

No. 26-1507

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

OLGA DIAZ,
Plaintiff-Appellant,

v.

JAMES SCHMIDT
Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Western District of Wisconsin
Case No. 24-cv-00161-jdp, Hon. James D. Peterson

OPENING BRIEF FOR PLAINTIFF-APPELLANT OLGA DIAZ

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May 1, 2026

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 26-1507Short Caption: Olga Diaz v. James Schmidt

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Olga Diaz

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- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Date: 3-18-26

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Attorney's Signature: s/ Christopher M. Kloth Date: 3-18-26Attorney's Printed Name: Christopher M. KlothPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

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- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Printed Name: Natasha R. Khan

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- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Printed Name: Brian Wolfman

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Introduction

In 2022, James Schmidt, a public university chancellor, asked Olga Diaz to pressure a subordinate to drop her race-discrimination complaint. Diaz, one of Schmidt's vice chancellors, refused, rightly believing that acceding to Schmidt's request would be illegal. She then participated in the investigation of the subordinate's discrimination complaint. In response, Schmidt fired Diaz.

Diaz then sued Schmidt for retaliation. The district court dismissed Diaz's claims as barred by sovereign immunity, concluding that they were really claims seeking damages against the State. That's wrong. Diaz seeks compensatory and punitive damages from Schmidt in his individual capacity for violating her rights under the First Amendment and Section 1981. Therefore, Schmidt—not the State—would be on the hook for any damages award. The district court's holding distorts this Court's precedent and, if countenanced, would severely limit employment suits against state officers, leaving state employees with little recourse for their employers' unlawful acts.

This Court should reverse the sovereign-immunity holding and remand for the district court to decide the merits of Diaz's First Amendment and Section 1981 claims. But if this Court reaches the merits, they do not supply alternative grounds for affirmance. To the contrary, a reasonable jury could find that Diaz was fired because she (1) refused to dissuade another employee from pursuing a discrimination

complaint and (2) participated in the resulting investigation, both of which are protected under the First Amendment and Section 1981.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331. The court's order granting summary judgment to the Defendant, Dist. Ct. Op., ECF 73, and its separate judgment, ECF 74, both entered on February 20, 2026, disposed of all of Diaz's claims. Diaz timely filed a notice of appeal on March 13, 2026. ECF 76. This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

I. Whether the district court erred in holding that Diaz's claims are barred by sovereign immunity.

II. Whether a reasonable jury could find that Schmidt violated Diaz's clearly established First Amendment rights by terminating her because of her protected speech.

III. Whether a reasonable jury could find that Schmidt violated Diaz's clearly established Section 1981 rights by terminating her because she opposed racial discrimination in the workplace.

Statement of the Case

I. Factual background

A. Diaz arrives at the University and encounters concerns about attrition of non-white staff.

In June 2021, Plaintiff-Appellant Olga Diaz started work as the Vice Chancellor of Equity, Diversity, Inclusion, and Student Affairs (EDISA) at the University of Wisconsin–Eau Claire. App. 113. Diaz reported directly to the University Chancellor, Defendant-Appellee James Schmidt. App. 316.

Upon arriving in Eau Claire, Diaz immersed herself in campus culture and built relationships with her staff. App. 59. Colleagues were impressed by her professionalism, work ethic, and welcoming demeanor. App. 302, 320-21. Schmidt appreciated Diaz’s administrative proficiency and regularly complimented her performance. App. 114, 359-60.

Diaz was responsible for “guid[ing] campus efforts to provide students with a transformative, inclusive and supportive living and learning experience.” App. 316. As relevant here, she oversaw the University’s Affirmative Action Office, which processed discrimination complaints, though Diaz herself was not responsible for processing or investigating individual complaints. App. 303 ¶ 1; App. 317, 333.

Diaz was the fourth EDISA leader in approximately two years. App. 207. Perceptions of high staff turnover in EDISA, particularly among non-white staff, had long generated concern on campus. App. 143,

357-58; *see* App. 385. Although the data reflected that EDISA was in fact “retaining staff,” App. 357, Schmidt remained sensitive to those perceptions. When Diaz informed him that a Black employee was chronically absent from work, Schmidt responded, “Olga, we can’t lose another black man on campus.” App. 307 ¶ 31.

B. After announcing an EDISA reorganization, Diaz faces backlash about white staff supervising non-white colleagues and advising non-white students.

In fall 2021, staff in two EDISA offices—Blugold Beginnings (BB) and the Office of Multicultural Affairs (OMA)—complained to Diaz that they were “understaffed, overworked,” and under-resourced. App. 59-60. The two offices served overlapping purposes: OMA provided programming for students of color, while BB supported first-generation, low-income, and other underrepresented students, including many students of color. App. 59-60, 162.

Diaz proposed merging the two offices to relieve staff concerns, preserve resources, and streamline operations. App. 59-60. In keeping with the University’s requirement to consult affected employees, Diaz discussed the potential merger with those employees and obtained their agreement before moving forward. App. 59-60, 140-41, 185.

In early 2022, Diaz announced the planned merger of BB and OMA into a new office: Multicultural Student Services (MSS). App. 141. She also announced that Rochelle Hoffman would serve as MSS’s interim

director. App. 79, 86-89. Hoffman, a white woman, had previously served as BB's assistant director and was the longest-serving and highest-ranking employee in either merged office. App. 66, 68, 71, 93. She had excellent performance reviews, and students she advised graduated at a higher rate than those advised by other coordinators. App. 93, 182, 348-49.

Hoffman's interim appointment sparked vehement opposition from some students, staff, and faculty, who focused largely on her race, rather than her qualifications. App. 71, 76-79, 83-85; App. 281-83 ¶¶ 1-13; App. 288 ¶ 21. At an open house about the reorganization, students shouted at Diaz: "You're telling me that you've put a white woman in as the interim director?" "Do you personally feel that white people can do as good of a job as people of color?" "Are you going to hire any more white people?" App. 167, 388-89.

Beyond objecting to Hoffman's appointment, the students wanted to maintain OMA's "affinity model," which matched students and coordinators by race. App. 39-40, 62, 75-78, 185. Accordingly, the students demanded that Diaz implement race-based hiring practices that would limit job eligibility to candidates of a particular race. App. 84, 138. Diaz refused, explaining: "I cannot put that in a job description, [that] I'm looking to hire a black person, a Hispanic person, an Asian person. I can't put that in a job posting, I can't use that as criteria for selecting someone." App. 138. She told the students that she aimed to attract

diverse candidates, but that explicitly race-based hiring was “not legal.” App. 138.

The demands for race-based hiring came from University employees, too. Some staff made clear that Hoffman’s race should have disqualified her from the interim director role. App. 71, 75-77, 83-85. One EDISA employee, Maggie Jensen, told Hoffman that her “identity as a white woman was an issue.” App. 74, 165. Another colleague told Hoffman that everyone was “questioning [her] legitimacy in this office.” App. 181. And when Diaz asked Affirmative Action Director Teresa O’Halloran—who led the office responsible for processing discrimination complaints, App. 333—why Hoffman’s promotion was administratively delayed, the response was telling. O’Halloran stated that Hoffman should not make more money than Jensen, who is Native American, because a white employee should not outearn a Native American colleague. App. 103-05, 163, 177, 393-94. Faculty likewise expressed concerns about the “optics” of white people being hired for positions previously occupied by non-white employees. App. 92.

The faculty criticism also turned personal. At an open house, a faculty member declared that Diaz—who is Mexican American, App. 62—“did not understand what it’s like to be a person of color on campus because [she] wasn’t dark-skinned enough to know what it feels like.” App. 84. Diaz sought to address her faculty critics by responding promptly to their concerns, inviting them to meet, and sharing information to correct their

misperceptions. App. 144. They rejected these reconciliation attempts. App. 144.

As a result of these incidents, Diaz grew increasingly concerned about a climate of racial hostility at the University. App. 79, 81, 129-30, 138. She shared these concerns with Schmidt, but he took no action to intervene. App. 290 ¶ 42; App. 298-99 ¶¶ 3, 7-10. And when the student senate presented Schmidt with a resolution condemning the EDISA reorganization and demanding race-based hiring practices, Schmidt signed it, leading some employees to infer he “was condoning racism.” App. 38-43, 171, 386; App. 305 ¶ 14.

C. Schmidt hires a consultant to help Diaz and other staff navigate campus tensions.

In spring 2022, Schmidt contracted with a conflict-resolution consultant, Gerry Preciado, to help Diaz and other staff navigate the difficult campus dynamics. App. 44-45, 213, 361, 366-69. Throughout summer 2022, Preciado interviewed employees about their work, met with Diaz, and provided Schmidt with regular updates. App. 213; *see* App. 231-47.

As Preciado learned, many employees regarded Diaz as kind, hardworking, and open to feedback. App. 200-01, 370, 373-74. Others, however, thought she was implementing structural change too quickly. App. 195-96, 198-99, 371-72. Diaz’s direct communication style was poorly received by some colleagues. *See* App. 33 (colleague dismayed

when Diaz declined informal coaching); App. 136-37 (staff members upset when Diaz reprimanded them for expressing homophobic views about a director). Though Preciado was sometimes critical of Diaz, *see* App. 231-47, he believed that Diaz had not “done anything to disqualify herself” from keeping her job. App. 238, 240.

Throughout spring and summer 2022, Schmidt indicated that he supported Diaz and wanted her to succeed as Vice Chancellor. App. 130, 226. In a June 2022 performance evaluation, while acknowledging it had “been a challenging year” and identifying some areas for improvement, Schmidt praised Diaz’s “creativity, energy and persistence” and “wholeheartedly” supported her “vision for EDISA.” App. 229. In Schmidt’s telling, he continued to support Diaz as Vice Chancellor as late as mid-July. App. 226.

D. Diaz refuses Schmidt’s request to interfere with an employee’s formal discrimination complaint.

The parties dispute what caused Diaz to lose Schmidt’s support. But they agree that the shift began in late summer 2022, App. 146, 216, 219, around the time that Diaz told Schmidt that Rochelle Hoffman was considering filing a formal complaint about workplace racial discrimination. App. 108, 214.

Hoffman had faced escalating hostility from colleagues throughout the summer. App. 174-76. She also found herself targeted by an alumni coalition’s social media campaign opposing white people in MSS

leadership roles. App. 47-56, 376-82; *see* App. 49 (“Why are white folks being escalated into positions of power ... or replacing BIPOC staff who have left (been forced out) of their positions?”). That campaign also explicitly criticized Diaz. App. 48, 50. Hoffman consulted with a human resources representative about her options and confided in Diaz that she was contemplating registering an official complaint with the University’s Affirmative Action Office. App. 178-79.

When Diaz informed Schmidt about Hoffman’s deliberations in late July, Schmidt asked Diaz to dissuade Hoffman from filing a complaint. App. 108, 115. Diaz refused. App. 108, 115. She told Schmidt that she “would not interfere” because “it was likely not legal for [her] to try to influence [Hoffman’s] decision.” App. 115. This visibly upset Schmidt: His posture shifted, his demeanor changed, and he “suddenly was a different person” toward her. App. 146.¹

¹ Schmidt denies that he asked Diaz to discourage Hoffman from pursuing a discrimination complaint. App. 255 ¶ 29. A reasonable jury could find that Diaz is telling the truth. The parties also dispute when this conversation took place. Diaz testified that it occurred before Hoffman filed her complaint on July 28, 2022. App. 108. Schmidt remembers having that conversation but does not recall when it occurred. App. 214. Diaz later testified that Schmidt asked her to dissuade Hoffman from pursuing her complaint on September 1. App. 115, 438-40. A reasonable jury could conclude that Diaz and Schmidt had two conversations about Hoffman’s complaint, first in late July and then on September 1, and that Schmidt made a similar request during both meetings.

