No. 12-1402

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; and 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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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?

PARTIES TO THE PROCEEDING

Respondents in this Court, defendants-appellees below, 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. The University of Toledo, which is not a party here, was an additional defendant-appellee below.

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INTRODUCTION

This case does not warrant review because the judgment below is correct, and the courts of appeals are not meaningfully divided over the question the Petitioner presents. The Petition challenges a Sixth Circuit rule "hold[ing] that where an employee is in a policymaking or confidential position and is terminated for speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." *Rose v. Stephens*, 291 F.3d 917, 922 (6th Cir. 2002) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). Although the courts of appeals articulate somewhat different approaches in these circumstances, the courts have not come to conflicting results on comparable facts. This case therefore does not present the type of concrete and consequential conflict that merits this Court's review.

First, Dixon's challenge to the *Rose* presumption fails because she makes no argument that she could prevail under traditional *Pickering* balancing. Even under such a framework, Dixon's claim falls short. Her complaint is that the University of Toledo retaliated against her because of her speech. The most she could hope for is to have a court evaluate her claim under traditional *Pickering* balancing. But the district court already did precisely that. After noting that Dixon's claim fails under the *Rose* presumption, the district court also rejected Dixon's claim under *Pickering* balancing. Having considered her arguments in favor of protecting her speech, the district court concluded that Dixon's interest in free speech was "clearly outweighed" by the University's interest in carrying out its mission effectively and efficiently. Pet. App. 39. Accordingly, there is no

reason to believe that resolving Dixon's Question Presented in her favor would change the outcome in this case.

Second, contrary to Dixon's contention, the courts of appeals are not in conflict over how to conduct *Pickering* balancing when a policy-making, confidential employee like Dixon is fired for speaking on matters of policy or politics related to her job duties. Although the courts characterize the governing analysis differently, they all come to the same end: No court of appeals has granted relief to a policy-making employee who was fired for speaking out about policies related to her job duties. This case would be an ill-suited vehicle for examining the circuits' different approaches because no circuit would grant Dixon relief.

The judgment below is correct, and no other court of appeals would come to a different conclusion. The Court should therefore deny the petition for a writ of certiorari.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2012. A petition for rehearing en banc was denied on February 27, 2013 (Pet. App. 45-46). The petition for a writ of certiorari was filed on May 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT

Petitioner Crystal Dixon was formerly employed as the interim Associate Vice President for Human Resources at the University of Toledo (UT). In that role, she implemented and enforced University policies, including UT's non-discrimination and anti-harassment policies, which included protections for gays and lesbians. Dixon wrote a guest column in the local newspaper asserting that homosexuality is a choice, that homosexuality "violate[s] God's divine order," that homosexuality is a sin, and that "those choosing the homosexual lifestyle" do not deserve civil-rights protections. Pet. App. 51-53. The University consequently terminated her employment. She alleges that she was fired in violation of the Free Speech Clause of the First Amendment. The district court granted summary judgment to the Respondent University officials, and the court of appeals affirmed.

A. Dixon's duties as a public employee included implementing and enforcing policies protecting gays and lesbians.

1. In January 2002, Crystal Dixon joined the human-resources staff at the Medical College of Ohio, a public medical school. Deposition of Crystal Dixon, R.62 at 38 (Dec. 8, 2010) ("Dixon Depo."). Four years later, the school (then called the Medical University of Ohio) merged into the University of Toledo, and in 2007 Dixon became the interim Associate Vice President for Human Resources at the merged institution. Pet. App. 4.

In that capacity, one of Dixon's most important responsibilities was "Policy Development and Application." R.64-3 at 1-2 (job description); Dixon Depo., R.62 at 51 (agreeing that the job description "accurately summarize[d]" her job duties). Specifically, she developed, implemented, and enforced policies touching on "labor and employee relations, recruiting and selection, classification and compensation, employee benefits, training and development, personnel records, regulatory compliance and employee services." R.64-3 at 1 (job description).

Dixon also had substantial authority over University personnel. The University named her an "appointing authority," meaning she had the power to hire and fire. Dixon Depo., R.62 at 46. Roughly 40 human-resources employees were subordinate to Dixon, and approximately 8 staff members reported to her directly. *Id.* at 42. She had the power to set compensation, develop training, administer benefits, and dispense discipline. *Id.* at 40, 43-45.

Dixon also served as an advisor to the President of the University of Toledo Lloyd Jacobs. She participated in what she described as regular "leadership meetings" with Jacobs and a small group of senior staff. *Id.* at 93. Likewise, Dixon developed "strategic issues and goals" that she presented to the President, and she recommended to him changes in employee salaries. *Id.* at 75-76, 106-07. By the President's reckoning, "Crystal Dixon was in a position of special trust and confidence, an advisor to me and an advisor to the trustees and an advisor to [the Vice President of Human Resources and

Campus Safety] Bill Logie." Deposition of Lloyd Jacobs, R.65 at 39 (Feb. 25, 2011) ("Jacobs Depo.").

Dixon also had a prominent public-contact role at the University, and she admitted in her deposition that she "was fairly visible in the community" as a result of her University role. Dixon Depo., R.63 at 180. She wrote articles on behalf of the University for the "UT News," a University-wide newspaper. Dixon Depo., R.62 at 48. Dixon also represented the University on "several task forces," in disciplinary hearings, in labor negotiations, in trainings for management staff, and in personnel actions "brought before the State Employment Relations Board, State Personnel Board of Review, Ohio Civil Rights Commission, Equal Employment Opportunity Commission, U.S. Department of Labor and other federal and state regulatory agencies." *Id.* at 40, 43, 45; R.64-3 at 2 (job description). As Dixon herself put it, she "serv[ed] as an ambassador to the students and the community, demonstrating the values and beliefs of the UT system." Dixon Depo., R.62 at 51.

