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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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

[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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APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-3218

[Filed December 17, 2012]

CRYSTAL DIXON, *Plaintiff-Appellant*,	)
v.	)
UNIVERSITY OF TOLEDO, *Defendant*,	)
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, *Defendants-Appellees.*	)

App. 2

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 3:08-cv-2806—David A. Katz, District Judge.

Argued: December 5, 2012

Decided and Filed: December 17, 2012

Before: MOORE, GILMAN, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Robert Joseph Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellant. Elizabeth M. Stanton, TAFT STETTINIIUS & HOLLISTER, LLP, Columbus, Ohio, for Appellees. **ON BRIEF:** Robert Joseph Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, Erin Elizabeth Mersino, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, James R. Acho, CUMMINGS, McCLOREY, DAVIS & ACHO, Livonia, Michigan, Thomas A. Sobecki, Toledo, Ohio, for Appellant. Elizabeth M. Stanton, Sarah D. Morrison, Donald C. Brey, TAFT STETTINIIUS & HOLLISTER, LLP, Columbus, Ohio, for Appellees.

OPINION

KAREN NELSON MOORE, Circuit Judge. In 2008, Plaintiff-Appellant Crystal Dixon, an African-American woman and then-interim Associate Vice President for Human Resources at the University of Toledo (the "University"), wrote an op-ed column in the *Toledo Free Press* rebuking comparisons drawn between the civil-rights and gay-rights movements. Shortly thereafter, Dixon was fired. Claiming violations of her First and Fourteenth Amendment rights, Dixon subsequently filed a § 1983 suit against the University and Defendants-Appellees University President Lloyd Jacobs and University Vice President for Human Resources and Campus Safety William Logie (collectively, "the defendants"). The district court granted summary judgment to the defendants on all claims, and Dixon appeals.

The issues raised in this appeal turn primarily on the resolution of a narrow inquiry: whether the speech of a high-level Human Resources official who writes publicly against the very policies that her government employer charges her with creating, promoting, and enforcing is protected. We conclude that, given the nature of her position, Dixon did not engage in protected speech. We therefore **AFFIRM** the judgment of the district court.

I. BACKGROUND

Dixon began her career at the University in January 2002. R. 71-4 (Dixon Tr. at 37:8–38:10) (Page ID #1396). At this time, she was recruited by Logie to become the Administrative Director of Employee Relations at the Medical College of Ohio (the "College"). *Id.* On July 1, 2006, the College merged with the University, and Dixon was promoted to Associate Vice President for Human Resources for the Health Sciences Campus. *Id.* 65:2–9 (Page ID #1401). In July 2007, Dixon was promoted to interim Associate Vice President for Human Resources for both campuses, the position she held until she was terminated on May 8, 2008. *Id.* 66:6–14; R. 60-13 (Termination Letter) (Page ID #521).

On April 4, 2008, Michael Miller, Editor-in-Chief of the *Toledo Free Press*, wrote an editorial titled "Gay rights and wrongs." R. 60-7 (Miller Editorial at 1) (Page ID #501). In this piece, Miller implicitly compared the civil-rights movement with the gay-rights movement: "As a middle-aged, overweight white guy with graying facial hair, I am America's ruling demographic, so the gay rights struggle is something I experience secondhand, like my black friends' struggles and my wheelchair-bound friend's struggles." *Id.* Miller then focused on a purported denial of healthcare benefits to same-sex couples at the University, explaining that "[w]hen [the College and the University] merged, [University] employees retained the domestic-partner benefits, but [College] employees were not offered them. So, people working for the same employer do not have access to the same benefits." *Id.* at 2 (Page ID #502).

On April 18, 2008, Dixon responded to Miller with her op-ed column "Gay rights and wrongs: another perspective." R. 60-9 (Dixon Op-Ed at 1–2) (Page ID #507–08). Dixon addressed both points highlighted above, but did not identify her official position at the University. *Id.* Dixon first rejected the comparison made by Miller between the gay-rights and civil-rights movements:

> As a Black woman who happens to be an alumnus of the University of Toledo's Graduate School, an employee and business owner, I take great umbrage at the notion that those choosing the homosexual lifestyle are "civil rights victims." Here's why. I cannot wake up tomorrow and not be a Black woman. I am genetically and biologically a Black woman and very pleased to be so as my Creator intended. Daily, thousands of homosexuals make a life decision to leave the gay lifestyle evidenced by the growing population of PFOX (Parents and Friends of Ex Gays) and Exodus International just to name a few. . . .

Id. at 1 (Page ID #507). Additionally, Dixon addressed Miller's discussion of the healthcare benefits system at the University:

> 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.

Id.

On April 21, 2008, as a result of her op-ed column, Dixon received a letter placing her on paid administrative leave. R. 60-12 (Administrative Leave Letter at 1–2) (Page ID #518–19). On May 4, 2008, Jacobs wrote a guest column in the *Toledo Free Press* responding to Dixon's op-ed column. R. 60-11 (Jacobs Op-Ed) (Page ID #515). Jacobs stated that "[a]lthough I recognize it is common knowledge that 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." *Id.* Jacobs then explained the various programs instituted at the University aimed at expanding and supporting diversity on campus. *Id.*

A hearing was held on May 5, 2008, at which Dixon read a prepared statement reiterating the beliefs stated in her op-ed column, expressing her view that she had been speaking as a private citizen, and accusing the University of treating her differently than other

employees. R. 71-4 (Dixon Dep. 174:1–18) (Page ID #1416); R. 71-8, Ex. KK (Dixon Prepared Statement at 1–3) (Page ID #1530–32). Dixon also asserted that her personal views did not affect her performance as Associate Vice President of Human Resources:

> If the University is taking the Herculean leap to assume that my convictions affect my service to or decisions about those practicing homosexuality, please consider this: it is commonly believed/perceived that there are one, possibly two practicing homosexuals in the Human Resources Department. I hired both of them (one last year and one earlier this year)! I hired both of them with the perception that while they may be homosexual, more importantly they were competent, motivated and simply the best candidates for the jobs. One individual, I actually hired this year *after* observing a questionable exchange between he and his male roommate in the parking lot one day. . . .

R. 71-8, Ex. KK (Dixon Prepared Statement at 2) (Page ID #1531).

On May 8, 2008, Dixon received a letter from Jacobs terminating her from the position of Associate Vice President for Human Resources for the following reasons:

> The public position you have taken in the Toledo Free Press is in direct contradiction to University policies and procedures as well as the Core Values of the Strategic Plan which is

> mission critical. Your position also calls into question your continued ability to lead a critical function within the Administration as personnel actions or decisions taken in your capacity as Associate Vice President for Human Resources could be challenged or placed at risk. The result is a loss of confidence in you as an administrator.

