CASE NO. 16-1826

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DUSTIN BUXTON,
Plaintiff-Appellant,

v.

SANDRA KURTINITIS, *et. al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Maryland
Case No. 1:14-cv-02836 (Hon. Ellen Hollander & Hon. J. Frederick Motz)

PETITION FOR REHEARING AND REHEARING EN BANC

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PETITION

Appellant, Dustin Buxton, pursuant to Fed. R. App. P. 35 and 40, as well as 4th Cir. R. 35 and 40, petitions the Court for rehearing and rehearing en banc of the decision entered by a panel of this Court on July 7, 2017, affirming the District Court's dismissal of Appellant Buxton's Free Speech claim. *See Buxton v. Kurtinitis*, Case No. 1:16-1826 (July 7, 2017) ECF No. 41 (hereinafter "Slip. Op.")

INTRODUCTION

The panel held that "the Free Speech Clause has no application in the context of speech expressed in a competitive interview," such that the government is free to engage in blatant viewpoint discrimination in selecting applicants for higher education programs. Slip. Op. at 14. This remarkable holding creates an issue of exceptional importance because it conflicts with decisions of the United States Supreme Court and this Court concerning the proper application of the Free Speech Clause to private speech. It also grants the government unfettered discretion to ferret out applicants for no other reason than their expression of disfavored views. Consideration by the full court is therefore required to secure and maintain uniformity of the court's decisions and definitively address these conflicts. Specifically, the panel's holding directly conflicts with the following Supreme Court and Circuit decisions: *Matal v. Tam*, 198 L. Ed. 2d 366 (June 19, 2017); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998);

R. A. V. v. St. Paul, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); and *Sons of Confederate Veterans v. Vehicles*, 288 F.3d 610 (4th Cir. 2002). The panel decision also conflicts with Supreme Court decisions clarifying that such protection against viewpoint consideration flows directly from the Free Speech Clause, including the above-cited cases, as well as *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), and the cases upon which it relies.

Because of the panel's erroneous conclusion regarding non-application of the Free Speech Clause, it failed to acknowledge that speech regulations in this context are still subject to rational basis review, even if they are based on content rather than viewpoint. In this regard, the panel opinion conflicts with the Supreme Court's decisions in *Finley*, *Forbes*, and *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003).

Finally, the panel opinion, in holding that Mr. Buxton's private religious speech, generally protected by the First Amendment, lost such protection when uttered in the interview process, conflicts with this Court's decision in *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

Panel rehearing is necessary because, in addressing Mr. Buxton's Free Speech claim (dismissed pursuant to Fed. R. Civ. P. 12(b)(6)), the panel overlooked the straightforward factual allegations presented in the Complaint and, instead, relied upon evidentiary facts never presented below with regard to that claim.

ARGUMENT

I. REHEARING IS NECESSARY BECAUSE THE PANEL OPINION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE AND CONFLICTS WITH SETTLED PRECEDENT OF THE SUPREME COURT AND THIS COURT.

One would think it obvious that the First Amendment forbids a government agency from screening out otherwise qualified applicants for a position on account of the government agency's hostility to their viewpoint on some collateral issue. Yet the panel endorsed precisely such behavior. This Court should grant rehearing.

Because of the dearth of cases involving Free Speech challenges in this specific context, both the district court and the panel determined that the applicable line of cases involves "situations where the competitive nature of the process in question inherently requires the government to make speech-based distinctions." Slip. Op. at 10. While every case on which the panel relied unmistakably included an analysis under the Free Speech Clause, the panel, like the district court before it, erroneously concluded that "the Free Speech Clause has no application in the context of speech expressed in a competitive interview." *Id.* at 14. Rehearing is necessary to correct this erroneous statement of law, which directly conflicts with cases from both the Supreme Court and this Court, and to clarify the proper application of the Free Speech Clause in such contexts.

A. Contrary to the Panel's Decision, the Supreme Court and This Court Have Confirmed that Government Viewpoint Discrimination Is Governed by, and Violates, the Free Speech Clause.