Hoffman filed a complaint with the University's Affirmative Action Office on July 28, 2022. App. 376-82. The complaint alleged that the four named respondents—EDISA employee Maggie Jensen and three faculty members who had repeatedly criticized Diaz, App. 91-92; App. 254 ¶¶ 16-20; *see* App. 35-37, 383-85—created a hostile work environment based on Hoffman's race. App. 378-82. Hoffman also noted that Diaz had witnessed and tried to address the discrimination. App. 379-82. Within days, Affirmative Action Director O'Halloran informed Schmidt of Hoffman's complaint. App. 46.

Because of the potential conflict of interest posed by the University's Affirmative Action Office investigating Hoffman's allegations, the complaint was referred to the University of Wisconsin System—which oversees all UW campuses—and then assigned to investigator Christine Buswell. App. 190, 334, 336. In early August, Buswell asked O'Halloran to forward Hoffman's complaint so that she could begin investigating. App. 341.

But O'Halloran delayed for more than two weeks. App. 343-45. She suggested to colleagues that transferring Hoffman out of MSS might resolve her complaint and obviate the need for an investigation. App. 342-43; *see* App. 335-39, 344-45. Surprised, Diaz responded that merely transferring Hoffman would not resolve her complaint. App. 342-43. Eventually, after conferring with Schmidt, App. 338-40, and drafting an email (which was never sent) instructing Buswell to “hold off on”

investigating Hoffman's complaint, App. 346, O'Halloran sent Buswell the information she needed, App. 280, 344-45.

Yet efforts to stymie the investigation continued. In late August, a human resources representative advised Hoffman to "pause" her complaint before the respondents learned of the allegations against them. App. 161, 183. Hoffman refused. App. 161, 183.

As the (ultimately unsuccessful) efforts to stop the investigation continued through August, Schmidt became increasingly critical of Diaz's performance. App. 216, 219. Until that point, Diaz had been "grateful ... for feeling supported by the chancellor" amid "a toxic work culture." App. 146. But Diaz perceived a marked shift after her conversation with Schmidt about Hoffman's complaint. App. 146. For example, at a campus breakfast a few weeks later, Schmidt instructed Diaz to publicly apologize to the faculty, alumni, students, and staff who had complained about her leadership. App. 121-24, 211. Despite providing Diaz little guidance, Schmidt later criticized Diaz's "unwillingness" to apologize or deliver a "full-throated acknowledgment" of the need for increased collaboration. App. 121, 124, 216.

Still, Diaz continued to enjoy support from much of her staff. An assistant dean told Schmidt: "I adore working for [Diaz]" because "she makes me feel like I have a purpose" and "has an energetic vision for the EDISA division that hasn't existed since [its] inception." App. 362. On the other hand, O'Halloran—after failing to stop Hoffman's complaint, as

described above—and two other EDISA directors told Schmidt that Diaz had lost their confidence to lead the division in late August. App. 259 ¶ 53.

E. Schmidt repeats his request, and Diaz refuses again.

On September 1, during a regularly scheduled one-on-one meeting, Schmidt again asked Diaz to pressure Hoffman to drop her discrimination complaint. App. 115. As Diaz later recounted to her assistant, during that meeting or around the same time, Schmidt also “tried to talk her out of” participating in Buswell’s investigation and “didn’t want her to testify.” App. 323-24. Schmidt believed that continued prosecution of the complaint would add “fuel to the fire” by further antagonizing the faculty members named in Hoffman’s complaint, who were already outspoken critics of his leadership. App. 93, 115, 134, 155, 193-94, 197, 221. And because those faculty had “previously gone to the press,” App. 161, their discovery that Hoffman had accused them of racial discrimination seemed likely to garner “unwanted media attention,” App. 365. Put differently, Schmidt—who staff believed “listen[ed] to social media too much,” App. 371-72; *see* App. 299 ¶ 6—wanted the complaint dismissed so that Diaz could “rehabilitate” her “reputation” and “rebuild ... relationships” with the faculty members who were the subjects of Hoffman’s complaint. App. 221, 376-82.

Diaz again told Schmidt that it would be inappropriate to interfere with the investigation because Hoffman was exercising a legal right. App. 125. In the same meeting, Schmidt suggested reassigning a course Hoffman was scheduled to teach to Jensen, the EDISA employee Hoffman had accused of discrimination. App. 138-39. Diaz pushed back, noting Jensen's lack of teaching experience and the below-average graduation rate of the students she advised. App. 138-39.

Despite Diaz's opposition, Hoffman's course was transferred to Jensen four days before classes were scheduled to begin. App. 138-39, 348-51; App. 296 ¶¶ 75-77. The transfer came just days after Hoffman refused advice from a human resources representative to drop her complaint. App. 161. Hoffman reported the removal of her teaching responsibilities to Buswell, saying, "I feel like I am being denied this opportunity ... because I did not drop this claim." App. 348-50. Buswell relayed Hoffman's report of retaliation to O'Halloran, who promptly informed Schmidt. App. 347-48.

Diaz met with Schmidt again on the Friday before Labor Day. App. 312 ¶¶ 68-69. Schmidt instructed Diaz to draft a workplace-communication plan over the weekend. App. 126-27, 216. Diaz did so. App. 230.

F. Diaz is interviewed by an investigator and is fired one week later.

In mid-September, a month and a half after Hoffman filed her discrimination complaint, Buswell began interviewing the individuals named in the complaint. App. 268-69. Buswell interviewed Diaz on September 19 about Hoffman's allegations. App. 312 ¶ 72. Buswell informed Diaz that she "was required to provide truthful answers," and Diaz accordingly provided Buswell with (undisputedly) truthful information corroborating the allegations. App. 271-72 (investigation report); App. 312-13 ¶¶ 72-73 (Diaz declaration).

One week later, on September 26, Schmidt asked Diaz to resign. App. 113. Stunned, Diaz asked Schmidt why. App. 129. Schmidt said that, although Diaz "was very professional and proficient" and he "had liked working with" her, she "had become a distraction" and he "needed [her] to leave." App. 129. After the meeting, Diaz reported to Buswell that she had been asked to resign in retaliation for cooperating with the investigation. App. 395-96. Buswell responded that Diaz's termination was "wrong" and "should not be happening." App. 396. Buswell then emailed Diaz a link so she could submit a written report of retaliation. App. 396.

The next day, during a brief meeting in Schmidt's office, Schmidt revealed that he knew Diaz had complained of retaliation to Buswell the day before. App. 396. Diaz confirmed that she believed her firing was

retaliatory and said that she would not resign until she received more information about her legal rights from the UW System. App. 396. Becoming visibly agitated, Schmidt stepped out from behind his desk and asked in an elevated voice why Diaz was making this “so difficult,” App. 396—although all she had done was report suspected retaliation, consistent with UW System policy, App. 117; App. 312 ¶ 72. Later that day, Schmidt effectively terminated Diaz by sending a campus-wide email announcing that Diaz was no longer employed by the University. App. 261.

Diaz sought to ease her transition by asking Schmidt if she could perform limited project work for six months and formally leave the University after the spring semester. App. 224. Schmidt refused, even though he had earlier allowed a similar arrangement for a vice chancellor who had been investigated for sex discrimination and bullying. App. 224, 397-411.

Meanwhile, in December 2023, Hoffman sued the University for race discrimination. App. 424. That suit was the subject of extensive media coverage. *See* App. 412-29. The board overseeing the University settled Hoffman’s suit for \$265,000.²

² Rich Kremer, *UW Board of Regents Settles Racial Discrimination Lawsuit for \$265,000*, Wis. Pub. Radio (Aug. 8, 2025), <https://www.wpr.org/news/uw-board-of-regents-settles-racial-discrimination-lawsuit-for-265000>.

II. Procedural background

Diaz sued Schmidt in the Western District of Wisconsin. App. 11-21. The operative complaint alleges that (1) Schmidt violated Diaz's First Amendment rights by unlawfully terminating her in retaliation for refusing to dissuade Hoffman and speaking to Buswell in the resulting investigation, and (2) Schmidt retaliated against Diaz for opposing racial discrimination at the University in violation of 42 U.S.C. § 1981. App. 20-21. Diaz sought lost wages and benefits, emotional and reputational damages, reinstatement, punitive damages, an order prohibiting retaliation against her, and attorney fees. App. 21. In her summary-judgment brief, Diaz withdrew her request for lost wages and reinstatement. Pl.'s Opp'n to Summ. J., ECF 58 at 4 n.2, 5.

Schmidt moved for summary judgment on both of Diaz's claims, Def.'s Mot. for Summ. J., ECF 42, arguing that they are barred by sovereign immunity, Def.'s Br. for Summ. J., ECF 43 at 16-20. Alternatively, Schmidt argued that Diaz's claims failed on the merits because she did not engage in protected speech under the First Amendment or a protected activity under Section 1981 and, even if she had, she was fired for non-retaliatory reasons. ECF 43 at 20-41.

The district court granted Schmidt's motion for summary judgment without reaching the merits of Diaz's claims. Dist. Ct. Op., ECF 73 at 1. The district court held that Diaz's claims are barred by sovereign immunity under this Court's precedent. *Id.* at 5 (citing *Omosogbon v.*

Wells, 335 F.3d 668 (7th Cir. 2003); *Haynes v. Ind. Univ.*, 902 F.3d 724 (7th Cir. 2018)). The district court reasoned that, because Diaz's termination deprived her of a state-employment benefit, the relief she sought would be paid by the State and thus barred by sovereign immunity. *Id.*

Summary of Argument

I. The district court erred when it dismissed Diaz's individual-capacity claims on the basis of sovereign immunity under this Court's decisions in *Omosogbon* and *Haynes* for three reasons. First, Diaz seeks compensatory and punitive damages, which do not require payment from the State treasury, so her claims are not against the State. Second, Schmidt was personally involved in imposing the claimed deprivation. And third, Diaz's rights are based on Schmidt's statutory and constitutional violations, not her employment contract. The district court's (mis)understanding of this Circuit's precedent also conflicts with the Supreme Court's decision in *Hafer v. Melo*, 502 U.S. 21 (1991), and would severely undermine Section 1983's protections in the public-employment realm.

This Court should also excuse any waiver of Diaz's official-capacity injunctive claim for reinstatement, which is not barred by sovereign immunity under *Ex parte Young*.

This Court should remand for the district court to consider the merits of Diaz's claims in the first instance. If the Court chooses to wade into the merits, it should remand both claims for trial, which we address in this summary in Parts II and III below.

