UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHAEL J. WAPPLER, Plaintiff, Counterclaim-Defendant, v. WAYNE IVEY, Defendant, Counterclaim-Plaintiff.	Case No. 6:19-cv-1224-CEM-NWH

MICHAEL WAPPLER'S SUPPLEMENTAL RESPONSE TO SHERIFF IVEY'S MEMORANDUM OF LAW AS TO THE COUNTERCLAIM AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to this Court's order, dated June 11, 2025 (Doc. 267), Plaintiff and Counterclaim-Defendant Michael Wappler submits this supplemental brief in response to Defendant and Counterclaim-Plaintiff Wayne Ivey's Memorandum of Law as to the Amount Due by Plaintiff Wappler on Sheriff Ivey's Counterclaim for Incarceration Costs (Doc. 235) and as a supplement to Mr. Wappler's Response to Defendant Sheriff Ivey's Memorandum of Law as to the Amount Due by Plaintiff Wappler on Sheriff Ivey's Counterclaim for Incarceration Costs (Doc. 255) ("Resp." or the "Response").

Additionally, Mr. Wappler respectfully requests summary judgment on the Sheriff's counterclaim for incarceration costs. (Doc. 66 at 6 (the "Counterclaim")).

In support of his motion, Mr. Wappler submits this brief and a Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("SUMF").

For the reasons stated herein, as well as those addressed in the Response, the Court should grant summary judgment in Mr. Wappler's favor or, alternatively, dismiss the Counterclaim.

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INTRODUCTION

In Brevard County, only those who exercise their First Amendment right to petition the courts are targeted for incarceration costs. Here, in response to Mr. Wappler's filing the instant suit, the Sheriff brought the Counterclaim for $91,250.00. The undisputed material facts show that the Sheriff asserted the Counterclaim in direct response to Mr. Wappler's protected speech. The Court should, therefore, grant Mr. Wappler summary judgment on the Counterclaim or, alternatively, dismiss the Counterclaim with prejudice.

Mr. Wappler's right to petition the courts has been described as "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. Riviera Beach*, 585 U.S. 87, 101 (2018). The right to petition takes on "central importance to prisoners," in particular. *Thaddeus-X v. Blatter*, 175 F.3d 378, 388 (6th Cir. 1999). Civil claims and counterclaims like the one at issue here can, and do, provide the basis for a claim of retaliation under the First Amendment. *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1298 (11th Cir. 2019); *Dear v. Nair*, No. 21-2124, 2022 WL 2165927, at *4–5 (10th Cir. 2022). Specifically, claims under Florida Statute section 960.297 can be retaliatory where a sheriff "elects to only seek [incarceration costs] from those who assert their constitutional rights." *Ahrens v. Pearson*, No. 2:24-cv-14300-DMM, Doc. 43 at 4 (S.D. Fla. May 19, 2025).

That is precisely what the Sheriff has done here. While he could elect to seek incarceration costs either "in a separate civil action or as counterclaim in any civil action," Fla. Stat. § 960.297(1), the Sheriff pursues them only against those who

engage in protected speech. Since April 2017, the Sheriff has sought incarceration costs against a total of eight individuals, each of whom had previously filed a lawsuit against the Sheriff. The Sheriff, therefore, implements Florida law in a manner inconsistent with the First Amendment by targeting only those who engage in protected speech.

In requesting a $91,250.00 judgment against Mr. Wappler, the Sheriff asks the Court to validate his attempt to retaliate against Mr. Wappler. Even if the Sheriff were a proper party to assert the Counterclaim (Resp. at 9–11), and even if the request for $91,250.00 did not violate the law of the case (Resp. at 7–9), the Sheriff still could not overcome the First Amendment violations from his selective enforcement and use of incarceration costs as retaliation.

Accordingly, the Court should grant summary judgment in Mr. Wappler's favor on the Counterclaim.

BACKGROUND

Mr. Wappler brought the instant lawsuit pro se to challenge the conditions at the Brevard County Jail Complex. (Doc. 1-1.) After removing the case to federal court (Doc. 1), the Sheriff asserted a counterclaim for incarceration costs (Doc. 66). Sheriff Ivey brought the Counterclaim under Florida Statute sections 960.293 and 960.297 "for damages and losses for incarceration costs and other correctional costs." (*Id.* at 6.) Mr. Wappler raised several affirmative defenses challenging the lawfulness of the Counterclaim. (Doc. 69.)