R. 60-13 (Termination Letter) (Page ID #521).

On December 1, 2008, Dixon filed suit in the U.S. District Court for the Northern District of Ohio against the University, Jacobs, and Logie. R. 1 (Compl.) (Page ID #1). The parties stipulated to dismiss Dixon's Equal Pay Act claim, and thus the University, from this case on January 7, 2011. R. 55 (Order at 1) (Page ID #374). On April 29, 2011, Dixon filed a motion for summary judgment, and the remaining defendants cross-moved for summary judgment in response. R. 60 (Pl.'s Mot. for Summ. J.) (Page ID #407); R. 71 (Defs.' Mot. for Summ. J.) (Page ID #1321). The district court granted the defendants' motion, and Dixon appealed. *Dixon v. University of Toledo*, 842 F. Supp. 2d 1044 (N.D. Ohio 2012).

II. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment. *Int'l Union v. Cummins, Inc.*, 434 F.3d 478, 483 (6th Cir. 2006). We review the evidence and draw all inferences in the light most favorable to the nonmoving party. *Id.* "[O]n cross-motions for summary judgment, the court must evaluate each party's motion on its own merits, taking care in each

instance to draw all reasonable inferences against the party whose motion is under consideration." *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 592 (6th Cir. 2001) (internal quotation marks omitted). Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III. CONSTITUTIONAL CLAIMS

Dixon appeals the district court order granting summary judgment to the defendants on her First Amendment retaliation claim and her equal-protection claim, as well as the district court's determination that the defendants are entitled to qualified immunity. Dixon argues that the district court erred in its First Amendment retaliation analysis, contending that the defendants "violated [her] right to freedom of speech by terminating her employment because she authored an opinion piece in a local newspaper in which she expressed her *personal* opinion and viewpoint on the issue of homosexuality and civil rights from the perspective of a Christian, African-American woman." Appellant Br. at 15. Dixon further asserts that the district court misapprehended the equal-protection standard, arguing that "when government officials engage in discriminatory treatment based on the exercise of the fundamental right to freedom of speech they violate not only the First Amendment, but they also violate the equal protection guarantee of the Fourteenth Amendment." *Id.* at 34–35.

A. First Amendment Retaliation

First Amendment retaliation claims are analyzed under a burden-shifting framework. A plaintiff must first make a prima facie case of retaliation, which comprises the following elements: "(1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006). If the employee establishes a prima facie case, the burden then shifts to the employer to demonstrate "by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct." *Eckerman v. Tenn. Dep't of Safety*, 636 F.3d 202, 208 (6th Cir. 2010) (internal quotation marks omitted).

Only the first element, whether the speech was protected, is at issue on appeal.[1] "[W]e have consistently described the question of whether, in a First Amendment retaliation action, a public employee's speech is protected as one of law, not one of both fact and law." *Fox v. Traverse City Area Public Schs. Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010); *see also Westmoreland v. Sutherland*, 662 F.3d 714, 718

[1] Termination is an adverse employment action, and it is clear that Dixon was terminated because of her speech. *See v. City of Elyria*, 502 F.3d 484, 494 (6th Cir. 2007) (concluding that, when terminated, "See undeniably suffered an adverse action").

(6th Cir. 2011) ("There being no factual dispute regarding what was said, this court treats the question of whether a public employee's speech is protected as a question of law.").

In order to establish that her speech was protected, Dixon must first show that the speech touched on a matter of public concern. *Scarbrough*, 470 F.3d at 255 (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983)). Dixon must then show that under the *Pickering* balancing test, her "free speech interests outweigh the efficiency interests of the government as employer." *Id.* (internal quotation marks omitted) (relying on *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). Finally, Dixon must demonstrate that the speech was not made pursuant to her official duties as Associate Vice President of Human Resources, a causation issue established in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In sum, Dixon "must satisfy *each* of these requirements: the *Connick* 'matter of public concern' requirement, the *Pickering* 'balancing' requirement and the *Garcetti* 'pursuant to' requirement." *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 338 (6th Cir. 2010).

Because the parties do not dispute that Dixon spoke on a matter of public concern, we turn to whether Dixon satisfies the *Pickering* requirement. The defendants argue that Dixon's speech falls into the presumption set forth in *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002). If this presumption applies, then Dixon's speech is not protected as a matter of law. Alternatively, the defendants argue that under the traditional *Pickering* balancing test, the balance of interests weighs in favor of the defendants rather than

Dixon. The district court addressed both issues, concluding that the presumption applied to Dixon and that "the balance of [Dixon's] interest in making a comment of public concern is clearly outweighed by the University's interest as her employer in carrying out its own objectives." *Dixon*, 842 F. Supp. 2d at 1051, 1053.

The *Rose* presumption dictates 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. Therefore, in order for the presumption to apply, Dixon must (1) hold a confidential or policymaking position, and (2) have spoken on a matter related to political or policy views. *See Silberstein v. City of Dayton*, 440 F.3d 306, 319 (6th Cir. 2006) ("Thus, if Silberstein occupied a policymaking position as Assistant Chief Examiner, and if her letter to the editor related to her policy views, then her free speech interests presumptively lose out to the city of Dayton's interests in efficiently running its government."). An application of this presumption "renders the fact-intensive inquiry normally required by *Pickering* unnecessary because under these circumstances it is appropriate to presume that the government's interest in efficiency will predominate." *Rose*, 291 F.3d at 923.

Although there is no clear line drawn between policymaking and non-policymaking positions, we have previously outlined the following four categories of individuals to whom the *Rose* presumption will always apply:

> "**Category One:** positions specifically named in relevant federal, state, county, or municipal 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;
>
> **Category Two**: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;
>
> **Category Three:** confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors; and
>
> **Category Four:** positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies."

Latham v. Office of Attorney Gen. of Ohio, 395 F.3d 261, 267 (6th Cir. 2005) (quoting McCloud v. Testa, 97 F.3d 1536, 1557–58 (6th Cir. 1996)). "In determining

whether an employee falls into one of these categories, we must examine the inherent duties of the position, rather than the actual tasks undertaken by the employee." *Id.* "While the inherent duties of the position are not necessarily those that appear in the written job description and authorizing statute, such descriptions can be instructive." *Id.* (internal quotation marks omitted).

The district court determined that as Associate Vice President for Human Resources, Dixon "was vested with a significant portion of the statutory authority available, placing her within category two." *Dixon*, 842 F. Supp. 2d at 1051. The district court reasoned that her delegated appointing authority, including the authority to hire and fire, was significant and discretionary. *Id.* Dixon contends on appeal that the district court erred in reaching this conclusion because "[a]lthough [Dixon] had authority to make some hiring decisions . . . she had *no* discretion to make policy regarding hiring practices nor was she delegated *any* such authority, let alone a 'significant portion' of it. Moreover, she had *no* authority, delegated or otherwise, to make any other policy of political concern." Appellant Br. at 26 (emphasis in original).