II. Diaz's refusal to dissuade another employee from pursuing a discrimination complaint and Diaz's participation in the resulting investigation were both protected by the First Amendment under *Pickering v. Board of Education*, 391 U.S. 563 (1968). Diaz spoke as a citizen on a matter of public concern: unlawful racial discrimination. Her interest in opposing that discrimination outweighs any conceivable countervailing governmental interest. And a reasonable jury could conclude that Diaz's protected speech motivated Schmidt to fire her.

III. Schmidt violated Diaz's Section 1981 rights. Diaz's refusal to pressure Hoffman to drop her complaint and Diaz's participation in the investigation were both protected opposition to an unlawful employment practice (and Diaz reasonably believed as much). And a reasonable jury could find that Diaz's protected opposition caused her firing.

IV. Schmidt is not entitled to qualified immunity on either the First Amendment or the Section 1981 claim. It is clearly established that Diaz could not be retaliated against for refusing to dissuade a subordinate from filing a race-discrimination complaint and for participating in an investigation into allegedly unlawful conduct.

Standard of Review

The district court's grant of summary judgment is reviewed de novo. *Johnson v. Accenture LLP*, 142 F.4th 536, 542 (7th Cir. 2025). This Court must “construe all inferences” in favor of Diaz, the non-moving party. *Chi. Reg'l Council of Carpenters Pension Fund v. Schal Bovis, Inc.*, 826 F.3d 397, 403 (7th Cir. 2016).

Argument

I. Diaz's claims are not barred by sovereign immunity.

Diaz seeks monetary relief from Schmidt in his individual capacity and injunctive relief from him in his official capacity. Sovereign immunity bars neither claim.

A. Diaz's individual-capacity claims are not barred by sovereign immunity.

1. Diaz's damages claims run against Schmidt in his individual capacity, not against the State.

Sovereign immunity generally does not preclude suits for damages brought under Section 1983 against state actors in their individual capacities. *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991). Individual-capacity claims may be barred by sovereign immunity only when “the state is the real, substantial party in interest,” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945))—that is, when a claim “demonstrably has the identical effect as a suit against the state.” *Luder v. Endicott*, 253

F.3d 1020, 1023 (7th Cir. 2001). If “money [must] flow from the state treasury”—rather than from the individual defendant—to compensate the plaintiff, the claim is barred. *Id.* at 1024; see *Pennhurst*, 465 U.S. at 101 n.11. This Court applied that rule in *Omoegbon v. Wells*, 335 F.3d 668 (7th Cir. 2003) and *Haynes v. Indiana University*, 902 F.3d 724 (7th Cir. 2018) to dismiss claims brought by terminated professors against state university officials.

The district court held that Diaz’s claims are barred under *Omoegbon* and *Haynes*. Dist. Ct. Op., ECF 73 at 5. But those cases don’t control for three reasons: (1) the types of relief Diaz sought, (2) Schmidt’s personal involvement, and (3) the source of Diaz’s rights.

a. Types of Relief.

i. Diaz’s suit is not barred under *Omoegbon* or *Haynes* because Diaz seeks compensatory and punitive damages, not backpay. *Contra* ECF 73 at 5. “Whether a state is the real party in interest depends upon the nature of the relief sought.” *New Orleans Towing Ass’n v. Foster*, 248 F.3d 1143 at *5 (5th Cir. 2001) (unpublished table decision). Diaz’s damages request indicates that her claims are not against the State. See *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985).

In *Omoegbon*, this Court relied on the relief sought by the plaintiff to conclude that his claims were functionally against the state. See 335 F.3d at 673. There, Omoegbon brought First Amendment, Fourteenth Amendment, and breach-of-contract claims against university officials

who declined to renew his probationary teaching contract. *Id.* at 671. Omoregbon claimed that the university deprived him of his due process and academic freedom rights by failing to renew his contract. *Id.*

Sovereign immunity bars requests for backpay because they “require[] the payment of funds from the state’s treasury.” *Lenea v. Lane*, 882 F.2d 1171, 1178 (7th Cir. 1989) (emphasis added). So, this Court affirmed dismissal of Omoregbon’s claims for “backpay and other forms of monetary compensation based on an employment contract.” *Omoregbon*, 335 F.3d at 673. Observing that the defendants were “not even parties to [Omoregbon’s employment] contract in their individual capacity,” the Court found it “inescapable that any resulting judgment will be paid by the state.” *Id.* That accords with the well-settled principle that “any demand for backpay from an individual-capacity defendant is a non-sequitur” because it “necessarily stems from the contract of hire.” *Negron-Almeda v. Santiago*, 528 F.3d 15, 26 (1st Cir. 2008); see *Lenea*, 882 F.2d at 1178; *Luder*, 253 F.3d at 1024. This Court later applied *Omoregbon* to bar a professor’s denial-of-tenure claim that similarly sought “monetary relief for an injury relating to his employment with Indiana University.” *Haynes*, 902 F.3d at 732.³

³ Although Haynes’s complaint also sought compensatory damages, Complaint at 20, *Haynes v. Ind. Univ.*, 2017 WL 3243895 (S.D. Ind. July 31, 2017), that fact played no role in this Court’s reasoning, *Haynes*, 902 F.3d at 731-32. In any event, *Haynes* is distinguishable for other reasons discussed below (at 26-28).

Diaz, however, does not seek backpay, but rather compensatory and punitive damages against Schmidt for the “psychological injury, emotional distress, loss of reputation and damage to her career” that Schmidt personally inflicted on her. App. 21; Pl.’s Opp’n to Summ. J., ECF 58 at 5. Diaz’s choice of remedy establishes that her claims are against Schmidt alone just as much as the backpay sought in *Omosogbon* and *Haynes* demonstrated that the plaintiffs’ claims ran against the state.

ii. Compensatory damages under Section 1983 must be taken “from the personal assets of the individual.” *Melo v. Hafer*, 912 F.2d 628, 632, 635 (3d Cir. 1990), *aff’d*, 502 U.S. 21 (1991); *see Negron-Almeda*, 528 F.3d at 26. So too, punitive damages can “be recovered against a government actor only in an individual capacity suit.” *Hill v. Shelandar*, 924 F.2d 1370, 1374 (7th Cir. 1991).

Thus, backpay and compensatory (and punitive) damages operate in two separate lanes: Backpay may be recovered only from the state as the contractual employer, and compensatory damages may be recovered only from the individual. Far from “*requir[ing]* the payment of funds from the state’s treasury,” *Lenea*, 882 F.2d at 1178 (emphasis added), the damages Diaz seeks cannot possibly be assessed against Wisconsin. *See Tanner v. Bd. of Trs. of Univ. of Ill.*, 2018 WL 1161140, at *9 (C.D. Ill. Mar. 5, 2018). Nor has Schmidt pointed to any “employment contract, salary, or list of benefits” indicating otherwise. *Reinebold v. Ind. Univ. at S. Bend*, 2019

WL 1897288, at *2 (N.D. Ind. Apr. 25, 2019); *see generally* Def.’s Br. for Summ. J., ECF 43.

District courts in this Circuit have come to the same conclusion: Section 1983 claims based on federal-law violations that seek compensatory and punitive damages are not barred by sovereign immunity unless the plaintiff’s claim is based in contract or seeks wage-like damages. *See, e.g., Sizyuk v. Purdue Univ.*, 2024 WL 68282, at *4 (N.D. Ind. Jan. 5, 2024); *Gibson v. Ind. State Pers. Dep’t*, 2020 WL 1956120, at *4 (S.D. Ind. Apr. 21, 2020); *Reinebold*, 2019 WL 1897288, at *2-3.

iii. Nor would Wisconsin’s decision to indemnify Schmidt alter the sovereign-immunity inquiry. *See* Wis. Stat. § 895.46(1)(a). An “indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak.” *Lewis v. Clarke*, 581 U.S. 155, 164-65 (2017). So, the State’s “voluntary choice” to take on its employees’ debts does not create an Eleventh Amendment bar. *Luder*, 253 F.3d at 1022-23. “[I]t would be absurd if all a state had to do to put its employees beyond the reach of section 1983 ... was to promise to indemnify state employees.” *Duckworth v. Franzen*, 780 F.2d 645, 651 (7th Cir. 1985), *abrogated on other grounds as noted in Burton v. Downey*, 805 F.3d 776 (7th Cir. 2015).

b. Personal involvement. Diaz wants Schmidt to compensate her for the retaliatory acts he personally took against her and for the

emotional distress and reputational harm he inflicted on her by doing so. That supplies a further distinction from *Omosogbon* and *Haynes*. Regardless of the existence of any contract between Diaz and the University, Diaz seeks to recover from Schmidt in just the same way as she would from any individual Section 1983 defendant, such as a police officer, prison guard, or other non-employer state actor who had caused her harm.

Like every plaintiff seeking compensatory or punitive damages, Diaz must demonstrate Schmidt's personal involvement in the unconstitutional acts to recover those damages. *See Kelly v. Mun. Cts. of Marion Cnty.*, 97 F.3d 902, 909 (7th Cir. 1996). The requirement to demonstrate defendants' personal involvement protects against plaintiffs who request compensatory (or punitive) damages only to plead around sovereign immunity. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997).

Diaz has demonstrated Schmidt's personal involvement. Schmidt asked Diaz to impede Hoffman's race-discrimination complaint. *See* App. 108, 115. Then, just days after Diaz participated in an interview with an investigator, Schmidt unilaterally decided to fire her. *See* App. 128-29, 260. These actions are attributable to Schmidt alone and cannot be attributed to the University as a whole. That distinguishes Diaz's claims from a denial of tenure or nonrenewal of a teaching position,

which may be logically understood as entity-level actions. See *Omosogbon*, 335 F.3d at 673; *Haynes*, 902 F.3d at 731-32.

Confirming the point, Diaz could not seek the same relief from Schmidt's successor in office, who was not personally involved in the deprivation. It would make no sense, for instance, to hold a future chancellor accountable for the distress Schmidt inflicted on Diaz. Whether a successor can be substituted supplies a simple test: If yes, then the suit is really against the defendant's office. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70-71 (1989). And the suit would persist regardless of who actually sits there. See *Graham*, 473 U.S. at 166 n.11 (citing Fed. R. Civ. P. 25(d) and Fed. R. App. P. 43(c), both of which automatically substitute successors when their predecessors are sued in their official capacities). The same is not true here. Diaz has maintained her suit against Schmidt in his individual capacity even though he is no longer employed by the University, see ECF 58 at 4 n.2, because only Schmidt may answer for her injuries.

Diaz's request for punitive damages underscores our position. Punitive damages may be recovered under Section 1983 only when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Record evidence may establish that Schmidt had that intent, see *infra* at 45-46, but it cannot be attributed to the University as a whole.

The district court maintained that Schmidt’s personal involvement “is immaterial to the sovereign immunity analysis” because *Omoegbon* and *Haynes* did not turn on the extent of the individual defendants’ involvement. ECF 73 at 6. True, those cases did not explicitly analyze the defendants’ level of personal involvement. *See Omoegbon*, 335 F.3d at 673; *Haynes*, 902 F.3d at 731-32. But that’s because those cases didn’t have to. The relief sought by the plaintiffs there did not depend on the defendants’ personal involvement. Rather, the defendants’ *lack* of personal involvement—that the defendants were not parties to the plaintiffs’ employment contracts—is what mattered to this Court. *Omoegbon*, 335 F.3d at 673; *Haynes*, 902 F.3d at 731-32.

c. Source of the right. Diaz’s claims arise from Schmidt’s violations of her constitutional and statutory rights, not from her employment contract. *See Sizyuk*, 2024 WL 68282, at *4. That, too, distinguishes this case from *Haynes*.

