No. 12-1402

In the Supreme Court of the United States

CRYSTAL DIXON,

Petitioner,

v.

UNIVERSITY OF TOLEDO, et al.,

Respondents.

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

REPLY BRIEF OF PETITIONER

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Respondents frame the question presented as follows: "Does *Pickering v. Board of Education*, 391 U.S. 563 (1968), permit a public employer to fire a policy-making and confidential employee when she speaks in her capacity as a private citizen on a *matter of policy* related to her employment duties?" (emphasis added). But what is the "matter of policy" to which Respondents refer? The speech at issue is Petitioner's personal, guest op-ed published in the *Toledo Free Press*, a local newspaper that is unaffiliated with the University of Toledo. App. 51-53. In this op-ed, Petitioner was expressing her personal religious beliefs and opinions regarding a very contentious issue: gay rights. Petitioner—an African-American, Christian woman—was addressing this matter of public concern by responding to an earlier op-ed in the very same newspaper that equated the current gay rights movement with the civil rights struggle of African-Americans, App. 47-50—an issue about which Petitioner is uniquely qualified to address.[1] Nowhere does Petitioner criticize <u>*any*</u> University policy or University employee. Indeed, her comments were in response to comments made by the editor of the newspaper—not in response to any policy promulgated by the University. *See* Resp. Br. at 14 (incorrectly

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[1] 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 comparisons of these struggles with the lifestyle choices of homosexuals. *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.*

asserting that Petitioner was "challenging the policies that [she is] responsible to enforce"), *but see* Resp. Br. at 35 (claiming that Petitioner "*implicitly* criticized" the University's policies) (emphasis added). In fact, the only comments she made *about* the University were favorable. *See* App. 53.

Pursuant to Respondents' view of the law urged upon this Court, the University could have fired Petitioner for writing a personal, guest op-ed that criticized this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (striking down a provision of the Defense of Marriage Act that denied certain federal benefits for same-sex marriages), because doing so would "implicitly" express a view that homosexuals should be deprived of "civil rights," even if the op-ed did not *directly* criticize any *specific* policy of the University or University employee. *See* Resp. Br. at 20 (describing the offending speech as "denounc[ing] 'the *notion* that those choosing the homosexual lifestyle are 'civil rights victims'") (emphasis added).

Herein lies a fundamental problem with Respondents' (and the Sixth Circuit's) reliance upon the *Rose* presumption (*Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002)) and Respondents' (and the district court's) application of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) in this case, which does *not* involve political patronage: neither *Rose* nor *Pickering* grants government officials the presumptive power to suppress core political speech based on a broad

rendering of the government's "diversity" values.[2] Permitting such blanket authority would allow government officials to "prescribe what shall be orthodox" in matters of opinion, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("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."), and thus undermine our "profound national commitment" to uninhibited debate on public issues, *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, anyone who shares (and expresses) Petitioner's religious views on this contentious public issue (gay rights) is presumptively barred from holding a managerial position at the University, thereby effectively establishing an impermissible religious test for government employment. *See McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down religious test for public office); *see also* Br. of *Amici Curiae* Alliance Defending Freedom & Pacific Justice Institute at 17 ("[T]he decision below . . . empowers public universities, and public employers more broadly, to impose speech codes on their employees, preventing them from uttering ideas contrary to their university employers.").

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[2] Respondents' assertion that the University's "diversity" policies also protect against discrimination based on religion, Resp. Br. at 35, is impossible to square with how they treated Petitioner, who was fired because she expressed her personal religious beliefs in an op-ed published in a local newspaper. Indeed, there is *no* evidence whatsoever in this case that Petitioner *ever* discriminated against *anyone* in the workplace for *any* reason. In fact, the evidence showed the very opposite to be true. However, the same cannot be said about Respondents.

As argued in the petition, the law should grant a presumption *in favor* of protecting Petitioner's speech, *see* Pet. at 17-18, which rests on the "highest rung of the hierarchy of First Amendment values," *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

In short, the Court should grant review of this important case involving the free speech rights of government employees.[3]

Indeed, Respondents' position can be distilled to this: a government employer should be permitted to fire an employee for speaking as a *private citizen* on a controversial matter of *public concern* when the employer disagrees with the viewpoint expressed based

