Nos. 25-1755, 25-1808

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES MARCH,
Plaintiff-Appellant-Cross-Appellee,

v.

TOWN OF GRAND CHUTE, JASON VAN EPEREN, and JEFFREY INGS
Defendants-Appellees,

and

RONALD WOLFF,
Defendant-Appellee-Cross-Appellant.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Wisconsin
Case No. 23-C-656, Hon. William C. Griesbach

COMBINED REPLY-RESPONSE BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE JAMES MARCH

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Introduction

Before turning to Defendants' arguments, we set the record straight. Defendants' basic assertion is that James March was disloyal—even "Machiavellian"—when he spoke with Agent Yerges without "advis[ing] Wolff and the board how to avoid the crime." Wolff Br. 45-46; *see* Town Br. 30. That telling is at war with the record.

To begin with, as a Town Supervisor, Ronald Wolff was aware of his legal obligations—and the potential perils of government contracting and conflicts of interest. After assuming office, Wolff received orientation materials that advised him "you can violate" Wisconsin's law against self-dealing by public officials "merely by bidding on [a] contract[.]" App. 80; *see* Wis. Stat. § 946.13(1)(a).

Nevertheless, shortly after his election, Wolff informed March that he "intended [to] bid[] on all township projects." App. 93, 308. March explicitly told Wolff he "could not do" so. App. 308; *see* App. 93. Undeterred, Wolff submitted his Champion Pond bid, justifying it by falsely telling March that he had sold his business. App. 92, 308. After realizing Wolff had lied to him, App. 308, March tried to forestall future problems, emphasizing to Wolff that "this can never happen again," App. 94. Wolff responded by "storm[ing] out of [March's] office." *Id*.

The record contains no evidence of any ulterior motive behind March's statements to Yerges. And events in the months preceding the State's

investigation gave March and other Town employees ample reason for concern about Wolff's conduct. For example, Wolff was alleged to have violated Wisconsin's open-meetings laws; lied about his residency in Grand Chute; invoiced the Town for landscape work that Wolff's business performed on Wolff's own property without the Town's approval; and pressured other Supervisors to approve a settlement that would reimburse Wolff for legal fees that he had incurred while suing the Town over its special-assessment policy. App. 302-10, 317-20; *see also* App. 286-95 (Yerges interview with Supervisor Gehring); App. 320-21 (Yerges interview with Public Works Director Schwartz).

In the end, only one of Wolff's alleged crimes—self-dealing on the Champion Pond contract—led to criminal charges. App. 78-86. But the broad scope of the investigation, conducted independently by Wisconsin officials, confirms the lack of support for Defendants' account, in which March supposedly schemed to "set up" Wolff for prosecution by speaking to Yerges. And far from failing to warn Defendants, March went to great lengths to serve the Town's interests—first by confronting Wolff and later by reporting him when approached by a state investigator. The Town repaid March by firing him.

Reply Brief of Appellant James March

Argument

Defendants maintain that the firing did not violate March's First Amendment rights. As we now show, each of their arguments fails, and March's claim should go to trial.

I. *Elrod-Branti* does not apply.

Defendants misapply the *Elrod-Branti* exception to *Pickering* balancing in two ways. First, *Elrod-Branti* does not apply because March's speech to Agent Yerges neither advocated his own political or policy views nor criticized Defendants' politics or policies. Second, Defendants may not use evidence that they did not have when March was fired to conclude that March's speech was politically motivated.

A. March's speech to Agent Yerges was not a political attack on the Town Board or criticism of its policies.

Elrod-Branti does not apply because March's speech did not advocate his politics or policy views. Whether March is a policymaker "is not the determinative question" in the *Elrod-Branti* analysis. *Marshall v. Porter Cnty. Plan Comm'n*, 32 F.3d 1215, 1221 (7th Cir. 1994). Policymakers like March can be fired for their speech only when it concerns their "politics or substantive policy viewpoints" because "speech unrelated to job duties or political viewpoint runs too remote" from the *Elrod-Branti* exception. *Bonds v. Milwaukee County*, 207 F.3d 969, 979 (7th Cir. 2000). Speech that is "critical of a superior's abuse of office does not come within

the policy-maker analysis." *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 973 n.4 (7th Cir. 2001). If March was critical of Defendants, it concerned only their possible abuse of office, which does not implicate *Elrod-Branti*. *See id.*

1. Defendants argue that March's responses to Agent Yerges' inquiries were disguised policy disagreements with Town Supervisors. Town Br. 14-20; Wolff Br. 28. Not so. Public corruption is not policy. March did nothing more than disclose Wolff's alleged conflicts of interest. Yerges asked March to discuss the ongoing investigation of Wolff and "any criminal misconduct that may have been occurring by local elected officials." App. 304. March did just that.

The Town says that March's statements were "critical of Defendant Wolff" and "not neutral" because March told Yerges that Wolff may not have been residing in Grand Chute and that Wolff had not divested from Lakeshore Cleaners. Town Br. 14, 16-17. True, but irrelevant. Speech to a criminal investigator about an official's potential crimes will of course be "critical" of that official.

If the Town were correct, any speech reporting public corruption by a supervisor would be unprotected. That cannot be right, and this Court has said so: A "government employer [may] not terminate a policymaking employee for speech criticizing her employer's abuse of office." *Bonds*, 207 F.3d at 979 (discussing *Marshall*, 32 F.3d at 1221). Why? Because, by definition, that type of "speech [does] not involve her political or policy

viewpoints." *Id.* The Town's far-reaching view would render this precedent meaningless, because any criticism of a government official's abuse of office could be recast as a criticism of that official and stripped of First Amendment protection.

The Town attempts to distinguish this Court's decision in *Marshall*, emphasizing that Marshall informed the Commission there about her boss's allegedly fraudulent reimbursement practices, while March did not report his "complaints" to the Board of Supervisors before cooperating in the investigation. Town Br. 17-18; *see Marshall*, 32 F.3d at 1218. That's not a legally salient distinction. *Marshall* turns on the type of speech at issue, not to whom it is reported. *See* 32 F.3d at 1221. In any case, both Agent Yerges and the Commission in *Marshall* were appropriate parties to whom "questions about [an elected official's] performance" could be directed. *Id.* at 1218.

The Town's effort to distinguish *Lane v. Franks*, 573 U.S. 228 (2014)—which held that the First Amendment protects government employees' speech reporting public corruption under *Pickering*—also fails. *See* Town Br. 19. Lane, a community-college employee, was terminated for testifying about a state representative's fraudulent conduct. *Lane*, 573 U.S. at 232-34. The Town says *Lane* doesn't matter here because the Court never classified Lane as a policymaker (although the Town acknowledges that he likely was one). Town Br. 19. But if an employee's policymaker status alone were enough to come within *Elrod-Branti*, the

Supreme Court presumably would have said so in *Lane*. *See* Opening Br. 17.

