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-UAM

**PLAINTIFF MICHAEL WAPPLER'S RESPONSE TO DEFENDANT SHERIFF IVEY'S MEMORANDUM OF LAW AS TO THE AMOUNT DUE BY PLANITIFF WAPPLER ON SHERIFF IVEY'S COUNTERCLAIM FOR INCARCERATION COSTS**

Plaintiff and Counterclaim-Defendant Michael Wappler, through undersigned counsel, respectfully submits this 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, ECF No. 235 (Sept. 16, 2024) (the "Sheriff's Memorandum" or "Mem."), and pursuant to the Court's orders on remand, Order, ECF No. 236 (Oct. 1, 2024); Order, ECF No. 241 (Feb. 18, 2025).

TABLE OF CONTENTS

## INTRODUCTION

The Sheriff's Memorandum invites the Court to enter judgment on constitutionally suspect grounds. As the U.S. Supreme Court has warned, fines and fees imposed by the government—like the incarceration costs at issue here—can "undermine other constitutional liberties" as the government may use them "to retaliate against or chill the speech of" disfavored individuals or groups. *Timbs v. Indiana*, 586 U.S. 146, 153 (2019). "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991). That warning seems prescient in these circumstances, where the Sheriff seeks incarceration costs in direct response to Mr. Wappler's assertion of his First Amendment right to petition the courts. By asking the Court to enter judgment in violation of the law of the case and in excess of the Court's jurisdiction—for incarceration costs to which he is not entitled by state law, on a record replete with disputed facts—the Sheriff seeks to impose a financial liability on Mr. Wappler as retaliation for filing this suit. The Court should not lend its authority to validate the Sheriff's retaliatory Counterclaim.

The Court should dismiss the Counterclaim with prejudice for at least two reasons. ***First***, the Sheriff's requested relief violates the law of the case. Despite the Eleventh Circuit reversing the Court's prior judgment for $91,250, the Sheriff insists that the Court may still enter judgment in that amount. Mem. at 9–10. That would, of course, undermine the Eleventh Circuit's ruling in this case. What's more, such an order could impose significant burdens on Mr. Wappler in violation of Florida law, as the Court cannot prohibit the State or the County from seeking the same costs in state court. ***Second***, the Sheriff is not entitled to incarceration costs because he does not have statutory standing to assert the Counterclaim. Florida law grants the authority to pursue

counterclaims for incarceration costs to "the state and its local subdivisions." Fla. Stat. § 960.293(2). The Sheriff insists he acts as a "local subdivision," but the statute defines that term to mean "county." The Court, though, need not to reach that statutory question because—on this record—the Sheriff does not act on behalf of the County; the County declined to bring the Counterclaim, and the Sheriff cannot now purport to act on its behalf. Accordingly, under either basis, the Court should dismiss the Counterclaim with prejudice.

If the Court were to determine the Sheriff did have statutory standing to assert the Counterclaim, it cannot grant summary judgment on this record as numerous disputes of material fact remain. The Sheriff has not satisfied his burden to show entitlement to the amount of incarceration costs requested. Moreover, there are ample disputes regarding Mr. Wappler's affirmative defenses under the First Amendment. Mr. Wappler's right to petition the Court for redress due to the conditions of confinement at the jail is "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. Riviera Beach*, 585 U.S. 87, 101 (2018) (internal quotation marks and citation omitted). The Counterclaim seeks to impose drastic financial consequences due to that speech. The record is, at least, unclear on: 1) the extent to which the Sheriff maintains a policy of using incarceration costs as a form of retaliation; 2) whether the Sheriff has sought incarceration costs against others who did not engage in protected speech; and 3) if the decision to assert the Counterclaim against Mr. Wappler was premeditated. Each of those issues precludes summary judgment here.[1]

Through no fault of his own, Mr. Wappler is in a position of responding to the Sheriff's Memorandum on an incomplete record. Mr. Wappler diligently sought discovery pro se in this case. *See, e.g.*, Mot. to Conduct Limited Disc., ECF No. 112 (June 7, 2021); Mot. to Compel, ECF

[1] Mr. Wappler does not waive any of his other affirmative defenses.

No. 120 (July 19, 2021). Since his lawyers entered an appearance three weeks ago, Notice of Appearance, ECF No. 242 (Feb. 20, 2025), they have been unsuccessful in obtaining the full evidentiary record. *See* Declaration of Charles Moore ("Moore Decl.") ¶¶ 2, 13. Counsel for the Sheriff has refused to provide discovery previously produced to Mr. Wappler. *Id.* ¶ 9. While the Sheriff previously inhibited Mr. Wappler's ability to litigate pro se, *e.g.*, Objection, ECF No. 237 (Nov. 12, 2024) (noting the Sheriff's policies prevent him from maintaining his files in this case), those efforts have been redoubled now that Mr. Wappler has representation. Moore Decl. ¶¶ 6, 9, 14. Even on the limited record available to counsel, summary judgment is inappropriate.

