No. 25-3275

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

Michael Melgaard,

Plaintiff-Appellant,

v.

Wisconsin Department of Natural Resources et al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Western District of Wisconsin
Case No. 24-cv-00561-jdp, Hon. James D. Peterson

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Introduction and Summary of Argument

This Court's decisions must accord not only with each other but also with Supreme Court case law. It follows, then, that if one party's theory "runs into [a] line of" Supreme Court "§ 1983 precedent," it must be rejected. *Bradley v. Vill. of Univ. Park*, 929 F.3d 875, 898-99 (7th Cir. 2019).

Yet Defendants, like the district court, adopt just such a theory. They read *Omosegbon v. Wells*, 335 F.3d 668 (7th Cir. 2003), and *Haynes v. Indiana University*, 902 F.3d 724 (7th Cir. 2018), to stand for the proposition that sovereign immunity bars any individual-capacity damages claim "stemming from [a] state employment contract." Defs.' Br. 43. But that articulation is irreconcilable with *Hafer v. Melo*, 502 U.S. 21 (1991). Like Michael Melgaard here, the *Hafer* plaintiffs sought money damages, through an individual-capacity suit, stemming from the termination of their state employment, and the Supreme Court held that "the Eleventh Amendment does not restrict their ability to sue in federal court." *Id.* at 23-24, 31.

Here's the actual test for when a cause of action denominated as an individual-capacity claim seeking monetary relief is precluded as "really and substantially … against the state," *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001): The claim cannot seek recovery of public funds or compel the state to act (or not act) in a certain way. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984). Under that test, flowing from controlling Supreme Court precedent, sovereign immunity does not bar Melgaard's claims because—as his opening brief explained—he seeks compensatory and punitive damages caused by Bryan Harrenstein's and Jeremy Peery's personal, discretionary violations of the Constitution and federal law. Defendants' responses, which rely on an overreading of *Omosegbon* and *Haynes*, thus get them nowhere. The district court's sovereign-immunity analysis should be reversed, and Melgaard's First Amendment claim should be remanded for resolution of the merits.

The district court also erred by granting summary judgment on Melgaard's Title VII retaliation claim because he had not experienced "severe or pervasive" retaliation. App. 677. Defendants' response all but concedes that the severe-or-pervasive standard applies only to discrimination claims and that the test for retaliation claims is whether Defendants' conduct, in the aggregate, would dissuade a reasonable person from engaging in protected activity. This Court could reverse and remand for the district court to apply the correct test in the first instance. But if it chooses to address the merits, it should remand for trial because the summary-judgment evidence would allow a jury to conclude that Melgaard's protected activity caused materially adverse actions.

Argument

I. Sovereign immunity does not bar Melgaard's First Amendment claim.

A. The Eleventh Amendment bars individual-capacity claims only in limited circumstances.

Defendants acknowledge that "the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983." *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974)); *see* Defs.' Br. 34. "Officers sued in their personal capacity come to the court as individuals." *Lewis v. Clarke*, 581 U.S. 155, 162-63 (2017) (quoting *Hafer*, 502 U.S. at 27) (brackets omitted). So, in individual-capacity cases, the "real party in interest is the individual, not the sovereign." *Id.* at 163.

True, a suit for damages denominated as one against defendants in their individual capacities is sometimes "really and substantially … against the state." *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001). But that occurs only in limited circumstances. The state is the real party in interest, first, "if the judgment sought would expend itself on the public treasury or domain," or, second, if the plaintiff's claim would "interfere with the public administration," such that "the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 101 n.11 (1984) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

Determining whether a state is the real party in interest "depends on the circumstances," *Luder*, 253 F.3d at 1022, and can be a "knotty and fact-bound inquiry," *Haynes v. Ind. Univ.*, 902 F.3d 724, 732 (7th Cir. 2018); *see* Defs.' Br. 32. But the inquiry's object is clear. The goal is to determine whether, in practice, the plaintiff's damages claim "*demonstrably* has the *identical* effect as a suit against the state," *Luder*, 253 F.3d at 1023—that is, whether the claim would compel payment from the public fisc or impose duties on the state. *See Pennhurst*, 465 U.S. at 101 n.11.

For instance, in *Luder*, this Court determined that a Fair Labor Standards Act case denominated as against defendants in their individual capacities was really against the state. By "seeking to force the state to accede to their view of the [FLSA] and to pay them accordingly," the Court reasoned, the plaintiffs were really "seeking to accomplish e*xactly* what they would accomplish were they allowed to maintain this suit against the state and did so successfully." *Luder*, 253 F.3d at 1024. In other words, the plaintiffs' claims flunked both *Pennhurst* prongs: They required payment from the state and compelled the state to adopt the plaintiffs' view of the state's obligations. 465 U.S. at 101 n.11.