The Town also argues that, unlike March, the plaintiff in *Lane* did not criticize his superiors. Town Br. 19. But that distinction played no role in the Supreme Court's analysis—and likewise makes no difference here. Like March, Lane was terminated for reporting corruption, and the Court did not apply *Elrod-Branti* to Lane's speech. *See Lane*, 573 U.S. at 235-38. As our opening brief explains (at 14-15), *Elrod-Branti* aims to protect a government employer's need for political loyalty from policymaking subordinates, not to shield government employers from any criticism at all.

2. Defendants take March's statements to Agent Yerges out of context, mischaracterizing them as political disagreements and criticisms. To begin with, Defendants did not know the particulars of March's speech to Yerges when they fired him, so they cannot logically invoke *Elrod-Branti*. *See Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016); *infra* at 9-11.

But March's statements to Yerges' could not trigger *Elrod-Branti* anyway. Wolff first objects to March's description of Wolff's demeanor as "hot-headed" or "unhinged." Wolff Br. 28. But that is irrelevant to *Elrod-Branti* because it is not "speech critical of his superiors' work-related policies." *Vargas-Harrison*, 272 F.3d at 973.

Defendants next point to March's references to Town policies in his interview with Yerges. Town Br. 16, 18; Wolff Br. 28. It cannot be that

any reference to the Board's policies—across several interviews spanning months—strips March's speech of First Amendment protection. The question is whether March voiced *disagreement* with his bosses' policies. *See Bonds*, 207 F.3d at 978. He did not. March discussed Town policies only to report concerns about potential conflicts of interest: Defendants' efforts to reimburse special assessments and attorney fees and to amend the Town's sewer-and-water ordinances in a way that would benefit only a few people, including themselves. *See* App. 304-310; 317-19; 324-25.

Wolff also points to March's description of the Town Attorney's concern about "the proposed policy direction" that the Board was taking. Wolff Br. 28 n.5. But that statement to Yerges conveyed *someone else's* views, not March's "political or policy viewpoints." *Bonds*, 207 F.3d at 979.

3. Defendants' use of this Court's precedent to apply *Elrod-Branti* to March's speech gets them nowhere.

The Town implies that March's speech is unprotected because it was similar to the speech held unprotected in *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995). *See* Town Br. 19-20. But Warzon's speech criticized a "government-provided medical care" policy that she administered. *Warzon*, 60 F.3d at 1235, 1239. Warzon *publicly* disagreed with her government employer by sending inter-office letters, meeting with public officials, and speaking to the media. *Id.* at 1236. In contrast, March spoke to Yerges privately and did not "advocat[e] positions in conflict with the

[Town's] stated policies" or "openly disagree[] with an official's policy stance." *Id.* at 1239.

Next, Wolff likens March's speech to the plaintiffs' accusations that the Governor violated the Constitution in *Hagan v. Quinn*, 867 F.3d 816 (7th Cir. 2017). *See* Wolff Br. 28-29. The *Hagan* plaintiffs publicly opposed workers' compensation legislation, which this Court recognized was "inherently political" and connected to their job duties as workers' compensation arbitrators. *Hagan*, 867 F.3d at 820, 829. March, on the other hand, did not seek any policy reform at all and spoke about his supervisors' alleged corruption, not how he should administer Town policy. And the *Hagan* plaintiffs sought to "undercut a key component" of their employer's policy by filing a lawsuit to "publicly challeng[e]" it. *Id.* at 820. March simply cooperated with an investigation.

Finally, relying on *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993), the Town says that the First Amendment allows it to fire a policymaking employee if he opposes the Board's political goals, even without evidence of the employee's disloyalty. Town Br. 20. In *Wilbur*, a policymaking employee was considered politically disloyal and placed on unpaid leave for campaigning and running for office against his supervisor. 3 F.3d at 215-16, 218. March (obviously) did not do that, and his speech was unrelated to his supervisors' political goals. Reporting abuses of office is "unconnected to and unmotivated by [the] need for political loyalty." *Bonds*, 207 F.3d at 979.

B. The district court improperly used after-acquired evidence that does not indisputably establish March's purported political motivations.

The district court mistakenly applied *Elrod-Branti* by relying on evidence Defendants acquired *after* March's firing to conclude that March was politically motivated against Wolff. ECF 123, at 22. What matters is what Defendants knew when they fired March. *See* Opening Br. 21-22. And even if the after-acquired evidence could be used, it does not indisputably show that March was politically motivated to undermine Wolff.

1. Defendants acknowledge that "after-acquired evidence cannot serve as the basis for [March's] termination." Town Br. 22. But they assert that their knowledge at the time of March's firing provided them with sufficient grounds for termination under *Elrod-Branti*. *Id.* at 22-23. Not so. When Defendants terminated March, they lacked any evidence that March opposed policies favored by the Board or was pursuing his own political agenda (assuming, counterfactually, that he ever did so). *See id.* at 22. They knew only that March (and other Town employees) had been interviewed as part of the investigation. *Id.*

Defendants focus on March's supposed disagreement with the Board's special-assessment policies. Town Br. 16-18. That is a red herring. Defendants cannot use Yerges' reports, which they acknowledge they did not know about at the time of the firing, *id.* at 22, to concoct a policy

disagreement over special assessments supported only by Defendants' after-the-fact litigation declarations. *See id.* at 22-23; App. 237 (¶ 17e), 243-44 (¶ 14), 249 (¶ 11).

2. Even assuming (incorrectly) that Defendants' after-acquired evidence could be used to support their invocation of *Elrod-Branti*, a reasonable jury could find that March did not participate in the investigation "to undermine the Town Board" or advance his political agenda. Town Br. 24; *see* Opening Br. 22-26.

The Town says that March did not do enough to stop Wolff from bidding on the Champion Pond project, which supposedly evidences March's political motive to "entrap" Wolff and destabilize the Board. Town Br. 24-25. To begin with, March's conduct outside his interviews with Yerges is not relevant to whether *Elrod-Branti* applies to that speech. As shown above, *Elrod-Branti* hinges on the content of the speech, not other evidence of the speaker's political motivations. So, even if March actively chose not to warn Wolff—which, again, is belied by the record, *see* App. 91-92—that does not mean that he subsequently had to stay silent in response to law-enforcement inquiries or risk termination.

In any event, as our opening brief explains (at 25), March *did* raise concerns with Wolff about the Champion Pond project, only to be met with deflection or lies about his involvement. *See* App. 91-92; *supra* at 1. March genuinely believed that Wolff had sold his business and so would not incur liability for his bid. App. 92, 104, 119, 121. And the Town

Attorney also suggested the bid was legal before the Town Board voted to approve it. App. 67. That March later learned otherwise and spoke to Yerges about it, App. 308, does not evince a desire to entrap Wolff.