The Court should therefore dismiss the Counterclaim with prejudice. If the Court does not dismiss the Counterclaim outright, it should deny summary judgment on this record and grant Mr. Wappler leave to conduct limited discovery before making a summary judgment ruling. *See* Mot. for Disc., ECF No. 243 (Mar. 3, 2025).

## BACKGROUND

Mr. Wappler brought this action pro se to challenge his conditions of confinement at the Brevard County Jail Complex, Compl., ECF No. 1-1 (April 5, 2019), and the Sheriff removed the case to federal court, Notice of Removal, ECF No. 1 (July 3, 2019). The First Amended Complaint ("FAC") alleged that the Sheriff detained Mr. Wappler in the following conditions:

> A) small (10' x 15') overcrowded strip cell housing eight men with a single open toilet; B) without a bunk or mattress forced to lay and sleep on a cold filthy concrete floor; C) without a chair or table; D) forced to eat without utinsils [*sic*] with bare hands; E) without shoes or socks barefoot on filthy cold concrete floor; F) provided only a blanket and uniform—no underwear, towel or hygiene items whatsoever (while vomiting and violently ill); G) co-mingled with sentenced and mentally ill exhibiting extreme, violent, bizarre, behavior symptoms; H) denied Bible and all reading and writing materials, court and legal papers seized—including bond papers never returned; I) subjected to excessive noise and light 24/7; J) denied any opportunity to shower-shave, wash-up, soap, toilet paper, or towel, deficate [*sic*] in open without toilet paper with persons on floor next to toilet; K) denied/any/all out of cell time for fresh air sunshine.

FAC ¶ 15, ECF No. 32 (Sept. 16, 2019). Accordingly, Mr. Wappler brought causes of action under the First, Eighth, and Fourteenth Amendments to the U.S. Constitution. *Id.* at 3.

Ultimately, the Sheriff answered the FAC and brought the Counterclaim. Answer & Affirmative Defenses, ECF No. 66 (Sept. 4, 2020). Sheriff Ivey asserted the Counterclaim under Florida Statutes §§ 960.293 and 960.297 "for damages and losses for incarceration costs and other correctional costs." *Id.* at 6. In support of the Counterclaim, the Sheriff alleged: (1) the Counterclaim is timely, (2) the Sheriff "is a 'local subdivision' as described by Florida Statute § 960.291(6)," and (3) Mr. Wappler was convicted and "sentenced to 5 years imprisonment." *Id.* The County filed its own answer, but did not counterclaim against Mr. Wappler. Def. Brevard County's Answer, Affirmative Defenses, & Demand for Jury Trial, ECF No. 67 (Sept. 4, 2020).

In response to the Counterclaim, Mr. Wappler asserted several affirmative defenses, ECF No. 69 (Sept. 24, 2020), including that: (a) the Sheriff improperly sought incarceration costs for the full five years Mr. Wappler was sentenced; (b) the Sheriff brought the Counterclaim "to retaliate and chill Plaintiff's pursuit of his federal constitutional claims;" (c) the Sheriff was not entitled to any relief under the Counterclaim because "it must be brought by Defendant Brevard County;" and (d) the Sheriff impermissibly chose to "selectively enforc[e]" the Counterclaim against Mr. Wappler. Answer & Affirmative Defenses to Countercl. at 2, 4, ECF No. 69 (Sept. 24, 2020).

Following discovery, the Sheriff moved for summary judgment on all of Mr. Wappler's claims as well as the Counterclaim, and the Court granted the motion. Order, ECF No. 207 (Sept. 20, 2022). As to the Counterclaim, the Court entered "judgment in the amount of $91,250.00."*Id.* at 28. Mr. Wappler timely appealed, Notice of Appeal, ECF No. 212 (Oct. 8, 2022), and the Eleventh Circuit reversed and remanded for further proceedings on the Counterclaim. *Wappler v. Ivey*, No. 22-13418, 2024 WL 3321147, *1 (11th Cir. July 8, 2024). In reversing judgment on the

Counterclaim, the Eleventh Circuit court noted that summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Id.* at *13. Based on the record, the Eleventh Circuit held the "costs of incarceration . . . must, in all fairness, be actual and not hypothetical," such that the Sheriff "would be entitled to an amount calculated based on the 17 months and 3 weeks that Wappler had been housed at the jail, not the amount calculated based on his total sentence upon conviction." *Id.* at *14. The Eleventh Circuit therefore vacated the judgment of $91,250.00. *Id.*

On remand, upon the Court's order, Order, ECF No. 234 (Aug. 26, 2024), the Sheriff filed a memorandum on the Counterclaim arguing "that judgment [should] be entered against Plaintiff Wappler in the amount of $91,250.00 . . . , 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." Mem. at 9–10. The Sheriff did not address Mr. Wappler's affirmative defenses. The Court ordered that the Sheriff's Memorandum would be construed under Rule 56 of the Federal Rules of Civil Procedure, Order at 1, ECF No. 236 (Oct. 1, 2024), and ultimately ordered Mr. Wappler to respond by March 17, 2025. Order at 3, ECF No. 241 (Feb. 18, 2025).