Gerlach v. Rokita, 95 F.4th 493 (7th Cir. 2024), also "provides a helpful illustration," Defs.' Br. 36, though not for the reasons Defendants suggest. When the plaintiff there sought interest from Indiana officials that had accrued after she reclaimed dormant property, the key question was whether "the amount she claim[ed] she [was] owed should have been paid by the state." *Gerlach*, 95 F.4th at 501. The answer was yes: The interest had "flowed to the state, not individual state employees," and the money was "in the state coffers, not the personal bank accounts" of Indiana officials. *Id.* So the claim was barred under *Pennhurst*. *Id.*

Omosegbon and *Haynes* turned on the same inquiry. In *Omosegbon*, it was "inescapable" that any "judgment" awarding "backpay and other forms of monetary compensation based on an employment contract" would "be paid by the state rather than the individual defendants." 335 F.3d 668, 673 (7th Cir. 2003). Likewise, in *Haynes*, there was "no reason to believe that" the individual defendants, "rather than the University, would foot the bill" for a judgment based on an employment contract. 902 F.3d at 732. Sovereign immunity thus doomed the individual-capacity damages claims in *Omosegbon* and *Haynes* for the same reason it foreclosed the claims in *Luder* and *Gerlach*: Each claim would have required the state to pay a judgment in the plaintiff's favor.

B. The district court's and Defendants' view of sovereign immunity contravenes binding precedent, is illogical, and would undermine Section 1983.

1. The district court and Defendants adopt a different, broader view of the circumstances in which nominally individual-capacity suits are "really and substantially … against the state." *Luder v. Endicott*, 253

F.3d 1020, 1023 (7th Cir. 2001). The district court stated that, under *Omosegbon* and *Haynes*, "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." App. 684. Similarly, Defendants argue that sovereign immunity turns on whether plaintiffs' "sought-after damages stem[] from their state employment contracts." Defs.' Br. 42. On either telling, the dispositive issue in the sovereign-immunity analysis is not whether the plaintiff's damages would be paid by the state, or whether the plaintiff's claim would interrupt state administration, but whether the claim arises in the employment context; if so, the claim is barred.

That view has no grounding in the real-party-in-interest test established by *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 101 n.11 (1984). More damningly, it flatly contravenes *Hafer v. Melo*, 502 U.S. 21 (1991). As Melgaard's opening brief explains (at 25), the *Hafer* plaintiffs sought monetary damages from defendant Barbara Hafer, in her personal capacity, after Hafer terminated them from state employment. 502 U.S. at 23-24. These damages thus represented compensation for lost "benefits … arising from [an] employment relationship with the state," App. 684, and "stemmed from [the plaintiffs'] state employment contracts," Defs.' Br. 42. Yet the plaintiffs' claims were not barred. The Supreme Court could hardly have been clearer: "Insofar as respondents seek damages against Hafer personally, the Eleventh Amendment does not restrict their ability to sue in federal court." *Hafer*, 502 U.S. at 31.

Because Defendants' and the district court's employment-contract-based reading of *Omosegbon* and *Haynes* "runs into" Supreme Court precedent, it cannot be correct. *Bradley v. Vill. of Univ. Park*, 929 F.3d 875, 898 (7th Cir. 2019). Recognizing the problem, Defendants first attempt to narrow *Hafer* as having nothing to do with whether "the state is the real party in interest." Defs.' Br. 54. Not so. As just explained, *Hafer* held that sovereign immunity did not bar claims imposing personal liability for damages inarguably stemming from plaintiffs' employment contracts with the state. 502 U.S. at 23-24, 31. For that reason, later Supreme Court precedent recognizes that *Hafer* concerned "whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 581 U.S. 155, 161-62 (2017) (citing *Hafer*, 502 U.S. at 25).

Defendants next try to narrow the district court's opinion by suggesting that a later opinion by the same judge—*Banes v. Levine*, 2026 WL 1623113 (W.D. Wis. June 5, 2026), *appeal pending*, No. 26-2346—confirmed that the decision below was a "fact-bound inquiry," not a "blanket approach" to contract-based cases. Defs.' Br. 56. But *Banes* repeated, word-for-word, the same broad "principle" barring all claims seeking compensation for lost "benefits … arising from" state employment that drove the decision here. 2026 WL 1623113, at *4; *compare* App. 684. And Defendants' proposed rule—under which sovereign immunity would preclude all claims seeking damages "stemm[ing] from … state employment contracts," Defs.' Br. 42—is equally irreconcilable with *Hafer*.

Defendants also suggest that *Hafer* is distinguishable because the plaintiffs' speech in that case "did not occur at the workplace or in the context of their employment." Defs.' Br. 57. This argument is a sure sign that Defendants have lost sight of sovereign-immunity first principles. The location and nature of a plaintiff's activity can matter when evaluating the merits of a First Amendment retaliation claim, *see Lane v. Franks*, 573 U.S. 228, 238-39 (2014), but it has nothing to do with the sovereign-immunity calculus. Sovereign immunity turns on who the *defendants* really are and what they've done: whether the officers "sued for damages … assume the identity of the government that employs them"—in which case sovereign immunity attaches—or "come to court as individuals"—in which case it does not. *Hafer*, 502 U.S. at 27. What the plaintiff said, or where he spoke, is irrelevant.