Even if, as Wolff says, a workaround could have been devised by splitting payment on the bid between two years, *see* Wolff Br. 6, it was hardly March's job to propose that maneuver, particularly after he had informed Wolff of his legal obligations and after Wolff had falsely told March that he had sold his business. App. 92, 308. A reasonable jury could find that March was not politically motivated to expose Wolff to criminal liability and had taken reasonable steps to prevent a conflict of interest.

II. March's statements to Agent Yerges are protected under *Pickering*.

Our opening brief explains (at 26-33) that March's statements to Agent Yerges are protected by the First Amendment under *Pickering* because (A) he spoke as a citizen (B) on a matter of public concern and (C) his free-speech interest outweighs any interest the Town may have had in regulating his speech. In arguing otherwise, Defendants misunderstand the legal standards and misapply governing precedent.

A. March spoke as a citizen because communicating with law enforcement about potential misconduct by a Town official was well outside his job duties.

Cooperating with a state investigation was not part of March's official duties, either on paper or in practice. Defendants' attempts to show otherwise fail.

"Determining the official duties of a public employee requires a practical inquiry into what duties the employee is expected to perform, and is not limited to the formal job description." *Houskins v. Sheahan*, 549 F.3d 480, 490 (7th Cir. 2008). Defendants contend that March spoke to Yerges as Town Administrator—not as a citizen—because his official duties included "[a]ct[ing] as Town liaison to other agencies and units of government." Wolff Br. 22; Town Br. 2-3, 30; App. 52. But when speaking with Yerges, March was not acting as Town "liaison." He wasn't acting on the Town's behalf or "liaising" with anyone; he was expressing concerns that any citizen could have about a Town official's potential corruption.

Other than being interviewed by Yerges, March never participated in any other law-enforcement investigation during his nearly fifteen years as Town Administrator, App. 217 (¶ 23), which contradicts the notion that speaking with Yerges was a duty that March was "expected to perform." *Houskins*, 549 F.3d at 490. And it makes no difference that Yerges subjectively believed that he was interviewing March in March's

"official capacity," *see* Wolff Br. 21, because whether March spoke as a citizen is a legal question for the Court, not a witness, to determine.

It likewise doesn't matter that March spoke to Yerges at the Town Hall during business hours. *See* Wolff Br. 21-22. The setting is "not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work." *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006); *see, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412-16 (1979) (protecting schoolteacher's speech even though it occurred in the school principal's office). Instead, what matters is whether the speech was part of the speaker's official duties. *See Garcetti*, 547 U.S. at 421. And answering an investigator's questions about potential corruption "was not part of what [March] was employed to do." *See Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007).

The Town contends that March's "speech was inherently connected to his job," given that "Agent Yerges would not have interviewed March if March was not the Town Administrator." Town Br. 26-27. But Yerges interviewed March because March had information relevant to the investigation, not because March was the Town Administrator. True, March learned the information at work, but "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Lane v. Franks*, 573 U.S. 228, 240 (2014); *see Garcetti*, 547 U.S.

at 421 ("The First Amendment protects some expressions related to the speaker's job.").

The Town's position has disturbing implications. If the Town were correct that work-related speech is inherently unprotected, then corrupt public officials could legally fire employees who cooperate with investigators whenever they report what they observed at work—which is where public corruption often takes place. "Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs." *Lane*, 573 U.S. at 241.

That's why the Supreme Court and this Court have repeatedly concluded that public employees were speaking as citizens when they reported misconduct and corruption by their employers. Examples include trial testimony by a community-college employee, *see Lane*, 573 U.S. at 238; a deposition in a civil lawsuit by a police officer, *see Morales*, 494 F.3d at 598; and statements in a police report by a prison social worker, *see Houskins*, 549 F.3d at 491. Like March, those public employees spoke as citizens for the "simple reason" that anyone who makes statements to government investigators or in a judicial proceeding "bears an obligation" to "society at large[] to tell the truth." *Lane*, 573 U.S. at 238. And Wisconsin codifies that obligation, making it unlawful to "knowingly giv[e] false information to [an] officer" "while such officer

is doing any act in an official capacity and with lawful authority." Wis. Stat. § 946.41(1)-(2)(a).

This obligation to speak truthfully applies just as much to out-of-court statements to an investigator as it does to in-court testimony. And it sets public employees like March apart from others whose job duties require them to make reports up the chain—like a prison guard officially responsible for informing superiors about potential breaches in prison search policy, *see Spiegla v. Hull*, 481 F.3d 961, 966-67 (7th Cir. 2007); a prosecutor formally assigned to write deposition memoranda, *see Garcetti*, 547 U.S. at 421-22; or a police officer regularly tasked with informing prosecutors about an ongoing investigation, *see Morales*, 494 F.3d at 597-98. Unlike those plaintiffs, March was neither required nor expected to engage in the speech as part of his job duties. He cooperated with Yerges's investigation because it was his obligation as a citizen, not as Town Administrator.

B. March's speech was about potential corruption, a quintessential issue of public concern.

March's speech to Yerges satisfies *Pickering*'s public-concern element because it described what March believed could be an act of public corruption: Wolff's potential self-dealing. *See* Wis. Stat. § 946.13(1). "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Lane*, 573 U.S. at 241 (citation omitted). Public

corruption "obviously involves a matter of significant public concern." *Id.* Put differently, speech like March's, which "[e]xpos[es] governmental inefficiency and misconduct[,] is a matter of considerable significance." *Garcetti*, 547 U.S. at 425.[1]

That's all that's needed to satisfy *Pickering*'s public-concern prong. But Defendants advance several arguments that misstate the facts or misapply the law, *see* Wolff Br. 23-24; Town Br. 28-31, so we address them for clarity's sake.

Wolff maintains that March's statements to Yerges were not on matters of public concern because the Champion Pond contract had not yet "become a legal problem" and "there was still plenty of time to fix the issue." Wolff Br. 23-24. But the notion that there was no "legal problem" cannot be squared with the already-opened criminal investigation into then-Supervisor Wolff. *See* Dist. Ct. Op., ECF 123, at 5-10; App. 284-95. True, Wolff was ultimately acquitted, ECF 123, at 10, but the public-concern prong is about matters of legitimate public *concern* and cannot turn on whether the alleged corruption later results in a conviction. *See Lane*, 573 U.S. at 241.

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[1] As described above (at 1-2), although Wolff was ultimately prosecuted on a single criminal charge, Wisconsin's investigation into Wolff encompassed multiple allegations of official misconduct—all of which were matters of public concern.