In Resolution No. 07-10-10, effective October 1, 2007, the Board of Trustees of the University delegated appointing authority to the Associate Vice President for Human Resources. R. 71-3, Ex. D (Resolution at 1) (Page ID #1387). Further, the official job description for Associate Vice President for Human Resources, which Dixon verified as accurate in her deposition, listed the most important job duty as "Policy Development and Application." R. 71-4 (Dixon Tr. at 50:12–51:10) (Page

ID #1399); R. 71-8, Ex. C (Job Description at 1–2) (Page ID #1447–48). Specifically, this duty requires that the Associate Vice President "[p]rovide leadership in recommending, implementing and overseeing human resource policies and procedures that support the university's strategic direction; reflect fair and equitable practices; and that are a model for innovative regulatory compliant and contemporary practice." R. 71-8, Ex. C (Job Description at 2) (Page ID #1448). The job description further notes that the Associate Vice President directs employee relations and "represent[s] the University in relevant employee relations actions brought before the . . . Ohio Civil Rights Commission, Equal Employment Opportunity Commission, . . . and other federal and state regulatory agencies." *Id.*

Additionally, Dixon's own testimony regarding her job responsibilities reflects significant discretionary authority. Dixon testified that she was responsible for answering grievances, issuing disciplinary and corrective action, serving on various task forces, supervising approximately forty employees, overseeing benefits administration, setting compensation, and making presentations at town-hall meetings. R. 71-4 (Dixon Tr. at 40:11–43:4, 44:19-46:21) (Page ID #1396–98).

This evidence establishes that Dixon was delegated appointing authority and was responsible for recommending, implementing, and overseeing policy. *See Hager v. Pike Cnty. Bd. of Educ.*, 286 F.3d 366, 376 (6th Cir. 2002) ("Moreover, in determining whether an employee occupies a policymaking position, consideration should be given to whether the employee formulates plans for the implementation of broad

goals.") (internal quotation marks and alterations omitted). The district court was thus correct in determining that these responsibilities constituted a policymaking position, i.e., that Dixon, as Associate Vice President for Human Resources, was a category-two policymaker.

In addition to holding a policymaking position, Dixon must have spoken on a political or policy issue in order to be subject to the *Rose* presumption. In *Rose*, we reasoned that "[t]he additional restriction that this presumption applies only to cases where the employee speaks on political or policy issues ensures that the content of the employee's speech directly implicates the loyalty requirements of the position and thus will adversely affect a central aspect of the working relationship in all cases." 291 F.3d at 923. Dixon argues that her op-ed column expressed a matter of personal concern and "was not speech that relates to either [her] political affiliation or substantive policy." Appellant Br. at 26–27 (internal quotation marks and emphasis omitted).

Dixon's argument, however, ignores critical policies developed in and promoted by the Human Resources Department at the University. Dixon's public statement implying that LGBT individuals should not be compared with and afforded the same protections as African-Americans directly contradicts several such substantive policies instituted by the University. For example, the University's Strategic Plan included pursuing a strategy that will "[r]ealize the strength and distinction to be derived from diversity in all its dimensions [and] recruit, retain, and celebrate a diverse university community." R. 71-8, Ex. N

(Strategic Plan at 11) (Page ID #1464). Additionally, the University enacted a Plan for Diversity that explicitly included sexual orientation. R. 71-8, Ex. P (Plan for Diversity at 1) (Page ID #1471). The University also included sexual orientation and gender identity and expression in its Equal Opportunity Policy and in its anti-harassment policy. R. 71-8, Ex. S (Equal Opportunity Policy at 1) (Page ID #1494); R. 71-8, Ex. T (Sexual Harassment Policy at 1) (Page ID #1497). Finally, as explained by Jacobs in his op-ed column, the University enacted the Spectrum Safe Places Program, which encourages "faculty, staff and graduate assistants and resident advisers to open their space as a Safe Place for Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning . . . individuals." R. 60-11 (Jacobs Opinion at 1) (Page ID #515).

Although Dixon correctly contends that she never explicitly stated that the University diversity policies should not extend to LGBT students and employees, by voicing her belief that members of the LGBT community do not possess an immutable characteristic in the way that she as an African-American woman does, the implication is clear: Dixon does not think LGBT students and employees of the University are entitled to civil-rights protections, even though the University, in part through the Human Resources Department, expressly provides them. In writing her op-ed column, Dixon not only spoke on policy issues, but also spoke on policy issues related directly to her position at the University. *See Rose*, 294 F.3d at 925 ("All of these issues are clearly related to police department policies and the memorandum thus fits easily within the scope of the exception.").

In sum, the *Rose* presumption applies to Dixon because there is evidence establishing that she was a policymaker who engaged in speech on a policy issue related to her position. The government's interests thus outweigh Dixon's interests as a matter of law, and we affirm the district court's grant of summary judgment to the defendants on this basis. Because the *Rose* presumption is dispositive, it is unnecessary for us to consider the district court's *Pickering* and *Garcetti* analyses.

B. Additional Challenges to the University's Speech Policy

Dixon also argues that the defendants "maintain unbridled discretion to punish University employees for expressing disfavored opinions in violation of the First Amendment." Appellant Br. at 32. The district court construed this argument as two claims—vagueness and viewpoint discrimination. *Dixon*, 842 F. Supp. 2d at 1054. The district court addressed these claims together and concluded that Dixon "has not presented any law applying these principles to the employment, rather than sovereign, context" and that "the damage she did to her ability to perform her job and to the University provide ample justification for her termination." *Id.* at 1054 & n.4.

On appeal, Dixon's argument presents the same flaws. To begin, as in the district court, she provides no meaningful case law in support of her vagueness

challenge.[2] Moreover, Dixon does not provide any evidentiary support for her argument. Mere claims that the University does not have "objective criteria for determining whether a particular opinion expressed by a University employee is sufficiently 'offensive' or 'discriminatory' to warrant its prohibition by terminating the speaker's employment" are insufficient at the summary-judgment stage. Appellant Br. at 32. In fact, Dixon fails even to describe or reference the policy that she claims is vague and discriminatory. We therefore affirm the district court's grant of summary judgment in favor of the defendants on these challenges to the University's speech policy.

C. Equal-Protection Claim

Dixon also alleges an equal-protection claim against the defendants, arguing on appeal that the defendants "punished Plaintiff because she expressed a 'less favored' viewpoint—one grounded in her strong Christian faith no less—in this very same forum in violation of the First Amendment (freedom of speech) *and* the Fourteenth Amendment (equal protection)." Appellant Br. at 34. The district court granted summary judgment to the defendants on this claim

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[2] The only Sixth Circuit case cited by Dixon, *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (6th Cir. 1998), addresses a due-process challenge to a state-agency restriction on controversial advertisements. *Id.* at 359. Dixon also relies upon *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006), a Fourth Circuit case that analyzes viewpoint discrimination as it applies to a school district's fee-waiver system.

because Dixon "has not presented anyone who was 'similarly-situated' and engaged in similar conduct." *Dixon*, 842 F. Supp. 2d at 1055.