It is unsurprising that *Hafer* goes uncited in *Omosegbon* and *Haynes*, as neither party's briefing in either case so much as mentions *Hafer*.[1] But

[1] The *Omosegbon* briefs are located at 2002 WL 32170408 (opening brief), 2002 WL 32170409 (response brief), and 2002 WL 32170410 (reply brief). The *Haynes* opening brief is not on Westlaw, but a publicly

Hafer is binding Supreme Court precedent with which this Court's cases must be reconciled. As a result, any broader language in *Omosegbon* and *Haynes* suggesting that sovereign immunity turns on whether a claim is contract-based, *see Omosegbon v. Wells*, 335 F.3d 668, 673 (7th Cir. 2003); *Haynes v. Ind. Univ.*, 902 F.3d 724, 732 (7th Cir. 2018), must be treated as dicta. By contrast, and consistent with *Hafer*, the holding of both cases is that where a judgment sought by the plaintiffs will be paid by the state, the claim is barred by sovereign immunity—and claims based on employment contracts will sometimes fall into that category. *Omosegbon*, 335 F.3d at 673; *Haynes*, 902 F.3d at 732.

2. Flouting Supreme Court precedent is not the only problem here. Defendants' proposal to impose a sovereign-immunity bar on any monetary-relief claim arising in the context of an employment contract with the state presents several other concerns.

Consider Defendants' explanation for why claims against state employers were allowed to proceed in *Reinebold v. Indiana University*, 2019 WL 1897288 (N.D. Ind. Apr. 25, 2019), and *Isabell v. Trustees of Indiana University*, 432 F. Supp. 3d 786 (N.D. Ind. 2020): namely, that the plaintiff in both cases was a job *applicant*, not an *employee* (and, thus, no contract with the state yet existed). *See* Defs.' Br. 47 (discussing

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accessible version is located at entry 11 on the appellate docket in case number 17-2890. The remaining *Haynes* briefs are located at 2017 WL 6611860 (response brief) and 2018 WL 454130 (reply brief).

Reinebold); *id.* at 52 (discussing *Isabell*). Even setting aside Defendants' incorrect description of *Isabell*—where the plaintiff already was a state employee and sought damages related to the denial of a promotion, 432 F. Supp. 3d at 789-92—their applicant-employee distinction is illogical. If it were right, a state employer who wanted to discriminate or retaliate against a job applicant could just hire and then immediately fire the person—the employment contract, on Defendants' telling, would preclude monetary damages.

That makes no sense, and it does not reflect what either *Reinebold* or *Isabell* actually turned on. Rather, both cases permitted the complaints to proceed because a judgment would not "interfere with public administration, restrain or compel the state to act, or necessarily expend public treasury funds." *Isabell*, 432 F. Supp. 3d at 795 (citing *Pennhurst*, 465 U.S. at 101 n.11); *see Reinebold*, 2019 WL 1897288, at *3 ("Defendants have not shown that a judgment against [the individual defendants] will expend itself on the state's treasury. Therefore, the Court will not dismiss Reinebold's § 1983 individual capacity claims based on sovereign immunity.").

Tying the sovereign-immunity analysis to the existence of an employment contract would also eliminate a substantial category of Section 1983 claims and undermine the statute's goals. *See* Opening Br. 26. As explained above (at 5-6), both the district court and Defendants would have *Omosegbon* and *Haynes* bar all individual-capacity claims seeking employment-related damages. *See* App. 684; Defs.' Br. 42-43. That rule would significantly undermine Section 1983's goals of deterring violations of federal law and rectifying them when they occur. *See Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); Opening Br. 26.

Defendants suggest that plaintiffs need not worry because Title VII could pick up the slack from any contraction of Section 1983. Defs.' Br. 58. But Title VII does not reach the same scope of misconduct as does Section 1983. Title VII does not, for example, create a cause of action for First Amendment or due-process violations. So, an employee whose constitutional rights are violated may well have nowhere to turn if, as Defendants propose and the district court held, sovereign immunity bars all Section 1983 monetary-relief claims arising in the context of a state employment contract.

In any event, both Section 1983 and Title VII are congressional enactments that must be given their full scope. Arguments that Title VII superseded the older civil-rights statutes, like Section 1983, "have never succeeded." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 732 (7th Cir. 2004). Though the statutes overlap to some degree, "both old and new remedial systems may be enforced according to their terms." *Id.* And *Hafer* establishes that Section 1983's terms permit individual-capacity damages claims by former employees against state officials, even if the claims arise in the context of a contractual relationship, because state officials "sued in their personal capacity come to court as individuals." *Hafer*, 502 U.S. at 27.

C. Properly understood, sovereign immunity does not preclude Melgaard's claims.

Melgaard's complaint is not barred by sovereign immunity because it does not represent "an effort at an end run around the Eleventh Amendment." *Luder v. Endicott*, 253 F.3d 1020, 1025 (7th Cir. 2001). As Melgaard's opening brief explains (at 18-24), three elements of Melgaard's complaint together demonstrate that his claims are not "really and substantially … against the state," *Luder*, 253 F.3d at 1023: (1) Melgaard sought compensatory and punitive damages payable only by individual defendants, and (2) those defendants took personal, discretionary actions (3) that violated Melgaard's constitutional and statutory rights. (Because elements (2) and (3) overlap, we examine them together below.) Where, as here, all three elements are present, there is no risk that a nominally individual-capacity claim for damages will in fact require public payment or impose obligations on the state. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984).

