applies to stand-alone decisions and actions by individual government actors. *See e.g., Rankin v. McPherson*, 483 U.S. 378 (1987) (employee's termination, occurring solely as a result of her employer's disagreement with her speech, not any applicable policy, violated her right to the freedom of speech). *See also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-85 (1977) (applying Free Speech analysis to teacher's firing even though

there was "no suggestion by the Board . . . that its reaction . . . was anything more than an *ad hoc response* to [the teacher's speech]") (emphasis added).[1]

Nor do the cases on which Respondents rely, Opp. at 12, call into question the unremarkable notion that Mr. Buxton's allegations (*i.e.*, that Respondents unlawfully retaliated against him when they penalized him during the admissions process based on his religious speech) raise a claim under the Free Speech Clause. In *Griswold v. Driscoll*, 616 F.3d 53 (1st Cir. 2010) (Souter, J., sitting by designation), the court held that a school board's revision of the curriculum did not implicate the First Amendment. Unlike the present case, however, there was no allegation that any plaintiff's private speech was penalized, let alone because of its content or viewpoint.

*Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995), similarly offers Respondents no help and actually confirms that the Free Speech Clause *does* apply to a student's allegations that her teacher (through her own decision rather than pursuant to any law, regulation or policy) violated the First Amendment in her treatment of the student's expression in an assignment. While Respondents have quoted a concurring opinion in that case, Opp. at 12, the majority actually held that while not *violated* there, the Free Speech Clause certainly *had application*. *Settle,* 53 F.3d at 155.

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[1] Although not required to state a Free Speech claim, Petitioner's Complaint actually does allege a practice whereby Respondent Dougherty penalized more than one applicant because they referenced their personal religious beliefs. App. 61-62, ¶¶ 27-31.

Second, Respondents appear to either (1) take the position that the Free Speech Clause prohibits content- and/or viewpoint-based discrimination only against private speech expressed within a public forum or (2) mistakenly believe this is Mr. Buxton's position. Opp. at 12-14. Specifically, Respondents take issue with Mr. Buxton's statement concerning "private speech invited by the government," *id.* at 12 (quoting Pet. at 7), which they contend necessarily implies the creation of a public forum. Opp. at 13. Since no forum exists here, Respondents argue, Mr. Buxton's argument must fail.

As an initial matter, Mr. Buxton's position concerning constitutional prohibition against governmental content- and/or viewpoint-based discrimination is not limited to speech that is expressed in a public forum. *See* Pet. at 6-10. Mr. Buxton referenced speech "invited by the government" not to argue that the CCBC interview constituted a public forum but because the speech for which he was penalized during that process was directly invited by Respondent Dougherty and the other CCBC interviewers. *See* App. at 61, ¶ 27 (alleging that the only religious expression he offered was in direct, honest response to a question posed by the interviewers, *i.e.*, "What do you base your morals on?").

More importantly, while Respondents emphasize the fact that the cases on which the Fourth Circuit relied "all found public forum analysis inapplicable," Opp. at 13 (citing *United States v. American Library Ass'n*, 539 U.S. 194 (2003), *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), and *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998)), they

fail to perceive that this only *bolsters* Mr. Buxton's argument. For, these cases, as well as the recent decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017), *see* Pet. at 8, confirm that even when the government invites or makes available private speech *without* creating a public forum (*e.g.*, in the contexts of public libraries, public broadcasting and public arts funding), content- and viewpoint-based treatment of that speech is still subject to proper scrutiny under the Free Speech Clause.[2]

## III. Respondents' Remaining Legal Arguments are Meritless and Further Support Granting the Petition.

While Respondents contend that the Fourth Circuit's decision was carefully limited, the express holding from that court (which Respondents fail to cite, offering only their characterization of "the *point* of the Fourth Circuit's holding," Opp. at 15 (emphasis added)) belies any such notion: "[W]e hold that the Free Speech Clause has no application in the context of speech expressed in a competitive interview." App. at 15.

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[2] Contrary to Respondents' assertion, "[t]he line of cases Mr. Buxton cites pertaining to differential taxation or financial penalties," Opp. at 13 n.8 (citing Pet. at 9), serves as further confirmation of this longstanding principle. Indeed, precisely the same concern raised in those cases is raised by Mr. Buxton's Complaint: "that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991)).