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[3] Respondents argue that this case would be a poor vehicle to address the speech issues presented because of qualified immunity. Resp. Br. at 21. They are mistaken. In fact, even if Respondents enjoyed immunity from damages in their personal capacities, qualified immunity does not preclude declaratory and injunctive relief (*e.g.,* an order declaring the firing unlawful, expunging all adverse employment records, and prohibiting any future adverse comments or recommendations regarding Petitioner's employment at the University) in this case, particularly since Respondents were sued individually and in their official capacities. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) (stating that "there is no qualified immunity to shield the defendants from claims" for "declaratory and injunctive relief"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity . . . does not bar actions for declaratory or injunctive relief."); *see also Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997) ("Qualified immunity shields defendant from personal liability, but it does not shield him from the claims brought against him in his official capacity.").

upon the government's prescribed orthodoxy of opinion on the matter. Respondents concede that Petitioner "spoke on a matter of public concern," *Connick v. Myers*, 461 U.S. 138, 143 (1983), and "that she did not write her guest column 'pursuant to' her 'official duties,'" *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).[4] Resp. Br. at 15-16. Moreover, there is no reasonable dispute that Petitioner's speech did not *directly* address nor criticize her government employer or any *specific* University policy, but instead represented a personal religious view and opinion on a controversial public issue. Resp. Br. at 35 (tacitly conceding the point by arguing that Petitioner "*implicitly* criticized" the University's policies) (emphasis added).

Because the Sixth Circuit invoked a presumption in favor of the government as a matter of law, the court did not address the importance of the actual speech at issue and its value to society in terms of its contribution to our profound national commitment to a robust and uninhibited debate on important public issues. *N.Y. Times*, 376 U.S. at 270. Similarly, the district court failed to consider the significance of Petitioner's speech in its one-sided "balancing" of interests under *Pickering*. *See* App. 37 (providing no

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[4] Respondents' objection to Petitioner's claim that *Rose* would be decided differently today under *Garcetti*, *see* Resp. Br. at 33, is misplaced. The speech at issue in *Rose* was a memorandum prepared pursuant to the employee's official duties. *Rose*, 291 F.3d at 919. Under *Garcetti*, such speech is not protected regardless of the employee's status. *Garcetti,* 547 U.S. 421-22. Consequently, there would have been no need to extend the *Elrod-Branti* line of reasoning to create a presumption in favor of the employer in that case.

discussion or analysis as to the weight to be given to the value of Petitioner's speech).

Indeed, after addressing the disparate approaches taken by the various courts of appeals, Resp. Br. at 21-33, and thus acknowledging that the courts are not uniform in their application of the law in employee speech cases, *see, e.g., Leslie v. Hancock Cnty. Bd. of Educ.*, No. 12-13628, 2013 U.S. App. LEXIS 14123 (11th Cir. July 12, 2013) (describing "three different approaches"), Respondents conclude, *ipse dixit*, that every other circuit would have upheld the firing of Petitioner, Resp. Br. at 32 ("For all the nuance across the courts of appeals, one common thread ties them together: Dixon cannot prevail under any of their approaches."). This conclusion is not only presumptuous, but it fails to acknowledge a threshold problem: what is the weight the courts should give to Petitioner's speech, assuming that the court will even conduct a balancing test under *Pickering* in the first instance? As noted previously, based on this Court's precedent, such speech deserves the greatest protection. *Claiborne Hardware Co.*, 458 U.S. at 913. Yet, the Sixth Circuit did not bother to even weigh the value of Petitioner's speech based on the *Rose* presumption, and the district court gave Petitioner's speech <u>no</u> weight when it conducted its *Pickering* analysis—a conclusion that Respondents endorse here.

As noted, in this case Petitioner, an African-American, Christian women, was fired for expressing her personal religious beliefs and opinions in response to an op-ed that compared the gay rights movement with the civil rights movement and that explicitly criticized those who have religious objections related to

this issue. *See, e.g.,* App. 48 ("I find it confusing that people who believe in a savior who opens his arms to everyone think he'll draw those same arms shut to keep gay people away."). Petitioner's speech did not address any "policy" of her employer in the first instance—unless, of course, it is University "policy" to prohibit its employees from expressing an opinion grounded in their religious beliefs that is critical of the gay rights movement—which, unfortunately, is precisely what happened here.

In sum, the pernicious effects of the Sixth Circuit's decision are clear: Christians who hold traditional moral values and who work for the government better hold their tongues when addressing controversial issues for fear that they will be fired for expressing a viewpoint that does not comport with their government employer's prescribed opinion on the matter. The First Amendment does <u>*not*</u> countenance such a conclusion. *See, e.g., Cole v. Richardson*, 405 U.S. 676, 680 (1972) ("We have made clear that neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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