This Court granted summary judgment to the Sheriff and other defendants in this case, including on the Counterclaim. (Doc. 207.) Mr. Wappler appealed. (Doc. 212.) On appeal, Mr. Wappler argued—as he had in his affirmative defenses (Doc. 69)—that granting the Counterclaim was improper for myriad reasons, *Wappler v. Ivey*, No. 22-13418, Doc. 37 at 33–38 (Dec. 20, 2023); and that affirming the Counterclaim would act as "a rubber stamp for the government to quash the people's right to petition the government for a redress of grievances enshrined in the First Amendment," *id.*, Doc. 46 at 4 (Mar. 15, 2024). The Eleventh Circuit affirmed summary judgment as to Mr. Wappler's claims. *Wappler v. Ivey*, No. 22-13418, 2024 WL 3321147, at *14 (11th Cir. July 8, 2024). However, the court vacated the judgment as to the Counterclaim "because the district court did not consider the merits of the counterclaim and based its judgment, instead, on the belief that Wappler did not dispute the counterclaim." *Id.*

Following remand from the Eleventh Circuit, the Sheriff filed a memorandum of law requesting:

> [J]udgment be entered against Plaintiff Wappler in the amount of $91,250.00 which represents $50 per day of Wappler's 5 year sentence, but that Sheriff Ivey is entitled to recover $27,050.00 of the $91,250.00 based on the 541 days that Wappler was held at the Brevard County jail.

(Doc. 235 at 9–10.) Mr. Wappler responded, requesting that the Court dismiss the Counterclaim with prejudice or, alternatively, deny the Sheriff summary judgment on the Counterclaim. (Doc. 255 at 3.) Primarily, Mr. Wappler argued that: (1) the Sheriff's request for a judgment of $91,250.00 is unlawful (*id.* at 7); (2) the Sheriff does not have statutory standing to assert the Counterclaim (*id.* at 9); and (3) there

existed disputes of material fact on Mr. Wappler's affirmative defenses to the Counterclaim (*id.* at 11). Moreover, Mr. Wappler asserted that the Sheriff had not satisfied his burden to show the absence of disputes of material fact, particularly the amount of time Mr. Wappler served in jail and served overall. (*Id.* at 18–19.)

Upon Mr. Wappler's motion (Doc. 243), this Court ordered a brief period of discovery, "limited only to document requests and/or interrogatories, which should be confined to the issues of the counterclaim and defenses to it" (Doc. 260 at 4). As part of discovery, the Sheriff disclosed materials regarding individuals against whom Sheriff Ivey has pursued incarceration costs and other materials regarding searches for responsive documents. (Doc. 261-1 ¶¶ 5, 9.)

The Sheriff does not maintain a written procedure regarding incarceration costs. (SUMF ¶ 17.) The Sheriff's practices, however, reflect an official policy, practice, or custom of pursuing incarceration costs "in cases brought by or on behalf of inmates who have sued the Sheriff." (*Id.* ¶ 18.) Pursuant to that policy, practice, or custom, from April 5, 2017, to the present, the Sheriff has sought incarceration costs against eight individuals: James Colello, Cynthia Jones, Michael J. Wappler, Kenneth O'Connor, David A. Miller, Timothy Said Chambliss, Hakeem K. Battle, and Darryl Postier. (*Id.* ¶ 9.) Each of those individuals filed suit naming the Sheriff as a defendant. (*Id.* ¶ 10.)

When the Sheriff brought the first of these eight claims, in September 2018, the Sheriff detained an average of 369 sentenced individuals each day at the jail. (*Id.* ¶ 12.) At the time Mr. Wappler brought the instant suit, the Sheriff detained

an average of 374 sentenced individuals each day and, at the time the Sheriff asserted the Counterclaim, he detained an average of 193 sentenced individuals per day. (*Id.* ¶¶ 13, 14.) The Sheriff has not sought incarceration costs against any individuals other than those who have filed lawsuits against the Sheriff or the Sheriff's Office. (*Id.* ¶ 16.) The Sheriff has not obtained judgment for incarceration costs against any of the eight individuals. (*Id.* ¶¶ 19, 20.)

In Mr. Wappler's case, the Sheriff followed this policy, practice, or custom to pursue incarceration costs because Mr. Wappler engaged in protected petitioning activity. In the Sheriff's own words, "the filing of the counterclaim in this case *was based on* Wappler's Complaint (Doc. 1) and Amended Complaint (Doc. 32) in this case, along with Wappler's April 22, 2019, guilty plea and sentence in State v. Wappler, Case No.: 05-2017-CF-AXXX-XXX (see Wappler dep., Doc. 147, Ex. 6)." (SUMF ¶ 6 (emphasis added).)

ARGUMENT

The central question before the Court is whether the Sheriff's pursuit of incarceration costs can be squared with the First Amendment. While some of the questions presented here are novel, none are particularly challenging. If the Court does not dismiss the Counterclaim for lack of statutory standing or as violative of the law of the case (Resp. at 7–11), the Court should grant summary judgment in Mr. Wappler's favor. Simply put, the constitutional issues demonstrate that the Counterclaim is unlawful and should not be sustained.