On February 20, 2025, undersigned counsel entered an appearance. Notice of Appearance, ECF No. 242 (Feb. 20, 2025). Mr. Wappler's newly-retained counsel requested all discovery previously produced by the Sheriff in this case. Moore Decl. ¶ 3. Counsel for the Sheriff declined that request, stating "the only evidence that is relevant to the counterclaim would simply be the evidence of the amount of days that Mr. Wappler was housed at the jail and the fact of his criminal conviction and five-year sentence." *Id.* ¶ 6. Counsel renewed the request for discovery, noting that Mr. Wappler cannot maintain his own case files while in the jail because of the Sheriff's "paperless

policy." *Id.* ¶ 9. The Sheriff's counsel has not responded to the renewed request. *Id.* ¶ 14. To date, counsel for Mr. Wappler has access to Mr. Wappler's paper files in the case and all records available on the Court's docket. *Id.* ¶ 13. Counsel does not, however, have access to the other materials produced in discovery by the Sheriff. *Id.*

Meanwhile, Mr. Wappler sought leave to conduct discovery regarding discrete issues pursuant to Rule 56(d). Mot. for Disc., ECF No. 243 (Mar. 3, 2025). The Court has not ruled on that motion. Mr. Wappler's counsel also sought an extension of the March 17th deadline. Mot. to Extend Deadline, ECF No. 250 (Mar. 11, 2025); Supp. to Mot. to Extend Deadline, ECF No. 251 (Mar. 14, 2025). In requesting the two-week extension, counsel noted its desire "permit the Court adequate time for the consideration of Mr. Wappler's Rule 56(d) motion." ECF No. 250 ¶ 8. As explained to the Sheriff's counsel, given the Sheriff's refusal to reproduce discovery previously provided to Mr. Wappler, "Mr. Wappler is . . . in a position of preparing a response under Rule 56 without the entire record at his disposal." Moore Decl., Ex. E at 2.

**LEGAL STANDARD**

Pursuant to Rule 56, the Court may only 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). "Summary judgment is not appropriate where a genuine issue of material fact exists about an affirmative defense," as asserted here. *Singleton v. Dep't of Corr.*, 277 F. App'x 921, 923 (11th Cir. 2008). In analyzing the appropriateness of summary judgment, the Court views the evidence in the light most favorable to Mr. Wappler, the nonmoving party. *Smith v. Fla. Dep't of Corr.*, 713 F.3d 1059, 1063 (11th Cir. 2013). Where a claimant does not have statutory standing, courts should exercise their jurisdiction to hear the claim and dismiss it with prejudice. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014);

*see also Griffin v. Publix Super Mkts., Inc.*, No. 8:16-cv-1243, 2016 WL 8999466, at *2 (M.D. Fla. Aug. 2, 2016) (dismissing with prejudice for lack of statutory standing).

## ARGUMENT

### I. The Sheriff's Requested Relief Violates the Law of the Case and Asks the Court to Exceed Its Jurisdiction.

The Sheriff's Memorandum asks the Court to enter an order contrary to the Eleventh Circuit's opinion and in excess of the Court's jurisdiction, seemingly for the benefit of non-parties. That would leave Mr. Wappler open to double- or even triple-billing if the County or the State were to seek incarceration costs in state court. Simply put, the Court cannot order the Sheriff's requested relief, as it would violate the law of the case; nor can it enter an order that binds non-parties. The Court should reject the Sheriff's request and dismiss the Counterclaim with prejudice.

"[T]he law-of-the-case doctrine bars relitigation of issues that were decided either explicitly or by necessary implication." *This That & the Other Gift & Tobacco, Inc. v. Cobb Cnty.*, 439 F.3d 1275, 1283 (11th Cir. 2006). Moreover, courts are powerless to bind those "who are not parties to the suit and who wouldn't be obliged . . . to honor an incidental legal determination the suit produced." *Lewis v. Gov. of Ala.*, 944 F.3d 1287, 1302 (11th Cir. 2019) (cleaned up) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 540 (1992)).