"The Equal Protection Clause prohibits a state from denying to any person within its jurisdiction the equal protection of the laws." *Scarbrough*, 470 F.3d at 260 (internal quotation marks omitted). "The threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Id.* "Fundamentally, the Clause protects against invidious discrimination among similarly-situated individuals or implicating fundamental rights." *Id.* Although Dixon recites this standard in her argument, she has failed to produce sufficient evidence in support of her equal-protection claim. To begin, as discussed above, she has not shown that the defendants violated a fundamental right, as her speech was not protected. Moreover, Dixon has not shown that the individuals she argues were allowed to engage in public speech on the issue of LGBT rights and protections without penalty—Jacobs and Vice Provost Carol Bresnahan—are similarly situated.

Dixon's comparison with Jacobs is easily distinguishable. Jacobs, as President of the University, wrote an op-ed column detailing the University's stance on diversity, specifically as it relates to sexual orientation. R. 60-11 (Jacobs Op-Ed) (Page ID #515). Jacobs was speaking in his official capacity as the President of the University in order to explain the University's position on a policy matter. Dixon, on the other hand, wrote an op-ed column that was not

commissioned by the University and that contradicted the very policies that she was charged with creating, promoting, and enforcing.

The comparison with Bresnahan, although intuitively more germane, fails because it is unsupported by sufficient evidence in the record. The evidence proffered by Dixon establishes that in December 2007, Bresnahan and her partner "became the first same-sex couple to file under the city's new domestic-partner registry." R. 60-14 (Bresnahan Article at 1) (Page ID #523). After she and her partner filed under the registry, Bresnahan was interviewed by the *Toledo Blade* and made the following statement regarding opposition of others to the registry: "It's their religious beliefs, and bigotry in the name of religion is still bigotry." *Id.* at 1–2 (Page ID #523–24). Bresnahan was identified as Vice Provost of the University in the article, yet she was not terminated or disciplined as a result of this statement. *Id.* at 1 (Page ID #523); R. 60-5 (Jacobs Tr. at 218:15–24) (Page ID #476).

Importantly, however, the record is silent as to the responsibilities and authority of the vice-provost position at the University. "Inevitably, the degree to which others are viewed as similarly situated depends substantially on the facts and context of the case." *Loesel v. City of Frankenmuth*, 692 F.3d 452, 463 (6th Cir. 2012) (internal quotation marks omitted). In this case, the critical inquiry centers on Dixon's role at the University. Therefore, in order to determine whether Bresnahan and Dixon are similarly situated, we must at the very least have before us a description of the duties inherent in Bresnahan's role at the University. Without such evidence, we cannot engage in an

accurate comparison of the two individuals for the purposes of summary judgment in this case. Although Dixon has identified another administrator at the University who also spoke publicly on the issue of LGBT rights, Dixon has not shown that Bresnahan is similarly situated. We thus affirm the district court's grant of summary judgment in favor of the defendants on the equal-protection claim.

D. Qualified Immunity

Finally, Dixon argues that the defendants are not entitled to qualified immunity. Appellant Br. at 35. However, given that Dixon has not shown a violation of her constitutional rights, we affirm the district court's determination that "the Court need not consider whether such rights were 'clearly established' at the time of her termination." *Dixon*, 842 F. Supp. 2d at 1055.

IV. CONCLUSION

For the stated reasons, we **AFFIRM** the decision of the district court granting summary judgment in favor of the defendants.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:08 CV 2806

[Filed February 6, 2012]

CRYSTAL DIXON,	)
Plaintiff,	)
	)
-vs-	)
	)
UNIVERSITY OF TOLEDO, et al.,	)
Defendant	)
	)

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on the cross Motions for Summary Judgment of Plaintiff Crystal Dixon (Doc. No. 60) and Defendants William Logie and Lloyd Jacobs (Doc. No. 71). The Court notes federal question jurisdiction under 28 U.S.C. §1331 and proper venue under 28 U.S.C. §1391. For the reasons stated below, Defendants' motion will be granted and Plaintiff's motion will be denied

I. BACKGROUND

At the beginning of 2008, Plaintiff was the interim Associate Vice President for Human Resources for all campuses at the University of Toledo. She had previously served as the permanent Associate Vice President for Human Resources for the Health Science Campus. Under either position, she reported directly to Logie, the Vice President of Human Resources and Campus Safety, and to[1] Jacobs, the University President. On April 15, 2008, Logie prepared paperwork to present to Jacobs to make Plaintiff's position over all campuses permanent.

As Associate Vice President for Human Resources, Plaintiff was an "appointing authority" at the University, which means she had the power to hire and fire employees. Her work reviews from Logie had always been positive and praised her in the area of diversity. Logie clearly knew of her views on homosexuality due to an interoffice memo she had written years earlier.

The University had an Equal Opportunity Policy which prohibited discrimination based on sexual orientation. Further, the University has taken explicit steps to reach out to homosexuals and make them feel welcome.

On April 4, 2008, the *Toledo Free Press* ran an opinion by Michael Miller which Plaintiff felt compared

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[1] There is some disagreement with regard to whether this was direct or indirect, but the Court need not address that.

the modern movement toward increased tolerance and rights for homosexuals to the historical struggles of the African-American civil rights movement and which noted that one University of Toledo campus offered domestic partner benefits and the other did not. Due to her religious conviction, Plaintiff, an African-American woman, felt the need to respond. The *Toledo Free Press* ran her response on April 18, 2008. In it she objected to the idea that homosexuals are "civil rights victims," asserted that homosexuality is purely a choice, and noted that the inter-campus benefits disparities involved all employees, not just those interested in domestic partner benefits. Plaintiff identified herself as "an alumnus of the University of Toledo's Graduate School, an employee and business owner" and signed only her name, though she used her University photograph. She did not mention her title or duties within the University. Since she intended to write as an unaffiliated citizen, she did not tell her superiors that she was writing an opinion or present it to them for approval.

Because of the response to her article, Plaintiff was immediately placed on administrative leave. However, the University could not proceed at that time because Jacobs was out of the country.

In early May, shortly after he returned, the *Toledo Free Press* ran an opinion by Jacobs in which he repudiated Plaintiff's opinion on the behalf of the University and noted the University's stance on diversity. He also noted Plaintiff's position within the University. On May 5, 2008, Jacobs held a disciplinary hearing concerning Plaintiff's actions. Logie was not

present. She appeared and read a statement, which she also distributed to those attending. In that statement Plaintiff did not state that her opinion had been misinterpreted, but claimed that she had never discriminated based on sexual orientation, noted the treatment and behavior of others (including Logie), and complained about the response her opinion had generated from the public and media. On May 12, she received a letter from Jacobs dated May 8, terminating her employment.

Plaintiff filed this suit against Logie, Jacobs, and the University. Her claims against the University and for equal pay discrimination have been dismissed or dropped. She and Defendants have cross-moved for summary judgment on her remaining claims: First Amendment Free Speech Retaliation and Fourteenth Amendment Equal Protection alleged against Logie and Jacobs in their individual and official capacities.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The Court views the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). The moving party bears the initial responsibility of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant may meet this burden by demonstrating the absence of evidence supporting one or more essential elements of the non-movant's claim. *Id.* at 323-25.