The issues raised under the U.S. Constitution and federal law entitle Mr. Wappler to summary judgment in his favor. ***First***, although the Counterclaim is a feature of Florida state law, the Court has jurisdiction because there are embedded federal issues. ***Second***, the Sheriff has chosen to selectively seek incarceration costs exclusively against those who exercise their First Amendment rights. The undisputed material facts demonstrate that Mr. Wappler exercised his First Amendment right to petition and that the Sheriff responded by pursuing adverse action against Mr. Wappler because of that protected speech. That is a blatant violation of the First Amendment. ***Third***, granting the Counterclaim in the Sheriff's favor would undermine Section 1983's intent to protect litigants' ability to seek redress and deter unconstitutional conduct.

Accordingly, the Court should exercise jurisdiction over the Counterclaim and enter summary judgment in Mr. Wappler's favor.

I. Legal Standard.

Pursuant to Rule 56, the Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is genuine if "a reasonable trier of fact could return judgment for the non-moving party" and a fact is material if it "might affect the outcome of the suit under the governing law." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008). "The movant has the burden of showing that there is no genuine issue of fact," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986), and once

that burden is met, the responsibility shifts to the non-movant to "present evidence beyond the pleadings showing that a reasonable jury could find in [his] favor." *Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). "Accordingly, the non-moving party must produce evidence, going beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designating specific facts to suggest that a reasonable jury could find in his favor." *Merideth v. Carnival Corp.*, 49 F. Supp. 3d 1090, 1092 (S.D. Fla. 2014).

II. The Court Should Exercise Supplemental Jurisdiction to Resolve the Constitutional Question, as It Raises Embedded Issues of Federal Law.

"[T]he doctrine of supplemental jurisdiction—sometimes referred to as 'pendent jurisdiction'—permits 'federal courts to decide certain state-law claims involved in cases raising federal questions' when doing so would promote judicial economy and procedural convenience." *Ameritox, Ltd. v. Millenium Labs., Inc.*, 803 F.3d 518, 530 (11th Cir. 2015) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348–349 (1988)). "[T]he doctrine of pendent jurisdiction . . . is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie-Mellon Univ.*, 484 U.S. at 350. Federal courts have "discretion to exercise pendent jurisdiction over state law claims" and consider several factors in deciding whether to exercise that discretion: "judicial economy, convenience, fairness, and comity." *Edwards v. Okaloosa County*, 5 F.3d 1431, 1433 (11th Cir. 1993) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)).

While the "usual case in which all federal-law claims are eliminated before trial . . . will point toward declining to exercise jurisdiction over the remaining state-law claims," *Carnegie-Mellon*, 484 U.S. at 350 n.7, courts may exercise supplemental jurisdiction when there are "federal issues embedded in state-law claims between nondiverse parties," *Grable & Sons Metal Prods., Inc. v. Darue Eng. & Mfg.*, 545 U.S. 308, 314 (2005). "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). "Where all four of these requirements are met . . . jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Id.*

The Counterclaim involves an embedded issue of federal law; because each of the factors articulated in *Grable*/*Gunn* is present here, the Court should exercise supplemental jurisdiction to decide the Counterclaim. ***First***, the Counterclaim involves numerous issues under the U.S. Constitution and federal law, including whether the Sheriff's practices violate the First Amendment and whether the claim for incarceration costs is preempted by 42 U.S.C. § 1983. (Doc. 69.) "Even if the federal issue would not appear on the face of a well-pleaded complaint . . . , but rather as a defense," pendent jurisdiction will be appropriate if a party "could bring its own state [] claim, which would necessarily raise a federal question."

Iberiabank v. Beneva 41-I, LLC, 701 F.3d 916, n.4 (11th Cir. 2012). In this instance, if the Court were to decline supplemental jurisdiction—and this case were to proceed in state court—Mr. Wappler would again be entitled to raise the federal questions presented here, whether in a state court action or a separate suit in federal court. As a result, one way or another, the Court is likely to be called upon to answer the federal questions raised here. ***Second***, the Sheriff has disputed the applicability of Mr. Wappler's constitutional and federal law defenses. (*E.g.*, Doc. 262 at 5.) The Sheriff has gone so far as to state that retaliation under the First Amendment is "utterly irrelevant" to a claim for incarceration costs. (Doc. 252 at 9.) It is therefore clear that the federal issues are "actually disputed." ***Third***, the issues raised by the Counterclaim are substantial for a number of reasons, including that at least one other court in this Circuit has noted that practices like the one at issue here may violate the First Amendment. *Ahrens*, No. 2:24-cv-14300-DMM, Doc. 43 at 4. A question like this one, which "will control many other cases," is "more likely" to present a "substantial federal question." *MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 842 (11th Cir. 2013). ***Fourth***, while the Counterclaim does raise questions of state law (*e.g.*, Resp. at 7–9), the Court can maintain the balance between federal and state court jurisdiction by addressing the issues raised under the U.S. Constitution.