As both applicable case law and sound judgment dictate, constitutional protection against viewpoint discrimination aimed at private speech flows, naturally, from the Free Speech Clause. The panel's holding to the contrary creates a carve-out in which, for the first time, and in direct conflict with well-settled precedent, such discrimination may be immunized from judicial scrutiny and, worse yet, blatantly condoned. Crucially, under the breadth of the panel's holding, any applicant for any governmental position can be retaliated against based solely on an opinion uttered in an interview that the interviewer doesn't like. This has never been before, and cannot now be, the law.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* (citing *R. A. V.*, 505 U.S. at 391). While there seems to be no confusion that this principle applies with full force to speech occurring within an identifiable government-created speech forum, the panel appears to have overlooked that courts, including this one, have confirmed that viewpoint discrimination violates the Free

Speech Clause even in the absence of a speech forum. *See, Sons of Confederate Veterans*, 288 F.3d at 622 (holding, in Free Speech Clause analysis, that "viewpoint discrimination presumptively is impermissible whether it occurs within or outside a private speech forum") (citing *Forbes*, 523 U.S. at 676, *Rosenberger*, 515 U.S. at 828, and *Multimedia Pub. v. Greenville-Spartanburg Airport*, 999 F.2d 154, 159 (4th Cir. 1993)). Indeed, in *R. A. V.*, the Supreme Court, discussing "'the freedom of speech' referred to by the First Amendment," 505 U.S. at 383, invalidated a city ordinance because it impermissibly discriminated on the basis of viewpoint (*i.e.*, "impose[d] special prohibitions on those speakers who express views on disfavored subjects"), regardless of whether regulated speech occurred within any forum, and, remarkably, even though the speech (consisting of "fighting words") was otherwise unprotected by the First Amendment. 505 U.S. at 391.

Cases in which the government *has been permitted* to exclude certain viewpoints are distinguishable, and thus not applicable, as they merely recognize that "*when the State is the speaker*, it may make content-based choices." *Rosenberger*, 515 U.S. at 833 (emphasis added). *See also, Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) ("A government entity has the right to 'speak for itself' . . . and to select the views that *it* wants to express.") (citations omitted) (emphasis added); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (holding that when the government "selectively fund[s] 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 . . . [it] has not discriminated on the basis of viewpoint"). In other words, courts have only "permitted the government to regulate the content of what is or is not expressed *when it is the speaker* or when it enlists private entities *to convey its own message*." *Rosenberger*, 515 U.S. at 833 (emphases added).

In the educational context, while the government may be the speaker in making decisions about the curriculum it offers, *see, id*; *see also, Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), it is undisputed that the speech at issue here was not that of CCBC – *i.e.*, the government – but rather that of Mr. Buxton – a private speaker. Slip. Op. at 8. *See also id.* at 4 (quoting Dougherty's notes, which expressly acknowledge that *Mr. Buxton's speech* forms the basis for his claims). Consequently, Mr. Buxton's speech is subject to proper analysis under the Free Speech Clause.

The cases on which the panel relied for guidance do not create any exception to the established principles that (1) private speech, wherever it might occur, is protected against governmental viewpoint discrimination, and (2) such protection arises directly from the *Free Speech Clause*. Slip. Op. at 10-14 (expressly relying on *Finley*, 524 U.S. 569 and *Ass'n of Christian Sch. Int'l v. Stearns*, 679 F. Supp. 2d 1083 (C.D. Cal. 2008), *aff'd* 362 F. App'x 640 (9th Cir. 2010) (both conducting analysis under the Free Speech Clause)). While it may be that in situations that

"inherently require[] the government to make speech-based distinctions," Slip Op. at 10, the Supreme Court has countenanced "evaluations of, and distinctions based upon, the *content* of the speech," *id.* (emphasis added) (quoting *Stearns*, 679 F. Supp. 2d at 1095 (citing *Am. Library Ass'n, Inc.*, 539 U.S. at 204-05; *Finley*, 524 U.S. at 580; *Forbes*, 523 U.S. at 672-73)), nothing in any of these cases indicates a departure from the prohibition against *viewpoint* discrimination, a reality the panel itself implicitly acknowledges. *See* Slip Op. at 11 ("Thus, library staff 'necessarily consider *content* in making collection decisions . . .'") (quoting *Am. Library Ass'n*, 539 U.S. at 205) (emphasis added); *id.* at 12 (noting the Court's holding that "a government agency could make *content-based* judgments in allocating competitive art funding") (quoting *Finley*, 524 U.S. at 585-86) (emphases added).