Once the movant meets this burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting FED. R. CIV. P. 56(e)). The party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. Rather, Rule 56(e) "requires the nonmoving party to go beyond the pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324; *see also Ciminillo v. Streicher,* 434 F.3d 461, 464 (6th Cir. 2006); *Harris v. General Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

"In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences therefrom in a light most favorable to the nonmoving party." *Williams v. Belknap*, 154 F. Supp. 2d 1069, 1071 (E.D. Mich. 2001) (citing *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987)). However, "'at the summary judgment stage the

judge's function is not himself to weigh the evidence and determine the truth of the matter,'" *Wiley v. U.S.*, 20 F.3d 222, 227 (6th Cir. 1994) (quoting *Anderson*, 477 U.S. at 249); therefore, "[t]he Court is not required or permitted . . . to judge the evidence or make findings of fact." *Williams*, 154 F. Supp. 2d at 1071; *Bultema v. United States*, 359 F.3d 379, 382 (6th Cir. 2004). The purpose of summary judgment "is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 130 F. Supp. 2d 928, 930 (S.D. Ohio 1999). Ultimately, this Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52; *see also Atchley v. RK Co.*, 224 F.3d 537, 539 (6th Cir. 2000).

III. ANALYSIS

The primary issue presented by this case is the distinction between how a government entity relates to its employees and how it relates to citizens in general. The Supreme Court has long held that, though "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment ... the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Connick v. Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). Thus, Plaintiff's reliance on arguments relating to sovereign authority is

unavailing. *See Waters v. Chruchill*, 511 U.S. 661, 674 (1994) ("constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign").

In addition, Plaintiff repeatedly emphasizes her religion. However, she never alleged a claim of violation of either her Free Exercise rights or her Establishment rights. Thus, the Court will only consider her Free Speech and Equal Protection claims.

A. Freedom of Speech Claim

In a First Amendment Free Speech employment retaliation claim filed under 42 U.S.C. § 1983, a plaintiff must show that the speech was constitutionally protected, that the retaliation at issue would deter an individual of "ordinary firmness," and that the speech motivated the employer's "retaliation." *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 337 (6th Cir. 2010) (citations omitted). Whether a plaintiff's speech is protected is a purely legal question for the Court to decide. *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 350-51 (6th Cir. 2010) (citations omitted). This question is further parsed into three elements: a plaintiff must show that the speech involved "matters of public concern," that the state employer's interest "'as an employer, in promoting the efficiency of the public services it performs through its employees'... [does] not outweigh [plaintiff's] desire to 'contribute to public debate' like any other citizen," and that the speech was not made "pursuant to" the duties of plaintiff's employment. *Evans-Marshall*, 624 F.3d at 337-38 (quoting *Pickering*, 391 U.S. at 568-73). In

weighing the government interest as employer, the Court must consider "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73). While the balancing factor incorporates the level of public concern as weight for Plaintiff, Defendants need not have "allow[ed] events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152.

Defendants present three theories justifying Plaintiff's termination in the face of her free speech rights. They argue that she spoke pursuant to her job duties, that she occupied a position demanding special loyalty, and that the University's interest outweighed her interest in saying what she said; they do not contest any of the other elements. Two of these theories are highly persuasive.

First, the Court will consider Defendants' theory based on the most recent permutation of the law on free speech for government employees: the First Amendment does not prohibit discipline for speech made "pursuant to official responsibilities." *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). Defendants support this theory by arguing that Plaintiff depended on her job to support her opinion. However, they do not argue that Plaintiff's job required that she write her article,

a situation which may be clearly contrasted with Jacobs' article.

Essentially, Defendants' theory expands "pursuant to official responsibilities" to "in relation to official responsibilities." The Sixth Circuit has already rejected a similar expansion in *Westmoreland v. Sutherland*, 622 F.3d 714 (6th Cir. 2011). In that case, an off-duty firefighter appeared at a public meeting, identified himself as a Fire Department employee, and railed against a policy regarding the Fire Department. *Id.* at 716-17. The Sixth Circuit held that merely identifying himself as a public employee and speaking regarding his public employment did not place the firefighter's speech within the *Garcetti* test. *Id.* at 719. To satisfy that test speech must be "made pursuant to a task that was within the scope of his official duties" rather than merely in regard to such official duties. *Id*.

Here, there is factual dispute over whether Plaintiff identified herself to the same extent as the firefighter in *Westmoreland*, but Defendants have not presented any job duty she was attempting to satisfy. Indeed, the evidence clearly demonstrates that Plaintiff was not attempting to fulfill any job duty in writing her article, but to present a personal opinion. Even if she attempted to give herself credence with the public by identifying herself, this does not satisfy the *Garcetti* test. Thus, Defendants' theory that Plaintiff spoke pursuant to her job duties does not defeat her First Amendment claim.

Defendants present two arguments concerning the balancing factor. First, they argue that Plaintiff's specific authority automatically tips the balance in

their favor. Second, they assert the specific weights and balances presented by this case demonstrate that the University's interest outweighs Plaintiff's.

The first argument relies on the Sixth Circuit's statement that when certain employees "speak on job-related issues in a manner contrary to the position of [their] employer" they have been insubordinate and a presumption arises that the balance weighs in the favor of the employer. *Rose v. Stephens*, 291 F.3d 917, 923 (6th Cir. 2002). Thus, "when an employee is in a policymaking or confidential position and is terminated for speech related to his or her political or policy views, there is a presumption that the *Pickering* balance favors the government." *Silberstein v. City of Dayton*, 440 F.3d 306, 319 (6th Cir. 2006) (citing *Rose*). In determining whether this exception applies to a particular situation, the Sixth Circuit directs the use of the four categories describing permissible political patronage employment actions set forth in *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996). *Rose*, 291 F.3d at 924. If a position falls within one of the categories, the presumption in favor of the employer automatically applies. *Id.*

The first category includes "positions specifically named in relevant federal, state, county or municipal 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." *McCloud*, 97 F.3d at 1557. Category two includes "positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated." *Id.* The third category consists of "confidential advisors who spend a significant portion

of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, [and] other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors." *Id.* The forth category relates to politically balanced positions. *Id.* A position may still be sufficiently "confidential" or "policymaking" for the *Rose* presumption to apply without fitting into one of the four categories. *Silberstein*, 440 F.3d at 319. Finally, in considering the four categories, the Court must focus on the duties inherent in the position. *Id.*

Defendants assert that Plaintiff's position as Associate Vice President for Human Resources fits into either category two or three. Plaintiff responds with her Declaration which states that she was not delegated "significant" policy making authority and did not spend a "significant" amount of time advising Defendants. She concludes that she was a ministerial employee. While the contours of any delegation or time spent advising may be factual questions, whether any delegation or time spent are "significant" is a question of law for the Court.

