No. 16-1826

In the
United States Court of Appeals
for the Fourth Circuit

DUSTIN BUXTON,
Plaintiff-Appellant,

v.

SANDRA KURTINITIS, individually and in her official capacity as President of The Community College of Baltimore County; CAROL EUSTIS, individually and in her official capacity as Dean of Instruction for the School of Health Professions at The Community College of Baltimore County; ADRIENNE DOUGHERTY, individually and in her official capacity as Program Director and Coordinator of Radiation Therapy at The Community College of Baltimore County; CHARLES MARTINO, individually and in his official capacity as Academic Advisor for the School of Health Professions at The Community College of Baltimore County; EBONY THOMAS, individually and in her official capacity as Coordinator for Selective Admissions in the School of Health Professions at The Community College of Baltimore County,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Maryland at Baltimore

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Christian Legal Society
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

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If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Kimberlee Wood Colby Date: October 21, 2016

Counsel for: Amicus Christian Legal Society

CERTIFICATE OF SERVICE

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I certify that on October 21, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/Kimberlee Wood Colby
(signature)

October 21, 2016
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No. 16-1826 Caption: Buxton v. Kurtinitis, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Evangelicals
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/Kimberlee Wood Colby Date: October 21, 2016

Counsel for: Amicus Nat. Assoc. of Evangelicals

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STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

The **Christian Legal Society** ("CLS") is an association of attorneys, law students, and law professors. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected. CLS was instrumental in passage of the federal Equal Access Act that protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074. See 128 Cong. Rec. 11784-85 (statement of Sen. Hatfield) (1982).

For three decades, CLS's Center for Law & Religious Freedom ("Center") has worked to protect citizens' religious expression from governmental discriminatory treatment. The Center has frequently represented students and community groups engaged in religious expression in public education settings,

[1] In accordance with FRAP 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. Plaintiff-Appellant consent to the filing of this brief. Defendant-Appellee denied consent to the filing of this brief; therefore, a motion for leave to file accompanies the brief.

including in this Court in a case involving the discriminatory denial of a religious community group's request for access to a public school forum. *Child Evangelism Fellowship of Maryland v. Montgomery County Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006); *see also, Child Evangelism Fellowship of Maryland v. Montgomery County Pub. Schs.*, 373 F.3d 589 (4th Cir. 2004).

CLS was a lead drafter of a document joined by diverse civil liberty and religious liberty organizations, *Religion in the Public Schools: A Joint Statement of Current Law*,[2] which became the basis for the Clinton Administration Department of Education's guidance letters regarding *Religious Expression in Public Schools*,[3] and the Bush Administration's regulations, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the

[2] *Religion in the Public Schools: A Joint Statement of Current Law*, American Jewish Congress, 1995, *available at* http://files.eric.ed.gov/fulltext/ED387390.pdf (last visited Oct. 20, 2016).

[3] *Religious Expression in Public Schools*, Letter from U.S. Secretary of Education Richard Riley to American Educators, May 30, 1998, *available at* files.eric.ed.gov/fulltext/ED416591.pdf (last visited Oct. 20, 2016).

United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. NAE also was a strong supporter of the Equal Access Act and joined the same collaborative documents regarding religious expression in the public schools described above.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether a public university violates the Free Speech and Establishment clauses of the First Amendment by grading an admissions applicant down on the basis that he makes a simple reference to his religious belief in an interview, in response to an open-ended personal question.

Dustin Buxton ("Buxton") was twice denied admission into the Radiation Therapy Program ("RTP") at the Community College of Baltimore County. He alleges, and the evidence shows, that a factor in the denial was that he mentioned his religious faith, briefly and simply, in response to an interview question about the basis for his personal morals. These allegations plainly state violations of the

Free Speech and Establishment clauses, and the district court committed serious error in rejecting both as a matter of law.