2. During Dixon's time at the University of Toledo, she had roles in several issues regarding gay and lesbian students, faculty, and staff. Dixon was responsible for implementing and enforcing several policies that offered protections to gay and lesbian employees and students. For example, the University committed not to discriminate on the basis of "sexual orientation, gender identity and [gender] expression" in recruitment, training, hiring, and firing. *Id.* at 83-84; *see* R.64-19 (UT non-discrimination policy). The University also had an

anti-harassment policy that protected against harassment on the basis of sexual orientation, gender identity, and gender expression. Dixon Depo., R.62 at 85-86; *see* R.64-20 (UT anti-harassment policy). Dixon was responsible for enforcing both. Dixon Depo., R.62 at 84-85. The University's strategic plan and plan for diversity also embraced protections for gays and lesbians. R.64-14 at 4, 11 (strategic plan); R.64-16 at 4, 17 (diversity policy).

Dixon also advised the President on the expansion of University benefits for same-sex domestic partners. Dixon Depo., R.62 at 93. At the time the institutions merged, the University of Toledo offered domestic-partner benefits, while the Medical University of Ohio did not. *Id.* at 87-88. After the merger, there remained a disparity: Employees who previously worked at the Medical University of Ohio (now called the University of Toledo Health Sciences Campus) still did not have access to domestic-partner benefits, while other UT employees did. *Id.* at 88. Dixon discussed how to remedy the disparity with President Jacobs and other members of University "leadership." *Id.* at 88-89, 93. Dixon administered the domestic-partner benefits to those employees who were eligible for them and was "[u]ltimately" responsible, along with her direct supervisor, for "addressing the disparity and the differences in benefits packages." *Id.* at 93-94, 147, 163-64.

Finally, in November 2007 President Jacobs revived the "UT-Spectrum Safe Places" project. Jacobs Depo., R.65 at 95-98; R.64-21 (memo

regarding the project); Dixon Depo., R.62 at 86-87. The program invited faculty, staff, and students to affix a sticker on their office doors as a sign that the office was a safe space for "LGBT students or staff to ask questions, discuss problems, or seek advice." R.64-21 at 1 (memo). President Jacobs had revived the program as part of his broader "plan for diversity" for UT. Jacobs Depo., R.65 at 96.

B. Dixon was fired for publishing a column regarding the rights of gays and lesbians.

On April 4, 2008, the *Toledo Free Press* ran an opinion column by Michael Miller titled "Gay Rights and Wrongs." *See* Pet. App. 47-50 (Miller's column). The column argued in favor of expanded rights for gays and lesbians, and compared the contemporary gay civil-rights movement to the African-American civil-rights movement. Pet. App. 47-48. Miller wrote that those who oppose gay rights violate the "Golden Rule" and that legislative efforts to restrict gay rights "make[] no intellectual or moral sense to me." Pet. App. 48. Lamenting "how far behind Ohio is in gay rights," Miller mentioned that same-sex domestic-partner benefits were not offered to employees at the University of Toledo Health Sciences Campus, yet were offered to other University employees. Pet. App. 49-50.

Crystal Dixon objected to Miller's column, and wrote a response to it that was published as a guest column on the *Toledo Free Press*'s website. Pet. App. 25; *see* Pet. App. 51-53 (Dixon's guest column). Describing herself as "a Black woman who happens to be an alumnus of the University of Toledo's Graduate School, an employee and business owner,"

Dixon challenged Miller's comparison of the gay-rights and African-American civil-rights movements. Pet. App. 51. She argued that while she "cannot wake up tomorrow and not be a Black woman," gays and lesbians can choose "to leave the gay lifestyle." *Id.* She said that gays and lesbians "violate God's divine order" and called on them to change because "[t]here are consequences for each of our choices." Pet. App. 53. Finally, although she did not mention her title at the University in the column, she stated that

> The reference to the alleged benefits disparity at the University of Toledo was rather misleading. When the University of Toledo and former Medical University of Ohio merged, both entities had multiple contracts for different benefit plans at substantially different employee cost sharing levels. To suggest that homosexual employees on one campus are being denied benefits avoids the fact that ALL employees across the two campuses regardless of their sexual orientation, have different benefit plans. The university is working diligently to address this issue in a reasonable and cost-efficient manner, for all employees, not just one segment.

Pet. App. 53. Dixon did not sign the guest column with her University title, but did use her University photograph. Pet. App. 25. She neither sought nor received permission from anyone at UT before submitting the column. Dixon Depo., R.62 at 155-6.

Dixon's column sparked a strong reaction in the University community. The day it appeared, University employees—including the vice provost—voiced their objections to Dixon's immediate superior, Bill Logie. Deposition of Bill Logie, R.68 at 56 (Feb. 25, 2011) ("Logie Depo."). Logie told Dixon that there was a "long line of people in and out of his office complaining" about the article. Dixon Depo., R.62 at 158. One of Dixon's subordinates in the human-resources department wrote Logie and President Jacobs a letter "to make a formal statement" objecting to Dixon's guest column and asserting that "[b]y stating, publicly, that she feels homosexual individuals do not warrant civil rights Crystal is directly affecting her career functions." R.67-11 at 1 (Erich Stolz letter).