The Eleventh Circuit explicitly reversed the judgment the Sheriff requests on remand. The Sheriff has asked the Court to enter "judgment . . . against Plaintiff Wappler in the amount of $91,250.00 . . . , but that Sheriff Ivey is entitled to recover $27,050.00 of the $91,250.00." Mem. at 9–10. The Court previously entered "judgment . . . in the amount of $91,250.00." Order at 28, ECF No. 207 (Sept. 20, 2022). The Eleventh Circuit reversed that judgment. *Wappler*, 2024 WL 3321147 at *14. The Eleventh Circuit did not direct the Court here to enter any sum certain, but rather "vacate[d] and remand[ed] to the district court for further proceedings." *Id.* These remand

proceedings thus require the Court to consider what amount, less than $91,250, is appropriate in this case, if at all. Nonetheless, the Sheriff now requests that the Court enter judgment in the precise amount that the Eleventh Circuit rejected. The Sheriff makes no attempt to explain under what authority the Court could enter that order or what purpose that order would serve (let alone, which entity or entities would be entitled to the remaining $64,200). The Sheriff's request plainly contradicts the Eleventh Circuit's opinion, over which the Sheriff expresses "concern." Mem. at 8. But the Court does not have the authority to defy the Eleventh Circuit and should, therefore, reject the Sheriff's requested relief.

What's more, the Sheriff's request for the full $91,250 seems to be intended to benefit entities not a party to these proceedings. It appears the Sheriff requests "judgment . . . in the amount of $91,250.00" so that those entities may draw from the judgment for their portion of incarceration costs. Mem. at 9. The Court, though, can only bind the parties before it; it cannot order non-parties to limit their claims for incarceration costs to this one judgment. *E.g.*, *Lewis*, 944 F.3d at 1302. If the Court were to enter a $91,250 judgment, Mr. Wappler may be subjected to "double-charging" strictly prohibited by Florida law. *See Wilson v. State*, 957 So.2d 683 (Fla. App. 2007) (finding double-charging of incarceration costs to be unlawful); *Guilder v. State*, 89 So.3d 1063 (Fla. App. 2012) (same). As the Sheriff points out, the statutory language at issue here provides that the state and its local subdivisions may charge for "the length of the sentence imposed by the court at the time of sentencing," not merely for time served. Fla. Stat. § 960.293(2)(b). If either the County or the State sought those costs "in a separate civil action," Fla. Stat. § 960.297(1), Mr. Wappler would essentially be liable for $100 or $150 per day for portions of his incarceration, in excess of the $50 under the statute. Fla. Stat. § 960.293(2)(b). Not only would this be

unmistakably unjust, it would allow non-parties to double-charge in violation of Florida law. The Sheriff's request for a $91,250.00 judgment is therefore improper.

At best, the Sheriff's request is unclear. At worst, it seeks to circumvent the law of the case and asks the Court to exceed its jurisdiction. Either way, the Court should reject the request.

## II. The Sheriff Is Not Entitled to Incarceration Costs as He Does Not Qualify as a "Local Subdivision."

The Sheriff brings the Counterclaim under a Florida statute that does not refer to the powers of his elected office or his position. By inserting himself into the statute, the Sheriff seeks a windfall unauthorized by law. In reality, the authority to bring the Counterclaim lies only with "the state and its local subdivisions." Fla. Stat. § 960.293(2). The definition subsection of the statute defines "local subdivisions" as "counties," Fla. Stat. § 960.291(6), consistent with the Florida Constitution, Fla. Const., Art. VIII § 1(a) ("The state shall be divided by law into political subdivisions called counties."). As a practical matter, the County—as a defendant in this case—declined to exercise the authority the Sheriff now asserts; it would be contrary to reason and the law to assume that the Sheriff can act for the County where the County itself declined to act. Accordingly, the Court should dismiss the Counterclaim with prejudice.

To determine whether a party has statutory authority to bring a claim, courts assess what the Supreme Court has referred to as "statutory standing," which most often "presents a straightforward question of statutory interpretation." *Lexmark*, 572 U.S. at 129. "[T]he cardinal rule of statutory construction is that when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction; the statute must be given its plain and obvious meaning." *Birnholz v. 44 Wall St. Fund, Inc.*, 880 F.2d 335, 341 (11th Cir. 1989) (internal quotation marks and citation omitted). The text of the statute demonstrates the Sheriff is not entitled to assert the Counterclaim.

The statutes at issue here are clear on their face: any liability an individual may have for incarceration costs is to "the state and its local subdivisions"—not the Sheriff. Fla. Stat. § 960.293(2); *see also* Fla. Stat. § 960.297(1). The statutory definition of "local subdivisions" refers only to counties: "local subdivisions of the State of Florida which maintain correctional facilities, such as *counties* that maintain county correctional facilities or *counties* that provide funds directly or indirectly for the maintenance of correctional facilities within the county." Fla. Stat. § 960.291(6) (emphasis added). The statutes contain no reference to actors within the County or to others acting on behalf of the County. The statute therefore confers the power to assert a counterclaim for incarceration costs solely to the County, not the Sheriff.

If the Florida Legislature wanted to grant the Sheriff the ability to seek incarceration costs in a civil action or as a counterclaim, it could have done so. Other portions of Florida law refer to the authority to charge certain fees related to incarceration and confer that authority to the "chief correctional officer of a local subdivision." Fla. Stat. § 951.033(3). That language is entirely absent here; Section 960.293 refers only to "local subdivisions" and "counties." The Court should not import text found nowhere in the statute to grant the Sheriff authority he does not possess.

