No. ______

In the Supreme Court of the United States

CRYSTAL DIXON,

Petitioner,

v.

LLOYD JACOBS, Individually and in his official capacity as President, University of Toledo;
WILLIAM LOGIE, Individually and in his official capacity as Vice President for Human Resources and Campus Safety, University of Toledo,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Crystal Dixon ("Petitioner") was fired from her employment as Associate Vice President for Human Resources with the University of Toledo ("University") because she expressed her personal, Christian views as a private citizen in an opinion piece published in the *Toledo Free Press.* Petitioner did not occupy a political position, nor did she publicly criticize her employer or any identified policy of her employer in her writing. Rather, Petitioner was fired for expressing her personal religious beliefs in a local newspaper on a controversial public issue: whether it is legitimate to compare the civil rights struggles of African Americans with those struggling to promote gay rights, an issue about which Petitioner, an African American, is uniquely qualified to address.

There is a conflict in the United States courts of appeals as to whether to expand the *Elrod/Branti* policymaker exception analysis, which favors the government employer as a matter of law, to include a situation where a policymaking employee was terminated for expressive conduct even though political affiliation was not at issue. In *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002), the Sixth Circuit adopted such a presumption, which eschews the balancing test set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and thus accords no weight to the employee's First Amendment interests. The *Rose* presumption was applied here to reject Petitioner's free speech claim.

1. Should the *Elrod/Branti* policymaker exception analysis apply to employee speech cases that do not involve political patronage?

2. Should a presumption apply in favor of protecting the free speech interests of a government employee in a case not involving political patronage and where the employee is speaking as a private citizen on a matter of public concern and the speech does not directly criticize her employer or any identified policy of her employer, as in this case?

PARTIES TO THE PROCEEDING

The Petitioner is Crystal Dixon.

The Respondents are Lloyd Jacobs, individually and in his official capacity as President, University of Toledo; and William Logie, individually and in his official capacity as Vice President for Human Resources and Campus Safety, University of Toledo (collectively referred to as "Respondents").

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OPINIONS BELOW

The opinion of the court of appeals appears at App. 1-22 and is reported at 702 F.3d 269. The opinion of the district court appears at App. 23-43 and is reported at 842 F. Supp. 2d 1044.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2012. App. 1-2. A Petition for Rehearing was denied on February 27, 2013. App. 45-46. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The Fourteenth Amendment provides, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Beginning in July 2007, Petitioner held the position of interim Associate Vice President for Human Resources over all University campuses. App. 4.

In April 2008, Petitioner read an opinion piece published in the *Toledo Free Press* that was authored by Michael Miller, the Editor-in-Chief, and titled, "Lighting the Fuse: Gay Rights and Wrongs."[1] Miller's editorial equated "the gay rights struggle" with the "struggles" of African-American civil rights victims.[2] App. 4, 47-50. Petitioner disagreed with the viewpoint expressed by Miller and decided to submit an opinion piece to the *Toledo Free Press* to express her personal viewpoint on this matter of public concern. App. 4-5

On April 18, 2008, Petitioner's op-ed, titled "Gay Rights and Wrongs: Another Perspective," was published in the *Toledo Free Press* online edition.[3] App. 5, 51-53. In the article, Petitioner expressed her personal viewpoint, stating, in relevant part, "I respectfully submit a different perspective for Miller and *Toledo Free Press* readers to consider . . . . I take great umbrage at the notion that those choosing the homosexual lifestyle are civil rights victims."

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[1] The *Toledo Free Press* is an independent newspaper; it has no affiliation with the University.

[2] Miller's editorial is reproduced in full in the Appendix. App. 47-50.

[3] Petitioner's published op-ed is reproduced in full in the Appendix. App. 51-53.

Petitioner signed her article as "Crystal Dixon." App. 51-53. She did not write the article pursuant to her official duties at the University, and never once did she claim to be writing on behalf of the University. Petitioner wrote her article as a private citizen addressing a matter of public concern. App. 5-6, 51-53.