"To hold otherwise," Respondents assert, "would be to hold that competitive interviews themselves violate the Constitution merely because they involve subjective, content-based considerations by the interviewer(s)." Opp. at 15. As this Court has made clear, however, even where "absolute neutrality," *Finley*, 524 U.S. at 585, is not the standard, content-based considerations still can trigger First Amendment scrutiny. *See Finley*, 524 U.S. at 587 ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. . . . [A]s the NEA itself concedes, a more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace.") (quotation omitted) (citing Free Speech cases). The application of this scrutiny is entirely necessary to prevent precisely what has been alleged here: governmental suppression of a particular viewpoint within the marketplace (here, a government-operated higher education program).

Nevertheless, Respondents, like the lower court, attempt to defend the holding below by citing several federal statutory and constitutional provisions that may apply to discriminatory decisions by government actors. Opp. at 17-18. Of course, government action can violate multiple constitutional provisions at the same time (*e.g.*, a university's targeted ban only on Christian student clubs would violate the Free Exercise, Establishment, Equal Protection and Free Speech Clauses). In any event, their argument only reinforces the constitutional impropriety of Respondents' actions.

That *other* legal provisions may[3] *also* be implicated by such government action does not neutralize the error of the Fourth Circuit's holding.

Furthermore, while Respondents readily acknowledge that the First Amendment applies to allegations of "discrimination based on *political* . . . belief," *id.* at 18 (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (emphasis added)), they fail to recognize that it *also* indisputably applies to discrimination based on *religious* belief (and the expression thereof).

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

*Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citations omitted).

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[3] Respondents maintain, for example, that, the Free Speech Clause is unnecessary in the context of discriminatory treatment of an individual's speech expressed in a public employment interview because, among other provisions, the Equal Protection Clause remains available. Opp. at 17. This Court, however, has confirmed that "class of one" equal protection claims are *not* viable in that context. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008).

## IV. Respondents Misunderstand the Posture of Mr. Buxton's Free Speech Claim.

The Fourth Circuit dismissed Petitioner's Free Speech Clause claim on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and the Fourth Circuit affirmed this dismissal on the asserted grounds that the Free Speech Clause has no application to Petitioner's religious speech in this context. App. 15, 18. Consequently, no evidence has been presented by either party in the context of a Free Speech content- and/or viewpoint-based retaliation claim.

Nonetheless, Respondents have improperly interjected facts not supported by the allegations in the Complaint, *see* Opp. at 4, 6 (citing to Fourth Circuit's discussion of facts introduced into evidence concerning other claims, not Mr. Buxton's Free Speech claim), as well as their own (disputed) characterizations of other evidentiary matters. *Cf., e.g.*, App. 63 at ¶¶ 34-36 (alleging that, despite having improved his superior qualifications, Mr. Buxton was not even granted an interview the following year) and Opp. at 6 (mischaracterizing same allegations to assert that Mr. Buxton "did not qualify" for an interview that year). *See also* Opp. at 6 (opining, without any support or explanation as to relevance, as to the religious beliefs of other applicants). While all of these factual issues may be properly addressed on remand to the district court, their presentation here is wholly improper.

The one exception is an express admission by Respondents concerning Respondent Dougherty's treatment of Mr. Buxton's religious speech. In their

Opposition, Respondents have now confirmed that Ms. Dougherty's statements concerning Mr. Buxton's religious speech were, in fact, an attempt to prevent those who express sincere religious beliefs from entering the radiation therapy field. *See* Opp. at 16 (admitting that "Ms. Dougherty's concerns with Mr. Buxton's answer to the interview question that he highlights in the Petition"—*i.e.*, that he bases his morals on his faith—caused her to conclude that he lacked the "interpersonal skills" to successfully work "with the wide array of clinical patients he would encounter if admitted into the Program"). With this admission, Respondents have invited this Court to issue a summary reversal. Sup. Ct. Rule 16.1. At the very least, they have confirmed the necessity that this Court grant the Petition to clarify that governmental decision-making based on such erroneous viewpoint-based assumptions is subject to proper analysis under the Free Speech Clause.

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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