Florida's courts appear to have had no occasion to address the question of whether a sheriff is properly considered a "local subdivision" for purposes of Florida Statute § 960.293. In analyzing other statutes, state courts have held that sheriffs act on behalf of the county only where there is explicit statutory language designating the sheriff as an "official" or "local governmental authority" within the county. *See Beard v. Hambrick*, 396 So.2d 708, 711 (Fla. 1981); *Bradshaw v. Bott*, 205 So.3d 815, 819 (Fla. App. 2016). Florida's courts have long recognized that a sheriff's powers are "prescribed by statute." *Lewis v. Leon Cnty.*, 91 Fla. 118, 182 (1926). Those "powers, duties, and obligations" are limited to those extended by the County. *See* Fla. Stat. § 30.15. In this

litigation, the County, acting on its own behalf, declined to bring a counterclaim. It would, therefore, upset the constitutional order to allow the Sheriff to assert the Counterclaim in these circumstances where the County chose not to exercise that power.

The Court, though, need not reach the statutory question because, *in this instance*, the Sheriff does not act on behalf of the County. Indeed, in alleging statutory standing to bring the Counterclaim, the Sheriff asserted he "*is* a 'local subdivision,"' ECF No. 66 at 6 (emphasis added), not that he acted on behalf of the County. For its part, the County denounced any control over the Sheriff, noting that the jail "is operated by the Brevard County Sheriff, which is a *wholly separate, distinct, and independent* legal entity from the County under the Florida Constitution." ECF No. 201-2 at 3–4, 9 (Mar. 25, 2022) (emphasis added)); *see also id.* ("The County does not operate the Brevard County Jail Complex and does not employ the Brevard County Sheriff or its deputies, officers, agents, or employees."). Indeed, "[u]nder Florida law, there are constitutionally created political subdivisions called counties and *separately created* constitutional officers." *King v. Escambia Cty. Corr. Facility*, No. 3:23-cv-24762, 2024 WL 2000685, at *2 (N.D. Fla. Mar. 29, 2024). The County could have brought the Counterclaim, but it chose not to. ECF No. 67 (Sept. 4, 2020). It would be illogical, then, to determine that the Sheriff is exercising powers for the County, as the "local subdivision," that the County itself chose not to assert.

On this basis alone, the Court should dismiss the Counterclaim with prejudice.

## III. Summary Judgment on the Counterclaim Is Unwarranted Given the Numerous Disputes of Material Fact on Mr. Wappler's First Amendment Defense.

While the Sheriff tries to reduce this matter to a simple mathematical calculation of incarceration costs, the Counterclaim is about more than mere technicalities. At the heart of this dispute is whether the Sheriff brings the Counterclaim to, as Mr. Wappler alleges, retaliate against Mr. Wappler in violation of the First Amendment. To enter an order for incarceration costs without

due consideration for this constitutional issue would be premature and would sanction the Sheriff's allegedly retaliatory and unconstitutional conduct.

A First Amendment retaliation claim requires the claimant to show: 1) that he engaged in constitutionally protected speech, such as petitioning the government for redress; 2) that the defendant's retaliatory conduct adversely affected that speech; and 3) that there is a causal connection between the retaliatory conduct and the adverse effect. *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1289 (11th Cir. 2019). A party's action can be impermissibly retaliatory under the First Amendment, regardless of whether it *could* have taken the same action for other reasons. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972). When there are factual disputes regarding whether the conduct at issue is retaliatory, summary judgment is inappropriate. *Id.*; *Smith*, 713 F.3d at 1064 (reversing summary judgment).

Mr. Wappler has satisfied the first two prongs of the First Amendment analysis, and there are numerous disputes of material fact regarding the third prong. In order to grant judgment, those disputes must be resolved. Therefore, if the Court does not dismiss the Counterclaim outright, it should deny summary judgment and grant Mr. Wappler leave to take discovery regarding these disputed facts. The Court should deny the Sheriff's request for incarceration costs because there are ample disputes of material fact on Mr. Wappler's First Amendment retaliation claim that must be resolved either through additional discovery or by a factfinder.

### *A. Mr. Wappler's Speech Is Protected Under the First Amendment and the Counterclaim Adversely Impacts His Protected Speech.*

Mr. Wappler's underlying § 1983 lawsuit is speech protected by the First Amendment. "The right to petition the government for a redress of grievances is 'one of the most precious of the liberties safeguarded by the Bill of Rights.'" *Lozman*, 585 U.S. at 101 (2018); *see also DeMartini*, 942 F.3d at 1289 (holding that "a citizen's . . . lawsuits against the government can clearly

constitute protected First Amendment activity"). This is especially true when an incarcerated person petitions for redress of his conditions of confinement. *Williams v. Radford*, 64 F.4th 1185, 1192 (11th Cir. 2023); *Boxer X v. Harris*, 437 F.3d 1107, 1112 (11th Cir. 2006); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1968). When Mr. Wappler exercised his First Amendment right to petition the courts for redress, the Sheriff sought to impose costs. As a matter of law, Mr. Wappler's speech is protected and he has satisfied the first prong of the analysis.

