IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICANS FOR IMMIGRANT JUSTICE, et al., *Plaintiffs*, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al., *Defendants*.	No. 1:22-cv-03118 (CKK)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

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INTRODUCTION

As is standard practice in early stages of litigation, Plaintiffs seek leave to amend their pleadings. In their proposed Second Amended Complaint, Plaintiffs seek to address factual issues raised by this Court in its opinion on Plaintiffs' motion for a preliminary injunction and by Defendants in their subsequent motion to dismiss. Plaintiffs seek to cure standing defects on behalf of Plaintiff RAICES[1] and to make allegations concerning harms caused by Defendants—including, at Basile, where Defendants began to transfer Plaintiff ISLA's clients after the commencement of this suit. Plaintiffs first informed Defendants of their intent to seek leave to file an amended pleading approximately two weeks after this Court's preliminary injunction order, and promptly brought this motion, which was the product of extensive fact gathering, one month later. Under these circumstances, leave to amend is appropriate under Rule 15(a).[2]

In arguing that Plaintiffs' request is outside the bounds of the liberal standard for amending pleadings, Defendants have failed to meet their burden to show that leave to file an amended complaint should be denied. *See Afram v. United Food & Com. Workers Union & Participating Emps. Health & Welfare Fund*, 958 F. Supp. 2d 275, 278 (D.D.C. 2013). Defendants argue that (i) Plaintiffs unduly delayed seeking leave to amend since Plaintiffs allegedly were aware of the facts underlying the amendments from the beginning of this litigation; (ii) Defendants will be prejudiced

[1] Capitalized terms not defined herein shall have the meanings set forth in Plaintiffs' moving brief, *see* Mem. in Support of Pls.' Mot. for Leave to File a SAC, ECF No. 92-1 ("Pls.' Br."), or the proposed Second Amended Complaint, ECF No. 92-2.

[2] With this brief, Plaintiffs respectfully withdraw Claim II (Denial of the Right to a Full and Fair Custody Proceeding, in Violation of the Due Process Clause of the Fifth Amendment) from the proposed Second Amended Complaint, SAC ¶¶ 266-72. On April 17, 2023, Plaintiffs conferred with opposing counsel, who do not oppose Plaintiffs' withdrawal of the claim. Unless the Court prefers another course of action, after this motion is decided, including if it is denied, Plaintiffs will file an amended complaint that removes Claim II and any corresponding references throughout.

given that they filed a motion to dismiss before Plaintiffs brought this motion; and (iii) the amendments are futile. Each argument is misguided.

First, Plaintiffs brought this motion without undue delay. The motion responds to issues that this Court and Defendants raised *after* Plaintiffs filed the earlier pleadings. Moreover, a portion of the proposed amendments are the result of events that occurred *after* the Plaintiffs commenced this action. Even if there had been a delay—there was none—Plaintiffs' motion comes at an early stage in the case, before entry of a scheduling order and any discovery. Defendants are wrong that a delay at this stage of litigation is a basis to deny leave to amend absent prejudice. As evidenced by the cases upon which Defendants rely, courts typically find undue delay only at much later stages of litigation, such as near or after the close of discovery—in stark contrast to the present posture of this case. *See, e.g.*, *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987) (affirming denial of leave to amend "based on facts known *prior to the completion of discovery*") (emphasis added).

Second, Defendants are not prejudiced by the fact that they filed a motion to dismiss before Plaintiffs moved for leave. This process—moving for leave to amend after a motion to dismiss is filed—promotes efficiency in litigation, is expressly permitted by the Federal Rules, and is regularly sanctioned by courts. *See, e.g.*, *Arias v. Marriott Int'l, Inc.*, No. 15-cv-1258, 2016 WL 11719221, at *1–2 (D.D.C. Apr. 21, 2016) (granting leave to amend after filing of motion to dismiss). Nor do the proposed amendments substantially change the scope of this litigation, as Defendants also contend. Allegations concerning Basile involve restrictions on attorney access similar to those at the other facilities and result from Defendants' overarching policies and procedures that are at the core of this action. At bottom, an amended complaint may moot the Defendants' current motion to dismiss, but that result does not constitute cognizable prejudice to

Defendants. *See, e.g., Easter v. District of Columbia*, 128 F. Supp. 3d 173, 179 (D.D.C. 2015) ("[A]ll pending motions pertaining to the prior operative complaint may be denied without prejudice as moot.").