There, a university professor claimed that he was denied tenure based on his race. *Haynes*, 902 F.3d at 728-29. He sued administrators on the tenure committee seeking backpay and other monetary benefits guaranteed to him under the contract. *Id.* at 729-32. True, Haynes’s complaint sought compensatory damages for emotional distress and other harms resulting from the tenure denial. Complaint at 20, *Haynes*, 2017 WL 3243895. But those damages were incidental to the contractual benefit he claimed to have been denied (tenure), not compensation for

defendants' personal mistreatment. *Haynes*, 902 F.3d at 732. Haynes did not seek compensatory damages for constitutional violations by any defendant separate and apart from that tenure denial—a decision taken on behalf of the university. Complaint at 17-19, *Haynes*, 2017 WL 3243895.

Here, in contrast, Diaz seeks to remedy constitutional and statutory violations perpetrated by Schmidt alone, not to redress “violations of a contract to which the [defendants] were not parties.” *Doe v. Purdue Univ.*, 2019 WL 1369348, at *3 (N.D. Ind. Mar. 25, 2019). The district court’s reasoning in *Mahmoud v. Board of Regents of the University of Wisconsin System*, 2026 WL 242087, at *7 (W.D. Wis. Jan. 29, 2026), is instructive. There, Mahmoud brought both a denial-of-tenure claim and a constructive-discharge claim. *Id.* The court held that his denial-of-tenure claim was barred under *Haynes* because he sought “only the benefit of his employment relationship with the state.” *Id.* But Mahmoud’s constructive-discharge claim, alleging that his supervisor “created an environment in which Mahmoud was made to feel unwelcome,” could proceed because the defendant “personally mistreated” Mahmoud. *Id.* Here, too, as described above (at 24-26), Diaz claims that Schmidt personally mistreated her.

This distinction is especially salient when, as here, the plaintiff claims retaliation. Diaz does not, for instance, claim that Schmidt breached her employment contract. Instead, she claims that Schmidt retaliated

against her *through* the deprivation of her employment relationship. See *Isabell v. Trs. of Ind. Univ.*, 432 F. Supp. 3d 786, 795 (N.D. Ind. 2020) (holding that an adjunct professor’s First Amendment retaliation claim against a hiring official was not barred under *Omoegbon* or *Haynes* because the plaintiff did not bring the claim under her employment contract).

Diaz has a right to be free from retaliation for engaging in protected activity. See *infra* at 34-35, 50-51. Any means of retaliation, whether related to her employment or not, violates that right. That Schmidt’s *method* of retaliation happened to implicate Diaz’s employment does not transform her claim into a contractual one. Schmidt could instead have chosen to instigate false criminal charges to retaliate against her, see *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006), an action “not directly related to [her] employment,” *id.* at 63. In either case, the source of the right Diaz seeks to vindicate is the Constitution and federal law, not her employment contract.

2. The district court’s holding conflicts with Supreme Court precedent and would seriously undermine Section 1983.

a. The district court understood *Omoegbon* and *Haynes* to stand for the broad principle that “sovereign immunity bars a state-employed plaintiff from bringing individual-capacity claims against state-employed supervisors or coworkers who deprived him of rights, benefits, or

opportunities arising from his employment with the state.” ECF 73 at 5. So, in the district court’s view, sovereign immunity precludes *any* Section 1983 claim for termination by a state employee, regardless of what relief is sought, who is liable for the judgment, or whether the claim is contractual in nature. As just explained, that conclusion is wrong.

The district court’s expansive holding also conflicts with the Supreme Court’s decision in *Hafer v. Melo*, 502 U.S. 21 (1991). There, state-employed plaintiffs sued the state auditor in her individual capacity, claiming that, after the auditor won an election, she fired them in retaliation for being affiliated with her political opponent. *Id.* at 23-24. The plaintiffs sought compensatory and punitive damages but not backpay. *See Melo v. Hafer*, 912 F.2d 628, 632 (3d Cir. 1990), *aff’d*, 502 U.S. 21 (1991). The Supreme Court held that the plaintiffs’ claims were not barred by sovereign immunity. *Hafer*, 502 U.S. at 30-31.

Hafer would be wrong under the district court’s holding: The plaintiff was a state employee bringing an individual-capacity claim against his state-employed supervisor, who deprived him of benefits arising from an adverse employment action (termination) imposed by that supervisor. 502 U.S. at 23-24. That’s exactly what the district court said was barred by sovereign immunity.

That is why this Court in *Omoegbon* and *Haynes* looked to the type of claim and the relief sought to determine whether the state was the real party in interest. To instead “presume blindly that every suit against an

individual state official cannot be paid by that individual ... would collapse this circuit’s distinction” between official-capacity and individual-capacity claims. *Isabell*, 432 F. Supp. 3d at 795.

b. Foreclosing any challenge to a deprivation related to state employment would carry anomalous consequences. For instance, under the district court’s rule, a state employee could sue under Section 1983 if her supervisor harassed her on the basis of sex. The same employee could not maintain a Section 1983 suit, however, if her supervisor unconstitutionally fired her for rejecting his advances—because that deprivation is linked to her employment. But the plaintiff in both hypotheticals seeks damages for emotional distress from the state actor who caused it. Whether that distress accompanied the deprivation of a state-employment benefit has no bearing on whether the state is the real party in interest.

The district court’s holding also seriously undermines Section 1983, through which “Congress sought ‘to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.’” *Hafer*, 502 U.S. at 27 (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). Because plaintiffs need a mechanism to sue, and recover from, state officials in their individual capacity, the Supreme Court declined to “absolutely immunize state officials from personal liability for acts within their authority.” *Id.* at 28. But under the district court’s rule, state officials would enjoy absolute immunity barring their employees’

Section 1983 damages claims. State employers could fire employees, subject them to unfavorable working conditions, decline to promote them, and more, all on the basis of constitutionally protected speech. And recovery would be limited to injunctive relief alone, subverting the goals of Section 1983: to deter the deprivation of federal rights through the threat of damages awards, and, if those rights are violated, to compensate victims. *See Carey v. Piphus*, 435 U.S. 247, 254-57 (1978).

B. Diaz’s official-capacity claim for reinstatement is not barred by sovereign immunity.

1. Waiver. Although Diaz requested reinstatement in her amended complaint, she withdrew her official-capacity claim and associated reinstatement request in her summary-judgment brief. *Compare* App. 21, *with* Pl.’s Opp’n to Summ. J., ECF 58 at 4 n.2. This Court may excuse that waiver, however, when the “ends of justice” or “fundamental fairness” demand it. *Amplicon Leasing v. Coachmen Indus., Inc.*, 910 F.2d 468, 471 (7th Cir. 1990), *abrogated on other grounds by* *Mayer v. Gary Partners & Co.*, 29 F.3d 330 (7th Cir. 1994). And when both parties are unharmed and may brief the issue on appeal, as here, this Court has also “chosen to overlook a party’s waiver.” *Bradley v. Vill. of Univ. Park*, 59 F.4th 887, 901 (7th Cir. 2023). Schmidt cannot show any prejudice from this Court excusing Diaz’s waiver.

Diaz withdrew her claim because she erroneously believed that she could not seek reinstatement from Schmidt’s successor. ECF 58 at 4 n.2.

As already explained (at 25), her official-capacity claim for reinstatement would run to Schmidt's successor. *See* Fed. R. Civ. P. 25(d).

The Rules' treatment of requests for relief provides further support for excusing Diaz's waiver. Federal Rule of Civil Procedure 54(c) provides that every final judgment (other than a default judgment) "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Under Rule 54(c), "the district court certainly has discretion to grant relief to a party even where that party has earlier abandoned the same requested relief." *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 299 (2d Cir. 1999).

This principle applies with particular force to reinstatement. Because reinstatement is an equitable remedy available for wrongfully discharged employees, "it is within the discretion of the trial court to order reinstatement" even when a party has not requested it. *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978); *Squires v. Bonser*, 54 F.3d 168, 171 (3d Cir. 1995); *Whatley v. Skaggs Cos.*, 707 F.2d 1129, 1137 (10th Cir. 1983). Here, where Diaz *did* initially request reinstatement, the Court should excuse her waiver.

2. Sovereign Immunity. Turning to the merits, under *Ex parte Young*, Diaz is authorized to seek prospective injunctive relief against an official-capacity defendant. 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 337 (7th Cir. 2000).

Reinstatement is a form of prospective injunctive relief that falls within *Ex parte Young*. See *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (per curiam). That reinstatement would necessarily require the University to pay Diaz’s future salary does not trigger Eleventh Amendment immunity because “such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.” *Id.* (quoting *Edelman*, 415 U.S. at 668). Accordingly, Diaz may seek reinstatement against Schmidt in his official capacity. See *Melo v. Hafer*, 912 F.2d 628, 635-36 (3d Cir. 1990), *aff’d*, 502 U.S. 21 (1991); App. 21.

* * *

If the Court agrees that sovereign immunity does not bar Diaz’s action, it should reverse on that basis and remand for the district court to consider the merits of Diaz’s First Amendment and Section 1981 claims—which it has not yet addressed. This Court is “a court of review, not one of first view,” and accordingly it should not decide the merits of Diaz’s claims before the district court has weighed in. *Motorola Solutions, Inc. v. Hytera Commc’ns Corp.*, 108 F.4th 458, 478 (7th Cir. 2024). Nevertheless, if this Court addresses the merits, as we now show, it should hold that Schmidt is not entitled to summary judgment and Diaz’s First Amendment and Section 1981 claims should be remanded for trial.

II. A reasonable jury could find that Schmidt violated Diaz's First Amendment rights by firing her.

To make out a prima facie case of First Amendment retaliation, Diaz must demonstrate that she engaged in constitutionally protected speech; that she suffered a deprivation likely to deter speech; and that her speech was at least a motivating factor in her employer's actions. *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006). Whether a government employee's speech is constitutionally protected is analyzed under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Under *Pickering*, when an employee speaks as a citizen on a matter of public concern, courts must weigh "the public employee's free speech interests" against "the employer's interest in government efficiency and effectiveness." *Bonds v. Milwaukee County*, 207 F.3d 969, 977 (7th Cir. 2000).

Diaz alleges three instances of protected speech. On two occasions, first in late July and then on September 1, Diaz refused Schmidt's requests to persuade Hoffman to drop her discrimination complaint. App. 108, 115. Then, on September 19, Diaz was interviewed about Hoffman's allegations by Buswell, the investigator assigned to Hoffman's complaint. App. 312-13 ¶¶ 72-73. That speech was protected by the First Amendment. And because a reasonable jury could find that Diaz's protected speech caused her firing, her claim should go to trial.

A. Diaz spoke as a citizen outside the scope of her official duties.

Diaz's refusals to discourage Hoffman's complaint and her statements to Buswell fell outside the scope of her official job duties, so they are eligible for First Amendment protection. *See Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). The citizen-speech inquiry focuses on whether the employee's speech formed part of their "daily professional activities." *Id.* at 422. Put differently, courts ask whether the speech constituted employee "work product" that has been "commissioned or created" by the employer." *Chrzanowski v. Bianchi*, 725 F.3d 734, 738 (7th Cir. 2013) (quoting *Garcetti*, 547 U.S. at 422).