Mr. Wappler alleged that the Sheriff detained him in unconstitutional conditions, which included being incarcerated in an overcrowded jail; without a mattress; without utensils; and without shoes, towels, or reading materials. FAC ¶ 12. He alleged that he was continuously subjected to excessive light and noise, and that he was "denied any out of cell time for recreation, fresh air, or sunshine." *Id.* Due to these conditions, Mr. Wappler petitioned the court for relief stemming from his conditions of confinement, speech that clearly falls within the protection of the First Amendment. *See Boxer X*, 437 F.3d at 1112.

In response to Mr. Wappler's complaint, Sheriff Ivey filed the Counterclaim seeking incarceration costs. *See* Countercl., ECF No. 66. The Sheriff's counterclaim has an adverse effect on Mr. Wappler, as it would on any person who petitions the court for relief and in return is slapped with a $91,250 bill. *See Echols v. Lawton*, 913 F.3d 1313, 1322 (11th Cir. 2019). 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)). Courts have found that much smaller economic harms have an adverse effect on First Amendment speech than the $91,250

at issue here. In *Garcia v. City of Trenton*, the defendant retaliated against the plaintiff for filing a complaint by saddling her with $35 worth of parking tickets. 348 F.3d 726, 729 (8th Cir. 2003). The court decided that the question of whether the $35 debt would have an adverse effect was a close one and should be decided by a jury. *Id.* 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." *Id.*; *accord Bennett*, 423 F.3d at 1250–51.

Because Mr. Wappler is unable to pay either $91,250—or $27,050.00, for that matter—an adverse order would have significant "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 20 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 fund could be garnished every time he receives funds in his account until the debt is satisfied. Fla. Admin. Code R. 33-203.201(10)(e). The magnitude of the possible consequences would clearly adversely affect the speech of a person of ordinary firmness.

Thus, as a matter of law, Mr. Wappler meets the first two prongs of his First Amendment retaliation defense.

### *B. The Court Should Deny Summary Judgment Because Mr. Wappler Has Satisfied His Burden to Establish Causation.*

When evaluating causation under the First Amendment, a court "asks whether the defendants were subjectively motivated" by Plaintiff's protected speech to retaliate. *Smith v. Mosley*, 532 F.3d 1270, 1278 (11th Cir. 2008). To establish causation, "the prisoner must show that, as a subjective matter, a motivation for the defendant'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. *See e.g.*, *Thaddeus-X v. Blatter*, 175 F.3d 378, 399–400 (11th Cir. 1999) (analyzing evidence, including "[c]ircumstancial evidence, like the timing of events or the disparate treatment of similarly situation individuals"). Ordinarily, as part of the causation analysis, courts assess probable cause, *DeMartini*, 942 F.3d at 1289; but even if there is probable cause, a party may still demonstrate retaliation if other factors are present, *Lozman*, 585 U.S. at 99–101. 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." *Thaddeus-X*, 175 F.3d at 399.

Although retaliation is usually brought as a claim or counterclaim, the First Amendment serves as an affirmative defense in a wide range of contexts. *See, e.g.*, *United States v. Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008) (First Amendment defense in a criminal case); *Cable/Home Commc'n Co. v. Network Prods., Inc.*, 902 F.2d 829, 849 (11th Cir. 1990) (asserting "a First Amendment affirmative defense regarding both the copyright and communications violations"); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195, n.4 (2012) (describing the ministerial exception, grounded in the First Amendment, "as an affirmative defense to an otherwise cognizable claim"). Mr. Wappler's allegation of selective enforcement is likewise a valid defense, as the assertion that a "'law or policy . . . [is enforced] in a certain manner for some but not for others raises the specter of content and viewpoint censorship,'" which is "facially unacceptable and constitutionally infirm." *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1199 (11th Cir. 1991) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988)).

Mr. Wappler can satisfy his burden to show that the Sheriff's filing the Counterclaim is causally connected to Mr. Wappler's protected speech. The Sheriff filed the Counterclaim in direct response to Mr. Wappler's lawsuit. While "[t]he state and its local subdivisions" can exercise their

discretion to seek incarceration costs "in a separate civil action," Fla. Stat. § 960.297(1), the Sheriff determined to do so in this litigation. ECF No. 66. That alone shows causation between Mr. Wappler's protected activity and the Sheriff's retaliatory action. *See, e.g.*, *Dear v. Nair*, No. 21-2124, 2022 WL 2165927, at *4–5 (10th Cir. 2022) (finding the causation prong satisfied in First Amendment retaliation when the state counterclaimed for common law tort); *Settles v. City of Garfield Heights*, No. 20-cv-1631, 2020 WL 5798364, *2 (N.D. Ohio Sept. 29, 2020) (citing *DeMartini*, 942 F.3d at 1277) (rejecting defendants' argument for dismissal of the First Amendment retaliation claim because the counterclaim was supported by probable cause).[2]