During the 2013 interview process for admissions to RTP, the panel of interviewers asked Buxton, "What do you base your morals on?," and Buxton replied, "My faith." App. 16 (Compl. ¶27). The program's director, Adrienne Dougherty ("Dougherty"), stated that Buxton had lost points in his interview because of this religious reference, adding her assertion that "'religion cannot be brought up in the clinic by therapist or students.'" *Id.* (Compl. ¶28). Buxton claims, among other things, that the admissions decision-makers penalized him for expressing his religious viewpoint in the interview, in violation of the Free Speech Clause, and inhibited his religious practice in violation of the Establishment Clause. The district court, however, (1) dismissed Buxton's free speech count for failure to state a legal claim under Fed. R. Civ. P. 12(b)(6) and (2) granted the defendants summary judgment on the Establishment Clause count.

In the posture of this case, the question is whether Buxton's simple interview reference to his religious faith is an unconstitutional basis for disfavoring—i.e., penalizing—his application to the RTP. He alleged that this reference was the only time he mentioned his religion in the interview process. App. 16 (Compl. ¶27)). In

her report, Dougherty asserted that Buxton had "'brought up religion a great deal during the interview'" (Compl. ¶28)—but that assertion cannot be credited for purposes of a motion to dismiss, where "a judge must accept as true all of the factual allegations [of] the complaint." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011). Nor can it be credited on summary judgment, where the court must construe the evidence, and draw all reasonable inferences, in favor of the party opposing the motion. *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550, 556 (4th Cir. 2011). The question here is whether, under the First Amendment, an applicant can be penalized in a public university's admission process simply for stating that the source of his moral views is his religion. The answer is plainly "No."

I. With respect to Buxton's free speech claim, the district court committed a fundamental legal error by holding that in the context of admissions to a selective program, a public institution may engage in any and all discrimination against an applicant's speech based on its content or viewpoint. This holding, relying on the district court's earlier decision in *Jenkins v. Kurtinitis*, 2015 WL 1285355 (D. Md. Mar. 20, 2015), ignores multiple lines of case law and would immunize discrimination that is clearly constitutionally unacceptable. It may be granted that

in an admissions process, school officials have some discretion to consider the content and viewpoint of applicants' speech in order to determine who is best qualified for the program. However, if viewpoint is to be considered, it must relate materially to the speaker's likely ability to perform in the program or position. In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), on which the district court primarily relied, the Supreme Court permitted government to consider content-based factors such as "decency" and "artistic quality" in awarding competitive arts grants—but the Court still emphasized that this discretion could not be used to penalize disfavored viewpoints or "drive [them] from the marketplace." *Id.* at 587. Likewise, even when government maintains a nonpublic forum to which access is selective, this Court and the Supreme Court have made clear that restrictions on access must be (1) reasonable and (2) viewpoint-neutral.

The actions of Dougherty and other defendants here violate these basic requirements in two respects. First, Dougherty's repeated statements that "religion may not be brought up in the clinic" erect a virtually *per se* rule against expression of religious belief by students in the clinic. By barring even perfectly legitimate expressions of religion, the rule manifests an intent to suppress religion and "drive [religious expressions] from the marketplace" of the RTP and radiation therapy.

Second, to the extent Dougherty fears that student-therapists who are religious may impose their beliefs on patients by making inappropriate or excessive religious statements, it is plainly impermissible—and unreasonable—to infer that a student would commit such misconduct on the basis of his simple statement of religious belief in response to an interview question. Such a leap is the essence of impermissible discrimination.

The inference Dougherty made here is the kind forbidden under one of the pillars of modern First Amendment jurisprudence: the Supreme Court decisions that forbid penalizing people for simple membership in the Communist Party. Those decisions forbid the government from making automatic inferences or conclusive presumptions about specific future misconduct based on an affiliation or a statement of very general belief.

Moreover, to immunize admissions decision-making from free speech review, as the district court did, will allow and invite discrimination not just against religious beliefs, but against a staggering range of beliefs with no connection to one's fitness for the program or job in question.

II. For similar reasons, disfavoring Buxton's application because of his religious reference violated the Establishment Clause. Under that clause,

government action must have a secular purpose, and it must not have the primary effect of inhibiting religion, nor of advancing it. Dougherty's assertion that "religion cannot be brought up in the clinic" treats the RTP as a religion-free zone and lacks any discernible secular purpose. And her unsupportable inference that merely mentioning one's faith means one will "impose" it on others has the primary effect of inhibiting religion by excluding from the RTP those who make any reference to their religion in an interview.