Moreover, the *Gibbs* factors also weigh in favor of the Court exercising supplemental jurisdiction over the Counterclaim. Issues of judicial economy, convenience, and fairness all clearly favor the Court retaining jurisdiction here. *See*

Parker v. Scrap Metal Processors, Inc., 468 F.3d 733, 745–47 (11th Cir. 2006). At a minimum, each of the following support litigating the Counterclaim in this Court: (1) the parties would, in state court, have to "rehash issues that have already been argued in federal court;" (2) "substantial judicial resources have already been committed" to resolving the dispute; and (3) retaining jurisdiction would entail no burden on the parties and witnesses." *Id.* at 745–47.

Issues of state law, on the other hand, do present challenging questions, but the Court can resolve those "without disrupting Congress's intended division of labor between state and federal courts." *Gunn*, 568 U.S. at 258. For example, the issue of the Sheriff's statutory standing can be decided on the facts of this case alone, without deciding an issue of first impression unanswered by Florida's courts. (Resp. at 9–11.) The Court can strike the proper balance by addressing the issues here only inasmuch as they apply to the parties before the Court.

As a result, the Court should exercise jurisdiction over the Counterclaim as involving embedded issues of federal law.

III. The Sheriff's Practices Violate the First Amendment.

"The [First] Amendment protects 'not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right.'" *DeMartini*, 942 F.3d at 1288. Mr. Wappler's lawsuit against the Sheriff constitutes speech protected by the First Amendment. (Resp. at 12–13.) By imposing incarceration costs against only those who file lawsuits, the Sheriff violates the First Amendment in two principal ways, by: (1) selectively enforcing

Florida Statute section 960.297 against those who exercise their First Amendment rights to petition the courts for redress and (2) using incarceration costs as a form of retaliation. Either one suffices to find the Sheriff's conduct unconstitutional and, therefore, the Court should grant summary judgment in Mr. Wappler's favor.

A. The Sheriff Has Chosen to Selectively Prosecute Mr. Wappler in Violation of the First Amendment.

"Selectivity in [] enforcement [is] . . . subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an . . . arbitrary classification, including the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal quotations and citations omitted). While typically a creature of criminal law, "[s]elective enforcement claims may be sustained in a variety of contexts, including administrative, civil, and criminal proceedings." *Gersten v. Rundle*, 833 F. Supp. 906, 913 (S.D. Fla. 1993). Selective enforcement requires that a party show "that he has been singled out for prosecution although others similarly situated, who have committed the same acts, have not been prosecuted." *Rindley v. Gallagher*, 890 F. Supp. 1540, 1551 (S.D. Fla. 1995) (citing *Owen v. Wainwright*, 806 F.2d 1519, 1523 (11th Cir. 1986)). Additionally, the claimant must establish that the enforcement is "constitutionally invidious" by showing that "the government's selective prosecution is motivated by constitutionally impermissible motives," such as interference with "his exercise of constitutional rights." *Id.* (citing *Owen*, 806 F.3d at 1523). Mr. Wappler satisfies both prongs.

i. Mr. Wappler Was Treated Differently than Other Similarly Situated Individuals Who Did Not Engage in Protected Speech.

Among hundreds of similarly situated criminal defendants serving a sentence in Brevard County, Mr. Wappler was one of only a handful subjected to claims for incarceration costs. Compared to the many others who did not engage in the protected speech at issue, petitioning the courts for redress, the pursuit of these costs against Mr. Wappler is unconstitutional.

In the Eleventh Circuit, a similarly situated individual is "one who engaged in the same type of conduct, which means that the comparator committed the same crime in substantially the same manner as the defendant—so that any prosecution of that individual . . . would be related in the same way to the Government's enforcement priorities and enforcement plan." *United States v. Brantley*, 803 F. 3d 1265, 1271–72 (11th Cir. 2015). Mr. Wappler is one of many convicted individuals the Sheriff detains at the jail. When the Sheriff first sought incarceration costs in the relevant timeframe, an average of 369 individuals were serving sentences at the jail each day. (SUMF ¶ 12.) When Mr. Wappler filed suit, roughly 374 sentenced individuals were serving time each day. (*Id.* ¶ 13.) In September 2020, at the time the Sheriff brought the Counterclaim against Mr. Wappler, he detained an average of 193 sentenced individuals each day. (*Id.*¶ 14.) Every sentenced inmate qualifies for the same incarceration costs claim brought against Mr. Wappler: "Upon conviction, a convicted offender is liable to the state and its local subdivisions for damages and losses for incarceration costs and other

correctional costs." Fla. Stat. § 960.293(2). "The state and its local subdivisions" can bring claims for incarceration costs against those individual either "in a separate civil action or as counterclaim in any civil action." Fla. Stat. § 960.297(1).