Form of damages. Defendants do not contest that because Melgaard seeks compensatory and punitive damages, they are payable only by Harrenstein and Peery rather than the state (and that indemnification cannot change the analysis). *See* Defs.' Br. 44; Opening Br. 18-21. Those concessions alone distinguish this case from *Omosegbon* and *Haynes*: *Omosegbon* deemed it "inescapable that any … judgment [in that case would] be paid by the state," 335 F.3d at 673, and *Haynes* found "no reason to believe" that individual defendants would pay damages, 902 F.3d at 732. But here it is undisputed that a damages judgment would run against Harrenstein and Peery, not the state.

True, the complaint in *Haynes* sought compensatory damages, while the complaint in *Omosegbon* sought forms of "monetary compensation" that may have been properly categorized as compensatory or punitive. *See* Defs.' Br. 42-43; Opening Br. 20 & n.2. But in both cases, the plaintiffs failed to meaningfully explain to this Court why sovereign immunity does not bar claims for compensatory or punitive damages. Because the issue was "not briefed," this Court's decision to preclude these damages through sovereign immunity "was dicta." *Clark v. All Acquisition, LLC*, 886 F.3d 261, 265 n.10 (2d Cir. 2018).

When this Court affirmatively considered the connection between the requested form of relief and sovereign immunity, it described the key question as whether the "sums" requested "should have been paid by the State" or by the individual defendants. *Lenea v. Lane*, 882 F.2d 1171, 1178 (7th Cir. 1989) (quoting *Dwyer v. Regan*, 777 F.2d 825, 836 (2d Cir. 1985), *modified on other grounds*, 793 F.2d 457 (2d Cir. 1986)); *see also Gerlach v. Rokita*, 95 F.4th 493, 501 (7th Cir. 2024) (same). The answer to that question here is undisputed: Harrenstein and Peery will be required by a judgment in this case to pay all of Melgaard's damages attributed to the First Amendment violation.

Finally, to clarify, Melgaard does not seek "lost income" through his Section 1983 claim, where "lost income" is synonymous with backpay. Opening Br. 19 n.1. That said, the "calculation and assessment of damages is a question of fact that is reserved for the jury." *Medcom Holding Co. v. Baxter Travenol Laby's, Inc.*, 106 F.3d 1388, 1400 (7th Cir. 1997). So, it may be that some of Melgaard's compensatory damages flowing from Harrenstein's and Peery's misconduct are eventually "measured" in part "by the value of the contract," *Republic Gear Co. v. Borg-Warner Corp.*, 406 F.2d 57, 63 (7th Cir. 1969). If so, that fact would change neither the nature of the case nor who will ultimately pay the damages. *See id.*; *contra* Defs.' Br. 43. As the First Circuit has put it, "a successful plaintiff is … entitled to receive compensatory damages" through an individual-capacity suit, and if "[p]roperly proven," these damages may equal what was provided by contract. *Negron-Almeda v. Santiago*, 528 F.3d 15, 26 (1st Cir. 2008). But what matters—and what precludes the application of sovereign immunity—is that any damages award would be payable solely by Harrenstein and Peery, not the state.

Personal, discretionary decisions to violate Melgaard's legal rights. That Melgaard's individual-capacity claims are really against Harrenstein and Peery, not the state, is confirmed by the complaint's allegations: The officials' retaliation represented personal, discretionary decisions to violate constitutional and statutory law. *See* Opening Br. 22-24. These aspects of the case ensure that Melgaard's request for compensatory and punitive damages is not an attempt to subvert the Eleventh Amendment's "real interests" via "elementary mechanics of captions and pleading." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997).

Consider the Second Circuit's account in *Dwyer*—a case cited favorably by this Court in *Lenea* and *Gerlach*—as to why a "request for compensatory and punitive damages stands on different footing from [a] request for backpay." *Dwyer*, 777 F.2d at 836. "[T]here is no Eleventh Amendment impediment" to recovering compensatory and punitive damages, *Dwyer* explained, because these damages stem from breaches of "dut[ies] not to deny" individuals "federally protected right[s]," not a "duty … to pay [a plaintiff's] salary." *Id.* at 836-37. So too here: Melgaard's claims arise from Harrenstein's and Peery's personal actions that violated the Constitution and a federal statute. Opening Br. 22-24. That underlying substance, not the label Melgaard has placed on his damages, confirms the legitimacy of Melgaard's individual-capacity claims.

Because Melgaard's complaint involves Harrenstein's and Peery's discretionary acts, moreover, a judgment in his favor would not "interfere with the public administration, … restrain the Government from acting, or … compel it to act." *Pennhurst*, 465 U.S. at 101 n.11 (quoting *Dugan* *v. Rank*, 372 U.S. 609, 620 (1963)). No party here contends that Defendants' misconduct flowed from the state's interpretation of its legal obligations. All agree that state officials may not retaliate based on protected activity; the dispute is over whether they did so. Thus, a judgment in Melgaard's favor would not require the state of Wisconsin to "accede to [Melgaard's] view of" the law. *Luder*, 253 F.3d at 1024; *see also Gerlach*, 95 F.4th at 496 (detailing the parties' dispute about the proper functioning of Indiana's Unclaimed Property Act). And unlike the complaints in *Omosegbon* and *Haynes*, Melgaard's claims do not ask the judiciary to dictate the mechanics of a state university's tenure process or any other state program. *See Omosegbon*, 335 F.3d at 672; *Haynes*, 902 F.3d at 728-30.