ARGUMENT

I. TO PENALIZE BUXTON'S APPLICATION BECAUSE HE MADE A SIMPLE EXPRESSION OF RELIGIOUS BELIEF IN HIS INTERVIEW IS RANK DISCRIMINATION THAT VIOLATES THE FREE SPEECH CLAUSE.

The district court held as a matter of law that Buxton's expression during his interview had no free speech protection whatsoever because the government must be able to consider the content of applicants' speech in making admissions decisions for a competitive program. As we will show, this holding misstates and ignores binding precedent and would permit a staggering range of discrimination against applicants based on their mere expression of belief. At the outset, of course, Free Speech Clause protection against invidious viewpoint discrimination

extends fully to religious as well as non-religious viewpoints. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993).

The district court's free speech holding is all the more radical because it immunizes unreasonable, viewpoint-based discrimination even when it is unquestionably the sole basis for denying an applicant admission. If no free speech claim exists, as the district court held, then public officials can make an applicant's mere statement of belief the sole reason for rejecting his application.

A. Even if Government May Give Some Consideration to the Content or Viewpoint of an Applicant's Speech in an Interview, the Free Speech Clause Forbids Actions that Are (1) Unreasonable or (2) Calculated to Suppress a Viewpoint or Drive It from the Marketplace.

The district court committed a fundamental error by refusing to apply any Free Speech Clause scrutiny to the defendants' denial of admission to Buxton or their reasons for the denial. The court, relying on its own opinion in *Jenkins v. Kurtinitis*, 2015 WL 1285355 (D. Md. Mar. 20, 2015), held that "'the Free Speech Clause does not protect speech expressed in an admissions interview from admissions consequences in a competitive process, *i.e.*, denial of admission based

on the content or viewpoint expressed." App. 41-42 (quoting *Jenkins*, *supra*, at *25). See *id.* (quoting *Jenkins*) ("'the Free Speech Clause does not prohibit [government] from taking into consideration the content or viewpoint of an applicant's speech when deciding which candidates to admit to a competitive educational training program'").

Accordingly, the court held in *Jenkins* that it "need not consider whether defendants' actions are reasonably related to a legitimate goal or the product of animus." *Jenkins*, *supra*, at *21. *Jenkins* held, and the court here followed it in holding, that because some evaluation of the content of an applicant's speech is necessary in a competitive application process, therefore any and all discrimination based on content or viewpoint is permitted. *Id.*

The district court's holding is not—and cannot be—the law. Even in those limited circumstances where the government can consider the content or viewpoint of an individual's speech to determine his qualifications for a program, there remain fundamental limitations against government abuse. As we will discuss, government actions based on viewpoint are forbidden if they are (1) unreasonable or (2) calculated to suppress or drive a viewpoint from the marketplace. This is true under any of the analytical categories into which this case may properly be placed.

In *Jenkins*, the district court described admission to an educational program as a "situatio[n] 'where the government is providing a public service that by its nature requires evaluations of, and distinctions based upon, the content of speech.'" *Jenkins*, at *18 (quotation omitted); accord App. 42. The court analogized the case to *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), where the Supreme Court held that in a "competitive process" for grants of limited arts funding, the government could consider content-based factors such as "decency" and "excellence," because "absolute neutrality is 'simply inconceivable.'" *Id.* at 585 (quotation omitted).

But while *Finley* upheld such content-based standards on their face, the Court carefully distinguished that holding from "an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination." *Id.* at 587. The Court said it would be different "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," because "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" *Id.* (quoting *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 550 (1983) (internal quotation marks omitted)). The Court added that "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.'" *Id.* (quoting *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

Amici acknowledge that like the NEA in *Finley*, a public educational institution has some power to consider the content of speech in an interview to assess an applicant's fitness for admission. But as in *Finley*, that general power cannot be applied so as to suppress a viewpoint or "drive [it] from the marketplace." The consideration of the applicant's speech must have a reasonable, material connection to the applicant's aptitude for the program—otherwise it is a mere pretext for invidious viewpoint discrimination.