As the Supreme Court reaffirmed just last month, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society [or the government itself] finds the idea itself offensive or disagreeable." *Matal*, 198 L.Ed. 2d at 387 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). In fact, the Court held, because the trademark statutory provision at issue there was viewpoint-based, it could not "be saved by analyzing it as a type of government program in which some *content*- and *speaker*-based restrictions are permitted." *Id.* (emphases added). Even in the context of higher education admissions decisions, the *Stearns* court explained that speech regulations

may not be "the result of government animus toward [particular] *viewpoints*." 679 F. Supp. 2d at 1102 (emphasis added) (directly relying on the Supreme Court's decisions in *Am. Library Ass'n* and *Finley*). *See also Finley*, 524 U.S. at 587-88 ("[E]ven in the provision of subsidies, the Government may not 'aim at the suppression of dangerous ideas' and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate.") (citations omitted) (quoted for support by the *Stearns* court).

While the panel decision attempts to demonstrate the propriety of viewpoint-based decision-making in such contexts, even its own hypothetical does not present an example of viewpoint discrimination because, rather than demonstrating government animus, it merely raises concerns with the content of the speech in light of the purposes of an educational program's goal of selecting the best candidates for that particular program. *See* Slip Op. at 13-14. *See also Rosenberger*, 515 U.S. at 893 (explaining that impermissible viewpoint discrimination occurs when "the burden on speech is explained *by reference to* viewpoint") (emphasis added).

Nor is there any basis for the conclusion that constitutional protection against viewpoint discriminatory treatment of *speech* flows from anywhere other than the *Free Speech* Clause. Indeed, the foregoing *Stearns* quote is found under the heading "The Free Speech Clause" and the subheading "Viewpoint Discrimination and Content Regulation." *Stearns*, 679 F. Supp. 2d at 1094. Similarly, in *Finley*, the

statement concerning "invidious viewpoint discrimination" – *i.e.*, "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," 524 U.S. at 587 – was expressly made within the Court's analysis of "respondents' First Amendment challenge," *id.* at 585, and, in support, cites directly to decisions concerning First Amendment protection against government suppression of particular viewpoints, *i.e.*, the Free Speech Clause. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (discussing viewpoint discrimination in the context of First Amendment protection of political *speech*); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (discussing viewpoint discrimination in context of First Amendment protection against "differential taxation of *First Amendment speakers*") (emphasis added); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (discussing viewpoint discrimination in context of First Amendment "right of *free expression*") (emphasis added); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969) (addressing the "First Amendment" and "the requirements of *free speech*") (emphasis added).

These cases unequivocally hold that the government may not, in any setting, permissibly engage in viewpoint discrimination, and, when government is alleged to have done so, such treatment of speech is subject to proper analysis under the Free

Speech Clause. The panel's conclusion to the contrary is wrong as a matter of law, and is in direct conflict with this longstanding precedent.

Despite the panel's protestations, its decision unabashedly "open[s] the door to a parade of discriminatory horribles." Slip. Op. at 16. While the panel decision posits that the Free Speech Clause is unnecessary in this context because other constitutional provisions provide sufficient protection against viewpoint discrimination, *id*., n. 6, this is simply not the case. If, for example, CCBC were to exclude (or otherwise punish) an applicant seeking admission to its Radiation Therapy Program because she made statements criticizing abortion, or gun rights, or climate change, or capitalism, such viewpoint discrimination would not necessarily implicate any of the constitutional provisions identified by the panel—except the Free Speech Clause.