Three days after the newspaper published Dixon's guest column, the University of Toledo placed Dixon on paid administrative leave pending further investigation. Dixon Depo., R.63 at 168; *see* R.64-33 (notice of paid administrative leave). On May 5, President Jacobs held a pre-disciplinary hearing where Dixon had an opportunity to be heard before Jacobs took any disciplinary action. Dixon Depo., R.63 at 174. At the hearing, Dixon read and distributed a statement that explained that her faith gave her a "divine mandate" to respond to Miller's opinion column. R.64-36 at 1 (statement Dixon distributed); *see* Dixon Depo., R.63 at 176. She argued that the guest column represented only herself, not the University, and that her views do not "affect [her] service to or decisions about those practicing homosexuality." R.64-36 at 2. She also accused Bill Logie of using her guest column as a

smokescreen for terminating her employment over a personal grudge. *See* R.64-38 (statement to Jacobs regarding Logie); Dixon Depo., R.63 at 177-79. At no point in the hearing did she apologize for writing the guest column. Dixon Depo., R.63 at 180.

Three days after the pre-disciplinary hearing, President Jacobs gave Dixon notice that he found "just cause to terminate [her] employment with The University of Toledo." R.64-39 at 1 (notice of termination). The "public position" that she took in her guest column was in "direct contradiction to University policies and procedures as well as the Core Values of the Strategic Plan." *Id.* Her position "also calls into question [her] continued ability" to serve as an effective human-resources executive because the column gave others grounds to "challeng[e]" her "personnel actions or decisions." *Id.* In sum, "[t]he result is a loss of confidence in [Dixon] as an administrator." *Id.*

C. The lower courts granted summary judgment to the University officials on Dixon's free-speech retaliation claim.

In December 2008, Dixon initiated this § 1983 case against the University of Toledo, Jacobs, and Logie. She claimed that her dismissal violated the First Amendment's protections against retaliation for protected speech and the Fourteenth Amendment's equal-protection guarantee. Second Am. Compl., R.57 (Jan. 10, 2011). She did not raise a claim under the Free Exercise Clause or Title VII. The claims against the University were dropped or dismissed, and the remaining parties filed cross-motions for summary judgment. *See* R.60; R.71. (Although the

University appears on this Court's docket, it is no longer a party to the case.)

The district court granted summary judgment to the University officials. *See* Pet. App. 23-44. Having determined that Dixon spoke on a "matter of public concern" and that she did not write her guest column "pursuant to" her official duties, the district court turned to the question whether Dixon's interest in free speech outweighed the University's interests. *See* Pet. App. 31-40. On this point, the University officials presented two alternative arguments. First, relying on Sixth Circuit precedent, they argued that *Pickering* balancing favors them as a matter of law because Dixon is a policy-making and confidential public employee whose speech related to her job duties. Pet. App. 31-32 (citing *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002)). Second, the officials argued that they should prevail under *Pickering* balancing even without the benefit of *Rose*. Pet. App. 35.

The district court agreed with the University officials on both scores. It concluded that Dixon was a policy-making and confidential employee because her role as interim Associate Vice President for Human Resources empowered her with a "significant portion" of the University's "'discretionary authority with respect to the enforcement of th[e] law or the carrying out of some other policy of political concern.'" Pet. App. 32, 34 (quoting *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996)). It also concluded that her speech related to her employment: "Plaintiff stated that she did not think homosexuals were civil rights victims. Not only does

this statement directly contradict the University's policies granting homosexuals civil rights protections (such as the Equal Opportunity Policy), but as an appointing authority, Plaintiff was charged with ensuring that the University maintained those protections in employment actions." Pet. App. 34. The district court therefore held that *Pickering* favored the University as a matter of law.

The district court also engaged in traditional *Pickering* balancing. It held that Dixon's guest column could disrupt the University's effective and efficient completion of its mission in three ways: (1) it could "disrupt the Human Resources Department by making homosexual employees uncomfortable or disgruntled," (2) it could "interfere[] with the University's interest in diversity" because gays and lesbians might choose not to seek employment at UT, and (3) it could "lead to challenges to her personnel decisions" because her statements could be used in future employment litigation as direct or indirect evidence of discrimination. Pet. App. 35-37. Dixon offered several arguments in response, which the court considered in its balancing. Pet. App. 37-39.

The district court ultimately held that Dixon's interest in free speech was "clearly outweighed" by the University's interest in carrying out its mission effectively and efficiently. Pet. App. 39-40. As a result, the University officials were entitled to summary judgment. The district court also granted them summary judgment on Dixon's equal-protection claim, an issue not in controversy here. Pet. App. 40-42. The district court also noted that Dixon

"presented no evidence that Logie had any input in Jacobs' decision to terminate her" employment. Pet. App. 43.

On appeal, the Sixth Circuit affirmed. Relying exclusively on the *Rose* presumption, the panel agreed that Dixon held a "policymaking position" because she had hiring and firing power and "was responsible for recommending, implementing, and overseeing policy." Pet. App. 15-16. It also determined that her guest column touched on political or policy issues related to her University employment: The guest column "directly contradicts several . . . substantive policies instituted by the University." Pet. App. 16. In short, Dixon was a "high-level Human Resources official who wr[ote] publicly against the very policies that her government employer charge[d] her with creating, promoting, and enforcing." Pet. App. 3. Given her position and the content of her speech, the University officials acted constitutionally in firing her.