Moreover, probable cause is absent here, as the Sheriff does not have statutory standing to bring the Counterclaim. *See supra* Section II. As explained above, an action can be impermissibly retaliatory under the First Amendment, *regardless* of whether the government could have appropriately taken the same action for other legitimate reasons. *Perry*, 408 U.S. at 598. Because the Sheriff has no authority under Florida state law to pursue incarceration costs as a counterclaim or, at least, does not have that authority on this record, he does not have statutory standing to assert the Counterclaim. The Court, therefore, does not need to go further to analyze the *Lozman* factors.

Even if probable cause for the counterclaim did exist, discovery can establish the exceptions to the general rule that probable cause defeats a First Amendment retaliation claim predicated on an underlying civil lawsuit. *See DeMartini*, 952 F.3d at 1306–07. A claimant can

[2] Of course, the circumstances presented here are unique. *DeMartini*, 942 F.3d at 1298 ("We have located only three circuit decisions involving § 1983 First Amendment retaliation claims predicated on a retaliatory civil lawsuit or counterclaim." (citing *Greenwich Citizens Comm., Inc. v. Cntys. of Warren & Wash. Indus. Dev. Agency*, 77 F.3d 26 (2d Cir. 1996) (counterclaim); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422 (8th Cir. 1986) (counterclaim); *Bell v. Sch. Bd. of Norfolk*, 734 F.2d 155 (4th Cir. 1984) (civil declaratory judgment action)). Since *DeMartini*, however, the Tenth Circuit has found that causation can be satisfied by alleging a counterclaim was brought to retaliate against protected speech. *Dear*, 2022 WL 2165927, at *4–5.

overcome the existence of probable cause by showing: (1) "retaliatory animus" through "objective evidence that the plaintiff was [retaliated against] when people who had committed the same conduct, but who had not engaged in the same sort of protected speech, had not been," *id.* at 1306; or (2) the existence of "five 'unique' factual circumstances" articulated by the Supreme Court in *Lozman*, 585 U.S. at 99–101, *DeMartini*, 942 F.3d at 1306.[3] At least one of the five *Lozman* factors is already evident on this record because Mr. Wappler alleges retaliation for his right to petition. *Id.* The other four factors are disputed.

Regardless, Mr. Wappler does not need to bring additional evidence to satisfy his burden. Even where the complainant "introduced no direct evidence that" the protected speech caused the alleged retaliation, the Eleventh Circuit has found that causation can be a "close question." *Mosley*, 532 F.3d at 1278. Given the circumstantial evidence cited above, this is such a scenario. The burden then shifts to the defendant to present some evidence showing a non-retaliatory rationale for the conduct. *Thaddeus-X*, 175 F.3d at 399. While undersigned counsel still does not have a full set of discovery, the Sheriff's counsel has stated that the only relevant discovery is the fact of Mr. Wappler's conviction and the number of days Mr. Wappler was confined at the jail. Moore Decl. ¶ 6. The Sheriff has not addressed Mr. Wappler's affirmative defenses throughout this litigation. He has presented no evidence of a non-retaliatory justification for the Counterclaim. Summary judgment, on this record, would therefore be inappropriate—and prejudicial—without an opportunity to take evidence on these issues. At present, the available evidence shows at least indirect evidence of retaliation. Accordingly, the Court should deny summary judgment.

[3] Those five factors are: (1) allegations that retaliation is "pursuant to an 'official municipal policy' of intimidation;" (2) premeditation; (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).

### *C. The Sheriff Has Failed to Carry His Burden and Disputes of Material Fact Regarding Causation Preclude Summary Judgment on this Record.*

The Court can only grant summary judgment in favor of the Sheriff if there are no disputes of material fact. Fed R. Civ. P. 56. The summary judgment standard extends to disputes regarding affirmative defenses. *See, e.g.*, *Stillman v. Travelers Ins. Co.*, 88 F.3d 911, 913–14 (11th Cir. 1996) (reversing summary judgment where district court "did not even purport to adjudicate . . . affirmative defenses"). Not only has the Sheriff failed to carry his burden, there are critical disputes of material fact regarding the Counterclaim, particularly with regard to the causation analysis. Accordingly, if the Court does not dismiss the Counterclaim entirely, the Court should deny summary judgment and grant Mr. Wappler leave to take discovery. *See* Mot. for Disc., ECF No. 243 (Mar. 3, 2025).