Third, Defendants fail to meet their burden of showing that Plaintiffs' claims are futile. Plaintiffs' proposed amendments resolve many of the issues raised by this Court and by Defendants, including by adding factual detail about specific clients, the harms they face, and the proceedings in which Plaintiffs represent them, as well as comparisons with conditions for individuals in criminal custody. In arguing otherwise, Defendants raise factual disputes that are not ripe for resolution on this motion. Plaintiffs should be afforded an opportunity to proceed to discovery to test their claims on the merits.

ARGUMENT

In their opposition, Defendants mischaracterize the standard for amending a pleading. Defendants suggest that Rule 15(a) permits leave to file only where litigants seek to correct minor mistakes or omissions. *See* Defs.' Opp. to Pls.' Mot. Seeking Leave to File a SAC ("Defs.' Opp.") at 7–8.[3] The Rule is not so constrained. Leave should be granted unless there is a compelling reason *not* to do so, such as "undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies, or futility." *Richardson v. United States*, 193 F.3d 545, 548–49 (D.C. Cir. 1999) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also* Fed. R. Civ. P. 15(a)(2) (instructing that a "court should freely give leave" to amend a pleading "when justice so requires"). Courts regularly grant leave to amend where more than minor changes are proposed to a pleading. *See, e.g.*, *Arias*, 2016 WL 11719221, at *1–2 (granting leave to amend complaint with substantive changes, including additional claims); *Djourabchi v. Self*, 240 F.R.D. 5, 14 (D.D.C.

[3] All page numbers of documents filed in this case refer to ECF page numbers.

2006) (granting leave to add additional claims to pleadings). Defendants also misleadingly suggest that Plaintiffs bear the burden on this motion. *See* Defs.' Opp. at 7 (heading titled "Plaintiffs Cannot Show That Filing a Second Amended Complaint is Justified"); 9 (arguing that Plaintiffs "do not explain why they could not have included these additional claims or details in their original or first amended complaints"); 11–12 (same). But it is Defendants' burden to show why leave should *not* be granted. *See Nwachukwu v. Karl*, 222 F.R.D. 208, 211 (D.D.C. 2004). Defendants fail to meet their burden.

I. PLAINTIFFS TIMELY FILED THE MOTION FOR LEAVE TO AMEND, WITHOUT UNDUE DELAY.

Plaintiffs filed this motion at an early stage of the case, before this Court has issued a scheduling order or the parties commenced discovery. Defendants argue that Plaintiffs unduly delayed bringing this motion because they allegedly knew of the facts supporting the proposed amendments before bringing suit and the facts were not omitted due to "oversight or excusable neglect." Defs.' Opp. at 8. But Plaintiffs' proposed allegations seek to address concerns raised by this Court in its preliminary injunction opinion and by Defendants in the Motion to Dismiss, which post-date the filing of Plaintiffs' prior pleading. Under these circumstances, amending pleadings is entirely appropriate, even if some of the facts were available to Plaintiffs before initiating this action. *See, e.g.*, *Gray v. D.C. Pub. Schs.*, 688 F. Supp. 2d 1, 6 (D.D.C. 2010) (granting leave to amend where amendments added, *inter alia*, "clarifications and details requested by [d]efendants in their Motion to Dismiss"); *Pietsch v. McKissack & McKissack*, 677 F. Supp. 2d 325, 328–29 (D.D.C. 2010) (granting leave to amend after filing of a motion to dismiss where amendments included new allegations regarding conduct underlying the original complaint). Indeed, it is disingenuous of Defendants to seek dismissal of Plaintiffs' claims based on failure to include certain factual allegations but then resist Plaintiffs' motion to add those allegations. Moreover, a

portion of the proposed amendments concern events that occurred *after* the filing of this lawsuit, including after the filing of the First Amended Complaint ("FAC"). *See, e.g.*, SAC ¶¶ 21, 34, 38–39, 62, 179, 247. Relatedly, Plaintiffs added allegations concerning Basile due in part to events occurring since initiating this action. After the initiation of this lawsuit, ICE transferred many of ISLA's clients previously held at the Central Louisiana ICE Processing Center ("Jena") to Basile beginning in October 2022, making attorney access issues and obstacles at the facility more fully apparent to ISLA. Plaintiffs seek to add allegations concerning Basile to ensure ISLA and its clients obtain relief for the harms already at issue in this litigation.