On May 4, 2008, an opinion piece authored by "Dr. Lloyd Jacobs, University of Toledo President" was published in the *Toledo Free Press*.[4] In his article, Respondent Jacobs stated, in relevant part:

> Crystal Dixon is associate vice president for Human Resources at the University of Toledo, her comments do not accord with the values of the University of Toledo. . . . It is necessary, therefore, for me to repudiate much of her writing. . . . We will be taking certain internal actions in this instance to more fully align our utterances and actions with this value system. . . . It is my hope there may be no misunderstanding of my personal stance, nor the stance of the University of Toledo, concerning the issues of "Gay Rights and Wrongs."

App. 54-56. The article concluded, "*Dr. Lloyd Jacobs is president of the University of Toledo*." App. 56.

On May 8, 2008, Petitioner received a letter from Respondent Jacobs, stating that effective immediately her employment at the University was terminated

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[4] Respondent Jacobs' published article is reproduced in full in the Appendix. App. 54-56.

because of "[t]he public position you have taken in the *Toledo Free Press*." App. 7-8.

In December 2008, Petitioner filed this civil rights lawsuit, challenging the constitutionality of Respondents' actions under the First and Fourteenth Amendments.

The district court held that Respondents were justified in firing Petitioner for publishing her article in the *Toledo Free Press*, App. 23-43, and the Sixth Circuit upheld that decision based on the application of the *Rose* presumption, which favors government censorship of an employee's speech as a matter of law when "a confidential or policymaking public employee is discharged on the basis of speech related to [her] political or policy views," App. 12-18.

REASONS FOR GRANTING THE PETITION

The United States courts of appeals are divided on whether to expand the *Elrod/Branti* policymaker exception analysis to employee speech cases that do not involve political patronage, such as the one at issue. The courts that have adopted this approach, which permits a presumption in favor of the government employer, eschew the balancing test set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and thus accord no weight to the employee's First Amendment interests.

The Sixth Circuit adopted such a presumption in *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002), which favors the government employer as a matter of law when the employee holds a "policymaking or

confidential" position based on four, loosely applied categories, and "where the employee's speech relates to either his political affiliation or substantive policy." *Id.* at 921. That presumption was applied here to reject Petitioner's free speech claim. App. 18.

By adopting and applying the *Rose* presumption in this case, the Sixth Circuit has entered a decision that conflicts with decisions of other United States courts of appeals. *See* Sup. Ct. R. 10(a). Moreover, because the Sixth Circuit applied the *Rose* presumption in this case and thus failed to accord the proper weight (indeed, any weight) to Petitioner's First Amendment interests, it has produced a decision on an important federal question in a way that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10(c).

In sum, review is warranted. And upon the Court's review, it should resolve this conflict in a manner that favors *protecting* the fundamental right of a private citizen to speak on controversial public issues. Consequently, the Court should reject the application of a presumption that favors the government censor in employee speech cases not involving political patronage. Further, the Court should ensure that an employee's right to speak as a private citizen on a matter of great public concern is given the appropriate and necessary weight in the balance set forth in *Pickering*. Indeed, when the speech in question does not criticize the government employer or any identified policy of the employer, as in this case, there should be a presumption that *favors* the speaker as a matter of law. As this Court noted, "expression on public issues" rests on the "highest rung of the hierarchy of First Amendment values," *NAACP v. Claiborne Hardware*

Co., 458 U.S. 886, 913 (1982); therefore, it should be accorded the greatest weight in any balance.

Indeed, the harmful effects of permitting the application of a speech-restricting presumption, such as the application of the Sixth Circuit's *Rose* presumption here, are most evident when the speech in question does not directly address nor criticize the government employer nor any specific policy of the employer, but instead represents a personal religious view and opinion on a controversial public issue. Here, Petitioner was fired by her government employer because her personal religious beliefs did not comport with the University's "diversity" values. Petitioner's speech was in response to a published editorial—it was not in response to anything her employer did or did not do. As Respondents acknowledged, the only part of Petitioner's speech that remotely touched upon University policies was, in fact, supportive of the University. *See* App. 53 ("The university is working diligently to address [the disparity in benefit plans] in a reasonable and cost-efficient manner, for all employees, not just one segment.").[5]