Under the panel's new pronouncement, however, that the Free Speech Clause has no application in this context, public schools will be free to weed out such applicants with impunity, for no other reason than that the government decision-makers find these viewpoints distasteful. Such a result is anathema to the basic purposes of the Free Speech Clause's prohibition against viewpoint discrimination, *i.e.*, to ensure that governmental authorities cannot "effectively drive certain ideas or viewpoints from the marketplace," *R. A. V.*, 505 U.S. at 387 (citations omitted). *See also, Sons of Confederate Veterans*, 288 F.3d at 624 ("[W]here restrictions or regulations of

speech discriminate on the basis of the content of speech, there is an 'inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion . . .' -- in other words, to exercise viewpoint discrimination.").

B. Contrary to the Panel's Decision, the Supreme Court Has Confirmed That The Government Does Not Have Unfettered Power To Make Even Content-Based Considerations.

Even if the facts alleged by Appellant Buxton, and overlooked by the panel, *see infra* Part II, supported a finding that Appellee's consideration of Appellant Buxton's private speech were based on content, rather than viewpoint, the panel failed to conduct the proper legal analysis to determine whether such consideration was, in fact, constitutional. *See* Slip. Op. at 13 (concluding that "distinctions based on the content . . . of the interviewee's speech during the interview is required" but failing to acknowledge that such distinctions must still be rationally related to the goal of selecting the best candidates).[1] It is well established that content-based restrictions on speech are subject to

[1] For this reason, the panel's decision conflicts with the decision in *Keeton v. Anderson-Wiley*,664 F.3d 865 (11th Cir. 2011), which clearly acknowledged that the Free Speech Clause *applied* to the claim before it, and that *viewpoint discrimination* would be impermissible. *Id.* at 872 ("Thus, if ASU's officials imposed the remediation plan because of Keeton's personal religious views . . . , it is presumed that they violated her constitutional rights."). There, the court merely concluded, based on evidence not present here, that the student's viewpoint was properly considered because it would have interfered with her ability to comply with program requirements. *Id*. at 872-74.

some level of judicial scrutiny. *Am. Library Ass'n, Inc.*, 539 U.S. at 208 (noting that some content-based decisions by the government are subject to heightened scrutiny, and others to rational basis review); *id.* at 207, n. 3. Importantly, even the few narrow circumstances in which the Supreme Court has rejected a heightened standard, the government's evaluations of, or distinctions based upon, the content of speech are "constitutional [only] if they are reasonably related to the government's goal . . . and are not the product of government animus." *Stearns*, 679 F. Supp. 2d at 1095 (relying upon *Am. Library Ass'n, Inc.*, 539 U.S. at 204-05; *Finley*, 524 U.S. at 580; *Forbes*, 523 U.S. at 672-73).

In *American Library Association*, the Court upheld a public library's exclusion of certain categories of content only after considering the reasonableness of the library's content-based considerations. 539 U.S. at 208 ("[I]t is entirely reasonable for public libraries to exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality."). Likewise, in *Forbes* and *Finley*, the Supreme Court upheld certain content-based considerations only after scrutinizing those considerations to ensure that they were reasonable, *i.e.*, rationally related to a legitimate purpose. *See Forbes*, 523 U.S. at 682 (upholding a public broadcaster's right to exercise editorial discretion based on content only after considering the evidence and concluding that the editorial decisions were based on objective standards, rather than opposition to a specific viewpoint); *Finley*, 524 U.S.

at 585-86 (finding content-based standards of "excellence" and "decency and respect" in awarding limited grant funding to be neutral and reasonable, especially in light of a lack of evidence that such standards had, thus far, resulted in subjective considerations and/or the suppression of particular viewpoints). *See also Stearns*, 679 F. Supp. 2d at 988-89 (applying rational basis review to the University of California's (UC) policies resulting in the exclusion of certain prerequisite courses for admissions purposes).