Once the need to amend the pleadings became clear, Plaintiffs worked diligently to prepare the proposed Second Amended Complaint, moving for leave approximately a month and a half after the Court entered its preliminary injunction opinion. This process was time-consuming, given the attorney access limitations that are at issue in this case. *See, e.g.*, SAC ¶ 65 (AIJ's collection of several client declarations in this case "entailed multiple in-person trips, many missed and re-scheduled phone calls, and diverting resources from client representation").

Courts simply do not find undue delay this early in litigation. *See Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 860 (D.C. Cir. 2015) (describing a motion to amend arriving "four years after litigation began, one year after summary judgment motions were decided, eight months after filing an amended answer and only days before trial" as "the very picture of undue delay"). Indeed, Defendants exclusively rely on cases in which plaintiffs sought leave to amend at far later stages in litigation, including where discovery was well underway or completed. *See United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 301 F.R.D. 5, 9, 10 n.4 (D.D.C. 2013) (motion for leave to amend filed before discovery closed but while a motion for summary judgment was pending); *Dorsey v. Jacobson Holman, PLLC*, 476 F. App'x 861, 863 (D.C. Cir. 2012) (affirming

denial of leave to amend "five months after the deadline [for pleadings to be amended and parties added] set by the district court's scheduling order"); *Anderson*, 818 F.2d at 57 (affirming denial of leave to amend "based on facts known *prior to the completion of discovery*") (emphasis added); *Mattiaccio v. DHA Grp. Inc.*, 293 F.R.D. 229, 231, 234–35 (D.D.C. 2013) (denying leave to amend where "the new information the [p]laintiff seeks to include *was known to the [p]laintiff at the time he filed his initial complaint,*" and "would require extensive new discovery" only "*one month before discovery is set to close . . . and three months after the deadline for amending pleadings*") (second emphasis added); *Scarlett v. Off. of Inspector Gen.*, No. 21-cv-819, 2022 WL 111236, at *3 (D.D.C. Jan. 10, 2022) ("Plaintiff's proposed amendments would invite discovery in a case otherwise subject to resolution without discovery."); *N. Am. Cath. Educ. Programming Found., Inc. v. Womble, Carlyle, Sandridge & Rice, PLLC*, 887 F. Supp. 2d 78, 87 (D.D.C. 2012) (denying leave to amend where the plaintiff "has not satisfactorily explained why it could not have made these allegations in its original complaint or at some earlier time" where "plaintiffs have been in possession of the facts supporting these new claims since 2006," and where "[f]act discovery has closed and the trial date is set"). These cases are inapposite. Rather than support Defendants' position, they illustrate that Plaintiffs did not unduly delay seeking leave to amend.

Defendants are also incorrect that undue delay, if it had occurred, is sufficient to deny leave to amend. Defendants rely on *Mowrer v. United States Department of Transportation*, *see* Defs.' Opp. at 10, but there the D.C. Circuit explicitly stated that it "need not decide" whether a further showing of prejudice in addition to undue delay is required given that the plaintiff's waiver was "more than enough to deny amendment." 14 F.4th 723, 733 (D.C. Cir. 2021). District courts that have addressed this issue, including this one, are clear that "'delay alone is an insufficient ground to deny the motion unless it prejudices the opposing party.'" *Abraha v. Colonial Parking, Inc.*, No.