Notably, Plaintiff's Declaration does not mention appointing authority. The Board of Trustees is charged, by Ohio law, with governing the university. O.R.C. §124.14(F). Thus, it falls within category one. At the time Plaintiff was fired, the Board had adopted a policy delegating appointing authority to four specific positions, in addition to the President; Plaintiff's position was listed and Logie's was not. Further, not only did Plaintiff testify that she was responsible for

employment decisions such as hiring and firing, but Ohio law states that all appointing authorities have that power. O.R.C. §124.01(D). Jacobs testified that he had been directly involved in only a handful of terminations. Any delegation of the ability to hire and fire is clearly significant, especially due to the possibility of employment related lawsuits. Plaintiff does not present anything to restrict the import of her appointing power and instead focused on Jacobs' control of written policy. As such, the Court concludes that Plaintiff was vested with a significant portion of the statutory authority available, placing her within category two.

Even though Plaintiff fell within the second *McCloud* category, the presumption of insubordination will only apply if her statement related her policy view on a matter 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. Thus, the *Rose* insubordination presumption applies. Plaintiff has offered nothing more than her claim that she "was never insubordinate to anyone" without any justification for why that would overcome (or even address) the presumption. Because the presumption holds, the balance of employee and employer concerns automatically tips in the employer's favor.

Defendants further argue that even if the *Rose* presumption does not apply, the actual weighing of employee versus employer interests in this case would clearly favor them. Plaintiff counters by asserting that her speech should be afforded the greatest protection.

In demonstrating the employer's interests in this case, Defendants again emphasize Plaintiff's position. As such, they emphasize her authority over employment actions and further note that even she has testified that she was serving as "an ambassador" for the University. Given her position, her statements against the rights of homosexuals could have done very serious damage to the University in three ways (all of which Defendants cited and stated multiple times, including in the termination letter). Though all three may be speculative and concern only what might happen, as noted above, the law does not require Defendants to wait for damage to occur. *Connick*, 461 U.S. at 152; *see also Waters*, 511 U.S. at 673 ("we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large").

First, her statements could disrupt the Human Resources Department by making homosexual employees uncomfortable or disgruntled. Though it did not enter into the actual consideration, Erich Stolz's

letter[2] to Defendants clearly demonstrated that effect: he stated that her letter not only made him individually uncomfortable, but it also reduced his respect for her professionalism. Plaintiff responds that mere offense is insufficient to justify her termination. That might be an appropriate response to Defendants' offense, but it does not address loss of cohesion in the Human Resources Department as a legitimate interest of her employer. *See Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006) (disruption of workplace rejected when it merely concerned difference of opinion with superiors on subject unrelated to work done). Further, this addresses only the least of the three feared effects.

Second, Plaintiff's public statements could have interfered with the University's interest in diversity. Because of her statements, homosexual prospective employees might reconsider applications they knew she would review or withdraw them altogether. This concern removes a significant portion of Plaintiff's rebuttal that she has only acted fairly because she has not demonstrated how any applicants would know. Plaintiff also complains about consideration of the value of diversity as opposed to focus on teaching capacity alone. However, not only is that an overly simple description of the University's interest, any decrease in the capability of the University workforce could have an impact on instruction. *See City of San Diego v. Roe*, 543 U.S. 77, 81 (2004) ("proper

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[2] Plaintiff's objection to consideration of Stolz's opinion as improper opinion (Doc. No. 76 at 15 n.9) is overruled because his lay opinion as to how he felt is exactly what he is qualified to offer.

functioning" a legitimate interest of police force, not merely law enforcement). If fewer qualified people apply, because some are homosexuals who know that the head of Human Resources (Plaintiff) does not think they deserve civil rights, then it could be that the quality of the eventual workforce will decline. Further, Plaintiff has not rebutted the concept that diversity itself (even with regard to non-faculty positions) improves the teaching function.

Third, as the termination letter stated, Plaintiff's public position could lead to challenges to her personnel decisions. In other words, Defendants feared lawsuits from homosexuals alleging sexual orientation or sexual harassment discrimination. This fear is clearly appropriate as her statement could be offered in a suit for either direct evidence of discrimination or for evidence of pretext (in rebuttal to a non-discriminatory reason). Further, Plaintiff's article could also lead to additional suits and grievances as people realize they may have a claim or the statement could be just enough to cause someone to decide to sue who otherwise might not have undertaken the expense and effort. Thus, Plaintiff's statements could subject the University to significant expense through more litigation or more difficult litigation (or other employment action challenges).

In response to these concerns, other than by emphasizing the value of her speech, Plaintiff primarily relies on the prior knowledge of her opinions and her history of behaving in a non-discriminatory manner. Neither of these actually addresses concerns over how others will react to Plaintiff, especially since

her claims relate to facts which are not public.[3] In other words, contrary to her assertion, she was not terminated due to Defendants discovering her views, but due to the public discovering them. While Plaintiff argues that the cause for her termination is at least a disputed fact, she has presented no evidence that Defendants actually relied on their discovery of her belief (other than to present differential treatment more appropriately characterized and addressed below under Equal Protection).

Next, Plaintiff claims that her article stated that she did not discriminate. Though she may have intended to imply this with some of her religious statements, her article never states that people should be treated without discrimination. Further, she claims that her article was merely meant to refute the comparison between historical racial and gender civil rights struggles and modern sexual orientation struggles. However, her article is far from clear on these points: she objects to homosexuals as "civil rights victims," not directly to the comparison of the movements. At her disciplinary hearing she had the opportunity to claim that she had been misunderstood and instead chose to defend her speech, claim that she did not discriminate, and complain about the complaints. Those very complaints she protested should have alerted her to the fact that it was not perceived as though she had said that she did not

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[3] While Plaintiff asserts that her previous statements could have been available to a public request, this does not compare to her article, most notably in that it requires active, rather than passive, search for information concerning her. It also provides no defense against the litigation concern.

discriminate or that she was merely contrasting historical movements, yet she did not suggest that such perceptions were inaccurate, instead calling them intolerant. She cannot inject now what she had the opportunity to clarify then.

Plaintiff then invokes academic freedom. However, her speech "was not related to classroom instruction and was only loosely, if at all, related to academic scholarship" and thus deserves no extra protection. *Savage v. Gee*, –F.3d–, 2012 WL 10967 at *6 (6th Cir. 2012). Further, Plaintiff did not even have any responsibilities related to classroom instruction or academic scholarship. Thus, this claim adds no weight to her interests.

Finally, Plaintiff claims that her termination impedes diversity. She claims that accepting Defendants' employer interest arguments would prevent any conservative Christians from holding managerial positions at the University of Toledo. Plaintiff's claim is far too broad in two important ways. First, Defendants' arguments only restrict those who cannot hold their tongues about their beliefs (or fail to submit their beliefs anonymously). Plus, the position would likewise restrict liberal atheists as well. Second, Plaintiff ignores that Defendants' arguments are very specific to her position at the top of the Human Resources Department with only one person between her and the President.

Thus, the balance of Plaintiff's interest in making a comment of public concern is clearly outweighed by the University's interest as her employer in carrying out its

own objectives. Therefore, Plaintiff has failed to establish that her speech was protected.