Wolff next says that by talking to Yerges, March intended to "set up" Wolff for prosecution to protect his own job and "to further his faction's goals." Wolff Br. 24. To begin with, this allegation lacks record support. *See supra* at 1-2. In truth, the investigation into Wolff was prompted by *Gehring's* tip, App. 285-86, and Gehring told Yerges about Wolff's Champion Pond bid before Yerges interviewed March, App. 293, 304, 308. But even if March did have an ulterior motive for his speech to Yerges, that would be irrelevant. On the public-concern prong, "[i]t does not matter that [a plaintiff] was motivated, at least in part, by self-interest." *Kristofek v. Village of Orland Hills*, 832 F.3d 785, 795 (7th Cir. 2016); *see also Marshall v. Porter Cnty. Plan Comm'n*, 32 F.3d 1215, 1219-20 (7th Cir. 1994) ("It is often the case that those who speak out are also involved in personal disputes with employers and other employees.").

Finally, Wolff contends that March's speech was not of public concern because it was "demonstrably false." Wolff Br. 24. Even if that were accurate, it would not matter, because "speech of public importance only loses its First Amendment protection if the public employee *knew it was false* or made it in *reckless disregard* of the truth." *Kristofek*, 832 F.3d at 796 (emphasis added); *see Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968). Tellingly, the only "lie" that Wolff accuses March of uttering to Yerges is a minor inconsistency in March's recollection (over a year after the fact) of the precise timing of payments under the Champion Pond contract. Wolff Br. 13-14. That's hardly "knowingly or recklessly false"

and couldn't, in any event, strip all of March's speech of First Amendment protection.

The Town contends that March's speech was about "internal governance," not a matter of public concern. Town Br. 31. To begin with, this argument does not address the public-concern inquiry but instead recycles the Town's arguments on the citizen-speech element. In any case, March spoke in the context of a *state criminal investigation*, not a workplace disagreement. So, when March provided information to Yerges about Wolff's "ethically and legally" dubious actions, March spoke on "a quintessential issue of public concern." *Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000).

C. March's and the public's interests outweigh the Town's asserted interest in preventing workplace dissension.

The third *Pickering* element balances the public employee's free-speech interest against the government's interest as an employer. *Pickering*, 391 U.S. at 568. As we've shown, a public employee, like any other citizen, has a First Amendment interest in commenting on matters of public concern. *Id.* And when public employees expose potential corruption by their employers, that speech furthers (rather than hinders) the government's own public-service interest by "promoting efficiency and integrity in the discharge of official duties." *Connick v. Myers*, 461 U.S. 138, 150-51 (1983). Here, then, March's side of the *Pickering* scale is heavily weighted by the interest that March, the people of Grand Chute,

and the Town itself as a governing body all shared in rooting out potential corruption by a sitting Supervisor. To tip the balance in its favor, the Town would have to show an extraordinary interest as an employer that was compromised by March's speech.

The Town comes nowhere close. It argues that March's speech to Yerges violated the "loyalty and confidence" demanded by March's position and "risked disrupting harmony within the Town" because March knew when he talked to Yerges that the investigation had "upset" Defendants. Town Br. 30. To begin with, the Town confuses the timeline: Defendants became aware of the investigation in March 2022, App. 234 (¶ 7), months *after* March spoke with Yerges in fall 2021, App. 302-10, 314-21. So, the Town cannot be correct that when March spoke with Yerges, he "knew [Defendants] were upset about the … investigation." Town Br. 30. Besides, any loyalty or confidence that a town administrator may owe elected officials surely does not require the administrator to refuse to cooperate with an official state investigation into potential corruption. And First Amendment protection for speech about public corruption cannot turn on whether the allegedly corrupt official is "upset" that he is under investigation. *See Lane*, 573 U.S. at 242.

Wolff contends that March's "insubordinate" statements to Yerges—which he hyperbolically characterizes as "gratuitous[] critici[sm]" that "fanned the flames of what was essentially a political investigation"—undermined the Town's interest because the "Board could not be expected

to trust and rely on an administrator" who made those statements. Wolff Br. 25-26. That's doubly wrong.

First, to the extent that Wolff—like the Town—implies that March was fired for making inflammatory or disloyal statements about his employer, that is directly at odds with the uncontroverted timeline of events. Defendants learned the specific content of March's speech to Yerges only during discovery. Dist. Ct. Op., ECF 123, at 16; App. 234 (¶ 10).

Second, Wolff misunderstands *Pickering* balancing. What counts is whether employee speech "hampers public functions," not whether "superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). That's because a public employer's interest in workplace harmony is valid only insofar as it advances the employer's ultimate end in "promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Firing a public employee for cooperating with an investigation into an elected official's alleged corruption can hardly be expected to enhance the efficient provision of public services.

Tellingly, Defendants do not identify a single way that March's speech to Yerges harmed the Town's interest in serving the people of Grand Chute. There's no evidence that March's speech "undermined" his job duties, Town Br. 30, or otherwise interfered with the Town's public functions, *see Rankin*, 483 U.S. at 384. On the contrary, less than a month

before March was fired, Board Chair Van Eperen stated publicly that March "ha[d] been meeting all his goals" as Administrator. App. 230. And eight Town Department heads signed a letter to Van Eperen stating their "unified opinion that Jim March is an exceptional leader and a man of outstanding integrity" who "has never failed to place the interests of the Town at the forefront of any issue we have brought to him." ECF 79-12 (Ex. L).

Likewise at odds with the record is Wolff's contention that March "accused [Defendants] of misdeeds to law enforcement without providing them the same information so that they could protect themselves legally." Wolff Br. 26. As noted above (at 1), March *did* advise Wolff of his legal obligations shortly after Wolff was elected, App. 91, 93, 308, but Wolff falsely assured March that he had sold his business, App. 92, 308. And when March tried to raise the topic with Wolff again, Wolff became angry and "stormed out" of March's office. App. 94.

In any case, it was not March's responsibility as Town Administrator to prevent Wolff from engaging in corrupt acts. And as our opening brief explains (at 33), to the extent that the criminal investigation into Wolff's conduct interfered with effective governance and "unnecessarily consumed town resources," Wolff Br. 26, responsibility lies with Defendants' own behavior, not March's speech to Yerges.

III. March suffered a deprivation, and a reasonable jury could find his cooperation was at least a motivating factor in his termination.

A. March's termination is a deprivation.

Wolff's contention that March did not suffer an actionable deprivation is easily dispensed with. Wolff Br. 29. Termination is a classic injury in an employment-discrimination case, including one that deters the exercise of free speech. *See Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006). March's status as an at-will employee, and the Town's payment of severance under his employment contract, *see* Wolff Br. 29, does not mean that the elimination of one's job after fifteen years of service is not a deprivation that would chill a reasonable employee from speaking, *see Massey*, 457 F.3d at 716.

B. Ample evidence shows that March's speech was a motivating factor in the Board's decision to terminate him.

Turning to causation, our opening brief explains (at 33-36) that to prevail as the non-moving party at summary judgment, March need show only that a reasonable jury could conclude that his protected speech was "at least a motivating factor" in the Town's decision to fire him. *Kidwell v. Eisenhauer*, 679 F.3d 957, 965 (7th Cir. 2012). If the Town offers non-retaliatory reasons for firing March, he must produce "evidence upon which a rational finder of fact could infer that the [Town's] proffered reason is a lie." *Zellner v. Herrick*, 639 F.3d 371, 379 (7th Cir. 2011).