16-cv-680 (CKK), 2019 WL 1506005, at *2 (D.D.C. Apr. 5, 2019) (quoting *Djourabchi*, 240 F.R.D. at 13); *see also Klayman v. Jud. Watch, Inc.*, 288 F. Supp. 3d 314, 318 (D.D.C. 2018) (courts evaluating whether delay is undue should generally consider the possibility of any resulting prejudice). As explained further below, Defendants are not prejudiced. Accordingly, any purported delay is insufficient to deny leave to amend.

II. DEFENDANTS DO NOT SHOW THAT PERMITTING AMENDMENT WOULD RESULT IN UNDUE PREJUDICE.

Defendants' claim of undue prejudice boils down to their contention that they "would be prejudiced by the advantage Plaintiffs would gain from having had access to Defendants' analysis to incorporate changes to their proposed [Second Amended Complaint]." Defs.' Opp. at 11. That is not undue prejudice—it is the intended standard practice in federal litigation. The Federal Rules of Civil Procedure expressly permit Plaintiffs to file amended complaints as of right *after* Defendants file motions to dismiss. *See* Fed. R. Civ. P. 15(a)(1)(B). And courts regularly grant motions for leave to amend after a motion dismiss has been filed. *See, e.g.*, *Arias*, 2016 WL 11719221, at *1 (granting plaintiff leave to add "substantive amendments" after defendant filed its motion to dismiss); *Norris v. Salazar*, 746 F. Supp. 2d 1, 4 (D.D.C. 2010) (granting leave to amend where plaintiff's proposed amendments were made "at the very least, in an attempt to substantively respond to the defendant's partial motion to dismiss" by replacing a retaliation claim with a claim of disparate treatment); *Djourabchi*, 240 F.R.D. at 13 (noting that under Rule 15(a), "after a responsive pleading has been served," a party may amend their pleading when justice so requires). The mere fact that Defendants filed their motion to dismiss does not amount to undue prejudice.[4]

[4] Defendants attempt to distinguish *Council on American-Islamic Relations Action Network, Inc. v. Gaubatz,* 793 F. Supp. 2d 311 (D.D.C. 2011), where this Court granted leave to amend after the

As Defendants would have it, Plaintiffs should have moved to amend before motion to dismiss briefing began. That simply is not how the rules work. The fact that Plaintiffs brought this motion after motion to dismiss briefing promotes efficiency by allowing Plaintiffs an opportunity to address issues raised in this Court's preliminary injunction opinion *and* the motion to dismiss together in one shot.

In any event, Plaintiffs did not gain any significant advantage by seeking leave to amend after Defendants filed their motion to dismiss, since Defendants' motion to dismiss arguments primarily tracked this Court's reasoning in its preliminary injunction opinion. Moreover, any burden Defendants incurred by briefing the motion to dismiss was similarly borne by Plaintiffs, who filed an opposition brief. Thus, to the extent Plaintiffs were advantaged, so were Defendants, who now have access to Plaintiffs' arguments in opposition to their motion to dismiss.

Contrary to Defendants' assertion, *see* Defs.' Opp. at 12, the proposed amendments regarding Basile do not change the scope of this litigation. Like the other facilities at issue in this action, Basile is controlled by Defendants. It is subject to the same Detention Standards as Krome and River. And the attorney access barriers at Basile are similar in nature to those at the other facilities. Moreover, this case is premised on Defendants' overarching policies and actions

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defendants' motion to dismiss was fully briefed but not yet decided, by arguing that Plaintiffs' proposed amendments are not limited in scope and do not seek to provide greater notice of their claims to Defendants. *See* Defs.' Opp. at 12. But Defendants took the opposite position in their motion to dismiss briefing. In their reply brief, Defendants argued that Plaintiffs' failure to identify a specific detained client that has been injured prevented "sufficient notice to Defendants about the claims against them, thereby inhibiting Defendants' ability to defend against such claims." Defs.' Reply in Further Support of Defs.' Mot. to Dismiss, ECF No. 90, at 12. By providing more detail regarding specific Detained Clients and the harms they experience—information this Court also highlighted, *see* PI Op. at 2, 6-7, 22 n.9, 34-35, 39—the proposed amendments seek to "flesh out the factual basis for the claims [Plaintiffs] have already asserted" and give Defendants the very notice they previously asked for. *Council on Am.-Islamic Rels. Action Network*, 793 F. Supp. 2d at 324.

regarding attorney access conditions at the relevant ICE detention facilities. The issues at Basile are a result of those same policies and actions.