Dixon petitioned for rehearing en banc, but no judge requested a vote on the issue. Pet. App. 45-46. The court of appeals therefore denied the petition. *Id.*

REASONS FOR DENYING THE WRIT

Dixon contends that the University officials retaliated against her for exercising her free-speech rights. The courts of appeals, she further contends, are in conflict over whether *Pickering* balancing favors the public employer as a matter of law when a policy-making or confidential employee speaks on

matters of policy or politics related to her job duties. Neither of these contentions is remotely true. The courts below properly rejected Dixon's retaliation claim, citing the University's overwhelming interest in preventing its high-level employees from publicly challenging policies that they are responsible to enforce. *See* Pet. App. 3, 39-40. As for the purported conflict, although the courts of appeals have taken somewhat different approaches to analyzing free-speech claims of policy-making or confidential public employees when they speak on policy matters, the variation in approaches does not warrant this Court's intervention. Dixon provides no basis for concluding that the different approaches have yielded different results on comparable facts. Indeed, the Court has previously denied at least seven petitions involving the question Dixon asks the Court to review. *See Guthrie v. City of Scottsdale*, 547 U.S. 1148 (2006) (No. 05-1208); *Riley v. Blagojevich*, 547 U.S. 1071 (2006) (No. 05-1060); *Simasko v. St. Clair Cnty.*, 547 U.S. 1020 (2006) (No. 05-910); *Latham v. Office of the Attorney Gen.*, 546 U.S. 935 (2005) (No. 05-2); *Vargas-Harrison v. Racine Unified Sch. Dist.*, 537 U.S. 826 (2002) (No. 01-1874); *Lewis v. Cowen*, 528 U.S. 823 (1999) (No. 98-2028); *Fazio v. City & Cnty. of S.F.*, 523 U.S. 1074 (1998) (No. 97-1353). There is no reason for a different result here.

A. The court of appeals' judgment is correct.

Contrary to Dixon's contention, the court of appeals' judgment in this case is correct and fully consistent with the Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968). This

Court's precedents make clear that "'the government as employer . . . has far broader powers than does the government as sovereign.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). Indeed, until the latter half of the twentieth century, the First Amendment imposed no constraints on a public employer's authority to dismiss an employee on the basis of her speech. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967); *Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952). Although the Court has since renounced such a rule, it has nevertheless recognized that one who accepts public employment "by necessity must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 417-18 (2006).

As a result of these limitations, a plaintiff like Dixon must clear several hurdles to establish that a public employer has engaged in unconstitutional retaliation. One of these hurdles—and the only one at issue here—require Dixon to establish that she engaged in "constitutionally protected" activity. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). To do so, she must make three showings: that she spoke on a "matter of 'public concern,'" *Connick v. Myers*, 461 U.S. 138, 143 (1983); that she did not write her guest column "pursuant to" her "official duties," *Garcetti*, 547 U.S. at 421; and that her interest in free speech outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Although the University officials at this stage of the litigation do not dispute that Dixon

satisfies the first two requirements, her claim nevertheless fails because she does not satisfy *Pickering*.

The University's interest is particularly strong in the circumstances presented by this case. Although the government's interest in providing services effectively and efficiently may have limited force when it endeavors to restrict speech in its role as sovereign, that interest becomes "a significant one when it acts as employer." *Waters*, 511 U.S. at 675 (plurality opinion). Government institutions owe citizens a duty to carry out their missions effectively and efficiently, and as in any workplace, employee speech can disrupt a government employer's efforts to do so. The risk of such disruption intensifies when the employee has policy-making or confidential duties. "Public employees . . . often occupy trusted positions in society," *Garcetti*, 547 U.S. at 419, and such employees have the power to obstruct government policies, particularly when they challenge the wisdom of those policies.

Accordingly, this Court has recognized the importance of the speaker's job duties to the *Pickering* analysis. In *Pickering* itself, Mr. Pickering's role as a classroom instructor decreased the likelihood that his letter to the editor would disrupt his government employer's mission. 391 U.S. at 570. His relationships with the school board and superintendent were "not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id*. Given that reality and given the content of the statements

at issue, Mr. Pickering's statements were protected. At the same time, the Court suggested that the same statements made by an employee with a different role in the institutional hierarchy could justify dismissal. *See id.* at 570 n.3 (Where the "relationship between superior and subordinate" is sufficiently "personal and intimate," the subordinate's "public criticism of the superior" may provide permissible grounds for dismissal.); *see Connick*, 461 U.S. at 151-52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

The Court again addressed the importance of a public employee's job duties in *Rankin v. McPherson*, 483 U.S. 378 (1987). There a clerical employee, upon learning of an attempt on President Reagan's life, remarked, "If they go for him again, I hope they get him." *Id.* at 380. The Court placed principal reliance on her role as a clerical employee, holding that where "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390-91. The employee's speech was therefore protected.

Pickering and *Rankin* show the importance of an employee's status as a policy-making or confidential employee to the *Pickering* analysis. Speech is more likely to disrupt a government employer when the speaker's job involves "personal loyalty and confidence," *Pickering*, 391 U.S. at 570, and where the speaker serves a "confidential,

policymaking, or public contact role," *Rankin*, 483 U.S. at 390-91.

Applying these principles to the case at hand, it is beyond dispute that the Sixth Circuit's judgment is correct. Dixon does not dispute that she occupied a policy-making, confidential, and public contact role at the University of Toledo. In fact, her testimony confirms it. She agreed that a job description for (permanent) Associate Vice President for Human Resources "accurately summarize[d]" her job duties, and that job description listed her most important job responsibility as "Policy Development and Application." Dixon Depo., R.62 at 51; R.64-3 at 1-2 (job description). As for being a confidential employee, Dixon testified that she advised the University President on a broad range of issues and participated in regular "leadership meetings" with President Jacobs and senior staff. Dixon Depo., R.62 at 75-76, 89-93; 106-07. Dixon also agreed that she "was fairly visible in the community" and that she "serv[ed] as an ambassador to the students and the community, demonstrating the values and beliefs of the UT system." *Id.* at 51; R.63 at 180. In short, Dixon was a policy-making and confidential employee with substantial public visibility.