Simply put, reversal is required if a reasonable jury could find that March's speech and his termination were "not wholly unrelated," *Kidwell*, 679 F.3d at 967.

The Town maintains that March cannot prove causation because he cannot show that his speech was *the* but-for cause of his termination. Town Br. 12-13. That's the wrong standard. *See Kidwell*, 679 F.3d at 965. As this Circuit's model instruction puts it, a jury could find for March if his speech "was a reason, alone or with other reasons" for his firing. Federal Civil Jury Instructions of the Seventh Circuit, *6.01 Public Employee's First Amendment Free Speech Retaliation Claim*, at 128-29 (cmt. c) (2017 rev.).

Wolff argues that March has not provided "sufficient" circumstantial evidence of the Supervisors' retaliatory motives to get to a jury. Wolff Br. 32. That's simply wrong. Our opening brief shows (at 34-35) that Defendants were infuriated by the investigation. *See, e.g.*, App. 140 (describing Wolff's confrontation with March in which Wolff was "ranting" because he was "angry over the investigation"). The Town Board was insistent on finding out who participated in it. App. 109-10, 139-42, 218. After investigators asked Wolff about his businesses, he was upset and told March he had a "plan" for him and that the "games [were] over." App. 140-41. Some Supervisors sought to use Town funds to investigate the State's investigation. App. 142, 218, 366. And after the

Supervisors learned March had participated in the investigation, they repeatedly questioned him about what he knew. App. 139-42.

Others also noticed Defendants' hostility towards March about the investigation. Wolff quibbles about whether Board Chair Van Eperen actually asked Human Resources Director Brinkman about how to fire March in light of the investigation. Wolff Br. 34. But Brinkman perceived it that way when Van Eperen asked her for March's employment contract and performance reviews: She informed Van Eperen that "if Jim were questioned by [the state investigator] and then terminated, he could potentially have a claim for retaliation." ECF 98-4, at 11-13. A jury could reasonably credit her understanding of this factual dispute. A jury could also credit Gehring's testimony that he believed Defendants fired March to punish him for participating in the investigation. App. 169, 209-13; *see* Opening Br. 34-35. With all reasonable inferences drawn in March's favor, a jury could conclude that Defendants retaliated against March for his participation in the investigation.[2]

Wolff asserts that the months-long lapse between the investigation and March's termination shows that a causal link is lacking. Wolff Br. 32-33. That's a non-sequitur. March is not relying on temporal proximity

[2] The record shows that only Van Eperen, not Wolff and Ings, spoke with Brinkman. *See* Wolff Br. 34 n.7. But Van Eperen's conversation still establishes Brinkman's perception that the Board was contemplating firing March because certain Supervisors were angered by the investigation. ECF 98-4, at 13.

between his protected speech and termination, but rather on the other compelling evidence just recounted to connect the two events. March can "survive summary judgment" with evidence besides temporal proximity "that supports the inference of a causal link." *Daza v. Indiana*, 941 F.3d 303, 309 (7th Cir. 2019).

C. A reasonable jury could conclude that Defendants' reasons for terminating March are pretextual.

As Defendants point out, they cannot be held liable if their reasons for firing March were non-retaliatory, even if those reasons are "foolish or trivial or baseless." Town Br. 34. But the persuasiveness of their non-retaliatory explanations is for the fact finder. *Milliman v. County of McHenry*, 893 F.3d 422, 431 (7th Cir. 2018). Summary judgment is appropriate only when "the court can say without reservation" that a reasonable fact finder would believe Defendants' reasons. *Massey v. Johnson*, 457 F.3d 711, 719 (7th Cir. 2006).

And it certainly doesn't help Defendants' cause when, as here, the reasons given *are* foolish, trivial, or baseless. If the Town's offered reasons lack credibility, then "the inference that the real reason [for terminating March] was a forbidden one … may rationally be drawn." *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990). And if this inference of "improper motive can be drawn, there must be a trial." *Id.* Defendants cite March's purported poor job performance, lack of trust with staff, delayed action on Board requests, and supposedly inflated

salary as non-retaliatory reasons for firing March. Town Br. 33-34; Wolff Br. 34-35. A jury could discredit each of these explanations.

Start with March's claimed performance deficiencies. First, the (purported) deficiencies were never brought to March's attention. *See* Opening Br. 35; App. 221 (¶ 61); ECF 34-8, at 133 (Supervisor English stating that only the Board and counsel attended the closed session discussing March's performance). Indeed, just weeks before March's firing, Van Eperen said at a public Board meeting that March had met all his annual job-performance goals. App. 230. Defendants rely solely on their own declarations to claim that March "ignored" their concerns about job performance raised in closed sessions. Town Br. 33, 35.

To understate things, these declarations could come across as suspicious to a jury. After all, at a Board meeting a few weeks before March's firing, which included an agenda item about March's performance, App. 230-32, several citizens praised March's work. App. 220 (¶ 55). And in advance of that meeting, eight Grand Chute department heads wrote to the Board expressing their trust in March's leadership, ECF 79-12 (Ex. L)—contradicting the Town's assertion that March suffered from a "lack of trust with staff," Town Br. 33.

Defendants' other purported justifications for the firing are even weaker. Their assertion that March delayed action on Board requests, failed to follow directives, and was not responsive to the Board has zero contemporaneous support in the record (and, again, is based solely on the

Defendants' litigation declarations). *See* Town Br. 33, 35. And Defendants' assertion that they fired March because his salary was too high makes no sense: The Board itself had recently set and approved his salary. App. 169, 231.[3]

All told, a reasonable jury could conclude that each of Defendants' proffered reasons is pretextual, underscoring that the real reason for March's firing was retaliation for his speech. Put otherwise, a jury must resolve any "genuine dispute about the sincerity" of Defendants' stated reasons for March's termination. *Hobgood v. Ill. Gaming Board*, 731 F.3d 635, 647 (7th Cir. 2013).

IV. The individual Defendants are not entitled to qualified immunity.

Our opening brief demonstrates (at 36-39) that Ings, Van Eperen, and Wolff are not entitled to qualified immunity because this Court and the Supreme Court have clearly established that public employees like March have a right to be free from retaliation for reporting potential corruption by their government employers. *See Marshall v. Porter Cnty.*

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[3] Wolff curiously points out that the Governor's salary was only slightly greater than March's. Wolff Br. 2. More salient—and more than a little ironic—is that when the Town sought to replace March, the advertised salary range included March's salary when he was fired. *See* Duke Behnke, *Grand Chute Board Selects Richard Downey of Altoona as Next Town Administrator*, The Post-Crescent (Dec. 13, 2023) https://www.postcrescent.com/story/news/local/2023/12/13/grand-chute-selects-richard-downey-of-altoona-as-town-administrator/71897190007/.