Crucially, the mere fact that "[Appellee] must 'judge the excellence of prospective students who apply for' admission to its programs," Slip. Op. at 13 (quoting *Stearns*, 679 F. Supp. 2d at 1097), does not give Appellee a blank check to screen out those the school deems ideologically undesirable. Application of the analysis in *Finley* to the facts in the instant case further highlights the panel's error in failing to conduct rational basis review here.

In *Finley*, while the government could make aesthetic, and even content-based, judgments on whether a submission was "excellent," 524 U.S. at 586, the artists who created the submissions were not invited to provide private expression unrelated to their submissions while their art was being assessed. Imagine, however, that the NEA advisory panel had, in its review of artistic submissions, asked each artist, "From where do you draw inspiration?" In such a hypothetical, had an artist answered, "From God," and the government rejected that artist's submission *because of his religious answer*, this would undoubtedly implicate, and blatantly

violate, the Free Speech Clause. Such action would impermissibly discriminate on the basis of religious viewpoint, or, at the very least constitute a *content*-based decision bearing no rational relation to the government's legitimate goal of selecting "excellent" artwork (just as Ms. Dougherty's basis for penalizing Mr. Buxton's religious speech, as alleged, bears no rational relation to CCBC's goal of selecting the best program candidates, *see infra* Part II). The panel's hypothetical (in contrast to this one, as well as the question asked of Mr. Buxton) demonstrates a far more reasonable consideration of speech content in light of the purpose of the program.

C. The Panel Opinion Conflicts with This Court's Decision in *Adams v. Trustees of the University of North Carolina-Wilmington*.

As this Court held in *Adams*, "The First Amendment protects not only the affirmative right to speak, but also the 'right to be free from retaliation by a public official for the exercise of that right." 640 F.3d 550, 560 (4th Cir. 2011) (quoting *Suarez Corp Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000)). In determining whether the university had retaliated against Mr. Adams by denying him a promotion on the basis of his conservative and religious speech, this Court held that the district court erred in concluding that "protected speech can lose its First Amendment protected status based on a later reading of that speech." *Adams*, 640 F.3d at 562.

In the instant case, the panel makes the same mistake as the district court in *Adams*, holding that Mr. Buxton's private religious speech, generally protected by the First Amendment, becomes unprotected speech once offered within a

competitive process. *Id*. As it was in *Adams*, this conclusion is "error as a matter of law" and should be overturned upon rehearing.

II. REHEARING IS NECESSARY BECAUSE THE PANEL OVERLOOKED CRUCIAL FACTUAL ALLEGATIONS.

The panel opines that "even if there were a First Amendment prohibition on 'invidious viewpoint discrimination' . . . it would not assist Buxton here." Slip. Op. 15 n. 5. The problem is that this observation is based on disputed facts, ignoring the facts actually alleged in the Complaint (which must be taken as true, since Buxton's Free Speech claim was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6)). *See id.* at 7 n.1 (acknowledging that analysis should be limited to the facts alleged in Buxton's complaint).

Mr. Buxton alleges that (1) his qualifications met or exceeded those of a competitive candidate for CCBC's Radiation Therapy Program, Joint Appendix ("App") at 15, ¶¶ 20-22; (2) during the interview and in response to a question posed by the panelists, "What do you base your morals on?" Mr. Buxton simply answered, "My faith," *id*. at 16, ¶ 27; (3) Mr. Buxton made no other mention of his faith during the interview, *id.*; and (4) Dougherty penalized him for his mention of his faith. *Id.*, ¶¶ 28-29. These facts simply fail to support, and directly contradict, the panel's assertion that Dougherty's penalization of Appellant Buxton's private religious speech was related to the program's purpose "to screen candidates with strong interpersonal skills and other relevant qualifications." Slip Op. at 15 n.5. Rehearing is necessary to conduct the proper analysis of Mr. Buxton's Free

Speech claim, based on the facts alleged in the Complaint, with all reasonable inferences drawn in Mr. Buxton's favor.

CONCLUSION

The petition for panel rehearing and rehearing en banc should be granted.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 16-1826 **Caption:** Buxton v. Kurtinitis, et al.

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Party Name Dustin Buxton

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