The personal nature of Harrenstein's and Peery's retaliation further separates this case from *Omosegbon* and *Haynes*. As the district judge here recognized in a different case, claims alleging that an employer "personally mistreated" an employee are not barred by sovereign immunity. *Mahmoud v. Bd. of Regents*, 2026 WL 242087, at *7 (W.D. Wis. Jan. 29, 2026). Defendants attempt to distinguish *Mahmoud*, which involved a state officer's alleged constructive discharge of a state employee, as "uniquely premised on extreme, personal mistreatment that cannot be understood as within the normal bounds of the employment relationship." Defs.' Br. 53. But this explanation implies that "non-extreme" retaliatory violations of the First Amendment and civil-rights laws can be properly understood as within the normal bounds of employment and thus barred by sovereign immunity. That cannot be right. Instead, the proper faultline is *Pennhurst*'s: When a case involves personal violations of constitutional or statutory law, such that remedying the misconduct would neither interfere with public administration nor direct the activities of the state, sovereign immunity does not apply unless the state would be on the hook to pay damages. 465 U.S. at 101 n.11.

Harrenstein's and Peery's individuated mistreatment of Melgaard is a necessary predicate to the claims advanced in Melgaard's complaint. The retaliation is attributable to Harrenstein and Peery alone, such that Melgaard may seek damages only from them (and not their successors in office). *See* Opening Br. 23. Similarly, only Harrenstein and Peery may have had the necessary mental state to justify punitive damages under Section 1983. *Smith v. Wade*, 461 U.S. 30, 56 (1983). Nor do Defendants explain how Melgaard's request for damages stemming from "injury to his personal reputation [and] mental and emotional distress," App. 24 ¶ 601, could possibly be attributed to the state, rather than Harrenstein and Peery.

Melgaard's claims are thus predicated on personal and discretionary mistreatment in a way that *Omosegbon* and *Haynes* were not. Those cases focused on state universities' hiring and tenure processes, not the intentional discriminatory acts of individuals. *Omosegbon*, 335 F.3d at

672; *Haynes*, 902 F.3d at 728-30. That distinction—plus Melgaard's request for compensatory and punitive damages stemming from Defendants' personal constitutional and statutory violations—demonstrates that Melgaard's claims are not barred by sovereign immunity.[2]

II. Defendants are not entitled to summary judgment on Melgaard's Title VII claim.

A. A reasonable jury could find that Melgaard suffered materially adverse employment actions.

1. The district court applied an improperly heightened standard in determining that Melgaard did not suffer a materially adverse action. *See* Opening Br. 39-41. It analogized Melgaard's *retaliation* claim to a hostile-work-environment *discrimination* claim before finding that the harms Melgaard suffered were not so "severe or pervasive" that they affected Melgaard's terms of employment. App. 686-87 (quoting *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 901 (7th Cir. 2018)).

But sister-circuit precedent, with near unanimity, rejects the severe-or-pervasive test for use in Title VII retaliation claims. *See* Opening Br. 40-41. And this Court has previously applied the baseline retaliation

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[2] If this Court allows Melgaard's First Amendment claim to proceed, the parties agree that the district court should decide the merits first. Opening Br. 26-27; Defs.' Br. 58. If this Court nonetheless reaches the merits, Melgaard's opening brief explains why summary judgment is unwarranted. Opening Br. 26-37. Defendants' brief makes no contrary argument.

rule—that harms are actionable if they would "dissuade a reasonable employee from engaging in protected activity," *Poullard v. McDonald*, 829 F.3d 844, 858 (7th Cir. 2016)—to assess the cumulative effect of multiple retaliatory actions. *See* Opening Br. 45 (discussing *Huri v. Off. of the Chief Judge of the Cir. Ct. of Cook Cnty.*, 804 F.3d 826, 833 (7th Cir. 2015)).

Defendants all but concede the issue. They note that Melgaard's reading "may be correct" and provide no argument to support the district court's test. Defs.' Br. 16. Defendants contend instead that the cumulative impact of the adverse actions Melgaard suffered was not material even under the "traditional standard." *Id.*

This is "'a court of review,' not 'one of first view.'" *Motorola Sols., Inc. v. Hytera Commc'ns Corp.*, 108 F.4th 458, 478 (7th Cir. 2024) (quoting *Arreola-Castillo v. United States*, 889 F.3d 378, 383 (7th Cir. 2018)). So, the Court may wish to simply reiterate that the material-adversity standard applies and then remand to the district court. *See* Opening Br. 41. But if this Court elects to apply the test itself, Melgaard suffered materially adverse actions—as we next explain.

2. Defendants purport to examine the "aggregate impact" of (1) the investigation of Melgaard's supposed COVID-19 policy violation, (2) the Letter of Expectations, and (3) Melgaard's first-ever negative review. Defs.' Br. 18-19. But their briefing largely dismisses each event, standing alone, as immaterial. *Id.* That rewrites Melgaard's argument, which describes a "litany of malfeasance" that, cumulatively, would dissuade a reasonable person from engaging in protected activity. *Huri*, 804 F.3d at 833; *see* Opening Br. 41-47. Defendants' retaliation "began with [an] investigation[]" after Melgaard supported Jennifer Burrow-Niemeyer's complaint and "culminated in" the Letter and negative review. *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004). The question is whether that entire sequence was materially adverse.