1. When Diaz refused to comply with Schmidt's requests to dissuade Hoffman from filing a complaint, her speech fell outside her job duties. As Vice Chancellor of EDISA, Diaz was responsible for "guid[ing] campus efforts to provide students with a transformative, inclusive and supportive living and learning experience." App. 316. She led initiatives and supervised units striving to create a more inclusive campus community. App. 316-17. To be sure, one unit she supervised was the Affirmative Action Office, which processed discrimination complaints. App. 316-17, 333. But Diaz's job duties did not include processing or investigating those complaints herself. App. 316-17. Both Diaz and O'Halloran, the Affirmative Action Director, confirmed that handling

discrimination complaints was not part of Diaz's job. App. 303 ¶ 1; App. 339.

That contradicts Schmidt's assertion that "discussing affirmative action complaints" was "part of Diaz's job duties as a manager." Def.'s Br. for Summ. J., ECF 43, at 35-36. Managers do not necessarily handle their subordinates' discrimination complaints. And Schmidt pointed to no evidence suggesting that processing complaints was part of Diaz's job duties, either on paper or in practice.

True, Diaz's refusals to Schmidt occurred in the context of regularly scheduled meetings with her supervisor. App. 391. But that is "not dispositive," because "[e]mployees in some cases may receive First Amendment protection for expressions made at work." *Garcetti*, 547 U.S. at 420. That's why a plaintiff schoolteacher's speech about "employment policies and practices" that the plaintiff regarded as "racially discriminatory" was protected—even though the plaintiff lodged her complaints with the school principal in his office. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413, 415-16 (1979); see *Conner v. Reinhard*, 847 F.2d 384, 392-93 (7th Cir. 1988).

Relatedly, a "public employee has a First Amendment right to comment on matters of public concern even when he communicates privately with his employer." *Caldwell v. City of Elmwood*, 959 F.2d 670, 672 (7th Cir. 1992) (citing *Givhan*, 439 U.S. at 415). For that reason, contrary to Schmidt's argument, ECF 43 at 34-45, this Court has

repeatedly held that a public employee's internal complaints of workplace misconduct are protected. *See Marshall v. Porter Cnty. Plan Comm'n*, 32 F.3d 1215, 1218-20 (7th Cir. 1994). For example, in *Kristofek v. Village of Orland Hills*, 832 F.3d 785, 791, 793-94 (7th Cir. 2016), a police officer's report of a superior's misconduct to two fellow officers and the FBI constituted protected citizen speech because it concerned activities outside the scope of the officer's job duties and was not compelled by department policy. And in *Buddenberg v. Weisdack*, 939 F.3d 732 (6th Cir. 2019), the court held that a public employee spoke as a citizen when she complained about workplace misconduct, including alleged sex discrimination, *id.* at 736, 740. Like those public employees, Diaz spoke about unlawful practices inside her organization but outside her job duties—so she spoke as a citizen.

To be sure, this Court has concluded that *some* internal complaints about workplace misconduct are unprotected. But those cases are far afield from this one because they involve public employees whose jobs *required* them to report unlawful activity. For example, misconduct complaints were unprotected when made by “law enforcement officers whose duty to report official police misconduct is a basic part of the job.” *Fehlman v. Mankowski*, 74 F.4th 872, 875 (7th Cir. 2023) (citation modified); *see generally Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007); *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007). Here, as already

explained, processing individual discrimination complaints was not part of Diaz's job. App. 303 ¶ 1; App. 316-17.

For Schmidt to suggest otherwise, *see* ECF 43 at 35-36—that Diaz's *refusal* to obey his (unlawful) orders was part of her job—is troubling. “[W]hen a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1075 (9th Cir. 2013). That's why, for instance, the First Amendment protected a police officer's refusal to carry out a superior's command to retract an unfavorable report. *See generally Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011).

2. Turning to Diaz's statements to the investigator, Buswell, this Court and the Supreme Court have repeatedly concluded that public employees were speaking as citizens when they provided information about workplace misconduct in a judicial or investigatory proceeding. *See, e.g., Lane v. Franks*, 573 U.S. 228, 238 (2014); *Morales*, 494 F.3d at 598; *Houskins v. Sheahan*, 549 F.3d 480, 491 (7th Cir. 2008); *Chrzanowski*, 725 F.3d at 740-42.

Diaz's speech to Buswell is indistinguishable from speech this Court has determined is protected. In *Morales*, a police officer's deposition testimony about superiors' lawbreaking qualified as citizen speech because “[b]eing deposed in a civil suit pursuant to a subpoena was unquestionably ... not part of what [the officer] was employed to do.” 494

F.3d at 598. Similarly, in *Houskins*, a jail employee’s account of workplace misconduct in a police report was citizen speech because the police report “was not generated in the normal course of [the plaintiff’s] duties and most likely was similar to reports filed by citizens every day.” 549 F.3d at 491.

Likewise, here, Diaz’s interview with Buswell is protected because speaking to an investigator about workplace discrimination was “unquestionably” not part of what Diaz was employed to do, as confirmed by her job description. *Morales*, 494 F.3d at 598; see App. 303 ¶ 1; App. 316-17. Instead, the witness statements she provided are like the statements provided every day by citizens who cooperate with investigations into illegal activity. See *Houskins*, 549 F.3d at 491.

Diaz’s speech to Buswell is much like the speech at issue in *Lane* and *Chrzanowski*, too. Both Lane and Chrzanowski testified in court about workplace misconduct they had witnessed, and both were subsequently fired in retaliation for their subpoenaed testimony. *Lane*, 573 U.S. at 232-33; *Chrzanowski*, 725 F.3d at 736-37. Lane’s speech was “speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.” *Lane*, 573 U.S. at 238. Here, too, Diaz, like any citizen, bore an obligation to provide truthful information about what she had witnessed—and Buswell reminded her of that obligation by instructing her to tell the truth. App. 312 ¶ 72; see *Lane*, 573 U.S. at 238.

Along similar lines, Chrzanowski's speech was citizen speech because it was not "work product" that [was] 'commissioned or created' by the employer." 725 F.3d at 738 (quoting *Garcetti*, 547 U.S. at 422). Likewise, here, no evidence suggests that the University directed or oversaw Diaz's responses to Buswell, and her just-described obligation to tell the truth applied no matter how her answers reflected on her employer. See *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) ("A government cannot tell its employees what to say in court, ... nor can it prevent them from testifying against it."). Quite the contrary, Schmidt did not want Diaz to participate in the investigation at all. App. 323-24.

It makes no difference to the citizen-speech analysis that Diaz spoke about events she witnessed on the job. That's because "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*, 573 U.S. at 240; see *Garcetti*, 547 U.S. at 421 ("The First Amendment protects some expressions related to the speaker's job."). Put differently, "speech does not 'owe its existence to a public employee's professional responsibilities' within the meaning of *Garcetti* simply because public employment provides a factual predicate for the expressive activity." *Chrzanowski*, 725 F.3d at 738 (quoting *Garcetti*, 547 U.S. at 422).

In arguing that Diaz's interview with Buswell was employee speech, Schmidt told the district court that "providing an interview to the

investigator” was “part of Diaz’s duties.” ECF 43 at 36. That citationless assertion is at odds with the record. Diaz’s written job description says nothing about participating in investigative interviews. App. 316-17. And no evidence indicates that Diaz contributed to any other investigation during her tenure as Vice Chancellor—so it can hardly be said that her speech to Buswell was “generated in the normal course of her duties,” *Houskins*, 549 F.3d at 491, or formed part of her “daily professional activities,” *Garcetti*, 547 U.S. at 422.

B. Diaz spoke on a matter of public concern.

“Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.” *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). 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, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Lane v. Franks*, 573 U.S. 228, 241 (2014) (citation modified). And because the public has an interest in the effectiveness and integrity of public institutions (like state universities), speech “[e]xposing governmental inefficiency and misconduct” is invariably “a matter of considerable significance.” *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

Simply put, “racial discrimination” is “a matter inherently of public concern.” *Connick*, 461 U.S. at 148 n.8. So, Diaz’s speech to Schmidt and to Buswell on that topic satisfies the public-concern element. And the extensive media coverage of Hoffman’s lawsuit against the University underscores that Diaz spoke about a “legitimate news interest.” *Lane*, 573 U.S. at 241; *see* App. 412-29.

By analogizing to complaints about minor workplace annoyances, Schmidt trivializes racial discrimination. For instance, below, Schmidt likened Diaz’s speech to a “teacher’s complaint about class size and discipline” which this Court held was not a matter of public concern. Def.’s Br. for Summ. J., ECF 43 at 37-38 (citing *Cliff v. Bd. of Sch. Comm’rs of City of Indianapolis*, 42 F.3d 403 (7th Cir. 1994)). But Diaz’s speech—which concerned discriminatory practices that pervaded a public university and were not even directed at Diaz herself—is nothing like a teacher’s speech addressing “only issues in her own classroom.” ECF 43 at 38 (citing *Cliff*, 42 F.3d at 411).

Relatedly, Schmidt contended that Diaz’s speech to the investigator was self-serving, rather than a matter of public concern, because “Diaz incorrectly believed” that Hoffman’s “complaint would vindicate Diaz’s appointment of Hoffman.” ECF 43 at 10. That’s doubly wrong. First, Diaz believed nothing of the sort. App. 311 ¶ 60. Second, even if (counterfactually) Diaz’s statements were selfishly motivated, a plaintiff’s “self-interest” “does not matter” for the public-concern inquiry.

Kristofek v. Vill. of Orland Hills, 832 F.3d 785, 795 (7th Cir. 2016); see *Marshall v. Porter Cnty. Plan Comm’n*, 32 F.3d 1215, 1219-20 (7th Cir. 1994).

True, in *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988), this Court suggested that speakers’ selfish motives may diminish the public concern of their speech, *id.* at 419. But that case is quite different from Diaz’s. There, an applicant for promotion filed a sex-discrimination complaint “to advance her career, not promote a cause.” *Id.* Here, by contrast, Diaz spoke in support of *another employee’s* right to complain about racial discrimination permeating the University. And Schmidt’s dismay when Diaz refused his illegal requests indicated that speaking out against discrimination was likely to *harm*, not help, Diaz’s career prospects at the University. App. 146. It ultimately cost Diaz her job.

C. Diaz’s First Amendment interest in her speech outweighs the University’s interest in efficiency and effectiveness.

Because Diaz spoke as a citizen on a matter of public concern, this Court must balance Diaz’s free-speech interest against a valid government interest in suppressing her speech. *Lane v. Franks*, 573 U.S. 228, 242 (2014). The burden is on the University “to demonstrate a state interest that outweighs the employee’s First Amendment rights.” *Glass v. Dachel*, 2 F.3d 733, 744 (7th Cir. 1993) (brackets omitted). And when,

as here, an “employee’s speech more substantially involve[s] matters of public concern,” the government must make a stronger showing to overcome the employee’s interest in that speech. *Lane*, 573 U.S. at 242 (quoting *Connick v. Myers*, 461 U.S. 138, 152 (1983)).