Plaintiff also claims that she was fired for violating an impermissibly vague speech policy. However, the damage she did to her ability to perform her job and to the University provide ample justification for her termination. Further, these reasons are supported by uncontradicted evidence as to the actual motives behind her termination, rather than speculation as to Jacobs' respect for the First Amendment or Plaintiff's religion. Plaintiff's claim that she suffered a viewpoint based restriction fails for the same reasons.[4]

Therefore, Plaintiff cannot establish that her termination violated her First Amendment rights. Thus, the Court will grant Defendants, and deny Plaintiff, summary judgment on the First Claim for Relief of the Second Amended Complaint.

B. Equal Protection Claim

The Second Claim for Relief in Plaintiff's Second Amended Complaint alleges violation of her Fourteenth Amendment Equal Protection rights because she was fired for expressing her view and others were not fired for expressing their views. Again, Plaintiff focuses on law that governs sovereign acts, rather than

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[4] Defendants correctly note that Plaintiff has not presented any law applying these principles to the employment, rather than sovereign, context. Further, "[t]hat certain messages may be more likely than others to have such adverse effects does not render *Pickering's* restriction on speech viewpoint based." *United States v. Nat'l Treasury Employees Union*, 413 U.S. 454, 467 n.11 (1995).

employment actions. However, "a plaintiff asserting a Fourteenth Amendment equal protection claim under §1983 must prove the same elements required to establish a disparate treatment claim under Title VII." *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000).

One of the key elements Plaintiff must establish is that those she claims were treated differently were "similarly-situated" and engaged in similar conduct. *Id.* (citations omitted). In matters of employee discipline, this requires the same, or at least relevantly similar, conduct, supervisors, and standards for both the plaintiff and the "similarly-situated." *Id.* (quoting *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992)); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998).

Plaintiff has not presented any sufficiently "similarly-situated" comparisons. She focuses primarily on Carol Breshnahan's statements to The Blade describing opponents of homosexual civil rights as "religious bigots." While this statement might be sufficiently similar conduct, Breshnahan, a vice provost, was not "similarly-situated" to Plaintiff. Most notably, as vice provost, Breshnahan is a member of the faculty and thus subject to very different standards from those applicable to Plaintiff as an associate vice president. Further, Plaintiff, unlike Breshnahan, was responsible for hiring, firing, and discipline; while both Plaintiff's and Breshnahan's statements could have a perceived intolerance affect on recruitment and employment action challenges, due to perception of the speaker as biased against a particular group, only Plaintiff held responsibilities for which such charges could be relevant.

Plaintiff also refers to Jacobs' opinion piece in response to hers, an article by Samuel Hancock, and to the opinions of other faculty members which were critical of the University administration. Without regard to whether Jacobs' opinion piece was similar to Plaintiff's, Jacobs, as president of the University, clearly occupied a different position. Hancock's article is dissimilar because, unlike Plaintiff, he submitted it to Jacobs beforehand. Finally, the articles written by Renee Heberle and Donald Wedding fail as comparisons in the same way as Breshnahan's statements - due to their positions as faculty.

Plaintiff has not presented anyone who was "similarly-situated" and engaged in similar conduct. Therefore, without regard to any other element of her Equal Protection claim, it fails. Thus, the Court will grant Defendants, and deny Plaintiff, summary judgment on the Second Claim for Relief of the Second Amended Complaint.

C. Additional Defenses

Defendants raise two additional defenses: qualified immunity for both Defendants for claims against them in their individual capacity and Logie's lack of involvement in Plaintiff's termination. The defense of qualified immunity challenges a plaintiff to both show a violation of a constitutional right and that the right was "clearly established" at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation omitted). Because Plaintiff has failed to demonstrate that her constitutional rights were violated, the Court need not consider whether such rights were "clearly established" at the time of her termination.

Logie claims to have had neither the ability nor any actual hand in Plaintiff's termination. Without regard to whether there is a sufficient disagreement on Logie's ability to fire Plaintiff at that time, Plaintiff has presented no evidence that Logie had any input in Jacobs' decision to terminate her. In fact, Defendants' story that Logie was excluded from any such consideration is undisputed, other than, perhaps, by argument of counsel.

IV. CONCLUSION

For the reasons discussed herein, Defendants' Motion for Summary Judgment (Doc. No. 71) is granted and Plaintiff's Motion for Summary Judgment (Doc. No. 60) is denied. Case closed.

IT IS SO ORDERED.

s/ *David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:08 CV 2806

[Filed February 6, 2012]

CRYSTAL DIXON,	)
Plaintiff,	)
	)
-vs-	)
	)
UNIVERSITY OF TOLEDO, et al.,	)
Defendant	)
	)

JUDGMENT ENTRY

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiff's motion for summary judgment is denied (Doc. No. 60).

FURTHER ORDERED that Defendants' motion for summary judgment is granted (Doc. No. 71). Case closed.

s/ *David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-3218

[Filed February 27, 2013]

CRYSTAL DIXON,
Plaintiff-Appellant,

v.

UNIVERSITY OF TOLEDO,
Defendant,

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,
Defendants-Appellees.

ORDER

BEFORE: MOORE, GILMAN, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX D

4/4/2008 OPINION

LIGHTING THE FUSE

Gay rights and wrongs
By Michael Miller
Editor in Chief
mmiller@toledofreepress.com

One of the great blessings of my life is the consistent, long-term presence of many friends. There are three very important people who have been in my life since first or second grade. More than a dearth of blood relatives makes those people my family; we have shared 30 years of ups and downs on the dizzying carousel ride of life.

Two of those people, and my closest blood relative, are gay.

I have been tangentially immersed in the gay culture for so long, it's a natural and common aspect of life. Three decades of loving these friends and family and sharing their successes in managing careers and raising families has jaded me to the hatred and prejudice many people harbor against the gay community. It's easy for me to let my guard down and take gay culture for granted. As a middle-aged, overweight white guy with graying facial hair, I am America's ruling demographic, so the gay rights

struggle is something I experience secondhand, like my black friends' struggles and my wheelchair-bound friend's struggles.

In the interest of full disclosure, at least three women I dated in college subsequently declared themselves gay, so I've directly contributed to the community's growth.

Because I have such intense love and respect for the people in my life who are gay, it never makes sense to me when I hear someone preaching anti-gay rights propaganda. I can never understand why they care.

It's basic Golden Rule territory: don't judge people for the color of their skin or their physical challenges, and don't judge them for their sexuality. I know that is a simplified and naïve statement, but for me, the issue really is that simple. There are people who are so strongly anti-gay rights, they lust for legislation to limit the gay community's freedoms. That makes no intellectual or moral sense to me. Some of this prejudice is based in religion. 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.

And do not tell me you are "tolerant" or "tolerate" gay people. Stop for a moment and think about how condescending and evil that attitude is.

Every month, some anonymous reader sends me a packet of articles photocopied from newspapers. These articles are about gay rights, marked up with a red pen that bleeds exclamation points with scrawls of "HIV"

and "AIDS Doom" all over them. I recognize the envelope now, and it lands, unopened, in the trash.