Adversity must also be considered in context. "Context matters," because "the significance of any given act of retaliation will often depend upon the particular circumstances." *Poullard*, 829 F.3d at 857 n.3 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006)). Because context can transform an adverse action from trivial to material (or vice-versa), there are no "categorical rules for retaliation claims," *Lesiv v. Ill. Cent. R.R. Co.*, 39 F.4th 903, 913 (7th Cir. 2022), and whether actions are materially adverse is often "best resolved by a jury," *Benuzzi v. Bd. of Educ.*, 647 F.3d 652, 665 (7th Cir. 2011). Here, a jury could reasonably conclude that the context surrounding Defendants' actions rendered those actions materially adverse.

Start with Defendants' inconsistent treatment of the ridesharing incident's seriousness. Defendants initially assured Melgaard that no additional discipline was forthcoming after the ridesharing investigation. App. 375 ¶ 25. But then they issued the Letter and Melgaard's first-ever negative review, both alleging serious flaws: The Letter faulted Melgaard for "incorrectly interpreting … written directives and guidance," App. 63, while the review contained three "Progress Necessary" ratings out of five categories, App. 79. These reprimands would concern any reasonable person in Melgaard's shoes.

Defendants' lack of explanation for these actions heightened Melgaard's trepidation. When Melgaard repeatedly sought to clarify the Letter's criticisms, Harrenstein stonewalled. *See* App. 207-210; App. 376-377 ¶¶ 34-35; Opening Br. 10. As Melgaard put it, he had been "informed there was no discipline" arising from the ridesharing investigation, so was left to "wonder[]" if the Letter was "specific to the possible alleged covid violation, or if there [were] some other instance(s) … where it is believed I've been deficient[?]" App. 209. Similarly, when Melgaard asked for specificity regarding the exceedingly generalized justifications for his review's "Progress Necessary" ratings—for instance, that his "engagement and support … [were] inconsistent," App. 80, 93, and he supposedly "struggle[d] at times in communicating with his supervisor," App. 80, 90—Harrenstein told Melgaard to stop "picking away," App. 91, and to just file a rebuttal, App. 222-23. When Melgaard did, HR issued an undetailed, pro forma letter stating that the review was justified. App. 87.

Defendants *now* assert that the Letter and negative review solely "stemmed from the COVID-19 policy incident." Defs.' Br. 22. But if the ridesharing investigation was closed, with no discipline warranted, what explains the Letter and negative review? And if Melgaard's ridesharing was the only reason for these reprimands, why couldn't anyone clarify that fact? In any event, because of Defendants' obfuscation, Melgaard reasonably viewed the Letter and review as "sweeping … unexplained memorand[a]." *Benuzzi*, 647 F.3d at 665. And unexplained actions—unlike typical written warnings—can be material because they raise the reasonable inference that Defendants were "setting [Melgaard] up to fail." *Id.* (quoting *Lang v. Ill. Dep't of Child. & Fam. Servs.*, 361 F.3d 416, 420 (7th Cir. 2004)).

Nor does Defendants' view that the Letter was non-disciplinary, *see* Defs.' Br. 18, negate Melgaard's reasonable perception. As the Wisconsin Employment Relations Commission has reasoned, letters of expectations and negative evaluations can be adverse because they "have a negative and potentially chilling impact on the employees who receive them." *AFSCME Local Council 32*, WERC Dec. No. 40370-A, at 6 (Mar. 16, 2026) (available at: https://perma.cc/G9G2-CHZQ). Finally, Melgaard's final, positive performance review is irrelevant. *Contra* Defs.' Br. 20. That review was conducted *after* Melgaard had worked his last day and informed Defendants he was retiring, so it could not cure the adversity of Defendants' earlier actions. App. 62 (Melgaard informed Harrenstein on March 7, 2023, that his last working day would be March 27, 2023, before retiring on January 9, 2024); App. 78 (Melgaard's final performance review completed April 20, 2023).

All told, it was reasonable for Melgaard to infer that the investigation, Letter, and negative review represented an intentionally constructed narrative of vaguely explained underperformance meant to penalize his support of Burrow-Niemeyer—not identification of genuine performance failings needing correction. A jury could accordingly find that a reasonable person in Melgaard's position would have experienced these actions as materially adverse. *See Benuzzi*, 647 F.3d at 665.

B. A reasonable jury could find that Melgaard's protected activity caused the adverse actions.

1. Because the district court resolved Melgaard's Title VII claim on the adverse-action element, it did not consider causation. App. 686-87. So, if this Court reverses the district court's adverse-action determination, remand is appropriate to allow the district court to consider causation first. *See Motorola Sols., Inc. v. Hytera Commc'ns Corp.*, 108 F.4th 458, 478 (7th Cir. 2024).

Allowing the district court to address causation first would be especially warranted if this Court also concludes that sovereign immunity does not bar Melgaard's First Amendment retaliation claim. *See supra* at 3-18. The parties agree in that circumstance that the district court should resolve the merits of Melgaard's First Amendment claim. Opening Br. 26-27; Defs.' Br. 58. Because that claim will involve causation issues that substantially overlap with the Title VII causation analysis, it makes sense for the district court to first assess causation for both claims.