To begin with, Schmidt has implicitly conceded this element of the *Pickering* analysis: He declined to advance *any* countervailing University interest in his summary-judgment brief. See ECF 43 at 33-40. That’s not surprising. To tip the *Pickering* balance in the University’s favor, Schmidt would have to assert an extraordinary interest that was compromised by Diaz’s speech. See *Lane*, 573 U.S. at 242. He cannot do so, because the University lacks any legitimate interest in carrying out unlawful instructions to impede an employee’s access to legal processes or in covering up racial discrimination. See *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). That’s because Diaz’s and the University’s interests “are co-extensive”—that is, the University *shares* Diaz’s interest in opposing and exposing “unscrupulous behavior in the workplace.” See *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986).

D. A reasonable jury could conclude that Diaz’s protected speech was a motivating factor in her termination.

Having established that Diaz’s speech was protected, we turn to the remaining elements of her retaliation claim: a deprivation that is causally connected to her speech. Although Schmidt did not contest that job termination is a deprivation likely to deter speech, he argued that

Diaz's speech was not in fact deterred. *See* Def.'s Br. for Summ. J., ECF 43 at 32 n.2. But what matters is whether the deprivation would *likely* chill a reasonable employee from speaking, and terminating an employee meets that standard. *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006).

Turning to causation, Diaz must show at summary judgment that a reasonable jury could conclude that her protected speech was “at least a motivating factor” in Schmidt's decision to fire her. *Kidwell v. Eisenhower*, 679 F.3d 957, 964-65 (7th Cir. 2012). The burden then shifts to Schmidt to offer non-retaliatory reasons for the termination, which, if offered, Diaz must show are pretextual. *McGreal v. Vill. of Orland Park*, 850 F.3d 308, 313 (7th Cir. 2017). If a reasonable jury could find that Diaz's firing was not “wholly unrelated” to her speech to Schmidt and the investigator, the case must go to trial. *Kidwell*, 679 F.3d at 966.

1. Circumstantial evidence, including “suspicious timing, ambiguous statements of animus, ... [and] evidence the employer's proffered reason for the adverse action was pretextual,” demonstrates that Diaz was fired because of her speech opposing racial discrimination. *Adebisi v. S. Suburban Coll.*, 98 F.4th 886, 892 (7th Cir. 2024). To start, Schmidt made several statements reflecting animus toward Diaz's speech. Schmidt's blatant requests that Diaz unlawfully interfere with Hoffman's complaint “evin[c]e disdain” for that complaint, and by extension, Diaz's support of it. *Greengrass v. Int'l Monetary Sys. Ltd.*, 776 F.3d 481, 486-

87 (7th Cir. 2015). Schmidt asserted that the complaint would add “fuel to the fire.” App. 115. His demeanor changed, and he became visibly upset when Diaz refused to dissuade Hoffman, further demonstrating his animus toward Hoffman’s complaint *and* those who supported it. App. 146, 214.

That animus stemmed from Schmidt’s knowledge of Diaz’s speech. *Contra* Def.’s Br. for Summ. J., ECF 43 at 24. Schmidt was obviously aware that Diaz twice refused to dissuade Hoffman from prosecuting her complaint because she did so to his face. App. 108, 115, 214; App. 438-39 ¶ 136. He was also apprised of the Hoffman investigation both when the complaint was filed and after Diaz spoke to Buswell. App. 46, 347-48, 396.

2. The temporal proximity between Diaz’s protected speech to the investigator and her termination also supports a causal relationship between the two. An adverse action “close on the heels of” the protected activity may alone support the inference of a causal connection. *Greengrass*, 776 F.3d at 486; *see also Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012). “This court has found a month short enough to reinforce an inference of retaliation.” *Magyar v. Saint Joseph Reg’l Med. Ctr.*, 544 F.3d 766, 772 (7th Cir. 2008) (citing *Lang v. Ill. Dep’t of Child & Fam. Servs.*, 361 F.3d 416, 419 (7th Cir. 2004)). Schmidt fired Diaz one week after she was interviewed in the Hoffman investigation and less than one month after Schmidt’s second plea to dissuade Hoffman

from pursuing her complaint. App. 113, 115, 125; App. 312 ¶ 72. That timing supports a causal inference. *See Lang*, 361 F.3d at 419; *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994) (holding that a four-week gap between complaint and adverse action supported the inference of a causal link).

This Court has found suspicious timing where an employer retaliated at his next opportunity to do so, even when the temporal gap was significantly greater than it is here. *See Greengrass*, 776 F.3d at 486 (three-month gap). Here, Schmidt fired Diaz as soon as he returned from travel away from the University following Diaz’s interview. App. 217. In other words, Schmidt took his next reasonable opportunity to retaliate after Diaz’s protected activity. A reasonable jury could find that Schmidt’s statements of animus, along with temporal proximity, demonstrate that Diaz’s speech was a motivating factor in Schmidt’s decision to fire her.

3. A reasonable jury could also conclude that Schmidt’s main justification for firing Diaz—the supposed lack of trust between Diaz and the community—suffers from a fatal “weakness.” *Adebiyi*, 98 F.4th at 893. That purported lack of trust stemmed from Diaz’s protected speech opposing racial discrimination. And that opposition cannot (of course) be “a legitimate and nonretaliatory explanation for the firing.” *McGreal*, 850 F.3d at 314. To the extent that an employee’s refusal to engage in race-based employment practices upsets community members, an employer

may not point to that distress as a reason for firing her. Otherwise, employers could easily evade the First Amendment's prohibitions by justifying deprivations by reference to *reactions* to protected opposition, rather than to the speech itself.

Here, some members of the campus community reacted negatively to Diaz's support of Hoffman. Recall that Diaz responded to student outrage at an open house by explaining that she could not support race-based hiring. App. 138. An alumni social media campaign opposing white people serving in leadership roles then called out Diaz explicitly. App. 48, 50. And after Diaz proposed a program merger—one of the effects of which was to move away from a race-based assignment model—a faculty member proclaimed that Diaz “did not understand what it’s like to be a person of color on campus because [she] wasn’t dark-skinned enough to know what it feels like.” App. 84. Against this backdrop, Schmidt asserted that he did not believe Diaz “could repair [campus] relationships” after she refused to engage in race-based employment practices. App. 219. Accordingly, a jury could find that any lack of trust between Diaz and the campus community stemmed from Diaz’s opposition to racial discrimination.

Schmidt also cited Diaz’s purported inability to improve her performance as a legitimate reason for firing her. ECF 43 at 40-41. But even after the controversy began, Schmidt praised Diaz’s “creativity, energy and persistence” and “wholeheartedly” supported her “vision for

EDISA.” App. 229. As late as mid-July, he continued to support Diaz’s continuation in her role. App. 226. Colleagues, too, regarded Diaz as kind, hardworking, and open to feedback. App. 200-01, 370, 373-75. An assistant dean told Schmidt in September that “I adore working for [Diaz]” because “she makes me feel like I have a purpose” and “has an energetic vision for the EDISA division that hasn’t existed since [its] inception.” App. 362. Schmidt’s opinion changed only after Diaz refused to dissuade Hoffman from filing her discrimination complaint. App. 146.

True, Diaz was targeted by an alumni coalition’s social media campaign to oppose white people serving in leadership roles in MSS. App. 47-56. But Schmidt continued to support Diaz after that, as just described. And, yes, O’Halloran (and two other EDISA directors) told Schmidt that Diaz had lost their confidence to lead the division in late August. App. 259 ¶ 53. But it would not be difficult for a jury to conclude that O’Halloran objected to Diaz because she supported Hoffman, given O’Halloran’s attempts to delay the investigation and her suggestion that transferring Hoffman to another office would make her complaint go away. App. 335-39, 342-45.

A reasonable jury could also find pretextual Schmidt’s explanation that Diaz’s welcome remarks at a campus breakfast were insufficiently apologetic and not a “full-throated acknowledgment” of the need for increased collaboration. ECF 43 at 31; App. 121-22, 211, 216. That interpretation is not credible. *See* App. 318 (Diaz’s draft remarks

pledging to increase communication and collaboration with campus community). And even if Diaz did not adequately apologize, Schmidt cannot fire her because she failed to apologize for opposing illegal race-based hiring. *See, e.g.*, App. 71, 138.

Taking the evidence together, a reasonable jury could conclude that Schmidt's purported reasons were pretext for the real reason he fired Diaz: her protected speech.

III. A reasonable jury could find that Schmidt violated Diaz's Section 1981 rights by firing her because she opposed racial discrimination.

Section 1981 prohibits "racial discrimination in the making and enforcement of contracts [and] applies to all phases and incidents of the contractual relationship, including discriminatory contract terminations." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302 (1994); *see* 42 U.S.C. § 1981. That prohibition includes retaliation. *Davis v. Time Warner Cable of Se. Wis., L.P.*, 651 F.3d 664, 671 (7th Cir. 2011); *see* 42 U.S.C. § 1981. To make out a prima facie case of Section 1981 retaliation, Diaz must show "(1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two." *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 404 (7th Cir. 2007), *aff'd*, 553 U.S. 442 (2008) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)).

Schmidt's termination of Diaz is "unquestionably a materially adverse action." *Pantoja v. Am. NTN Bearing Mfg. Corp.*, 495 F.3d 840, 849 (7th Cir. 2007). And Schmidt did not argue otherwise in the district court. *See* ECF 43 at 20-32. So, we now turn to the other elements.

A. Diaz engaged in statutorily protected activity when she refused to impede Hoffman's complaint and participated in the resulting investigation.

The "methods of proof and elements" for proving a Section 1981 retaliation case "are essentially identical" to those under Title VII. *Davis v. Time Warner Cable of Se. Wis., L.P.*, 651 F.3d 664, 671 (7th Cir. 2011). So, Schmidt was prohibited from retaliating against Diaz because Diaz "opposed ... an unlawful employment practice," 42 U.S.C. § 2000e-3(a)—in this case, racial discrimination against Hoffman.

To satisfy the first element of a Section 1981 claim, Diaz must show that (1) her refusal to dissuade Hoffman and her participation in Buswell's investigation are protected opposition; and (2) when she engaged in those activities, she had a "subjective (sincere, good faith) belief that [s]he opposed an unlawful practice," and her belief was "objectively reasonable" because she opposed "discrimination that is prohibited by" the statute. *Scheidler v. Indiana*, 914 F.3d 535, 542 (7th Cir. 2019).

1. Diaz engaged in statutorily protected opposition to an unlawful employment practice. Employees can "suffer[] retaliation for advocating

the rights of those protected under section 1981.” *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 403 (7th Cir. 2007), *aff’d*, 553 U.S. 442 (2008). And “voicing informal complaints to superiors” is statutorily protected activity. *Casna v. City of Loves Park*, 574 F.3d 420, 427 (7th Cir. 2009) (quoting *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004)).