Plan Comm'n, 32 F.3d 1215 (7th Cir. 1994); *Kristofek v. Village of Orland Hills*, 832 F.3d 785 (7th Cir. 2016); *Lane v. Franks*, 573 U.S. 228 (2014).[4]

In seeking qualified immunity, the individual Defendants mainly rehash their *Elrod-Branti* and *Pickering* arguments. For example, Defendants seek to sidestep *Marshall* and *Lane* by emphasizing non-dispositive details, such as the time and place in which March's speech occurred. Town Br. 36-37; Wolff Br. 35-37. But these factors cannot help establish qualified immunity because, as discussed above (at 5-6, 13-14), they do not bear on the validity of March's First Amendment right to begin with.

Wolff notes that the *Marshall* plaintiff's speech did not implicate *Elrod-Branti* because politics were not involved in the plaintiff's discharge. Wolff Br. 35. But *Elrod-Branti* does not apply here for the same reason: March's politics played no role in his speech to Agent Yerges, or at least a reasonable jury could so find. *See supra* at 9-11; Opening Br. 15-19. At bottom, *Marshall* established that a public employee, even a policymaker, cannot be lawfully fired for criticizing her employer's abuse of office. 32 F.3d at 1221-22. This holding put Defendants on notice that firing March for his speech would violate the First Amendment.

[4] Defendants do not dispute that the Town lacks qualified immunity. *See* Opening Br. 37.

Next, Wolff contends that *Lane* did not clearly establish March's rights because the speech there was subpoenaed testimony, not statements to an investigator. Wolff Br. 36. But *Lane*'s analysis of the plaintiff's testimony centered on the obligation that witnesses bear "to the court and society at large[] to tell the truth." *Lane*, 573 U.S. at 238. That obligation applies equally in the context in which March spoke: an interview with a state investigator in which March was legally obligated to speak truthfully, *see supra* at 14-15; Wis. Stat. § 946.41(1), culminating in a public-corruption trial like the one in *Lane*. *Lane* clearly established that when public employees speak truthfully outside the scope of their job duties in aid of a law-enforcement proceeding, they speak as citizens with the First Amendment's protection. *See* 573 U.S. at 238.

Turning to policymaker status, Defendants contend that *Lane* and *Kristofek* cannot clearly establish March's rights because the plaintiffs in those cases, unlike March, were not held to be policymakers. Town Br. 37; Wolff Br. 36-38. But as shown above (at 3), policymaker status is not, as the Town would have it, a "'make or break' factor which determines whether First Amendment protections apply." Town Br. 37. That proposition follows from *Lane*, where the plaintiff likely *was* a policymaker, but the Supreme Court nevertheless applied *Pickering* without so much as mentioning *Elrod-Branti*. *Lane*, 573 U.S. at 238-42; *supra* at 5-6. *Lane* therefore underscores that policymaker status is not

outcome-determinative, and that speech about public corruption, even by a policymaker, is protected by the First Amendment.[5]

Finally, Wolff says that the *Lane* plaintiff's speech was undisputedly truthful, whereas here March made false statements to Yerges. Wolff Br. 36. But March's speech was not false. *See supra* at 17-18. And, in any case, any dispute over the truthfulness of March's speech is irrelevant to qualified immunity, because at summary judgment, a court must accept the non-moving party's version of the facts—meaning that Defendants cannot rely on any purported falsehood in March's speech to establish qualified immunity. *See Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam).

Conclusion

This Court should reverse the district court's grant of summary judgment to all Defendants and remand for trial on March's First Amendment claim.

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[5] In addressing qualified immunity, Wolff observes that our opening brief (at 39) cited *Spiegla v. Hull (Spiegla I)*, 371 F.3d 928 (7th Cir. 2004). We acknowledge that the broad holding in *Spiegla I* was abrogated by *Spiegla v. Hull (Spiegla II)*, 481 F.3d 961 (7th Cir. 2007), where this Court recalibrated *Pickering*'s citizen-speech prong after *Garcetti v. Ceballos*, 547 U.S. 410 (2006). That said, *Spiegla I*'s analysis of the second and third *Pickering* prongs remains good law, which is why this Court in *Kristofek* relied on it in rejecting the defendant's claim of qualified immunity there. 832 F.3d at 798-99.

Response Brief of Cross-Appellee James March

Statement of the Issue

Whether Wolff has made out violations of his clearly established rights under the First Amendment and the Equal Protection Clause.

Statement of the Case

We rely on the Statement of the Case in our opening brief (at 3-11). It provides a thorough review of the record, refuting Wolff's claims that March was involved in a "Machiavellian scheme" to "set up" Wolff for criminal prosecution. Wolff Br. 39-50; *see also supra* at 1-2 (Introduction). As explained below, the record is bereft of facts showing that March imposed a deprivation on Wolff, let alone one that could deter Wolff's exercise of free speech, and March did not illegitimately target Wolff for differential treatment that violated Wolff's right to equal protection.

Summary of Argument

As already explained, March spoke truthfully as a citizen when approached by a Wisconsin state investigator conducting an inquiry into alleged public corruption. Wolff asserts, however, that March's cooperation violated *his* First Amendment and equal-protection rights. Wolff maintains that March retaliated against his political campaign speech because it criticized March and the Town's special-assessment policy. Wolff argues that, once he was elected, March breached a contractual duty he owed Wolff and instigated a criminal investigation

and prosecution of his private business conduct because of an illegitimate retaliatory animus against Wolff's speech. The district court rejected these claims. ECF 123, at 31-38. And rightly so, because Wolff's alleged scheme has no basis in reality.

Wolff's cross-appeal fails on multiple independent grounds. We discuss those reasons in some detail below. But this Court need not address all the infirmities of Wolff's cross-appeal and can quickly dispose of it in one of two ways. First, the Court could hold that March is entitled to qualified immunity because Wolff nowhere identifies March's violation of a clearly established or obvious constitutional right. Or the Court could hold that March cooperated with a law-enforcement investigation as a citizen, not while acting under color of law as required to invoke Section 1983.

Turning to the merits, Wolff's First Amendment claim goes nowhere because March imposed no deprivation on Wolff, let alone one that could chill speech, and because Wolff's speech did not motivate March to cooperate with Wisconsin's investigation. Wolff's class-of-one equal-protection claim fails from the jump because Wolff lacks a similarly situated comparator. Besides, March's actions were not driven by a baseless animus or hatred toward Wolff, and Wolff's claim arose in a public-employment context, where class-of-one claims are categorically barred.

Argument

I. March is entitled to qualified immunity because Wolff's claims are neither clearly established nor obvious constitutional violations.