The district court in *Jenkins* cited the above passages from *Finley* disapproving viewpoint discrimination, but then, remarkably, it disregarded them in holding that the Free Speech Clause was irrelevant. See *Jenkins*, *supra*, at *20-21. The only reason it gave was the assertion that "[c]onstitutional protection against arbitrary government decisionmaking, and against 'invidious discrimination,' flows from the Equal Protection Clause . . ., not the Free Speech Clause." *Id.* (quotation omitted). This flatly disregards the statements in *Finley*,

and the cases it cites, that the "invidious discrimination" in question is discrimination against a private person's expression of a disfavored viewpoint.[4]

The district court also wrongly disregarded this Court's binding principles concerning speech in government-operated forums. Although the court in *Jenkins* correctly concluded that a competitive admissions process is not a public forum for speech (see *Jenkins* at *15-18), it utterly ignored the teachings of this Court and the Supreme Court that "even in a nonpublic forum, government regulation must be not only reasonable but also viewpoint neutral." *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006) (hereinafter *CEF of Md.*); *id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) ("in a nonpublic forum 'the regulation on speech [must be] reasonable *and not an effort to suppress expression merely because public officials oppose the speaker's view'* (emphasis added)"); also quoting *NAACP Legal Def. & Educ. Fund v. Cornelius*, 473 U.S. 788, 806 (1985). In a

[4] As Buxton states, nonpublic-forum analysis is an appropriate category here. Opening Br. of Appellant at 13 & n.3. An applicant's personal expression in an interview for a college program is clearly not a case of "government speech." Cf. *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2251-52 (2015). The applicant is not "'conveying a government message'" (*id.* at 2251 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009)); he is expressing his own view within the context of a government program.

nonpublic forum, this Court has emphasized, "the government must employ 'selective access' policies" and decide access based on "individual, non-ministerial judgments,'" *CEF of Md.*, 476 F.3d at 381—which is just what the district court in *Jenkins* emphasized is true of admissions programs. *Jenkins*, *supra*, at *18-21. Nevertheless, as in *Finley*, such selectivity cannot be exercised in ways that are unreasonable or are calculated to suppress a disfavored viewpoint.

In *CEF of Md.*, therefore, this Court held that even if a public school's practice of sending flyers home with students to their parents did not create a public forum, the school still violated the Free Speech Clause when it excluded CEF's flyer based on its religious viewpoint. The district court there had erred, this Court held, by asking only whether the exclusion of CEF's flyer was "reasonable" and failing to address whether it was viewpoint discriminatory. *Id.* at 383-84. Likewise, in *Lamb's Chapel*, 508 U.S. 384, the Supreme Court unanimously held that even if a school district had not created a public forum by opening its rooms to community groups after hours, the district's exclusion of religious uses was permissible "only if [it] was reasonable and viewpoint neutral." *Id.* at 393. The

Court held that the exclusion was viewpoint discriminatory as applied in the circumstances of the case. *Id.* at 393-94.[5]

The district court here doubled its error by refusing to scrutinize defendants' decision either for unreasonableness or for viewpoint discrimination. As we will now discuss, taking plaintiff's allegations as true, defendants' decision is invalid on both counts. To infer that plaintiff would engage in inappropriate conduct on the job because of his simple interview statement of religious belief and motivation is unreasonable and is rank discrimination against religious viewpoints. Immunizing such an unreasonable inference from all free speech scrutiny would authorize innumerable examples of discrimination against beliefs in government-related interview processes.

B. To Disfavor an Applicant for an Educational Program Merely Because of His Statement of Religious Belief or Motivation is Unreasonable and Impermissibly Penalizes a Religious Viewpoint.

[5] See also *Widmar v. Vincent*, 454 U.S. 263, 280-81 (1981) (Stevens, J., concurring in the judgment) (arguing that "[a] university legitimately may regard some subjects as more relevant to its educational mission than others," but that it "may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted," and that university's reason for excluding "voluntary" religious speech" was "groundless" and thus invalid).