In that role, Dixon was responsible for managing several issues involving the rights of gays and lesbians. Broadly, she bore responsibility to implement the University's strategic plan, which included "[c]reat[ing] an environment that values and fosters diversity" and "recruit[ing], retain[ing] and celebrat[ing] a diverse university community" that defines "diversity in all its dimensions." Dixon

Depo., R.62 at 73-74; R.64-14 at 4, 11 (strategic plan). She also enforced the University's non-discrimination and anti-harassment policies, both of which provided protections for gays and lesbians. Dixon Depo., R.62 at 83-86; *see* R.64-19 (non-discrimination policy); R.64-20 (anti-harassment policy). She advised the President regarding the disparity of same-sex domestic-partner benefits across different campuses of the University. Dixon Depo., R.62 at 87-93. And she was aware of President Jacobs' effort to revive the "UT-Spectrum Safe Places" project, an initiative meant to make gay and lesbian faculty, students, and staff feel more comfortable on campus. *Id.* at 86-87.

Dixon nevertheless spoke out on matters that directly related to these employment duties. Her guest column asserted that homosexuality is a choice; that gays and lesbians should choose to "leave the gay lifestyle"; that homosexuality "violate[s] God's divine order"; that homosexuality is a "sin"; and that "[t]here are consequences for each of our choices." Pet. App. 51-53. And she denounced "the notion that those choosing the homosexual lifestyle are 'civil rights victims.'" Pet. App. 51. The record unambiguously shows that her comments caused disruption at the University and that University officials had reasonable grounds to fear further disruption. *See* Dixon Depo., R.62 at 158; Jacobs Depo., R.65 at 62-63, 120-21, 129-30; Logie Depo., R.68 at 46, 56, 77-78; R.67-11 (letter from university employee to Jacobs and Logie). In light of all these facts, Dixon could not possibly prevail under *Pickering* balancing.

Put simply, the University did not need the benefit of the *Rose* presumption to prevail in this case. When a high-level public executive charged with enforcing the civil rights of gays and lesbians tells the world that "those choosing the homosexual lifestyle" do not deserve civil-rights protections, Pet. App. 51, the *Rose* presumption does no work. Every court of appeals would have concluded that Dixon's speech is unprotected. The Sixth Circuit's use of *Rose* here is best viewed merely as an application of *Pickering*, because on these facts there is no daylight between the *Rose* presumption and traditional *Pickering* balancing. Any doubt on this matter is dispelled by the fact that the district court thoroughly analyzed these facts and held that traditional *Pickering* balancing favored the University. *See* Pet. App. 35-40.

Tellingly—and fatal to her cert petition—Dixon makes no effort to show that the district court got the *Pickering* analysis wrong. Instead, she asks this Court to establish a presumption that no court has *ever* adopted—a presumption that definitively strikes the *Pickering* balance in favor of the *employee* in these circumstances. *See* Pet. 5 ("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."); Pet. ii (Question Presented asking this Court to establish "a presumption . . . in favor of protecting the free speech interests of a government employee").

In support of her novel presumption, Dixon cites no case that has ever adopted such a rule, because no

such case exists. Instead she invokes broad principles of First Amendment law, without ever explaining how *Pickering* and its progeny support her new creation. Pet. 16-17 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Stromberg v. California*, 283 U.S. 359 (1931)). At bottom, Dixon does not contend that she should prevail under this Court's precedents, but instead asks the Court to create a new presumption. That claim warrants no further review.

Finally, even if Dixon had a colorable claim under traditional *Pickering* balancing (and she does not), this case would still be an ill-suited vehicle for review. The University officials raised a qualified-immunity defense before both the district court and the court of appeals. Because neither court found a constitutional violation, neither court considered the second prong of qualified immunity. *See* Pet. App. 22 (court of appeals); Pet. App. 42 (district court). Yet if this Court granted review and struck down the *Rose* presumption, the University officials would still deserve qualified immunity on Dixon's damages claims because the officials did not violate clearly established law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That posture makes this case a particularly poor candidate for review.

B. Dixon has not identified any meaningful conflict across the courts of appeals.

Dixon also contends (Pet. i) that the Court should grant review to resolve what she perceives to be a circuit split regarding whether *Pickering* balancing favors the public employer as a matter of

law when a policy-making or confidential employee engages in speech on matters of policy or politics related to her job duties. There is no disagreement concerning the principles applicable to cases like this one, nor is there a conflict in results.

In addition to its free-speech retaliation cases, the Court has also recognized in a separate line of cases that the government has an interest in guaranteeing that the policies "sanctioned by the electorate" will not be "undercut" by disloyal employees. *Elrod v. Burns*, 427 U.S. 347, 367 (1976) (plurality opinion). Although patronage dismissals based on political affiliation ordinarily violate the First Amendment, the Court has created an exception providing that public employees may be terminated from employment based on political affiliation if "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). *Elrod* and *Branti* permit government employers to dismiss policy-making and confidential employees based merely on their affiliation. No speech is necessary.

Understandably, some courts of appeals have held that *Pickering* balancing favors public employers as a matter of law when a policy-making or confidential employee—an employee that *Elrod* and *Branti* would allow to be fired for mere association—engages in speech related to her employment. *E.g.*, *Rose*, 291 F.3d at 922. This rule rests on common sense. If the Constitution permits a government employer to fire a subordinate who

belongs to the wrong political party, even if the subordinate has created no friction or particularized reason to fear future friction, then surely the First Amendment permits the employer to fire the same subordinate when she engages in speech challenging the employer's policies. Otherwise an obstreperous employee would have more constitutional protection than a silent one.