Whether the relevant comparator here is 369, 374, 193—or the many others serving sentences at the jail from April 2017 to the present—it is clear the Sheriff singles out only those who file suit against him. The Sheriff has only brought claims for incarceration costs against eight individuals, and each of those claims came as a counterclaim after those individuals exercised their constitutionally protected right to petition the government for redress by suing the Sheriff. (SUMF ¶ 16.) From April 2017 to the present, the Sheriff did not bring any claims for costs of incarceration in a separate civil suit, despite detaining hundreds of sentenced inmates. (*Id.* ¶¶ 12–14, 16.) If the Court were to enter judgment against Mr. Wappler on the Counterclaim, he would be the only individual against whom the Sheriff has obtained judgment for incarceration costs since April 2017. (*Id.* ¶¶ 22, 23.) This course of conduct reeks of selective enforcement intended to chill the exercise of the right to petition.

Given the indisputable evidence that Mr. Wappler is one of only eight sentenced inmates out of the similarly situated hundreds that have served a sentence at the jail over the past eight years to face any kind of claim for incarceration costs, it is clear that the Sheriff selectively enforces claims for incarceration costs against those inmates that sue the Sheriff.

ii. The Sheriff Exercised Unfettered Discretion to Use Incarceration Costs as Invidious Discrimination.

In the absence of a written policy governing incarceration costs (SUMF ¶ 17), the Sheriff exercises unfettered discretion to pursue these costs as he sees fit. "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 132–134 (1992) (striking down a county ordinance that permitted an administrator to "deci[de] how much to charge for police protection or administrative time—or even whether to charge at all"). When a decisionmaker "need not provide any explanation for his decision," there will be "[n]othing . . . prevent[ing] the official from encouraging some views and discouraging others." *Id.* Courts, therefore, view such unfettered discretion "over protected constitutional rights with profound suspicion." *Hand v. Scott*, 285 F. Supp. 3d 1289, 1300 (N.D. Fla. 2018), *vacated as moot by Hand v. Desantis*, 946 F.3d 1272 (11th Cir. 2020).

The Sheriff's use of incarceration costs works as a form of invidious discrimination based on the exercise of protected rights. Invidious discrimination "implies that the decisionmaker selected or reaffirmed a particular cause of action 'at least in part because of . . . its adverse effects upon an identifiable group.'" *Rindley*, 890 F. Supp. at 1552 (quoting *Wayte*, 470 U.S. at 610). Here, the only individuals subjected to claims for incarceration costs are those who exercise their First Amendment rights. That practice amounts to an "arbitrary classification" prohibited by the U.S. Constitution. *Wayte*, 470 U.S. at 608.

In determining whether the government acted invidiously, *United States v. Steele* is instructive. 461 F.2d 1148 (9th Cir. 1972). There, the defendant, along with three other individuals, was prosecuted for refusing to answer questions on the census form. *Id.* at 1150. The defendant argued that he was singled out "for prosecution because he had publicly advocated noncompliance with census requirements." *Id.* The court found he was a "vocal offender," as were all four individuals prosecuted. *Id.* at 1150–52. The defendant argued that many others had refused to answer the census questions and that what separated him was his public dissent of the census. *Id.* at 1151. Dismissing the government's only explanation, prosecutorial discretion, the court found that because "evidence which created a strong inference of discriminatory prosecution" was put forth, "the government was required to explain it away." *Id.* at 1152. And having failed to give any other plausible explanation for the seemingly discriminatory prosecution, the court ultimately held in favor of the defendant, stating "[a]n enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen . . . are being punished for their expression of ideas, a constitutionally protected right." *Id.*

Here, the facts are strikingly similar. The Sheriff housed 193 sentenced inmates at the jail when the counterclaim was brought against Mr. Wappler. (SUMF ¶ 14.) Since April 2017, only eight inmates have faced a claim for incarceration costs brought by the Sheriff. (*Id.* ¶ 8.) The difference between those eight and others serving a sentence at the jail is that the eight sued the Sheriff. (*Id.*

¶ 10.) Only the vocal offenders, like Mr. Wappler, are targeted by the Sheriff, making the enforcement "inherently suspect." *Steele*, 461 F.2d at 1152.

Because there are no disputes of material fact and the evidence shows the Sheriff selectively enforces Florida law against those who exercise their First Amendment rights, the Court should grant Mr. Wappler summary judgment.

B. The Sheriff Unconstitutionally Retaliated Against Mr. Wappler by Bringing the Counterclaim for Incarceration Costs.

Establishing retaliation under the First Amendment requires showing: (1) constitutionally protected speech; (2) adverse impact on that speech; and 3) a causal connection between the retaliatory conduct and the adverse effect. *See DeMartini*, 942 F.3d at 1289. In general, "most courts resolve" questions of causation "under the *Mt. Healthy* burden-shifting formula." *Smith v. Mosley*, 532 F.3d 1270, 1278 (11th Cir. 2008) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). Under that framework, once a party meets "his burden of establishing that his protected conduct was a motivating factor behind any harm, the burden of production shifts to the defendant . . . [to] show that he would have taken the same action in the absence of the protected activity." *Id.*

i. Mr. Wappler's Speech Is Protected by the First Amendment, and the Counterclaim Adversely Impacts His Protected Speech.