Taking the allegations of the complaint as true, Dougherty and other interviewers penalized Buxton's application to the RTP based on his statement, in response to their own question, that he bases his morals on his religious faith. App. 16 (Compl. ¶27). From this Dougherty apparently inferred that Buxton might act inconsistently with her understanding that "'religion cannot be brought up in the clinic by therapist or students.'" *Id.* (Compl. ¶28). To deny Buxton admission based on this simple statement of religious belief and motivation is unconstitutional viewpoint discrimination—"calculated to drive [religious] viewpoints from the marketplace" (*Finley*)—for two reasons.

First, Dougherty's rationale for penalizing applicants' religious statements was breathtakingly broad: that religious expression is virtually *per se* inappropriate in the RTP. She stated to Buxton that "religion cannot be brought up in the clinic" (App. 16 (Compl. ¶28)); she stated to Jenkins that "this field is not the place for religion" and that he "may want to leave [his] thoughts and beliefs" about religion out of future interviews. *Jenkins*, *supra* at *3, *30. These blanket assertions make it impossible for many religious believers to work in the RTP unless they suppress any expression of this important aspect of their lives. On their face, therefore, the assertions are calculated to "drive [religious] viewpoints" from the RTP—and thus

indirectly from the field of radiation therapy—in violation of *Finley* and other governing decisions. Dougherty's assertions also would authorize the factfinder to infer that she aims to penalize religious viewpoints because she personally disfavors them.

The assertion that "religion cannot be brought up in the clinic" is simply false. Neither educational programs nor workplaces are religion-free zones: students and workers may mention religion to each other, and even to patients, in a wide variety of permissible ways. In Justice Brennan's words, government may not "treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment). In *McDaniel*, the Court unanimously held that states could not exclude ministers from service in the legislature—despite the fact that they no doubt would make "public statements regarding religion" (*id.* at 641 (Brennan, J.)). The same principle, under the Free Speech Clause, forbids a state program from forbidding all expression of religious belief within the confines of the program.

Second, to the extent that Dougherty's rationale is any more than simple distaste for religion, it appears to reflect a fear that a therapist might express his

religious views in excessive or inappropriate ways to patients with differing views. For example, Dougherty told Jenkins that "'We have many patients who come to us for treatment from many different religions and some who believe in nothing at all.'" *Jenkins*, *supra*, at *30. More specifically, Dougherty testified that "[w]e don't want students to impose their religion on patients." Dkt. 49, Pl.'s Response in Opp. to Motion for Summary Judgment, Ex. 2 (Dougherty Tr. 107:6-11).[6]

But if "imposing on patients" is the concern, then Dougherty impermissibly drew the inference that simply because Buxton stated he is guided by religious faith, he would express that faith to patients in overbearing or inappropriate ways. This inference is an unjustified leap; it creates no plausible concern about Buxton's ability to perform the functions of the position.[7] Even when the government can consider the content or viewpoint of an applicant's statements, it must bear a reasonable relation to the applicant's likely conduct or fitness in the position; otherwise it is simply an invidious penalty against expression of the viewpoint.

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[6] Although the deposition testimony was not available or admissible on the motion to dismiss, it may shed light on Dougherty's assertion quoted in the complaint.

[7] The inference that Buxton would inject his religion improperly with patients is especially unfair because he only mentioned his religion in response to a question posed by the interviewers themselves —"What do you base your morals on?"— that can easily prompt a religious response.

Moreover, Dougherty's inference was triggered by so little evidence—Buxton's bare statement of belief—that it penalizes any candidate for admission who deigns to mention his religion. This is one short step away from barring religious believers from the program *per se*. At the very least, the broad, unsupportable inference has an effect that is "calculated to drive [religious] viewpoints from" the RTP (*Finley*, 524 U.S. at 587). The breadth of the inference is also evidence of Dougherty's actual intent to penalize religion and drive it from the program.