Unfortunately, the panel gave Petitioner's speech—and the opinions she expressed in that speech—no consideration and instead held in favor of the government as a matter of law based on the

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[5] Respondent Jacobs repeated the very same point in his published article, acknowledging that the "asymmetry of benefits packages across the campuses of this university" continues and confirming that the University is "working as rapidly as [it] can to correct this asymmetry." App. 56.

presumption set forth in *Rose*.[6] App. 18 ("Because the *Rose* presumption is dispositive, it is unnecessary for us to consider the district court's *Pickering* and *Garcetti* analyses."). That result does not comport with—nor provide any protection for—the values enshrined in the First Amendment. *See generally NAACP v. Button*, 371 U.S. 415, 433 (1963) (observing that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society").

Indeed, this Court has described as "well settled" the proposition "that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'" *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (same).

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[6] There is no dispute that Petitioner was speaking on a matter of public concern and was thus terminated as a result of her speech. *See* App. 10, 11 (stating that "[o]nly the first element, whether the speech was protected, is at issue on appeal" and that "the parties do not dispute that Dixon spoke on a matter of public concern"). And there is no reasonable dispute that when Petitioner was writing her opinion piece on her personal computer from her home on a Sunday, she was not speaking pursuant to her official duties with the University, but as a private citizen. Thus, the district court properly concluded that Petitioner's opinion piece was not written or published pursuant to any of her official duties. App. 31 ("Indeed, the evidence clearly demonstrates that [Petitioner] was not attempting to fulfill any job duty in writing her article, but to present a personal opinion.").

Here, Respondents have effectively disqualified Christians (certainly those who publicly profess their faith) from holding managerial positions at the University because their traditional religious beliefs do not comport with the University's "diversity" values. *But see McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down a Tennessee law barring ministers and priests from holding certain political offices). Indeed, such a position runs squarely into *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), in which the Court stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id*. at 642 (emphasis added). In direct contravention, Respondents seek to prescribe what "shall be orthodox" in matters of opinion by permitting University employees to express personal messages that promote certain *favored* viewpoints on controversial political and social issues, while censoring certain *disfavored* viewpoints, such as Petitioner's Christian viewpoint on the issue of gay rights. As a result of Respondents' speech restriction, that "fixed star" in our constitutional constellation has been obscured and an official orthodoxy prescribed in direct violation of the First Amendment. *See id*.

In the final analysis, this Court should grant review, resolve the circuit split by rejecting the application of the *Elrod/Branti* presumption in cases not involving political patronage, and reverse the decision below in favor of protecting Petitioner's right as a private citizen to speak on a matter of great public concern.

I. The Sixth Circuit's Adoption and Application of the *Rose* Presumption in this Case Is an Unwarranted and Improper Extension of the *Elrod/Branti* Analysis.

The *Rose* presumption represents an unwarranted extension of this Court's precedent as enunciated in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), in which the Court established that the termination of a government employee based on the employee's political affiliation in political patronage cases is permissible under the First Amendment. The *Rose* presumption extends the *Elrod/Branti* line of reasoning beyond political patronage cases to include employee speech cases involving "policymaking or confidential" positions. Accordingly, the *Rose* presumption eschews the balancing required under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and favors the government as a matter of law.

More precisely, in *Rose v. Stephens*, the Sixth Circuit "adopt[ed] the rule that, where a confidential or policymaking public employee is discharged on the basis of speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." *Rose*, 291 F.3d at 921. The rule adopted applies "where the employee's speech relates to either his political affiliation or substantive policy." *Id*.

In *Rose*, the plaintiff's termination as the Commissioner of the Kentucky State Police resulted from a dispute between himself and the Secretary of Kentucky's Justice Cabinet over the plaintiff's refusal

to withdraw a memorandum which he had submitted to the Secretary and the governor of Kentucky announcing his decision to eliminate the position of deputy police commissioner. *Id*. at 919. In its decision, the court outlined four general categories of positions to which the exception applies. These "categories" include (1) "positions specifically named in relevant . . . law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted"; (2) "positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated," or positions not specifically named by law but inherently possessing category-one type authority; (3) "confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders" or who "control the lines of communication" to such persons; and (4) "positions that are part of a group of positions filled by balancing out political party representation" or "by balancing out selections made by different government bodies." *Id.* at 924.