Even if that logic is incorrect, however, the Court need not take sides now, because Dixon's purported split has never caused differing results on comparable facts. All courts agree that a speaker's status as a policy-making or confidential employee weighs heavily in the *Pickering* balance. While some courts state that such a status is determinative, even the courts that have rejected this *per se* rule have never granted relief to a policy-making employee who was terminated from her employment for speaking out about policies related to her job duties. Perhaps most importantly to the question at hand, there is not a single court of appeals that would have found the termination of Dixon's employment unconstitutional.

1. The judgment below is not in meaningful conflict with the courts of appeals that have adopted the most employee-friendly framework.

In a telltale sign that her purported split is illusory, Dixon nowhere explains what she sees as the lines of disagreement among the courts of appeals. She does not portray courts as being on one side of a "split" or the other and instead offers only brief quotations without any context or

characterization. *See* Pet. 12-16. So some classification is in order. As the following discussion will reveal, three courts of appeals have adopted the *Rose* presumption (First, Sixth, and Seventh Circuits), two have rejected it (Second and Eighth Circuits), one has adopted a rule that is even more employer-friendly than the *Rose* presumption (Ninth Circuit), and six circuits have neither adopted nor rejected the *Rose* presumption (Third, Fourth, Fifth, Tenth, Eleventh, and DC Circuits). Dixon's purported split would deserve review only if she could show that she would prevail in the court that has adopted the most employee-friendly stance on this issue. Accordingly, a proper beginning point is comparing the Sixth Circuit with the two courts that have rejected the *Rose* presumption.

The court below relied on circuit precedent "hold[ing] that where an employee is in a policymaking or confidential position and is terminated for speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." *Rose*, 291 F.3d at 922. Two other courts of appeals have adopted the same rule. *See Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 971 (7th Cir. 2001) ("[T]he First Amendment does not prohibit the discharge of a policy-making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies."); *Foote v. Town of Bedford*, 642 F.3d 80, 84 (1st Cir. 2011) (adopting the *Rose* and *Vargas-Harrison* rule where "a policymaker, by espousing contrary views, openly undermines the appointing

authority's interest in ensuring that its policies will be implemented").

Although the disagreement is marginal, the courts that most starkly disagree with the Sixth Circuit are the Second and Eighth Circuits. Those courts have rejected the argument "that a dispositive policymaker exception . . . exists in the *Pickering* context." *McEvoy v. Spencer*, 124 F.3d 92, 102 (2d Cir. 1997). The Eighth Circuit has likewise "decline[d] to follow all aspects of *Rose*." *Hinshaw v. Smith*, 436 F.3d 997, 1006 (8th Cir. 2006).

Notably, however, both the Second and Eighth Circuits accept that "the policymaking status of the discharged or demoted employee is *very significant* in the *Pickering* balance, but not conclusive." *McEvoy*, 124 F.3d at 103 (emphasis added); *see also Lewis v. Cowen*, 165 F.3d 154, 165 (2d Cir. 1999) ("[A] public employer's interests in running an effective and efficient office are given the utmost weight where a high-level subordinate insists on vocally and publicly criticizing the policies of his employer."). The Eighth Circuit agrees that an "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." *Hinshaw*, 436 F.3d at 1007. Even though these courts reject the *Rose* presumption, the Second Circuit has conceded that, as a practical matter, the *Rose* presumption and traditional *Pickering* balancing may come to the same end in all cases: "where the employee holds an extremely confidential or highly placed advisory position, it

would be unlikely if the *Pickering* balance were to be struck in his favor." *McEvoy*, 124 F.3d at 103.

Even though the Second and Eighth Circuits represent the greatest disagreement with Rose, they cannot be said to be in meaningful conflict with the Sixth Circuit. Dixon identifies no case from those circuits that would come out differently in the Sixth Circuit (or vice versa). More fundamentally, the Second and Eighth Circuits have never granted relief to a policy-making or confidential employee who was terminated from her employment for speaking on a policy issue related to her job duties.

The Second Circuit's decision in *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225 (2d Cir. 2003), is not to the contrary. *Catletti* involved a prison administrator charged with "develop[ing] prison policy" who was fired after offering truthful testimony in other litigation. *Id.* at 227. The Second Circuit denied qualified immunity to the public employers, but apparently not on any ground that divides that court from the Sixth Circuit. In the other litigation, Catletti testified about the County Executive's role in the termination of two nurses' employment. *Id.* The next month, the County Sheriff fired Catletti. *Id.* When Catletti sued various county officials, the Second Circuit denied qualified immunity because "[e]ven if Catletti is considered a policymaker . . . [the defendants] have presented no evidence of disruption or even potential disruption." *Id.* at 231. A showing of disruption was necessary because Catletti did not take a position on policy contrary to his *employer*. Instead, Catletti testified against one official who did not have the

authority to fire him (the County Executive) and was subsequently fired by a different official (the County Sheriff). That fact pattern takes the case outside the scope of *Rose* and thus presents no conflict. *See Rose*, 291 F.3d at 923 ("In short, the rule we adopt today simply recognizes the fact that it is insubordination for an employee whose position requires loyalty to speak on job-related issues in a manner *contrary to the position of his employer*. . . . In *this* situation an individualized balancing of interests is unnecessary." (emphases added)).

Nor does *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007), create a circuit split. In that free-speech retaliation case, the court of appeals denied qualified immunity to city officials who fired the city's public works director for accusing the city council of violating state open-meetings law. *Id.* at 896-97, 903. But *Lindsey* does not implicate Dixon's alleged split because the plaintiff did not speak about policy issues related to his employment. Lindsey's "job duties included park, water, sewer, and street maintenance," as well as employee supervision, and the record in the case contained "no evidence Lindsey's job duties even arguably included sunshine law compliance." *Id.* at 898. He therefore did not speak about policy matters related to his employment, and *Lindsey* is not in conflict with *Rose*.