In many instances a therapist can mention his religious faith without coming close to imposing it on a patient. Surely clinic employees or students can speak to each other about various subjects, including religion, as human beings ordinarily do when they work together. Even in speaking to a patient, a therapist might quite naturally make an unintrusive reference to his religion. For example, suppose a cancer patient receiving radiation treatment expressed nervousness about his situation and therefore asked a radiation therapist how she copes with fear, and the therapist responded, "I pray to God." Surely this simple reference to religion is perfectly legitimate: it answers a patient's open-ended personal question that naturally invited a possible religious response. But Dougherty would apparently

regard that response as impermissible, since she deducted points from Buxton for giving the same sort of response in his interview: he answered "My faith" in response to the personal question "What do you base your morals on?"[8]

Dougherty's explicit assertions that virtually every form of religious expression is inappropriate in the RTP, and her insupportable inference that an applicant who simply expresses his religious belief will also express it intrusively or inappropriately to patients, add up to only one conclusion. Penalizing Buxton for his interview statement was unreasonable, and calculated to drive religious viewpoints from the RTP. The Free Speech Clause must remain applicable to prevent such abuses.

C. To Infer that an Applicant Will Commit Misconduct Because of His Mere Statement of Religious Belief is Unreasonable.

As we now discuss in greater detail, it is simply unreasonable to infer that merely because Buxton stated his religious belief and viewpoint in response to an

[8] According to the summary judgment record, Dougherty's notes on Jenkins state that religion "cannot be brought into this field – unless by the patient of course." Dkt. 49, Pl.'s Response in Opp. to Motion for Summary Judgment, Ex. 7 (DEF 581). But in the hypothetical in the text, the patient does not bring up religion; he merely asks a question for which a religious response is natural and legitimate. The panel asked such a question in the interview and penalized Buxton for his religious response.

interview question, he would therefore express his beliefs in intrusive or overbearing ways to patients.

The proposition that general belief or affiliation does not justify predictions of specific future misconduct is the foundation for one of the pillars of modern First Amendment jurisprudence: the decisions holding it unconstitutional to penalize someone for mere membership in the Communist Party. The Supreme Court repeatedly held that such membership could not justify a conclusive inference that the member "share[d] the unlawful goals of the organization." *Elfbrandt v. Russell*, 384 U.S. 1, 17 (1966). The Court called that inference "[i]ndiscriminate" and said that it "must fall as an assertion of arbitrary power": i.e., it was unreasonable. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952). "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities," the Court said, "surely pose no threat, either as citizens or as public employees." *Elfbrandt*, 384 U.S. at 17. Accordingly, to penalize them for membership "threaten[ed] the cherished freedom of [expressive] association protected by the First Amendment." *Id.* at 18; see also *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (such a penalty "infringe[s] unnecessarily on protected freedoms").

The Court repeatedly found this presumption invalid as a ground not only for criminal punishment, but also for disqualification from government jobs or from professions such as law. See, e.g., *Keyishian* (striking down exclusion from state university faculty); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). *Schware*, for example, held that membership in the Communist Party alone did not support an inference of bad moral character so as to justify preventing Schware from taking the state bar exam. 353 U.S. at 246-47. The Court acknowledged that states could set high standards of qualification for bar admission, but it held that any qualification must have a rational connection with the applicant's fitness or capacity to practice law:

> Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these [fitness] standards, or when their action is invidiously discriminatory.

Id. at 239.

These principles apply here *a fortiori*. If, as the Court recognized (*id.*), many people joined the Communist Party during an economic crisis without seeking to further any illegal aims—even though the Party had those aims—then it is all the more obvious that people order their lives according to their religious beliefs

without thereby intending to impose it on others. The mere fact that Buxton declared his belief, briefly, in response to a personal question does not make it any more likely that he will act inappropriately with patients. This case therefore presents virtually the same situation that the Court in *Schware* envisioned: "Obviously an applicant could not be excluded [from the legal profession] merely because he was . . . a member of a particular church." 353 U.S. at 239. If there is any case in which an inference of future harmful conduct is baseless, this is it; if the inference here is not constitutionally invalid, then virtually no inference is.

D. The District Court's Holding that the Free Speech Clause Is Inapplicable in This Context Would Authorize a Staggering Range of Discrimination Against Applicants for Government Programs or Jobs.