Mr. Wappler's underlying § 1983 lawsuit is speech protected by the First Amendment. *DeMartini*, 942 F.3d at 1289. When Mr. Wappler exercised his First Amendment right to petition the courts for redress, the Sheriff sought to chill "one of the most precious of the liberties safeguarded by the Bill of Rights," *Lozman*,

585 U.S. at 101, by retaliating with a claim for incarceration costs. The violation is especially invidious when a person who is incarcerated petitions for redress of his conditions of confinement. *See Williams v. Radford*, 64 F.4th 1185, 1192 (11th Cir. 2023); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986).

As a matter of law, Mr. Wappler's petitioning activity is protected by the First Amendment, and he satisfies the first prong of the analysis. Mr. Wappler alleged that the Sheriff detained him in unconstitutional conditions. (Doc. 1 at 3–4). That speech clearly falls within the protection of the First Amendment. *See DeMartini*, 942 F.3d at 1289; *Dear*, 2022 WL 2165927, at *3–4.

Mr. Wappler has also made a sufficient showing of adverse effect. The adverse effect test is an objective one under which courts assess whether the retaliatory conduct is likely to deter a person of "ordinary firmness" from engaging in speech. *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005). "[T]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." *Id.* (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)). The sheer magnitude of the economic harm—whether $91,250 or $27,050—demonstrates adverse effect. Courts considering monetary harm have found an adverse effect in charging $35 worth of parking tickets. *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003), *accord. Bennett*, 423 F.3d at 1250–51. In *Garcia*, the court commented that while small, parking tickets have "concrete

consequences," and the mayor had used "the punitive machinery of government in order to punish Ms. Garcia for her speaking out." 348 F.3d at 729.

Granting the Counterclaim would have clear "concrete consequences" for Mr. Wappler. *See Garcia*, 348 F.3d at 729. Any property he owns or comes to own in the future can be seized for a period of twenty years, and the amount he owes would be subject to interest from the date his civil debt was entered. Fla. Stat. § 960.294. Were Mr. Wappler to be transferred to the custody of the Florida Department of Corrections, his inmate trust account could be garnished every time he receives funds until the debt is satisfied. Fla. Admin. Code R. 33-203.201(10)(e).

Thus, Mr. Wappler meets the first two prongs under the First Amendment.

ii. The Undisputed Material Facts Demonstrate the Counterclaim Was Motivated by Mr. Wappler's Protected Speech.

To establish causation for purposes of retaliation under the First Amendment, Mr. Wappler "must show that, as a subjective matter, a motivation for the [Sheriff]'s adverse action was the prisoner's grievance or lawsuit." *Jemison v. Wise*, 386 F. App'x 961, 965 (11th Cir. 2010). The subjectivity analysis is inherently fact-intensive, and can rely on "[c]ircumstantial evidence, like the timing of events or the disparate treatment of similarly situated individuals." *Thaddeus-X*, 175 F.3d at 399. Once a claimant satisfies their initial burden, the burden shifts to the party asserting the conduct is not retaliatory to "show that he would have taken the same action in the absence of the protected activity." *Id.* at 399 (citing *Mt. Healthy*, 429 U.S. 274).

Mr. Wappler has satisfied his burden to show that the Counterclaim is causally connected to Mr. Wappler's protected speech. *See supra* Section III.A. Nevertheless, the Sheriff offers two reasons for seeking incarceration costs here: (1) the statutory conditions were met; and (2) Mr. Wappler sued the Sheriff. (SUMF ¶ 6.) The first condition is not unique to this situation, as hundreds of other inmates who did not bring suit against the Sheriff also satisfied the statutory condition of being a "convicted offender," Fla. Stat. § 960.293(2), but did not face a claim for incarceration costs from the Sheriff, *supra* Section III.A.i. Accepting the Sheriff's assertion at face value, he concedes that Mr. Wappler's protected speech was at least a part of the motivation behind bringing the Counterclaim. That is enough for Mr. Wappler to meet his burden in demonstrating causation. *E.g.*, *Smith*, 532 F.3d at 1278. The Sheriff cannot now assert that he "would have taken the same action had there not also been a retaliatory animus motivating that conduct." *DeMartini*, 942 F.3d at 1289.