Wolff asserts that March violated Wolff's First Amendment rights because March instigated Wolff's prosecution in retaliation for his campaign speech criticizing March and the Town's special-assessment policy. Wolff Br. 39-47. Wolff also says that March violated Wolff's right to equal protection because March treated him differently from other Supervisors and harbored an illegitimate animus toward Wolff. Wolff Br. 47-50. These arguments can readily be rejected on qualified-immunity grounds.

Wolff points to no authority in this Circuit (or any other) clearly establishing his First Amendment or equal-protection rights or involving allegations remotely resembling his. *See* Dist. Ct. Op., ECF 123, at 36. Instead, he argues that his claims present an "obvious" violation of his rights. Wolff Br. 51-52. Charitably put, that assertion is baseless. Plaintiffs face a significantly higher burden to defeat a qualified-immunity defense on obviousness grounds than when seeking to do so based on clearly established case law. *See e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 738-41, (2002); *Reed v. Palmer*, 906 F.3d 540, 547 (7th Cir. 2018).

This case is not one of those "rare cases[] where the constitutional violation is patently obvious." *Reed*, 906 F.3d at 547 (quoting *Jacobs v.*

City of Chicago, 215 F.3d 758, 767 (7th Cir. 2000)). That is, March's conduct was not "so egregious and unreasonable that … no reasonable [official] could have thought he was acting lawfully." *Id.* (quoting *Abbott v. Sangamon County*, 705 F.3d 706, 724 (7th Cir. 2013)).

The few cases Wolff cites demonstrate that obvious First Amendment or equal-protection violations are nothing like his case. In *Eberhardt v. O'Malley*, for example, this Court reversed the district court's dismissal of a First Amendment claim because a state attorney had adequately alleged that he was fired for no reason other than drafting (but not publishing) a crime novel. 17 F.3d 1023, 1024-25, 1027-28 (7th Cir. 1994). That allegation was "an elementary violation of the First Amendment." *Id.* at 1028. As to equal protection, Wolff cites *Nabozny v. Podlesny*, where this Court found an obvious gender-based equal-protection violation because a male student, who was bullied by his peers, was treated differently by public-school officials than were similarly situated female students. 92 F.3d 446, 451-53, 456 (7th Cir. 1996).

Here, all reasonable officials in March's shoes would have thought that their actions were lawful. Wolff courted criminal liability when he submitted a bid on a Town contract. Dist. Ct. Op., ECF 123, at 35-36; App. 81-82. March expressed concerns to Wolff about his bidding and contracting with the Town, App. 94, initially took Wolff at his word that he had sold his business, App. 104, raised his concerns when approached by a law-enforcement officer, App. 308, and cooperated in a public-

corruption investigation, App. 87-88, 317. Even if Wolff's unsubstantiated allegations of a "Machiavellian scheme" were true, *see* Wolff Br. 39-41, 45, 52, it is not obvious that a town administrator must prevent an elected official from engaging in potentially unlawful business conduct, much less that he should subsequently conceal that elected official's conduct from investigators. No precedent remotely suggests otherwise.

II. Wolff's claims fail because March was not acting under color of law when he cooperated with the investigation.

To establish liability under Section 1983, the defendant must have been acting under color of law. 42 U.S.C. § 1983. As the district court suggested, March, though a Town official, was not acting under color of law when he spoke to Agent Yerges. ECF 123, at 35. This Court could reject Wolff's claims for that reason alone.

March cooperated with the investigation in his capacity as a citizen. *See* Opening Br. 27-30; *supra* at 12-15. March's cooperation did not "involve any exercise of state authority" related to the performance of his duties as Town Administrator. *Barnes v. City of Centralia*, 943 F.3d 826, 831 (7th Cir. 2019). The State of Wisconsin, not the Town of Grand Chute, investigated and charged Wolff, and judicial officers found probable cause

for a search warrant and the criminal charge. Dist. Ct. Op., ECF 123, at 35. It was they, not March, who acted under color of law.[6]

III. This Court should affirm the district court's rejection of Wolff's First Amendment retaliation claim.

Wolff's First Amendment claim fails as a matter of law and fact. To succeed on his First Amendment retaliation claim, Wolff must demonstrate that (1) his "speech" while campaigning for and serving in office was protected by the First Amendment; (2) when March spoke to Agent Yerges, March engineered a chain of events that deprived him of the right to be free of a baseless criminal prosecution, thus chilling his speech; and (3) his speech motivated March's actions in causing that deprivation to occur. *See Kidwell v. Eisenhauer*, 679 F.3d 957, 964 (7th Cir. 2012).

We agree that Wolff had a First Amendment right to criticize the Town's special-assessment policy and personnel when he ran for the Board and served as a Supervisor. *See* Wolff Br. 42-43. But Wolff's claim nonetheless fails for three independent reasons.

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[6] Wolff argues that March is liable in his official capacity. Wolff Br. 51. He's not liable in any capacity for the reasons provided in this brief. But even if March could be held responsible in his official capacity, that would render the *Town* liable, not March. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

A. March imposed no deprivation on Wolff.

Wolff's claim fails as a matter of law because his alleged injury—that March's speech as a citizen in a law-enforcement investigation caused Wolff's investigation and prosecution—is not a deprivation. And Wolff cannot show that March materially deprived him in any way likely to deter his free speech, let alone that the alleged scheme even existed.

1. As the district court observed, March was not at the center of a scheme, nor was he "legally responsible for the state investigation or resulting criminal charges." ECF 123, at 35. Wolff, Gehring, Agent Yerges, the state prosecutor, and multiple judicial officers all played pivotal roles outside of March's control in the investigation and trial of Wolff. *See id.* at 35-36. The investigation had already started when Yerges approached March and likely would have continued anyway without March's involvement. App. 285-295. And Wolff provides zero evidence that March prevented or hindered Wolff from running for or being elected to public office.

As a result, Wolff's argument is largely premised on a supposed contractual right owed by March to him. *See* Wolff Br. 39, 41, 44, 46 (citing no evidence or authority). To start, March's employment contract was with the *Town*, not with individual Supervisors, so March could not possibly owe *Wolff* a contractual duty. *See* App. 52-53, 150-152; ECF 26-1; ECF 34-4.

In any event, March did not deprive Wolff or the Board of his services as Town Administrator. March met job-performance goals set by the Board, even amidst continued intimidation by Supervisors, including Wolff, and pressure to divulge what he knew about the investigation. App. 139-41, 220 (¶ 49), 328. Right before March was fired, the Town Department heads expressed support for March's leadership. ECF 79-12 (Ex. L); *see supra* at 21, 26. And contrary to Wolff's contention, *see* Wolff Br. 39, 48-49, March's contract did not obligate March to advise the Board on avoiding a felony charge for self-dealing (or for any other crime). *See* App. 52-53, 150-152; ECF 26-1; ECF 34-4.