At bottom, the Second and Eighth Circuits have never decided a case that would have come out differently in the First, Sixth, or Seventh Circuits. At most, these courts allow the possibility of a theoretical case where the *Rose* presumption makes a difference. Because this is not such a case, and

because such a case has never otherwise come to pass, Dixon's split likewise is theoretical.

2. The other courts of appeals either have adopted more employer-friendly frameworks than the Sixth Circuit or have not taken sides in Dixon's purported split.

Given that the difference between the courts adopting the *Rose* presumption and the courts rejecting it has never had an identifiable effect on the outcome of any case, that should be the end of the matter. Dixon, however, lists decisions from several other courts of appeals, so completeness counsels reviewing how the other circuits treat this question.

The only other court of appeals to weigh in on the question is the Ninth Circuit, which has adopted an even more employer-protective rule than the Sixth Circuit. In that court, "an employee's status as a policymaking or confidential employee [is] dispositive of *any* First Amendment retaliation claim." *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994-95 (9th Cir. 1999) (emphasis added); *see also Fazio v. City & Cnty. of S.F.*, 125 F.3d 1328, 1332 (9th Cir. 1997). The Ninth Circuit does not consider whether the employee spoke on a matter of policy, but instead determines the *Pickering* balance solely on the employee's position. The Sixth Circuit has rejected the "broader position of the Ninth Circuit" because "it is possible to conceive of situations where the government might terminate an employee for speech completely unrelated to the working relationship and thus would lack the justification

that the speech impacted the efficient operation of the office." *Rose*, 291 F.3d at 923 n.3. That disagreement does not help Dixon's efforts here, however, because both the Sixth and Ninth Circuits would rule for the University as a matter of law on these facts.

The remainder of the courts of appeals have neither adopted nor rejected the *Rose* presumption. Three courts have expressly declined to take sides in the debate, and in three courts the state of the law remains unclear.

The Eleventh, Third, and DC Circuits have chosen not to take sides in the *Rose* debate. We know that the Eleventh Circuit has not taken a position because it just said so: "Neither the Supreme Court, this Court, nor the Supreme Court of Georgia has answered the question whether the *Pickering* balance of interests favors the government employer when an employee who serves in a policymaking or confidential role can be dismissed based on political affiliation or belief." *Leslie v. Hancock Cnty. Bd. of Educ.*, __ F.3d __, No. 12-13628, 2013 U.S. App. LEXIS 14123, at *16 (11th Cir. July 12, 2013). In *Leslie*, the court disposed of the claim on qualified-immunity grounds, without addressing the merits of the underlying constitutional claim. *Id.* at *23, *31. Although Dixon cites *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), as rejecting the *Rose* presumption (Pet. 15), *Leslie* shows that *Stough* did no such thing. The recent decision emphasized that *Stough* involved an employee who did *not* hold a policy-making or confidential position. *Leslie*, 2013 U.S. App. LEXIS

14123, at *17-18 (citing *Stough*, 967 F.2d at 1526-29). The Eleventh Circuit thus concluded that to date it has "not decided the effect on the *Pickering* balance when an employee is a policymaking or confidential employee." *Id.* at *17.

The Third Circuit, contrary to Dixon's representations (Pet. 13), likewise remains on the fence. That court has said that "[n]ot only the [*Pickering*] balancing, but the outcome as well, *may* be inevitable because the public employer's interest may weigh so heavily that no other outcome is possible." *Curinga v. City of Clairton*, 357 F.3d 305, 312 (3d Cir. 2004) (emphasis added). *Curinga* reserved the question, however, stating that "[w]hether or not this can be decided as a matter of law, the government's interest in these kinds of cases is likely dispositive." *Id.* at 312 n.5 (citing *Rose*, 291 F.3d at 921). The Third Circuit, therefore, cannot be said to conflict with the decision below.

Dixon does not mention the DC Circuit, but that court too appears to remain undecided. In *Hall v. Ford*, 856 F.2d 255 (DC Cir. 1988), the court affirmed a 12(b)(6) dismissal where the plaintiff was a "policy level employee" who spoke contrary to his employer's views regarding how "policies should have been formulated and implemented." *Id.* at 264-65. The court invoked *Elrod* and *Branti*, did not consider the employee's interest in free speech, and sided with the employer, *id.*, all of which hints at a *Rose*-like *per se* rule. Like the Third Circuit, the DC Circuit thus seems to favor adopting *Rose*, but given that neither *Hall* nor any other DC Circuit case in the ensuing 25 years explicitly adopts or rejects a rule like the *Rose*

presumption, the court is best characterized as undecided.

Turning then to the three courts where the state of the law is unknown: The Tenth Circuit has not decided a case with facts equivalent to those involved here. Dixon accurately identifies (Pet. 14-15) the closest case, *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), but that case must be viewed as one analytic step away from this one. In *Barker*, the plaintiff-employee spoke on a matter "*unrelated* to her politics or substantive policy positions." *Id.* at 1139 (emphasis added); *see also id.* ("[T]he policymaking exception does not apply and courts must apply *Pickering* balancing when the speech at issue *does not* implicate the employee's politics or substantive policy viewpoints." (emphasis added)). *Barker*, in short, eschews a *per se* rule when the employee does *not* speak on a matter of policy. It says nothing, however, about whether it would apply a *per se* rule when the employee *does* speak on a matter of policy. It thus says nothing about the issue presented here.