The Sheriff has suggested that the Counterclaim is not retaliatory because "the legislature has specifically authorized the filing of the counterclaim in cases brought by inmates." (Doc. 252 at 9.) Of course, a party's action can constitute impermissible retaliation under the First Amendment, regardless of whether it could have taken the same action for other reasons. *See Perry v. Sindermann*, 408 U.S. 593 (1972). In *Perry*, for example, the Supreme Court rejected the argument that an action permitted by state law cannot be unconstitutional. In other words, "even though the government may deny [] [a] benefit for any number of reasons,

there are some reasons upon which the government may not rely," including "on a basis that infringes [] constitutionally protected interests," like those protected by the First Amendment. *Id.* at 597. Regardless of whether Florida law permits a claim for incarceration costs, the way in which the Sheriff implements that law violates the First Amendment. *See Ahrens*, No. 2:24-cv-14300-DMM, Doc. 43 at 4. Simply put, the text of Florida Statute section 960.290 does not relieve the Sheriff from the obligation to avoid infringing on constitutional liberties.

Ultimately, the Sheriff's use of incarceration costs as retaliation is plain. The common denominator amongst all individuals that the Sheriff brings a claim for incarceration costs against is that they all sued the Sheriff for redress. (SUMF ¶ 10.) The question is whether the Sheriff was motivated to bring the counterclaim, at least in part, because of Mr. Wappler's lawsuit. *See Jemison*, 386 F. App'x at 965. Given the commonality and "inherently suspect" nature of the Sheriff's use of claims for incarceration costs, *Steele* 461 F.2d at 1152, Mr. Wappler has satisfied the showing of causation necessary for summary judgment in his favor.

Accordingly, the Court should grant Mr. Wappler summary judgment on the Counterclaim.

iii. Mr. Wappler Does Not Need to Establish the Absence of Probable Cause to Show Retaliation Under the First Amendment.

While Supreme Court precedent acknowledges the applicability of probable cause in assessing causation in the context of retaliatory arrests, "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence

that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves v. Bartlett*, 587 U.S. 391, 407 (2019). To the extent the probable cause inquiry is relevant here,[1] Mr. Wappler falls within the exception to that requirement recognized in *Nieves* and *Gonzalez v. Trevino*, 602 U.S. 653 (2024). *See supra* Section III.A.i.

Mr. Wappler has "produce[d] 'objective evidence that he was [subjected to the retaliatory conduct] when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.'" *Gonzalez*, 602 U.S. at 655 (quoting *Nieves*, 587 U.S. at 407). In *Gonzalez*, the Court held that to meet the objective evidence standard, a claimant need not come forward with "very specific comparator evidence;" rather, a "survey" of similar cases is permissible because it raises the inference that others in the same situation were not similarly targeted. *Id.* at 658. There, the plaintiff showed "no one has ever been arrested for engaging in a certain kind of conduct," thus "mak[ing] it more likely that an officer has declined to arrest for engaging in" the same conduct. *Id.*

By demonstrating the eight instances in which the Sheriff has sought incarceration costs (SUMF ¶¶ 8–10), Mr. Wappler surpasses the *Gonzalez*

[1] In *DeMartini*, the Eleventh Circuit held that the presence of probable cause may defeat a First Amendment retaliation claim premised on a civil lawsuit, but did not analyze the applicability of *Nieves* and *Gonzalez* because "there [was] no claim or evidence that other individuals engaged in similar conduct, without ramifications." 942 F.3d at 1306. The facts of *DeMartini* are substantially different. There, the plaintiff brought an affirmative claim for First Amendment retaliation, rather than a defense, after the government sued him for fraud. Unlike the plaintiff in *DeMartini*, Mr. Wappler faces a claim for incarceration costs not based on allegedly fraudulent conduct, but in retaliation to his protected speech in the instant litigation. Moreover, he has presented sufficient comparator evidence under *Nieves* and *Gonzalez* to trigger the exception to the no-probable-cause requirement, which the Eleventh Circuit had no occasion to assess.

evidentiary standard. The objective evidence here establishes not just that it is merely "more likely" that similarly situated individuals were not assessed incarceration costs; it is a matter of certainty. At a minimum, at the time that the Sheriff asserted the Counterclaim here, there were 192 other sentenced individuals at the jail. (*Id.* ¶ 14.) The only logical conclusion is that Mr. Wappler faced incarceration costs, ***because he sued the Sheriff***. Accordingly, to the extent that the probable cause inquiry applies, Mr. Wappler easily fits within the exception under *Gonzalez*.