Defendants rely on *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 209 (D.D.C. 2020)—a decision that did not concern a motion for leave to amend, but rather joinder of plaintiffs—to argue that the addition of Basile changes the scope of this litigation. Defs.' Opp. at 13. Unlike in *C.G.B*, Plaintiffs' claims stem from ICE's general national policies and procedures regarding attorney access conditions. Although the substitution of Basile for River may require some facility-specific evidence when discovery commences, that has not yet happened, and Plaintiffs' legal theories remain the same. The proposed addition of a Rehabilitation Act claim on behalf of Detained Clients with Disabilities at Basile also does not substantially change the scope of the litigation where the claim closely relates to the issues already implicated in the present litigation. *See* Pls.' Br. at 12–13; *see also Childers v. Mineta*, 205 F.R.D. 29, 32–33 (D.D.C. 2001) (granting leave to amend where "the additional claims . . . bear a significant relationship to the original claims").

Even if the addition of Basile changed the scope of this litigation to some degree, the fact that amendments may change the scope of the litigation does not result in prejudice, absent a showing that the amendment is also "'proposed late enough so that the opponent would be required to engage in significant new preparation.'" *Klayman*, 288 F. Supp. 3d at 317 (quoting *Djourabchi*, 240 F.R.D. at 13). As explained in Part I *supra*, that is not the case here. Defendants state that substituting one detention facility for another "will put Defendants back at square one to investigate conditions at a new detention facility." Defs.' Opp. at 13. But Defendants do not explain how the need to examine conditions at a new facility undermines any of the work done in connection with the other facilities.

In sum, Defendants have not and cannot demonstrate undue prejudice, *i.e.*, that the proposed amendments would deny them an "opportunity to present facts or evidence which would have been offered had the amendment been timely." *See Does I through III v. District of Columbia*, 815 F. Supp. 2d 208, 215 (D.D.C. 2011) (citation and internal quotation marks omitted); *see also United States ex rel. Scott v. Pac. Architects & Eng'rs (PAE), Inc.*, 327 F.R.D. 17, 21 (D.D.C. 2018) ("Despite the passage of time, this case is still in the early stages of litigation, preceding the expenses of discovery. Defendant still would have ample opportunity to make its case in a renewed motion to dismiss, without dramatic effects on its preparation thus far."). Defendants' arguments amount to an effort to avoid expending additional resources. But "[i]nconvenience or additional cost to a defendant is not necessarily undue prejudice," *Westrick*, 301 F.R.D. at 9 (citation and internal quotation marks omitted), particularly where discovery is not underway. *See Does I through III*, 815 F. Supp. 2d at 216 (citation omitted) (holding that "[e]ven if the proposed amendment would require the [defendant] to conduct some discovery that the current complaint does not, the [defendant's] argument for prejudice is much weaker when discovery has not yet begun.").

For these reasons, Defendants have not shown undue prejudice, and Plaintiffs should be permitted to amend their complaint.

III. PLAINTIFFS' PROPOSED SECOND AMENDED COMPLAINT IS NOT FUTILE.

Defendants fail to meet their burden of showing that Plaintiffs' claims are futile.

Third-Party Standing: The proposed Second Amended Complaint sufficiently pleads that Plaintiffs have third-party standing to bring claims on behalf of Detained Clients.[5] In the

[5] Defendants' contention that the amended allegations undermine Plaintiffs' prior allegations regarding RAICES is incorrect. *See* Defs.' Opp. at 15. Plaintiffs' First Amended Complaint, filed on November 18, 2022, alleged that RAICES "had to pause intakes of new clients detained at the

organizational context, the injury element of third-party standing involves harm to the *organization*. *See* Pls.' Opp. to Defs.' Mot. to Dismiss, ECF No. 88 ("MTD Opp."), at 27 (citing PI Op. at 18); *see also Am. Immigr. Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1361 n.13 (D.C. Cir. 2000) (noting that it did not see what the "injury in fact" element of third party standing adds, because "[p]rudential standing aside, if the *litigant* has not suffered injury there is no constitutional standing") (emphasis added). Defendants erroneously focus on the harms suffered by individual Detained Clients when arguing that Plaintiffs fail to allege injury in fact. Defs.' Opp. at 15–17. Plaintiffs adequately allege organizational injury. *See* SAC ¶¶ 213–25; MTD Opp. at 23–26.