Based on this analysis, the court concluded that "[t]he cabinet-level designation and broad range of discretionary authority granted under Kentucky law to the police commissioner demonstrate that plaintiff unquestionably occupied a category one position." *Id*. But that did not end the inquiry. The "final step" in the court's analysis was to determine whether the offending memorandum "addressed political or policy-related issues." *Id*. The court concluded that it did in that the issues addressed "are clearly related to police department policies." *Id*. at 925; *see also Latham v. Office of the Att'y Gen. of Ohio*, 395 F.3d 261, 268 (6th

Cir. 2005) (holding that "as a confidential advisor to, and delegatee of, a policymaking employee [*i.e.*, the Attorney General] on job-related matters," the plaintiff, an Assistant Attorney General, held a position that fell "sufficiently within the bounds of Categories Two and Three" and thus her letter to the Attorney General outlining concerns she had with the settlement of a case she was handling and the general direction of the Consumer Protection Section to which she was assigned was not protected speech); *see also Silberstein v. City of Dayton*, 440 F.3d 306, 320 (6th Cir. 2006) (holding that the plaintiff, having prepared—pursuant to her "duty"—a report to the Civil Service Board on the problems with the diversity plan that was under consideration, was a policymaking employee because she was "responsible for making important policy implementation recommendations to a policymaker" and could thus be terminated for writing a letter in which she "criticized" the City Commission's "actions in their efforts to implement the new diversity plan").

Indeed, the very case that established the presumption at issue (*Rose v. Stephens*) would be analyzed differently today in light of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In *Garcetti*, this Court held that when public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for First Amendment purposes and thus may be disciplined for the speech. In *Garcetti*, the employee, a deputy district attorney, was fired for statements he made pursuant to his official duties as a prosecutor to advise his supervisor about how best to proceed with a pending criminal

case.[7] *Id*. at 421-22. The Court held that the statements were not protected speech because the deputy district attorney was not speaking as a private citizen for purposes of the First Amendment. *Id*.

Pursuant to the reasoning in *Garcetti*, the memorandum submitted to the Secretary and the Governor of Kentucky at issue in *Rose* and the letter to the Attorney General at issue in *Latham* would not be protected speech under the First Amendment. Consequently, *Garcetti* addresses the concerns at issue in *Rose* and those in *Latham*, thus further demonstrating the need to reject the *Rose* presumption, particularly in light of the facts of this case.

II. The United States Courts of Appeals Are Divided in Their Application of the *Elrod/Branti* Analysis to Employee Speech Cases.

The United States courts of appeals are not uniform in their application of the *Elrod / Branti* presumption to government employee speech cases that do not involve political patronage. As a result, the courts have rendered conflicting decisions as to its application.

For example, in *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999), the Second Circuit stated, "Although it is true that, consistent with the First Amendment, a policymaking employee may be discharged on the basis of political affiliation such as membership (or lack of

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[7] It should be noted that this Court did not apply the *Elrod / Branti* exception in *Garcetti*. *See Garcetti*, 547 U.S. at 410.

membership) in a particular political party, that same employee may not be discharged on the basis of specific speech on matters of public concern unless the *Pickering* balancing test favors the government employer." *See also McEvoy v. Spencer*, 124 F.3d 92, 101, 102-03 (2d Cir. 1997) (rejecting *Elrod* and applying *Pickering* when a policymaking employee is discharged solely for speaking on a matter of public concern and political affiliation is not an issue).

In *Curinga v. City of Clairton*, 357 F.3d 305, 314 (3d Cir. 2004), the Third Circuit stated that "when an employee's speech is intermixed with political affiliation, the *Pickering* balancing standard is the better analysis to apply."