Alternatively, Mr. Wappler can meet another exception to the probable cause requirement under *Lozman*, 585 U.S. 87. Under *Lozman*, the presence of five factors can supplant the requirement to show an absence of probable cause: (1) the retaliation was "pursuant to an 'official municipal policy' of intimidation;" (2) the decision to retaliate was premeditated; (3) there is "'objective evidence' of a policy motivated by retaliation;" (4) the "official policy of retaliation was formed months earlier;" and (5) the protected speech—the right to petition—is "one of the most precious of the liberties safeguarded by the Bill of Rights." *DeMartini*, 942 F.3d at 1294 (quoting *Lozman*, 585 U.S. at 99–101). It appears the Sheriff contests only the existence of an "official policy"[2]—under the first, third, and fourth

[2] The second and fifth factors are not disputed. The decision was clearly premeditated. The Sheriff had asserted at least one counterclaim for incarceration costs against another individual before pursuing the Counterclaim here. (SUMF ¶ 12.) Mr. Wappler filed suit in April 2019 (Doc. 1-1) and the Sheriff brought the Counterclaim in September 2020 (Doc. 66). Where the decision to engage in the alleged retaliation was "formed months earlier," there is premeditation. *DeMartini*, 942 F.3d at 1294. Additionally, Mr. Wappler has engaged in the same kind of speech *Lozman* addressed, so the fifth factor is present here as well.

factors—but that contention is misguided. While the Sheriff has suggested that seeking incarceration costs "is not something driven by some sort of policy of the Sheriff" (Doc. 262 at 7), an official policy may exist "even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). "[N]ot always committed to writing," official policy may arise from "a course of action tailored to a particular situation and not intended to control decisions in later situations." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986). Despite the Sheriff's assertions to the contrary, such an official policy, practice, or custom exists in Brevard County: the Sheriff pursues incarceration costs "in cases brought by or on behalf of inmates who have sued the Sheriff." (*Id.* ¶ 18.) That has been the practice of the Sheriff since at least September 2018 and persisted until at least September 2022. (SUMF ¶ 11.) The Sheriff's decision to not pursue incarceration costs in hundreds of cases, and to pursue such claims in only eight instances, is more than enough to establish an "official policy." *E.g.*, *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986); *see also Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994) (*Depew's* finding of a policy was based on "approximately five prior incidents").

Therefore, even if probable cause is relevant here, Mr. Wappler should still prevail as he falls within the exceptions to the probable cause requirement.

IV. The Sheriff's Practices Undermine the Intent of Section 1983.

By imposing incarceration costs on Mr. Wappler simply for bringing suit, the Sheriff undermines 42 U.S.C. § 1983, which is intended to deter wrongdoing. "Under the Supremacy Clause, state law is preempted . . . when 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hankins v. Finnel*, 964 F.2d 853, 861 (8th Cir. 1991) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988)).

Section 1983 preempts the incarceration costs sought here, as sustaining the Sheriff's practices would deter would-be litigants from filing suit against the Sheriff. "The purpose of section 1983 is two-fold: to compensate victims and to deter future deprivations of federal constitutional rights." *Id.* (citing *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)); *see also Monroe v. Pape*, 365 U.S. 167, 179–80 (1961) (discussing the legislative history of Section 1983), *overruled on other grounds by Monell*, 436 U.S. 658. Preemption may arise when conduct "would be inimical to the goals of the federal statute." *Hankins*, 964 F.2d at 861 (holding claim for incarceration costs was preempted, as applied to plaintiff).

The Sheriff's practices have "the potential to severely frustrate the enforcement of federal rights" by those incarcerated in Brevard County. *Id.* at 860.[3]

[3] The Eleventh Circuit has declined to apply the rationale from *Hankins* in a case distinct from this one. *Rinaldo v. Corbett*, 256 F.3d 1276 (11th Cir. 2001). There, the plaintiff "rejected the Defendants' offer of judgment" in favor of trying his case before a jury. *Id.* at 1281. Because the jury awarded the plaintiff only $10, he was liable to the defendants for "the costs incurred after the offer was made." Fed. R. Civ. P. 68(d). An offer of judgment inheres different considerations—namely, judicial economy while still ensuring fairness—which are absent here.

In analyzing cost awards, courts have properly considered the effect of such an award on future litigants and avoided imposing costs where doing so could chill the ability to bring future claims. *E.g.*, *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1247 (9th Cir. 2014). If the Sheriff is permitted to utilize Florida law in the manner pursued here, it would significantly hamper the ability of future inmates from pursuing federal civil rights complaints. *See, e.g.*, *Williams v. Murphy*, No. 13-cv-1154-MPS, 2018 WL 2016850, at *1 (D. Conn. Mar. 29, 2018). If every inmate was afraid of being slapped with a $90,000 bill for petitioning the court, surely, that practice would deter the filing of meritorious claims.

Affirming the Counterclaim would frustrate the intent of Section 1983 and, thus, the Court should reject it as applied to Mr. Wappler.

CONCLUSION

For the foregoing reasons, as well as those stated in the Response, this Court should grant Mr. Wappler judgment on the Counterclaim as violative of the First Amendment or, alternatively, dismiss the Counterclaim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been electronically served upon Defendant by and through counsel via the Court's CM/ECF filing system on July 11, 2025.

Respectfully submitted,

/s/ Charles Moore
Charles Moore