Nor did the contract create a "ministerial duty" to report any concerns about corruption by Supervisors directly to the Board. *See* Wolff Br. 48-49. Wolff relies on *Cavanaugh v. Andrade*, 550 N.W.2d 103 (Wis. 1996), in which a city was held negligent for failing to establish written policy guidelines mandated by Wisconsin statute. March's contract creates no duty to report corruption concerns to the Board remotely like the express statutory command in *Cavanaugh*. *See id.* at 107-08; App. 52-53, 150-152; ECF 26-1; ECF 34-4.

2. Wolff also says that March's speech to Agent Yerges itself deprived Wolff of a constitutional right. But "[w]hen the alleged retaliatory act is a defendant's speech, the plaintiff must show that the speech rose to the level of threat, coercion, intimidation, or profound humiliation." *Deeren v. Anderson*, 72 F.4th 229, 235 (7th Cir. 2023). "[C]riticism—even in the

form of condemnation—is not enough" to show a deprivation caused by speech. *Id.* Elected officials especially are expected "to shoulder a degree of criticism about their public service from their constituents and their peers" and continue to exercise their free-speech rights unabated. *Houston Cmty. Coll. Sys. v. Wilson,* 595 U.S. 468, 478 (2022).

Speech that criticizes a political figure or discusses her potential criminal conduct does not rise to the level of threat, coercion, or intimidation, even when the speech occurs outside of an active public-corruption investigation, like the speech here. *See Deeren*, 72 F.4th at 235-36. In *Deeren*, a deputy sheriff, running to replace the current sheriff, did not establish a retaliation claim for comments made by colleagues to other officials, a private citizen, and a subsequent employer that described him as "a bad guy" and "no good" and discussed his disciplinary record, including an expunged sexual-assault charge. *Id.* at 233, 235-36.

If the speech in *Deeren* was not actionable, then surely March's speech does not rise to the level of a "threat, coercion, intimidation, or profound humiliation." *See Deeren*, 72 F.4th at 235-36. Here, even taking Wolff's non-record-based story as true—that March was driven by political animus against Wolff—March simply answered Yerges's questions in an ongoing investigation about Wolff's potential criminal misconduct. App. 304-10. Any (purported) criticism of Wolff that March expressed during the investigation was simply not enough to constitute a deprivation, so Wolff's First Amendment claim fails.

B. Wolff's speech did not cause March to cooperate in the investigation.

If this Court reaches causation, it should conclude that no reasonable jury could find that Wolff's political speech was a motivating factor in March's cooperation in the investigation. Wolff would have this Court find, without any evidence, that March manufactured and orchestrated a criminal investigation into Wolff to retaliate for Wolff's protected speech. Wolff's fantastical tale of a "Machiavellian scheme" lacks any support in the record and is rife with speculation. Wolff Br. 39-41. It's no surprise that Wolff uses conclusory statements devoid of record citations and conditional statements to declare that a scheme existed. *See, e.g.*, Wolff Br. 39-40 (rendering purported facts of a scheme without *any* record citations), 45 ("*If* March engineered … and *if* March utilized").

Even taking as true Wolff's (manifestly false) claim that March improperly remained "silent" in the face of Wolff's bid on the Champion Pond contract, *see supra* at 1-2; Opening Br. 4-5, 25-26; App. 93, Wolff courted criminal liability "before March even was aware of his conduct," when he bid on a large contract with the Town while serving in public office. Dist. Ct. Op., ECF 123, at 36; *see supra* at 1. No reasonable jury could find that Wolff's imagined scheme existed.

IV. This Court should affirm the district court's rejection of Wolff's class-of-one equal-protection claim.

Wolff's class-of-one equal-protection claim can succeed only if he can demonstrate that (A) March intentionally treated him differently from similarly situated Board members and (B) March exhibited "totally illegitimate animus" toward Wolff. *McDonald v. Village of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004). He can do neither.

The district court rejected Wolff's class-of-one claim based on *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 594 (2008), which held that a class-of-one theory has no place in the public-employment context. ECF 123, at 36-38. *Engquist* reasoned that certain discretionary government decisions, such as employment decisions, involve subjective, individualized assessments in which "treating seemingly similarly situated individuals differently … is par for the course." 553 U.S. at 604. Courts have employed this analysis to reject class-of-one claims made by elected officials, like Wolff. *See, e.g.*, *Haney v. Winnebago Cnty. Bd.*, 2020 WL 1288881, at *7 (N.D. Ill. Mar. 18, 2020); *Zimmerlink v. Fayette Cnty.*, 2012 WL 5989198, at *7 (W.D. Pa. Nov. 29, 2012), *aff'd sub nom. Zimmerlink v. Zapotsky*, 539 F. App'x 45 (3d Cir. 2013). This Court could affirm on that basis alone.

A. Wolff lacks a similarly situated comparator.

The most basic attribute of an equal-protection claim—disparate treatment among similarly situated people, *McDonald*, 371 F.3d at

1002—is absent here. To establish similarly situated comparators for a class-of-one claim, "the persons alleged to have been treated more favorably must be identical or directly comparable to the plaintiff in all material respects." *Reget v. City of La Crosse*, 595 F.3d 691, 695 (7th Cir. 2010). Wolff was not similarly situated to other Grand Chute Supervisors. Wolff's claim—even if believed—is a one-off. Wolff has not suggested, *see* Wolff Br. 29, nor does the record indicate, that any other Supervisor pursued public contracts, let alone contracts that might run afoul of Wisconsin's public-corruption laws.

B. March's actions were not animus-driven.

To support a class-of-one equal-protection claim, the government's action must be driven by "totally illegitimate animus" or "baseless hatred." *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), *aff'd*, 528 U.S. 562 (2000). A "tincture of ill will" is not nearly enough. *Id.*

In *Olech*, this Court found a plausible allegation of "substantial ill will" toward a homeowner when a town refused to connect the home to the municipal water system unless she granted the town an unusually large easement to widen the adjoining road. 160 F.3d at 387-88. The town's conduct stemmed from illegitimate animus because it could be explained only by the homeowner's previous lawsuit against the town. *Id.* at 388.

Here, Wolff points to no facts that suggest that March spoke to Yerges out of a "baseless hatred" or "illegitimate animus" for Wolff anything like the facts surrounding the town's easement demand in *Olech*, 160 F.3d at 388. March cooperated with a public-corruption investigation when asked by a state official to do so. That's not remotely an equal-protection violation.

Conclusion

This Court should affirm the district court's grant of summary judgment to March on Wolff's counterclaims.

Respectfully submitted,

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March 3, 2026

Certificate of Compliance

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 28.1(e)(2)(A)(i) because it contains 9,726 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016, set in Century Schoolbook in 14-point type.

/s/Brian Wolfman
Brian Wolfman