The Fourth Circuit is also best classified as "unknown." Dixon correctly identifies (Pet. 13-14) that nearly two decades ago the court endorsed the "more open-ended inquiry prescribed by *Pickering*" when a public employee is discharged for "'political' speech or expression." *Jones v. Dodson*, 727 F.2d 1329, 1334 n.6 (4th Cir. 1984). But the *en banc* Fourth Circuit has overruled *Jones* at least in part, citing its misunderstanding of *Elrod* and *Branti*. *Jenkins v. Medford*, 119 F.3d 1156, 1164-65 (4th Cir. 1997) (en banc). Since *Jenkins*, the Fourth Circuit

has not clarified how that court analyzes a free-speech retaliation claim when a policy-making employee speaks on a policy issue related to her job. That uncertainty means the court cannot fairly be considered in conflict with either the courts adopting the *Rose* presumption or the courts rejecting it.

Finally, Dixon does not mention the Fifth Circuit, but the state of the law in that court also seems to be uncertain. In the leading case, a school superintendent was fired after an election changed the makeup of the school board. *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 990 (5th Cir. 1992) (en banc) (plurality opinion). A plurality of the en banc court affirmed the district court's order granting judgment notwithstanding a jury verdict in favor of the former superintendent, noting that "policymaking or confidential employees' First Amendment rights are more easily outweighed" by government employers' interests. *Id.* at 994. That statement does not clearly take sides in the *Rose* debate, and two additional ambiguities complicate any effort to interpret the statement. First, the court noted that the plaintiff raised a hybrid speech-association claim, and therefore the analysis was "distinct[]" from "cases involving only speech." *Id.* at 992. Second, the plurality's statement on this score did not command a majority of the court, and the Fifth Circuit has not squarely adopted or rejected a rule like the *Rose* presumption since then.

For all the nuance across the courts of appeals, one common thread ties them together: Dixon cannot prevail under any of their approaches.

Accordingly, her claim provides no basis for granting review in this case.

3. Dixon's other arguments in favor of review lack merit.

Dixon also seeks this Court's review (Pet. 11) on the ground that *Rose* and a successor Sixth Circuit case, *Latham v. Office of the Attorney General*, 395 F.3d 261 (6th Cir. 2005), "would be analyzed differently today in light of *Garcetti*." Dixon is wrong that *Garcetti* implicitly overruled *Rose* and *Latham*. Any argument that *Garcetti* somehow affects this case also bumps heads with Dixon's acknowledgment that her guest column "was not written or published pursuant to any of her official duties." Pet. 7 n.6. What is more, the only post-*Garcetti* decision that Dixon cites *adopted* the *Rose* presumption, indicating that *Garcetti* did not undercut *Rose*. *See Foote*, 642 F.3d at 84. Finally, even assuming for the sake of argument that *Garcetti* overruled *Rose*, it is an argument *against*—not in favor of—certiorari. Arguing that *Rose* no longer represents Sixth Circuit law undercuts her argument that *Rose* conflicts with cases from other circuits.

Dixon also complains (Pet. 18-19) that President Jacobs wrote to the *Toledo Free Press* in response to Dixon's guest column and that the University did not discipline him for doing so. *See* Pet. App. 54-56 (Jacobs's letter). The differential treatment, she alleges, shows that her letter caused "no harm to the University's legitimate interests." Pet. 19. For starters, this objection that her employer treated a similarly situated individual differently than it treated her amounts to an equal-protection

argument. But Dixon forfeited her Fourteenth Amendment claim by failing to raise it here. More to the point, President Jacobs's response was written "pursuant to" his official duties, *see Garcetti*, 547 U.S. at 421, and comported with, rather than contradicted, his public employer's policies. These two differences set Jacobs's letter apart from Dixon's guest column.

Next, Dixon contends that the First Amendment should protect her speech because her guest column did "not directly address nor criticize" the University of Toledo nor "any specific policy" of the University. Pet. 6. As the Sixth Circuit noted, "Dixon correctly contends that she never explicitly stated that the University diversity policies should not extend to LGBT students and employees." Pet. App. 17. Yet the "implication" of her column was "clear"—Dixon does not believe government institutions should offer protections to gays and lesbians "even though the University, in part through the Human Resources Department, expressly provides them." *Id.* The implication of Dixon's column—and the attendant disruption at the University—cannot be reasoned away by saying that she did not explicitly mention the University's particular policies.

Relatedly, Dixon emphasizes that "[s]he was not speaking on behalf of her employer (and nowhere indicated that she was)." Pet. 17. Dixon's point would be relevant in a *Garcetti* case, but this is a *Pickering* case. The outcome therefore does not turn on whether Dixon spoke "pursuant to" her official duties. *Garcetti*, 547 U.S. at 421. The outcome instead turns on whether her speech *as a private*

citizen nevertheless harmed the University's efforts to carry out its mission. *See Pickering*, 391 U.S. at 568 (balancing the interests of the State and the "interests of the [employee], as a *citizen*" (emphasis added)). Because the University's interest "clearly outweighed" Dixon's in this case, Pet. App. 39, the judgment below is correct.

Finally, Dixon offers an appeal to consequences, arguing that the University of Toledo has "effectively disqualified Christians (certainly those who publicly profess their faith) from holding managerial positions at the University." Pet. 8. The accusation is plainly wrong. The very policies that Dixon implicitly criticized—the University's diversity, equal opportunity, and anti-harassment policies—all pledge to protect faculty, staff, and students on the basis of religion. *See* R.64-16 at 4, 17 (diversity policy); R.64-19 at 1-2 (equal opportunity policy); R.64-20 at 1 (anti-harassment policy). Moreover, the University did not terminate Dixon's employment because of her religion (a point proven by the fact that she raised no free-exercise or Title VII claim). It terminated her employment because her speech challenged policies she was charged with implementing and enforcing. Because any court of appeals would have concluded that the University of Toledo acted constitutionally, the Court should deny review.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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