If the decision to disfavor Buxton based on his expression of belief is immunized from free speech scrutiny, the types of viewpoint discrimination permitted to the government would go far beyond religion—they would be almost limitless. The inference of potential future misconduct would be allowed as long as the government put forward some interest related to the functioning of the program, regardless of how pretextual the interest was, or how unlikely it was that the predicted misconduct would occur. Such unsupported leaps are the essence of

prohibited viewpoint discrimination: they are exactly how a decision-maker silences a particular expression of belief.

The district court's ruling would eliminate all free speech protections for individuals during a competitive admissions process for any government program. Whether it be for a public-school teacher position or other public employment; for a public-university training program for doctors, nurses, lawyers, or other professionals; or for a scholarship program at a public university, an applicant would have no constitutional protection for expression of his belief during the process.

Such a position is untenable. Even in those situations where government can consider the content or viewpoint of an applicant's expression, it must bear a reasonable relationship to the applicant's fitness or likely performance for the job. Eliminating all free speech protections would open the door for government interviewers and decision-makers to make a vast array of unacceptable inferences based on their biases or overbroad stereotypes. For example:

- If a candidate for a government job stated he was voting for Donald Trump in the upcoming election, the interviewer would be allowed to

infer that the candidate was racist, anti-Hispanic, or anti-Muslim, and therefore unfit for the position.

- If a candidate for a medically related job or program stated that he was a member of, or even merely expressed support for, the Black Lives Matter movement, the interviewer would be allowed to infer that the candidate would therefore refuse to treat law-enforcement officers, making him unfit for the position.
- If a candidate for an educational program admitted to being a follower of Islam, the interviewer would be allowed to infer that the candidate would therefore refuse to give women fair or equal treatment, making him unfit for the position.
- If a candidate for a state job cited previous work with a union in his or her working life, an interviewer in a state that barred government-employee unions would be allowed to infer that the candidate would agitate for unions in the workplace, making him unfit for the job.

In each of these cases—as in countless others—the government may legitimately seek to prevent some sort of conduct in the workplace or an educational program, but it cannot engage in discriminatory or unreasonable

inferences that a candidate who expresses certain general beliefs will engage in such conduct. The government cannot have *carte blanche* to use such inferences to disqualify persons from acceptance into an educational program or a job.

The district court in Jenkins defended its immunizing of all viewpoint discrimination by asking:

> Would plaintiff argue that defendants violated his right to free speech if they denied him admission because he said, in his interview, that he wants to avoid treating adults with cancer? That certainly would be a good reason to deny him admission to a program that trains students to treat all people with cancer. Defendants must be able to take such a "viewpoint" into consideration when choosing between candidates for competitive admission.

Jenkins, *supra*, at *32. But this is a *non sequitur*. Upholding such a "good reason" for denying admission need not mean—under free speech law, it cannot mean—immunizing unreasonable or prejudice-based inferences like those above.

Amici do not specify where the line of reasonableness should be drawn, but it is clear that Dougherty's inference that Buxton would act improperly toward RTP patients was unreasonable. Buxton is a far cry from the applicant whose expression specifically indicates he is unwilling to provide treatment. In that respect, this case resembles *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), where the Supreme Court held that ordinances prohibiting the

killing of animals in Santeria religious rituals violated the Free Exercise Clause because they allowed multiple other instances of killing animals and therefore were not "[religion]-neutral [or] of general applicability." *Id.* at 531. The Court added: "In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543. Similarly, this Court need not define the precise point at which the government decision-makers may infer that a candidate's belief will lead him to engage in specific harmful conduct. Under any standard, Buxton's simple statement of general religious belief cannot be the basis for the inference that he will impose his faith on patients in the RTP.

II. FOR SIMILAR REASONS, DISFAVORING AN APPLICANT BECAUSE OF HIS SIMPLE STATEMENT OF RELIGIOUS BELIEF VIOLATES THE ESTABLISHMENT CLAUSE BY INHIBITING RELIGION.