2. If this Court tackles causation, however, it must first clear two pieces of brush. To start, Melgaard has not forfeited his Title VII causation argument. *Contra* Defs.' Br. 21-22. Only "'perfunctory and underdeveloped' arguments," like those without "any supportive authority," are forfeited. *Felton v. Brown*, 129 F.4th 999, 1010 (7th Cir. 2025) (quoting *Batson v. Live Nation Ent., Inc.*, 746 F.3d 827, 833 (7th Cir. 2014)). The opening brief's discussion of causation was far from perfunctory. It explained that Title VII requires but-for causation, Opening Br. 49, and pointed to the extensive briefing on First Amendment causation to explain why a jury could reasonably find both (1) a causal connection between Melgaard's support of his colleague's complaint and adverse actions, and (2) that Defendants' proffered non-retaliatory reasons were pretextual, *id.* at 50 (referencing *id.* at 28-37). In other words, the brief explained that though the standards differ for First Amendment and Title VII causation, a jury could find causation for both claims using the same evidence and logic. That's an express, coherent argument—not forfeiture.

Next, Defendants' criticism of Melgaard's reliance on disputed facts, *see* Defs.' Br. 25-26, misunderstands the district court's decision and creates an upside-down summary-judgment standard. Melgaard's causation briefing didn't challenge "the district court's determination of the undisputed facts," *id.* at 25, because those facts were used only to resolve the adverse-action element of Melgaard's Title VII claim, App. 687. More fundamentally, as the non-moving party, Melgaard is entitled at this stage to rely on *contested* facts supported by record evidence. He didn't present any "argument as to why this Court should accept his facts," Defs.' Br. 25, because disputed facts are resolved in Melgaard's favor on summary judgment, *Snukis v. Taylor*, 145 F.4th 734, 739 (7th Cir. 2025).

3. Turning to the merits, Defendants assert that the investigation, Letter, and negative review stemmed solely from Melgaard's "violation of the Department's COVID-19 policies." Defs.' Br. 22. But at the time, Harrenstein stated that the review was based only in part on Melgaard's ridesharing, with other concerns—such as Melgaard's supposed choice to "decline[] involvement in a committee," App. 80, 92—also contributing. A jury may find that these "shifting explanations" suggest that Defendants' "proffered reason" for the adverse actions "is pretextual." *Sweet v. Town of Bargersville*, 18 F.4th 273, 280 (7th Cir. 2021).

The larger issue is that Defendants never clearly communicated their current position—that everything flowed from the ridesharing incident—to Melgaard, despite his repeated requests for clarification. *Supra* at 21-22; App. 208-10 (Melgaard requesting clarification regarding the Letter); App. 93 (Melgaard was not "provided any foundation" for the review's statement that his "engagement and support of Division leadership" was "inconsistent"). Defendants' "opaque" contemporaneous explanations "raise an inference of pretext" because they suggest that the Department's current position may be a "post-hoc rationalization by the employer." *Bragg v. Munster Med. Rsch. Found. Inc.*, 58 F.4th 265, 272 (7th Cir. 2023).

4. Defendants' proffered nondiscriminatory rationale is further undermined by the disparate treatment Melgaard experienced, the adverse actions' suspicious timing, and Defendants' ambiguous explanations. *See* Opening Br. 29-31; *Rozumalski v. W.F. Baird & Assocs., Ltd.*, 937 F.3d 919, 924 (7th Cir. 2019).

Disparate treatment. Though Melgaard was investigated and penalized for ridesharing, at least four others who also shared rides while COVID-19 rules were in effect—Peery and wardens Rick Peters, Robin Barnhardt, and Scott Bowe—were not. *See* Opening Br. 7, 29; App. 342-46 (Bowe); App. 350 ¶ 28 (Peery); App. 375 ¶ 24 (Peters and Barnhardt). Defendants cast each as differently situated from Melgaard, Defs.' Br. 26-29, but "[w]hether a comparator is similarly situated is usually a question for the fact-finder, and summary judgment is appropriate only when no reasonable fact-finder could find that plaintiffs have met their burden on the issue," *Barbera v. Pearson Educ., Inc.*, 906 F.3d 621, 629 (7th Cir. 2018) (quoting *Coleman v. Donahoe*, 667 F.3d 835, 846-47 (7th Cir. 2012)).

Defendants contend that Peery's position as Melgaard's supervisor renders him differently situated as a matter of law. Defs.' Br. 26. But "a comparator need not be 'identical,'" and Peery and Melgaard were presumably subject to "the same criteria"—that is, the COVID-19 no-ridesharing rules. *Pratt v. Wis. Aluminum Foundry*, ___ F.4th ___, 2026 WL 2123935, at *8 (7th Cir. July 23, 2026) (quoting *Coleman*, 667 F.3d at 846). A jury could "connect the dots" and find that Peery's non-discipline suggests pretext. *Id.* at *9.

Defendants then suggest that ridesharing by other wardens was treated differently because it occurred before the issuance of a November 15, 2021 memo on COVID-19 rules. Defs.' Br. 26-27. But viewing that memo as a meaningful faultline is nonsensical. It asked employees to "remember [the COVID-19] recommendations" already in effect, linking to rules from September 2021. App. 144-45. When Peters and Barnhardt shared a ride, moreover, the applicable (pre-November) guidance already forbade ridesharing outside of limited exceptions that do not appear to have applied. *See* App. 160. And Burrow-Niemeyer was investigated *before* the November memo's issuance. App 373 ¶ 15; *see* Opening Br. 34. The evidence, in short, is inconsistent with treating the November memo as the key hinge-point. Instead, it supports Melgaard's story: He and Burrow-Niemeyer, but not others, were disciplined as retaliation for protected activity.