Preliminarily, the Sheriff has failed to establish that Mr. Wappler actually served the five years to which he was sentenced. The Sheriff asserts that Mr. Wappler "spent *approximately* 17 months and 3 weeks in the Brevard County Jail" and "[t]he remainder [of his five-year sentence] was spent in the Department of Corrections as discussed in Wappler's deposition." Mem. at 8 (emphasis added). Critically, the Sheriff has failed to establish that Mr. Wappler actually served the five years. The portion of the deposition to which the Sheriff cites contains no information on the length of time Mr. Wappler served in the Florida Department of Corrections. As relevant here, the testimony cited by the Sheriff from Mr. Wappler's deposition is as follows:

> Q: So you pled guilty to the charges, and you received a sentence?
>
> A: They were trying to give me 40 something years, and I pleaded guilty, yeah.
>
> Q: And that's why you are here today in this facility? . . . you are serving your five-year sentence currently at this facility?
>
> A: Correct. My outdate is going to be May, and I am going to go back to Michigan, leave all you guys alone.

Q: That would be great.

ECF No. 147 at 92–93 (Oct. 4, 2021). The record evidence upon which the Sheriff relies simply indicates that Mr. Wappler would be released in "May," presumably of 2022. *Id.* That would have been roughly four and half years after his arrest, *id.* at 21; and approximately three years after his sentence, ECF No. 147-6 at 1–4. The Sheriff, therefore, has not established that Mr. Wappler actually served the entire five years. As a result, in addition to the reasons articulated above, the Sheriff's request for "judgment in the amount of $91,250" is unsupported by the facts in the record.

Moreover, there are multiple disputes as to the causation element of the retaliation analysis.

***First***, there is a dispute as to whether the Sheriff maintains a policy of imposing incarceration costs as retaliation. Evidence that the retaliation at issue was "pursuant to an official municipal policy of intimidation" may establish that the retaliation violates the First Amendment. *Lozman*, 585 U.S. at 99. Similarly, "objective evidence of a policy motivated by retaliation" can establish the existence of unconstitutional retaliation. *Id.* at 100. Notably, this sort of evidence can overcome a finding of probable cause for the retaliatory action taken by the government. *Id.*

***Second***, the record is apparently undeveloped as to whether the Sheriff has sought incarceration costs against other individuals who have not filed suit against the Sheriff. The Eleventh Circuit has noted that a party may prevail in showing retaliation, even when probable cause exists, if they can show "retaliatory animus" through "objective evidence that the plaintiff was [retaliated against] when people who had committed the same conduct, but who had not engaged in the same sort of protected speech, had not been." *DeMartini*, 942 F.3d at 1306. In this instance, that group consists of individuals detained at the jail who did not file affirmative lawsuits against the Sheriff. If there is evidence that the Sheriff has targeted Mr. Wappler—or, similarly, only seeks incarceration costs against those who have filed suit against the Sheriff—that may demonstrate that the Counterclaim is unconstitutionally retaliatory.

***Third***, from counsel's review of materials, there does not appear to be record evidence regarding the decision to pursue the Counterclaim. If the decision was premeditated, it may show retaliatory animus. In *Lozman*, the Supreme Court credited allegations that the defendants "formed a premeditated plan to intimidate [the plaintiff] in retaliation for his criticisms of city officials and his open-meetings lawsuit." 585 U.S. at 100. Evidence of premeditation can defeat a finding of probable cause. *Id.* Courts in this Circuit and elsewhere have acknowledged that this is precisely the sort of evidence amenable to an order for discovery under Rule 56(d). *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 484 (4th Cir. 2014); *Swenson v. Palecek*, No. 3:19-cv-821-BJD-PDB, 2021 WL 2917633, at *2 (M.D. Fla. July 12, 2021). Such evidence may be established by statements made by the Sheriff and his representatives prior to or since the filing of the Counterclaim. Mr. Wappler sought that information in discovery, Mot. to Compel, ECF No. 121 (July 19, 2021), and counsel has sought leave to pursue those as well, Mot. for Disc., ECF No. 243 (Mar. 3, 2025).

These disputes of material fact preclude summary judgment. Granting summary judgment would risk the Court legitimating the Sheriff's unconstitutionally retaliatory conduct without properly considering Mr. Wappler's defenses. Such a result would be error. It would also be unjust.

As a result, the Court should deny summary judgment and, if the Court does not dismiss the Counterclaim with prejudice, it should grant Mr. Wappler's motion for discovery on the issues that remain in dispute. Mot. for Disc., ECF No. 243 (Mar. 3, 2025).

## CONCLUSION

For the reasons stated herein, the Court should dismiss the Sheriff's request for incarceration costs with prejudice and deny summary judgment on the Sheriff's Counterclaim. If the Court does not dismiss the Counterclaim outright, it should grant Mr. Wappler leave to conduct discovery under Rule 56(d). Mot. for Disc., ECF No. 243 (Mar. 3, 2025).

Respectfully submitted,

/s/ Jennifer Safstrom

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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 March 17, 2025.

Respectfully submitted,

/s/ Jennifer Safstrom
Jennifer Safstrom