Even under Defendants' misguided view of the requisite injury, Defendants' argument fails for two reasons. *First*, there is no requirement, such as under Rule 23(a) typicality, that Plaintiffs' "cited examples of clients experiencing difficulty communicating with their attorneys should be representative of issues generally experienced by clients." Defs.' Opp. at 15. *Second*, Plaintiffs' allegations adequately allege harm to Detained Clients caused by Defendants as a result of attorney access barriers. In arguing otherwise, Defendants mischaracterize Plaintiffs' allegations. Plaintiffs allege harm on behalf of both Detained Clients and Detained Clients with Disabilities. And the same barriers to attorney access—such as lack of VTC, private attorney-client visitation, and scheduled phone calls—affect all Detained Clients, regardless of disability. That Detained Clients with Disabilities are particularly affected by deficient attorney access conditions *because* of their

facility because of Defendants' restrictions on access to counsel." FAC ¶ 22. Plaintiffs' proposed Second Amended Complaint alleges that, in February 2023, RAICES "resumed intake and representation of new clients at Laredo despite the ongoing restrictions on access to counsel." SAC ¶ 21. This new allegation simply explains events that occurred after the prior complaint was filed and in no way undermines Plaintiffs' prior allegations. *See Scahill v. District of Columbia*, 909 F.3d 1177, 1184 (D.C. Cir. 2018). Notably, Defendants do not contest that Plaintiffs' proposed amendments demonstrate RAICES's close relationship with Detained Clients at Laredo. *See* Pls.' Br. at 14.

disability does not mean that they do not suffer injury attributable to Defendants' access to counsel deficiencies.[6]

In addition, the proposed Second Amended Complaint adequately alleges that Plaintiffs' clients have been wrongfully subjected to prolonged detention. For example, Defendants claim that Plaintiffs cannot establish that "Mary," a detained client at Laredo, faced prolonged detention as a result of attorney access barriers. *See* Defs.' Opp. at 16–17. However, Defendants fail to note allegations that "[i]t took Mary's attorney six days and eight emails to arrange a second private legal call with her" and because of this, "RAICES was delayed in submitting Mary's parole request," which ICE granted after receiving it. SAC ¶¶ 39, 217. Likewise, Plaintiffs clearly allege that for clients like "Jaime," "the complexity of [the phone scheduling system at Krome] causes significant delays in Detained Clients' ability to access pro bono counsel, which unnecessarily prolongs their time in detention." *Id.* ¶ 118.[7]

Defendants similarly claim that Plaintiffs do not explain why "Caterina" and "Juan"—both detained at Krome—cannot utilize VTC "where available," but this overlooks Plaintiffs' allegation that "free, confidential VTC is not available" to them. *Id.* ¶ 160. Although Detained Clients at

[6] Defendants fail to mention that communication delays between Detained Clients with Disabilities and counsel are caused in large part by the barriers created by Defendants. For example, in the case of "Donovan"—one of AIJ's clients at Krome—Defendants do not mention that he was unable to understand how to use the phone system at Krome to contact pro bono counsel. SAC ¶ 50. Plaintiffs allege that "AIJ frequently has difficulties in completing client screenings due to the challenges in navigating the pro bono telephone system" at Krome, *see id.* ¶ 218, demonstrating that although clients like Donovan may experience additional hardships because of disability, Plaintiffs plausibly allege that his prolonged detention was caused by access to counsel deficiencies. Defendants' speculation regarding difficulties being "more likely attributable to the clients' mental illnesses," *see* Defs.' Opp. at 16, should be ignored, as all reasonable inferences must be drawn in the Plaintiffs' favor at the pleading stage.