Defendants finally suggest that Bowe was not penalized for his ridesharing because, unlike Melgaard's, it was "driven by necessity." Defs.' Br. 28. But Bowe's declaration does not say necessity compelled his ridesharing. App. 344-45 ¶¶ 20-21. Nor is it clear whether Melgaard's ridesharing to address deer-baiting—which often requires multiple officers, App. 346 ¶ 28—was necessary or not. And Bowe himself saw no difference between his conduct and Melgaard's. He was "surprised" because he "committed essentially the same infraction" as Melgaard, yet "was not disciplined in any way." App. 346 ¶¶ 30-31. At the least, the legitimacy and materiality of Defendants' explanations for why Melgaard was treated differently are factual issues for the jury. *Donley v. Stryker Sales Corp.*, 906 F.3d 635, 639 (7th Cir. 2018).

Suspicious timing. Defendants emphasize that causation arguments based "solely" on suspicious timing typically require "no more than a few days to elapse between the protected activity and the adverse action." Defs.' Br. 29 (quoting *Kidwell v. Eisenhauer*, 679 F.3d 957, 966 (7th Cir. 2012)). That rule is inapposite because Melgaard's causation argument is not *solely* timing-based. He also points to differential treatment and ambiguous justifications. *See supra* at 26-28; *infra* at 29-30; Opening Br. 29, 31.

Defendants also err by evaluating only the timing of the negative review. Defs.' Br. 29. A reasonable jury could conclude that Harrenstein and Peery knew about Melgaard's support of Burrow-Niemeyer by mid-

2021. App. 371-72 ¶¶ 7-10; *see* Opening Br. 31-32. Burrow-Niemeyer's complaint then became more threatening to Defendants in late October 2021, when the Wisconsin Equal Rights Division determined that she may have a winning claim. App. 354 ¶ 13.

Defendants' retaliation then began quickly: Harrenstein reported Melgaard's purported COVID-19 violation in November 2021, App. 372-73 ¶ 11; Melgaard was investigated for that alleged violation in December 2021, App. 373 ¶ 16; and the Letter followed in early February 2022, App. 375 ¶ 28. Then, Melgaard formally participated in Burrow-Niemeyer's case in February and March 2022, App. 378 ¶¶ 43-44, before receiving the negative review in October 2022, App. 378 ¶ 46. A reasonable jury could find that the rapid retaliation after Burrow-Niemeyer's complaint became a serious issue, followed by escalating retaliation through fall 2022, represents a suspicious timeline raising an inference of pretext.

Nor can Defendants deny that Melgaard and Burrow-Niemeyer had clean records until they filed and supported each others' claims, after which they both suffered adverse actions. Opening Br. 31. That "sudden dissatisfaction" with employees' otherwise "flawless employment record[s]" is particularly suspect. *Culver v. Gorman & Co.*, 416 F.3d 540, 546 (7th Cir. 2005).

Ambiguous Justifications. Defendants label as "not ambiguous," Defs.' Br. 30-31, the Letter's language and Harrenstein's statement that

Melgaard "did not fully understand [his] roles and responsibilities," App. 207. But if the Letter and Harrenstein's statement were clearly referencing the ridesharing incident, as Defendants now contend, Harrenstein easily could have said so when Melgaard requested clarification. Determining the meaning and proper weight of these and other ambiguous statements "is an appropriate question for the jury." *Greengrass v. Int'l Monetary Sys., Ltd.*, 776 F.3d 481, 486-87 (7th Cir. 2015) (quoting *Kasten v. Saint-Gobain Performance Plastics Corp.*, 703 F.3d 966, 974 (7th Cir. 2012)).

5. Defendants finally assert that Melgaard "has certainly not proven that the Department's articulated legitimate, non-retaliatory reasons are a 'lie.'" Defs.' Br. 31 (quoting *Hobbs v. City of Chicago*, 573 F.3d 454, 461 (7th Cir. 2009)). That gives away the game. At summary judgment, Melgaard need not *prove* anything. What's required is evidence that, when evaluated cumulatively with fact disputes resolved and reasonable inferences made in Melgaard's favor, a jury could use to determine that Melgaard's protected activity triggered Defendants' adverse actions. *Rozumalski*, 937 F.3d at 924.

Here, evidence suggests that Melgaard was treated worse than similarly situated coworkers, suffered reprimands after supporting his colleague's discrimination complaint, and was repeatedly provided ambiguous rationales for these actions. That "[e]vidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself." *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). Together, it demonstrates that if this Court reaches causation, summary judgment is unwarranted, and "a trial is necessary." *Id.* at 766.

Conclusion

This Court should reverse the district court's grant of summary judgment to Defendants and remand for additional merits proceedings. If this Court fully evaluates the merits of any claim, it should deny summary judgment and remand for trial.

Respectfully submitted,

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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 6,975 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, set in Century Schoolbook in 14-point type.

/s/ Alex Bodaken

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