Diaz’s refusal to dissuade Hoffman from filing a complaint is exactly the kind of activity that this Court found protected in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996). There, McDonnell filed sexual-harassment complaints against her employer, a government agency. *Id.* at 258. McDonnell’s supervisor (and co-plaintiff) then alleged that the employer retaliated against him “as a punishment for his having failed to control his subordinate—that is, to get McDonnell to drop her complaints.” *Id.* The supervisor’s refusal to prevent McDonnell from filing discrimination complaints (as the employer wanted) was “[p]assive resistance,” which is “a time-honored form of opposition.” *Id.* at 262. So too here, Diaz’s refusals to dissuade Hoffman or otherwise intervene to prevent her complaint are protected opposition.

Diaz’s participation in the investigation is also protected opposition. In *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009), an employee engaged in protected opposition when, during an internal investigation, she described the unlawful harassment she had witnessed to a human resources officer, *id.*

at 273-74, 276-80. An employee can oppose racial discrimination “by responding to someone else’s question just as surely as by provoking the discussion.” *Id.* at 277. After all, employees would stay silent if they could “be penalized with no remedy” for “report[ing] discrimination in answering an employer’s questions.” *Id.* at 279.

Here, like the plaintiff in *Crawford*, Diaz provided information about unlawful conduct that she witnessed in response to an internal investigator’s questions. App. 271-72; App. 312-13 ¶ 73. Diaz told the investigator that although she appointed Hoffman to the interim director position because of Hoffman’s qualifications and performance, “it was exclusively [Hoffman’s] white identity that was the issue, criticism was [about] [Hoffman’s] race, not her ability.” App. 271-72 (Buswell quoting Diaz’s statements during her interview). Diaz’s interview was thus protected opposition.

2. Diaz had a good-faith subjective and objectively reasonable belief that refusing to impede Hoffman’s complaint and reporting what she witnessed to an investigator was opposing unlawful racial discrimination against her subordinate. *See Scheidler*, 914 F.3d at 542.

First, Diaz subjectively believed that she was opposing unlawful racial discrimination by refusing to dissuade Hoffman. Diaz testified that “it was likely not legal for me to try to influence her decision,” App. 115, and “it’s not my job to dissuade somebody from pursuing their rights,” App. 125. And Diaz expressed to the investigator that Hoffman’s race,

not her ability, was the reason that people opposed her appointment. App. 271-72.

Second, Diaz's belief was objectively reasonable because the conduct she opposed "falls into the category of conduct prohibited by the statute." *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 563 (7th Cir. 2016). Diaz need not prove that Schmidt's conduct was actually unlawful. "It is improper to retaliate for the filing of a claim of violation of [Section 1981] even if the claim does not have merit—provided it is not completely groundless." *See McDonnell*, 84 F.3d at 259. Hoffman's complaint easily meets that low bar.

For starters, the conduct described in Hoffman's complaint is prohibited by Section 1981. Students and faculty opposed Hoffman's appointment because of her race, questioning whether a white person could ever serve in that role, even on a temporary basis. App. 38-43, 75, 77-79; App. 290 ¶ 39. When Diaz shared concerns about the uproar with Schmidt (both Hoffman's and Diaz's boss), he did not intervene or reject the requests for race-based hiring practices. App. 133; App. 290 ¶ 42; App. 298-99 ¶¶ 3-10. And Hoffman was subsequently transferred to a lower-ranking role in a different office to "settle her complaint" and stripped of her teaching responsibilities for a course she had taught for multiple years just days before the semester began. App. 138, 348, 365. Together, that evidence is more than enough to supply an objectively reasonable basis for Diaz's belief that Hoffman's complaint had merit.

In the face of all this, Schmidt responded below that he was unaware that Hoffman's complaint involved a statutorily protected activity. Def.'s Br. for Summ. J., ECF 43 at 24. That's hard to take seriously. Schmidt understood that Hoffman was claiming racial discrimination against University employees. App. 46, 264. Schmidt later acknowledged that he was concerned about the complaint precisely because it accused faculty members of creating a racially hostile work environment. *See* App. 125, 221. So, Schmidt was aware that Hoffman's complaint concerned racial discrimination.

B. A reasonable jury could find that Diaz's protected opposition caused her termination.

For her Section 1981 claim, Diaz must show that Schmidt would not have fired her but for her protected opposition to racial discrimination: her refusal to dissuade Hoffman and her later participation in the investigation. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013). As already shown (at 44-50), Diaz has presented sufficient evidence supporting that causal link.

IV. Schmidt is not entitled to qualified immunity.

The district court did not address Schmidt's argument that even if Diaz has established a constitutional or statutory violation, he is entitled to qualified immunity. In case this Court chooses not to remand to the district court to decide the merits, we now demonstrate that Schmidt is not entitled to qualified immunity. *See* Def.'s Br. for Summ. J., ECF 43

at 41-45. Public officials are entitled to qualified immunity unless their conduct violates a clearly established federal right. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Schmidt is not entitled to qualified immunity because any reasonable official in his position would have understood that his actions violated Diaz’s clearly established rights under the First Amendment and Section 1981.

A. First Amendment. Several cases clearly establish that Diaz had a right not to be retaliated against for refusing to dissuade a subordinate from filing a race-discrimination complaint and for speaking in an internal investigation.

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979), clearly established the right not to be terminated for expressing opposition to racial discrimination to a supervisor, *id.* at 415-16. There, a teacher was dismissed after criticizing the racially discriminatory policies and practices of the school district in which she taught. *Id.* at 411-13. Although the plaintiff privately expressed her complaints to the school’s principal, the Supreme Court held that the First Amendment protects a “public employee who arranges to communicate privately with his employer.” *Id.* at 415. Therefore, Diaz’s private conversations with Schmidt regarding Hoffman’s race-discrimination complaint and Diaz’s refusal to dissuade Hoffman from filing that complaint were clearly protected by the First Amendment.

This Court’s precedent confirms the point. As discussed (at 36-38), state employers may not retaliate against an employee for making internal complaints about workplace misconduct. *See Marshall v. Porter Cnty. Plan Comm’n*, 32 F.3d 1215, 1217-21 (7th Cir. 1994). For instance, a police officer’s report of his superior’s misconduct to coworkers is protected and may not serve as the basis for his termination. *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 791-99 (7th Cir. 2016). In *Kristofek*, it was already “clearly established” “that the First Amendment prohibited retaliating against a public employee because he had spoken with colleagues” and authorities about unlawful behavior (there, public corruption). *Id.* at 798. For the same reasons, it is “clearly established” that “the First Amendment prohibit[s] ... terminating a public employee because [s]he had helped another employee pursue a lawsuit” about unlawful conduct. *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 648 (7th Cir. 2013).

Turning to Diaz’s statements to Buswell, any reasonable state official would have known it was unconstitutional to retaliate against Diaz for participating in an investigation into workplace misconduct. After an assistant state’s attorney testified about his supervisor’s alleged wrongdoing—sharing “information learned and opinions formed in the course of [his] public employment”—he was fired. *Chrzanowski v. Bianchi*, 725 F.3d 734, 739-40 (7th Cir. 2013). This Court held that a

reasonable supervisor would have understood that firing Chrzanowski for giving truthful testimony violated the First Amendment. *Id.* at 742.

Likewise, the Supreme Court has held that a public employee's testimony on a matter of public concern is protected under the First Amendment, even when the speech "relates to his public employment or concerns information learned during that employment." *Lane v. Franks*, 573 U.S. 228, 238 (2014). The same is true of deposition testimony concerning information that an employee obtained through his job duties. *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007).

Diaz was fired for providing truthful statements in an investigation. *See Chrzanowski*, 725 F.3d at 739. And although she shared information that she learned in the course of her public employment, she spoke as a citizen. *See Lane*, 573 U.S. at 238; *Morales*, 494 F.3d at 598. Schmidt was thus on notice that Diaz's speech was protected and that he could not fire her for participating in a race-discrimination investigation.

B. Section 1981. Diaz's right not to be retaliated against for the actions just described was also clearly established under Section 1981.

An employer is prohibited from retaliating against an employee for failing to dissuade a subordinate from filing discrimination complaints. *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996). Opposing discrimination through "passive resistance" "is a time-honored form of opposition" and cannot form the basis for an adverse job action. *Id.* The facts are the same here, so any reasonable official in Schmidt's position

would have known that firing Diaz for refusing to interfere with a subordinate's discrimination complaint violated Diaz's clearly established rights.

Diaz's later participation in the investigation is similarly protected. An employee may not be fired after responding to questions during an internal sexual-harassment investigation. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 273-74, 276-80 (2009). The employee's participation in the investigation was protected activity in *Crawford. Id.* Thus, any reasonable official in Schmidt's position was on notice that terminating an employee for participating in an investigation into another employee's discrimination complaint is unlawful.

Conclusion

This Court should reverse the district court's grant of summary judgment to Schmidt on sovereign immunity grounds and remand for the district court to decide the merits of Diaz's First Amendment and Section 1981 claims in the first instance. If the Court chooses to consider the merits, for the reasons given above, it should remand Diaz's claims for trial.

Respectfully submitted,

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May 1, 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 32(a)(7)(B) and Circuit Rule 32(c) because it contains 13,415 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/ Natasha R. Khan

Natasha R. Khan

Attached Appendix

Certificate of Circuit Rule 30 Compliance

In accordance with Circuit Rule 30(d), I certify that this appendix contains all of the materials required by Circuit Rule 30(a) and that the separately submitted appendix contains all of the materials required by Circuit Rule 30(b).

/s/ Natasha R. Khan

Natasha R. Khan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

OLGA DIAZ,

Plaintiff,

v.

OPINION and ORDER

JAMES SCHMIDT,

24-cv-161-jdp

Defendant.

Plaintiff Olga Diaz is the former vice chancellor for Equity, Diversity, Inclusion, and Student Affairs at the University of Wisconsin—Eau Claire. Diaz contends that chancellor James Schmidt terminated her in retaliation for opposing race discrimination and for exercising her rights under the First Amendment, in violation of 42 U.S.C. § 1981 and § 1983. Specifically, Diaz says that Schmidt terminated her because she refused to persuade an employee in her department to drop a racial discrimination complaint and because she agreed to provide testimony to outside investigators about the employee's complaint.

Schmidt moves for summary judgment on two grounds. First, he contends that Diaz's claims are barred by sovereign immunity. Second, he contends that Diaz's claims fail on the merits. The sovereign immunity issue is dispositive, so the court will grant Schmidt's motion on that basis without considering the merits.

BACKGROUND

Many details in this case are disputed, but the facts that matter to sovereign immunity are not. The following facts are undisputed except where noted.

Diaz began working for the University of Wisconsin—Eau Claire in 2021 as the vice chancellor for Equity, Diversity, Inclusion, and Student Affairs (EDISA). Diaz was responsible for managing several campus departments, including Blugold Beginnings, which provided support to low-income, first-generation, and other underrepresented students, and the Office of Multicultural Affairs, which provided support to students who were members of racial minority groups.

In early 2022, Diaz announced that Blugold Beginnings and the Office of Multicultural Affairs would merge into the new Multicultural Student Services (MSS) department. Some faculty, staff, and students objected, believing that the merger would inhibit the retention of non-white staff and end the Office of Multicultural Affairs' longstanding practice of matching students with support staff of the same racial background. Some members of the campus community felt that Diaz didn't adequately respond to these objections, and some of them expressed concerns about Diaz's leadership skills to Chancellor Schmidt.