In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), the Fourth Circuit stated:

> We therefore believe that raw patronage discharges of the *Elrod/Branti* type are properly treated as a narrow, special case within the wider category of First Amendment discharges. Only in this narrow circumstance may the requisite balancing of governmental and individual interests appropriately be accomplished by the essentially rigid *Branti* inquiry. In the raw patronage situation both the individual and governmental interests are essentially fixed and unvarying in content. Balancing those interests from case to case does not require open-ended inquiry concerned with specific work-place relationships that may underlie overt expressive conduct. Where the protected activity involves overt "expression of

> ideas," the more open-ended inquiry prescribed by *Pickering* and its progeny are required to accomplish the necessary balancing. This is so even where the arguably protected activity involves "political" speech or expression.

Id. at 1334, n.6

In *Hinshaw v. Smith*, 436 F.3d 997 (8th Cir. 2006), the Eighth Circuit refused "to expand the *Elrod / Branti* exception to a case where party affiliation is not alleged as a basis for the termination" and expressly "decline[d] to follow all aspects of *Rose*." *Id*. at 1006-07 (rejecting *Rose* and applying *Pickering*, but noting "that the employee's status as a policymaking or confidential employee weighs heavily on the government's side of the *Pickering* scale when the speech concerns the employee's political or substantive policy views related to her public office"); *cf. Foote v. Town of Bedford*, 642 F.3d 80, 85 (1st Cir. 2011) ("The *Elrod/Branti* line of cases must inform the *Pickering* balance whenever a policymaking employee is dismissed for speech elucidating his views on job-related public policy.").

The Eight Circuit further observed that this Court "has also indicated that where speech is intermixed with a political affiliation requirement, *Pickering* balancing is appropriate." *Hinshaw*, 436 F.3d at 1005-06 (citing *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996)).

Indeed, in *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), the Tenth Circuit noted that this Court in *O'Hare Truck Serv., Inc.* implicitly rejected the argument that a "political affiliation" employee can be

terminated for her speech without considering the *Pickering* balancing factors. *Barker*, 215 F.3d at 1139 (citing *O'Hare Truck Serv., Inc.,* 518 U.S. at 719 (noting that there will be cases "where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable.")).

And in *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), the Eleventh Circuit refused to combine the *Elrod* and *Pickering* lines of cases, such that if the subordinate was fired because of what he said rather than because of his party affiliation, the fact that he was a confidential or policymaking employee is not dispositive. The court stated "that cases involving the 'overt expression of ideas' or political speech, unlike political patronage cases, require the open-ended inquiry or method of analysis the Supreme Court established in *Pickering*." *Id*. at 1527 (citing with approval *Dodson*, 727 F.2d at 1334, n.6).

However, in *Vargas-Harrison v. Racine Unified Sch. Dist*., 272 F.3d 964, 973 (7th Cir. 2001), the Seventh Circuit stated its position as follows: "The [policymaker] corollary is a shorthand for the *Pickering* balancing; in certain instances, the government employer's need for political allegiance from its policymaking employee outweighs the employee's freedom of expression to such a degree that the fact-specific *Pickering* inquiry is not required." (internal marks and citation omitted).

And in *Fazio v. City & Cnty. of S.F.*, 125 F.3d 1328, 1334 (9th Cir. 1997), the Ninth Circuit held as follows:

"Because we hold that [plaintiff's] position . . . was a policymaking one, we do not address [plaintiff's] claim that under the *Pickering* balancing test his interest in free speech outweighs the [employer's] interest in running an efficient office." *See also Biggs v. Best, Best, & Krieger*, 189 F.3d 989, 994-95 (9th Cir. 1999) (noting that "an employee's status as a policymaker or confidential employee would be dispositive of any First Amendment retaliation claim").

In short, there is no uniform application of the *Elrod/Branti* analysis—or the *Pickering* analysis for that matter—in employee speech cases not involving political patronage. This conflict should be resolved by the Court, and it should be resolved in a manner in which Petitioner's speech is protected.