[7] To the extent Defendants seek to minimize the harm caused to Detained Clients by pointing to the length of their detention, that argument fails. *Ramirez v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 7, 31 (D.D.C. 2018) (irreparable injury shown from "each additional day" of "purportedly inappropriate detention").

Krome can make video calls on a tablet app, those calls are not confidential or free, and "[t]he tablets can be used only in the communal housing pods." *Id.* ¶ 167. AIJ clients have "reported that lack of access to the internet in certain units such as the MHU makes the tablets unusable." *Id.* Therefore, Caterina, who is currently housed in the MHU at Krome, cannot make video calls via the tablets. *See id.* ¶ 45. The same is true for Juan. *Id.* ¶ 47 (describing how "the only way for Juan to place legal calls [while in quarantine] was via tablet provided by Krome," but "Juan was unable to contact an attorney because the tablet did not have internet access and could not make calls or send messages"). As for "Hilda," Defendants' speculation is contrary to the facts as alleged. *Compare* Defs.' Opp. at 17 (arguing that Hilda's purported "refusal [to attend a medical evaluation] could be consistent with her mental illness") *with* SAC ¶ 219 (Hilda "was never alerted that her attorney was trying to meet with her" and "reported that she was not told by staff that it was time for her appointment or escorted to the room where it would occur"). The proposed Second Amended Complaint plausibly alleges injury.

With respect to hindrance, contrary to Defendants' position, Defs.' Opp. at 17–18, the proposed Second Amended Complaint adequately alleges that Detained Clients are hindered from bringing this lawsuit as first-party litigants by demonstrating the presence of access to counsel barriers, privacy concerns, and imminent mootness of Detained Clients' claims. *See, e.g.*, SAC ¶ 68. Courts have recognized "systemic practical challenges to pursuing one's own rights" as a hindrance justifying third-party standing. *United States v. TDC Mgmt. Corp.*, 263 F. Supp. 3d 257, 274 (D.D.C. 2017) (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)). The daily access to counsel restrictions Detained Clients face is one obvious challenge. *See, e.g.*, SAC ¶ 65 ("AIJ and its clients are left with the impossible choice, just as they were in *Gayle* for all Krome declarants, of pushing forward to protect Detained Clients' rights despite the harm and risks that come with

not being able to conduct confidential legal calls."). The fact that this Court decided *SPLC I* in the context of the COVID-19 pandemic does not foreclose Plaintiffs from demonstrating hindrance (as Defendants suggest, Defs.' Opp. at 18 n.3) by alleging that Detained Clients are unable to bring this lawsuit as first-party litigants due to the very access to counsel restrictions that form the basis of this litigation. *Id.* ¶ 68; *see S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec. (SPLC I)*, No. 18-cv-0760, 2020 WL 3265533, at *1 (D.D.C. June 17, 2020).

The proposed Second Amended Complaint also demonstrates the presence of privacy concerns. Defendants contend that Plaintiffs' allegations "are limited to the clients' comfort levels sharing such information over the phone." Defs.' Opp. at 18. This argument, however, improperly attempts to shift the blame for Defendants' restrictions and failures onto Detained Clients' justified fears and discomfort with sharing sensitive information germane to their legal proceedings with their attorneys in a non-confidential setting. Defendants overlook Plaintiffs' allegation that Detained Clients have already experienced retaliation for bringing federal lawsuits against Defendants, "leading some to fear sharing their names, even under public pseudonym, in [the proposed Second Amended Complaint]." SAC ¶ 68. The inability to have confidential communications understandably exacerbates Detained Clients' fears. These fears operate as a powerful deterrent to bringing suit. *See Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 36 (D.D.C. 2020) (concluding that patients' fear of stigmatization satisfied the hindrance element).