Diaz appointed Rochelle Hoffman, a white woman who had formerly worked in Blugold Beginnings, to a leadership role in the new MSS department. The court described Hoffman's case in detail in *Hoffman v. Board of Regents of the University of Wisconsin System*, No. 23-cv-853-jdp, 2025 WL 1504376 (W.D. Wis. May 27, 2025). To briefly summarize, some students, faculty, and staff reacted negatively to Hoffman's appointment, believing that white people should not lead departments dedicated to supporting non-white students. Some of Hoffman's coworkers also treated her in an unfriendly manner. Ultimately, Hoffman filed a race discrimination complaint about her treatment within the MSS department. Shortly after, Hoffman transferred from the MSS department to the Student Support Services (SSS)

department. The university said that the transfer was Hoffman's decision, but Hoffman said that she had been forced to transfer.

Diaz supported Hoffman's discrimination complaint and provided testimony to a UW System investigator that corroborated Hoffman's allegations. Diaz says that during a one-on-one meeting, Schmidt asked her to persuade Hoffman to withdraw the discrimination complaint and he became angry when Diaz refused to do so. Shortly thereafter, Schmidt asked for Diaz's resignation and when she did not give it, he terminated her. For his part, Schmidt denies asking Diaz to persuade Hoffman to withdraw the discrimination complaint. He says that he terminated Diaz because senior members of her team had lost confidence in her leadership abilities.

ANALYSIS

This case turns on the scope of the state's sovereign immunity from suit under the Eleventh Amendment. The State of Wisconsin is not formally a defendant in this case because Diaz has sued Schmidt in his individual capacity. But Schmidt contends that the state is the real party in interest, so sovereign immunity bars Diaz's claims.

Diaz is suing Schmidt under 42 U.S.C. § 1983, contending that he retaliated against her in violation of her rights under 42 U.S.C. § 1981 and the First Amendment. Section 1983 authorizes suits for monetary damages against individuals who commit statutory or constitutional violations under color of state law. *See Campbell v. Forest Pres. Dist. of Cook Cnty., Ill.*, 752 F.3d 665, 671 (7th Cir. 2014) (§ 1983 is the exclusive remedy for violations of § 1981 committed by state actors). But states cannot be sued under § 1983; the Supreme Court has held that they are not "persons" who may be sued under the statute, nor did § 1983 abrogate

state sovereign immunity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989); *Quern v. Jordan*, 440 U.S. 332, 344–45 (1979); *see also Gerlach v. Rokita*, 95 F.4th 493, 500–01 (7th Cir. 2024).

Generally, state actors can be sued in their individual capacities under § 1983 without raising sovereign immunity concerns. *Hafer v. Melo*, 502 U.S. 21, 30 (1991) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974)). But the Seventh Circuit has recognized an exception to the general rule when a plaintiff's claims are “really and substantially . . . against the state.” *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001). In *Luder*, state prison employees sought damages from their supervisors for violations of federal wage-and-hour laws. The court held that these claims were barred because a judgment for the employees would require the state to pay the employees the wages that they sought. The court reasoned: “The plaintiffs are seeking to accomplish *exactly* what they would accomplish were they allowed to maintain this suit against the state and did so successfully: they are seeking to force the state to accede to their view of the [FLSA] and to pay them accordingly.” *Id.* at 1024.

The Seventh Circuit has twice applied the *Luder* exception to cases in which a state employee has sued a supervisor under § 1981 and § 1983 for workplace conduct. *Omoegbon v. Wells*, 335 F.3d 668, 673 (7th Cir. 2003); *Haynes v. Indiana Univ.*, 902 F.3d 724, 731–32 (7th Cir. 2018). In *Omoegbon*, the plaintiff sued state university officials under § 1983 for due process and academic freedom violations after the university terminated his junior faculty contract. 335 F.3d at 672. The court held that sovereign immunity barred the plaintiff's claims because he sought “backpay and other forms of monetary compensation based on an employment contract” and therefore the case bore “no resemblance to a *bona fide* individual capacity suit.” *Id.* at 673. In *Haynes*, the plaintiff sued university administrators under § 1981, alleging that he was denied tenure because of his race. Because the plaintiff was seeking

“monetary relief for an injury relating to his employment” and because the individual defendants were not parties to his employment contract in their individual capacities, the court determined that there was “no reason to believe that [the individual defendants], rather than the University, would foot the bill for a resulting judgment.” 902 F.3d at 732.

This court, applying *Omoegbon* and *Haynes*, has ruled in three recent cases that individual-capacity claims brought by state employees were barred by sovereign immunity. *Hoffman*, 2025 WL 1504376; *Melgaard v. Wisconsin Dep’t of Nat. Res.*, No. 24-cv-561-jdp, 2025 WL 3268370 (W.D. Wis. Nov. 24, 2025); *Mahmoud v. Bd. of Regents of the Univ. of Wisconsin Sys.*, No. 24-cv-384-jdp, 2026 WL 242087 (W.D. Wis. Jan. 29, 2026). The court understands *Omoegbon* and *Haynes* to stand for the following principle: “sovereign immunity bars a state-employed plaintiff from bringing individual-capacity claims against state-employed supervisors or coworkers who deprived him of rights, benefits, or opportunities arising from his employment relationship with the state.” *Melgaard*, 2025 WL 3268370 at *4. Thus, claims that supervisors unlawfully demoted, transferred, brought disciplinary action against, and failed to promote state employees were barred, because each of those claims involved the deprivation of rights, benefits, or opportunities arising from the state employment. *Hoffman*, 2025 WL 1504376, at *4–*5; *Melgaard*, 2025 WL 3268370, at *4; *Mahmoud*, 2026 WL 242087, at *7.

The same result follows here. Diaz’s claims are based on Schmidt’s decision to terminate her, which is plainly a deprivation of a benefit arising from her state employment. The monetary relief that Diaz seeks stems directly from the loss of her employment contract with the state. The court sees no meaningful distinction between this case and *Omoegbon* and *Haynes*, so binding circuit precedent compels the dismissal of this case on sovereign immunity grounds.

Diaz resists this conclusion with two arguments. First, she attempts to distinguish *Hoffman*, arguing that “Schmidt did not personally participate in the racial discrimination that Hoffman endured whereas Schmidt is the individual who retaliated against and terminated Diaz.” Dkt. 58, at 5. It’s not clear that this is a true distinction: Hoffman argued on summary judgment that the individual defendants in her case, including Schmidt, were personally involved in depriving her of her rights. *See Hoffman*, case no. 23-cv-753-jdp, Dkt. 47, at 34–37 (Hoffman’s brief in opposition to summary judgment). In any event, *Omoegbon* and *Haynes* turned not on the extent of the individual defendants’ involvement, but on the injuries suffered by the plaintiff. *Omoegbon*, 335 F.3d at 672; *Haynes*, 902 F.3d at 732. Schmidt’s personal involvement in the alleged deprivations that Diaz experienced is relevant to the merits of Diaz’s § 1983 claims against him, but it is immaterial to the sovereign immunity analysis.

Second, Diaz argues that if the sovereign immunity principle outlined in *Omoegbon* and *Haynes* were construed to bar her claims, then it would bar almost all § 1983 claims based on a state employment relationship, essentially “render[ing] individual capacity suits a nullity.” Dkt. 58, at 6. This is a fair point. The Seventh Circuit, in *Omoegbon* or *Haynes*, did not explicitly address the apparent far-reaching implications of a rule barring individual capacity suits where a state employee seeks “monetary relief for an injury relating to his employment with [the state].” *Haynes*, 902 F.3d at 732. Nor did the Seventh Circuit explain how it distinguished the Supreme Court’s decision in *Hafer*, which endorsed an individual-liability suit under § 1983 against a state-employed supervisor who terminated state employees without due process and in violation of their First Amendment rights. 502 U.S. at 23. But *Omoegbon* and *Haynes* are binding in this circuit, so this court must apply them in the absence of a meaningful factual distinction.

District courts in this circuit have proposed two limiting principles to *Omosegbon* and *Haynes*, neither of which the court finds persuasive. First, some district courts have concluded that individual-capacity suits are not barred if the plaintiff seeks compensatory or punitive damages other than lost wages and benefits.¹ But this court already rejected that argument in *Hoffman*, observing that *Omosegbon* and *Haynes* turned on whether the claims against the individual defendants stemmed from the plaintiff's state employment contract, not on whether the plaintiffs sought damages other than lost wages and benefits. *See Omosegbon*, 335 F.3d at 668 (plaintiff seeks "backpay and other forms of compensation based on an employment contract") (emphasis added); *Haynes*, 902 F.3d at 732 (plaintiff seeks "monetary relief for an injury relating to his employment").

Second, some district courts have observed that *Haynes* was a case under 42 U.S.C. § 1981, which governs contractual relationships, so the claims in that case were uniquely premised on the plaintiff's employment contract with the state. *E.g., Isabell v. Trs. of Indiana Univ.*, 432 F. Supp. 3d 786, 795–96 (N.D. Ind. 2020). But the court of appeals did not rely on that fact to reach its conclusion in *Haynes*. On the contrary, the court described the facts of *Haynes* as "materially the same" as *Omosegbon*, which involved a § 1983 due process claim, not a § 1981 claim. 732 F.3d at 732.

¹ *See Sizyuk v. Purdue Univ.*, No. 4:20-cv-75, 2024 WL 68282 (N.D. Ind. Jan. 5, 2024), *Doe v. Purdue Univ.*, No. 4:18-cv-89, 2019 WL 1369348 (N.D. Ind. Mar. 25, 2019); *Williams v. Ne. Illinois Univ.*, No. 23-cv-03961, 2024 WL 2959504 (N.D. Ill. June 11, 2024); *Reinebold v. Indiana Univ. at S. Bend*, No. 3:18-cv-525, 2019 WL 1897288 (N.D. Ind. Apr. 25, 2019); *Higgins v. Lake Cnty. Cir. Ct. Clerk's Off.*, No. 17-cv-07637, 2025 WL 3683058 (N.D. Ill. Dec. 18, 2025). *But see Smith v. Illinois Dep't of Corr.*, No. 24-cv-5022, 2025 WL 744098, at *4 (N.D. Ill. Mar. 7, 2025) (considering and rejecting this argument).

This case is identical in material respects to *Omosegbon* and *Haynes*, so the court must apply this circuit's controlling law. Under that law, Diaz's claims against Schmidt are barred by the doctrine of sovereign immunity, so they will be dismissed without prejudice. *See Morgan v. Fed. Bureau of Prisons*, 129 F.4th 1043, 1052 (7th Cir. 2025) (dismissal on sovereign immunity grounds is without prejudice). This case will be closed.

ORDER

IT IS ORDERED that

1. Defendant James Schmidt's motion for summary judgment, Dkt. 42, is GRANTED.
2. Plaintiff Olga Diaz's claims are DISMISSED without prejudice as barred by sovereign immunity.
3. The clerk of court is directed to enter judgment for defendant and close this case.

Entered February 20, 2026,

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

OLGA DIAZ,

Plaintiff,

Case No. 24-cv-161-jdp

v.

JAMES C. SCHMIDT,

Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant James C. Schmidt against Plaintiff Olga Diaz dismissing this case without prejudice.

s/ Deputy Clerk

Joel Turner, Clerk of Court

2/20/2026

Date