By employing the *Rose* presumption in this case, the Sixth Circuit rejected any balancing that would give weight to Petitioner's free speech interests, thereby ignoring the great social value of her speech and thus implicitly rejecting the values safeguarded by the First Amendment. As an African-American woman, Petitioner is clearly a "member[] of a community most likely to have informed and definite opinions as to" the civil rights struggles of African-Americans and any comparison of these struggles with the current gay rights movement. *See Pickering*, 391 U.S. at 572. Accordingly, it is essential that she "be able to speak out freely on such questions without fear of retaliatory dismissal." *See id.*

Consequently, in light of the important First Amendment values at stake, *see Claiborne Hardware Co.*, 458 U.S. at 913 ("[Speech] concerning public affairs

is more than self-expression; it is the essence of self-government.") (citations omitted); *Stromberg v. Cal.,* 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system."); *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasizing our "profound national commitment" to uninhibited debate on public issues), restrictions on speech addressing important public issues should be reviewed in a manner that favors *protecting*—and not *suppressing*—the speech, particularly in cases that do not involve political patronage.

Indeed, in cases such as this, where the speech in question does not directly and specifically criticize the speaker's employer or the employer's policies, a presumption should exist that favors *protecting* the employee's speech.

Here, Petitioner's op-ed was published in the *Toledo Free Press*, a local newspaper, in response to an earlier published editorial written by a private individual—the Editor-in-Chief of the newspaper. Petitioner's article was not directed toward, nor critical of, the University, University policies, or anyone employed by the University. Both opinion pieces addressed the issue of gay rights and civil rights, and they did so from different viewpoints. Petitioner addressed this issue of public concern from her perspective as a Christian, African-American woman (not as an employee of the University). She was not speaking on behalf of her employer (and nowhere indicated that she was), nor was she even criticizing any policy or practice of her employer. The only substantive reference to the University was to correct a misstatement of fact in the

prior editorial. Indeed, Petitioner affirmed that the University does not discriminate against anyone in the healthcare benefits it provides regardless of sexual orientation. Thus, when viewed in its proper context, Petitioner's opinion piece was not expressing political or policy views related to the University (and there was certainly nothing in the article that could be construed as insubordination); she was expressing her personal, Christian view on a matter of broad public concern.

In light of the content, form, and context of Petitioner's speech, and the fact that the "speech" was made to a public audience, outside the workplace, and involving content largely unrelated to Petitioner's employment, there can be no question that Petitioner was speaking as a private citizen, not as an employee, on a matter of public concern. This speech must be accorded the greatest weight on the *Pickering* scale and not presumptively dismissed, as the Sixth Circuit did here, thus allowing a government employer to suppress speech based on a broad rendering of its "diversity" values.

In conclusion, Petitioner's "statements are in no way directed towards any person with whom [she] would normally be in contact in the course of [her] daily work . . . . Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here." *See Pickering*, 391 U.S. at 569-70. Additionally, the University President, Respondent Jacobs, was permitted to express his personal and controversial opinions on the very same subject in the *Toledo Free Press* without being punished for doing so. *See* App. 56 (stating in his published article that "[i]t is my hope there may be no

misunderstanding of my *personal* stance, nor the stance of the University of Toledo, concerning the issues of 'Gay Rights and Wrongs'") (emphasis added). Consequently, there can be no harm to the University's legitimate interests in permitting its employees to engage in a public debate in a local newspaper on a significant social issue. In fact, permitting Petitioner to express her personal opinion and viewpoint on this matter of public concern in the *Toledo Free Press* and thereby allowing her to meaningfully contribute to this public debate—particularly in light of the fact that she is an African-American woman and thus has a unique perspective to offer—promotes the University's interests as well. *See, e.g., Healy v. James*, 408 U.S. 169, 180 (1972) (observing that "American schools" are "peculiarly the 'marketplace of ideas'"). Indeed, one would expect a university to welcome such debate. *See Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."). Unfortunately, it appears that Respondents seek to monopolize the "marketplace of ideas" by only permitting the public expression of personal opinions that comport with the official orthodoxy established by the University, in direct violation of the First Amendment. *See generally Barnette*, 319 U.S. at 642.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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