On March 26, I moderated a town hall meeting sponsored by Equality Ohio and Equality Toledo. The meeting, "A Level Playing Field," dealt with issues of employment discrimination against gay people. It was lightly attended, but the attendees, including a couple who drove from Youngstown, were clearly invested in the issue. The panelists were Michelle Stecker, attorney and interim executive director of Equality Toledo; Kim Welter, program manager for education and outreach for Equality Ohio; and Rob Salem, a clinical professor of law at the UT College of Law.

There were many interesting discussions, and I learned a lot about Ohio's gay rights laws, or lack thereof. I left the forum with a vague sadness — sadness that there is so much needless public struggle and strife based on something as private as sexuality, and sadness that I have been ignorant to the struggles some of my closest friends endure.

One message that came through was how far behind Ohio is in gay rights. A single gay Ohioan may adopt a child, but a gay Ohio couple cannot. A gay couple may raise a child, but if something happens to the biological parent or primary caregiver, the partner may find him or her self without legal access to the child.

The frequent denial of health care benefits leads to horror stories. According to the panelists, UT has offered domestic partner benefits since then-president Dan Johnson signed them into effect. The Medical University of Ohio did not offer those benefits. When

the institutions merged, UT employees retained the domestic-partner benefits, but MUO employees were not offered them. So, people working for the same employer do not have access to the same benefits. According to the panel, it may be 18 months before the situation is addressed. Eighteen months is a very long time to live (and work at a medical facility) without health benefits.

Ohio's policies have a direct impact on economic development. The panelists have specific examples of companies who will not consider locating in Ohio because they have gay employees who would lose benefits.

There have been studies that show how much states benefit economically from offering equal rights, and how much money is left on the table by states that put prejudice before profit. It would be in the best interest of the local Meta-Plan groups to host a presentation by Equality Ohio to learn just how great our competitive disadvantage is.

It's a sad irony that I embrace so many gay people without fully understanding their challenges; as the people who know me best could tell you, I'm on a very long learning curve. But I'm willing to learn.

Are you?

APPENDIX E

4/18/2008 OPINION

GUEST OPINION

Gay rights and wrongs: another perspective

By Crystal Dixon

I read with great interest Michael Miller's April 6 column, "Gay Rights and Wrongs."

I respectfully submit a different perspective for Miller and Toledo Free Press readers to consider.

First, human beings, regardless of their choices in life, are of ultimate value to God and should be viewed the same by others. At the same time, one's personal choices lead to outcomes either positive or negative.

As a Black woman who happens to be an alumnus of the University of Toledo's Graduate School, an employee and business owner, I take great umbrage at the notion that those choosing the homosexual lifestyle are "civil rights victims." Here's why. I cannot wake up tomorrow and not be a Black woman. I am genetically and biologically a Black woman and very pleased to be so as my Creator intended. Daily, thousands of homosexuals make a life decision to leave the gay lifestyle evidenced by the growing population of PFOX (Parents and Friends of Ex Gays) and Exodus

International just to name a few. Frequently, the individuals report that the impetus to their change of heart and lifestyle was a transformative experience with God; a realization that their choice of same-sex practices wreaked havoc in their psychological and physical lives. Charlene E. Cothran, publisher of Venus Magazine, was an aggressive, strategic supporter of gay rights and a practicing lesbian for 29 years, before she renounced her sexuality and gave Jesus Christ stewardship of her life. The gay community vilified her angrily and withdrew financial support from her magazine, upon her announcement that she was leaving the lesbian lifestyle. Rev. Carla Thomas Royster, a highly respected New Jersey educator and founder and pastor of Blessed Redeemer Church in Burlington, NJ, married to husband Mark with two sons, bravely exposed her previous life as a lesbian in a tell-all book. When asked why she wrote the book, she responded "to set people free… I finally obeyed God."

Economic data is irrefutable: The normative statistics for a homosexual in the USA include a Bachelor's degree: For gay men, the median household income is $83,000/yr. (Gay singles $62,000; gay couples living together $130,000), almost 80% above the median U.S. household income of $46,326, per census data. For lesbians, the median household income is $80,000/yr. (Lesbian singles $52,000; Lesbian couples living together $96,000); 36% of lesbians reported household incomes in excess of $100,000/yr. Compare that to the median income of the non-college educated Black male of $30,539. The data speaks for itself.

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.

My final and most important point. There is a divine order. God created human kind male and female (Genesis 1:27). God created humans with an inalienable right to choose. There are consequences for each of our choices, including those who violate God's divine order. It is base human nature to revolt and become indignant when the world or even God Himself, disagrees with our choice that violates His divine order. Jesus Christ loves the sinner but hates the sin (John 8:1-11.) Daily, Jesus Christ is radically transforming the lives of both straight and gay folks and bringing them into a life of wholeness: spiritually, psychologically, physically and even economically. That is the ultimate right.

Crystal Dixon lives in Maumee.

APPENDIX F

A6 ▪ TOLEDO FREE PRESS **OPINION**
MAY 4, 2008

GUEST COLUMN

UT protects gay rights

***Dr. Lloyd* JACOBS**

I write to clarify the position of the University of Toledo on certain comments made in Michael S. Miller's April 5 column, "Gay Rights and Wrongs," and also to repudiate comments made subsequently in an April 19 online writing, "Gay rights and wrongs: Another perspective," by Ms. Crystal Dixon.

Although I recognize it is common knowledge that 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 and to make this attempt to clarify our values system. The Strategic Plan of the University of Toledo states certain "Core Values." Among them are "Diversity, Integrity and Teamwork." The document further states that we "create an environment that values and fosters diversity; earn the trust and commitment of colleagues and the communities served; provide a collaborative and supportive work

environment, based upon stewardship and advocacy, that adheres to the highest ethical standard."

Recently I have supported the revival of a Safe Places Program at the University of Toledo. Our Spectrum student group created the Safe Places Program to "invite faculty, staff and graduate assistants and resident advisers to open their space as a Safe Place for Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning [LGBATQ] individuals." I took this action because I believe it to be entirely consistent with the values system of the university. Indeed, there is a Safe Places sticker on the door of the President's office at the University of Toledo.

I have recently written a letter to the legislatures of the state of Ohio, on behalf of the University of Toledo, to support Senate Bill 305 and House Bill 502. Those legislative initiatives extend to domestic partners a number of rights and privileges which I believe are assured by the constitutional rights of everyone in our state. My letter of support is dated April 30, 2008 and is available through my office to any interested party.

The University of Toledo welcomes, supports and places value upon persons of every variety. Disability, race, age or sexual orientation are not included in any decision making process nor the evaluation of worth of any individual at this university. To the extent that appearances may exist which are contrary to this value statement, we will continue to do everything in our power to align all of our actions every day with the value system discussed.

We will be taking certain internal actions in this instance to more fully align our utterances and actions with this value system.

As regards the continued asymmetry of benefits packages across the campuses of this university, do understand that we are fully aware that asymmetry that Michael S. Miller spoke of does exist and are working as rapidly as we can to correct this asymmetry. When this asymmetry is corrected, the solution will be reflective of the university value statements above.

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."

Dr. Lloyd Jacobs is president of the University of Toledo.