For the reasons given so far, to disfavor Buxton's application for admission based on his bare statement of religious belief and motivation violates not only the Free Speech Clause, but also the Establishment Clause. "To pass muster under the Establishment Clause, government conduct (1) must be driven in part by a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion;

and (3) must not excessively entangle church and State." *Moss v. Spartanburg County School Dist. Seven*, 683 F.3d 599, 608 (4th Cir. 2012) (italics omitted) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). While Establishment Clause claims typically challenge that government action benefits religion, the Clause also governs claims that government conduct inhibits or is hostile toward religion. *Id.*

As we have already discussed, Dougherty in this case (1) stated that "religion cannot be brought up in the clinic" and "this field is not the place for religion" and (2) leaped, from Buxton's simple statement of belief, to the conclusion that he might "impose [his] religion on patients." See *supra* pp. 4, 17. The first of these propositions is hostile to religion on its face: it lacks any apparent secular purpose, and it would inhibit religion by making it impossible for a religious believer to express her faith, even in perfectly legitimate ways, while participating in the RTP. The First Amendment's Religion Clauses prohibit "treat[ing] religion and those who teach or practice it . . . as subversive of American ideals and therefore subject to unique disabilities." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment). As such, the clauses prohibit imposing such disabilities simply because the religious individual states his belief.

The second proposition, that there is a legitimate interest in preventing students and therapists from imposing their religious beliefs on patients, states a secular purpose in the abstract. But when a decision-maker infers that an applicant will engage in such imposition simply because he states his belief in response to an interview question, this action still violates the Establishment Clause because it has the primary effect of inhibiting religion.

In *McDaniel*, *supra*, the Court confronted a similar rationale for the state provision disqualifying clergy members from the legislature: the assertion that "if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others." 435 U.S. at 628-29. But the Court rejected the assertion, and held the exclusion unconstitutional, because it found "no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *Id.* at 629. Similarly, here there is no support for the proposition that an applicant who expresses a simple statement of religious belief in response to an interview question will be less careful to maintain proper, non-intrusive interactions with patients than those who do not express a religious belief. Indeed,

in the similar situation of Jenkins, Dougherty admitted that she merely assumed he would mention religion in the clinical setting, even though he never said he would do so in his religious statement in the interview. Dkt. 49, Pl. Ex. 2 (Dougherty Tr. 112:11-13).

It does not matter that the Establishment Clause claim was dismissed on motion for summary judgment, rather than (as with the free speech claim) a motion to dismiss. The summary judgment documents confirm that Dougherty graded applicants down for mentioning religion in their interview, and that she told Buxton and Jenkins (and continues to assert) that applicants should not mention religion. See Opening Br. of Appellant at 26-27. Although Dougherty asserted in her report that Buxton had brought up religion "a great deal" during his interview, this assertion is clearly in dispute, based on Buxton's allegation and on interviewers' notes and testimony that failed to show such specific references other than in response to Question 3 (the question about the basis for his morals). See Dkt. 50, Pl.'s Corrected Memorandum in Opp. to Motion for Summary Judgment, at 8-9.

Finally, the issue is not whether Buxton was denied admission solely on the basis of his religious statement, but whether it was used to disfavor or penalize him

in the decision process. Even the latter is enough to inhibit applicants from making any mention of their religious faith in an interview. Opening Br. of Appellant at 26-27. Deducting points for the mere mention of religion and telling applicants they should not mention it are enough to show the hostility toward religion that the Establishment Clause forbids.[9]

CONCLUSION

The judgment of the District Court should be reversed.

[9] In its opinion granting summary judgment, the district court noted that Buxton "apparently is a Christian who practices his religion by going to church two days a year—on Easter and Christmas." App. 222 n.3. That would clearly be an impermissible ground for concluding that Buxton is not entitled to the protections of the Religion Clauses. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 832-34 (1989) (holding that claimant who described himself as simply a "Christian," but did not belong to any particular church, could invoke the Free Exercise Clause). But if anything, Buxton's attendance practice makes it even more unreasonable to infer that he would make excessive or intrusive references to religion in the clinic.

Respectfully submitted.

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OCTOBER 21, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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