Lastly, the potential imminent mootness of Detained Clients' claims is also a sufficient hindrance. *See* SAC ¶ 68. Even Defendants acknowledge that some of Plaintiffs' clients were

released from detention during the pendency of this lawsuit. *See* Defs.' Opp. at 18.[8] By the time Detained Clients could litigate this suit themselves, their custodial proceedings may already have concluded, or Defendants may have removed them from the United States. *See* SAC ¶ 68 ("RAICES's clients generally do not spend more than one month at Laredo . . . ."). Further, that a successful claim can be brought in Immigration Court or that a client has been released does not somehow negate the serious access to counsel deficiencies in this case, as Defendants appear to suggest. *See* Defs.' Opp. at 18. Defendants' comment that Detained Clients could bring this lawsuit as first-party litigants post-release ignores that Plaintiffs seek forward-looking injunctive relief.

Subject Matter Jurisdiction: The proposed Second Amended Complaint clearly alleged claims establishing the Court's subject matter jurisdiction over the matter. Relying on cherry-picked phrases from the proposed Second Amended Complaint, Defendants contend that Plaintiffs do not identify the proceedings in which they represent five of the clients identified in the proposed Second Amended Complaint. Defs.' Opp. at 18.[9] Contrary to Defendants' argument, Plaintiffs' allegations clearly identify the proceedings in which they represent these clients. SAC ¶¶ 29 ("FIRRP represents Mugisha in his ***request for release from detention***.") (emphasis added); 31 ("FIRRP has been appointed to represent [Jose] under NQRP in ***custody proceedings***.") (emphasis added); 33 ("FIRRP represents Pedro in ***custodial proceedings***.") (emphasis added); 37 ("FIRRP was appointed as [Mateo's] counsel under NQRP in February 2022, and has represented him in ***custody and conditions of confinement proceedings***.") (emphasis added); 46 ("AIJ represents

[8] Since filing this motion, Plaintiffs are aware of at least four individual clients named in the proposed Second Amended Complaint whom Defendants have released from custody.

[9] Defendants do not contest that Plaintiffs identify the proceedings in which they represent the remaining 10 clients identified in the proposed Second Amended Complaint. *See, e.g.*, SAC ¶¶ 38 (RAICES represented Mary "in her request for release on parole."); 58 ("ISLA represents Hilda in her custodial proceedings.").

Claude in his ***request for release***.") (emphasis added). Because Plaintiffs have specified that they represent Detained Clients in custodial proceedings and conditions of confinement challenges—as opposed to removal proceedings—this Court has subject matter jurisdiction over Plaintiffs' claims. *See id.* ¶ 67.

Substantive Due Process: Plaintiffs' substantive due process claim, as alleged in the proposed Second Amended Complaint, is far from futile. Defendants' sole argument regarding Plaintiffs' substantive due process claims is that "Plaintiffs fail to adequately plead whether the individuals in criminal detention were detained pre-trial (which could be an appropriate basis for comparison to Plaintiffs' clients) or post-conviction (which would not)." Defs.' Opp. at 19. Defendants confuse the appropriate test for a substantive due process claim: as this Court held in its preliminary injunction opinion, "a plaintiff attempts to show a 'presumption' of punitive detention by establishing that the conditions of confinement applicable to civil (e.g., pretrial or immigrant) detainees are equal to or worse than *conditions experienced by inmates convicted of a criminal offense*." PI Op. at 25 (emphasis added); *cf. SPLC I*, 2020 WL 3265533, at *19 (where conditions at a detention facility "[a]re not more considerate than those at pretrial and prison facilities," they "may be punitive in nature") (citation and internal quotation marks omitted).

In any event, the proposed Second Amended Complaint clearly compares attorney access conditions at the Four Detention Facilities to facilities holding both people in pre-trial criminal custody *and* people serving sentences after criminal conviction. *See* SAC ¶¶ 36, 89, 104, 111, 125. In addition, the proposed complaint alleges that numerous state prisons require, or in practice have, better attorney access conditions for convicted people serving their criminal sentences. *Id*. ¶¶ 105, 125, 157, 161. Plaintiffs' substantive due process claim is not futile.

Procedural Due Process: Because Defendants' argument regarding the futility of Plaintiffs' procedural due process claim mirrors their argument pertaining to this Court's subject matter jurisdiction, Defendants do not meet their burden in showing Plaintiffs' amended procedural due process claims would be futile. *See supra* pp. 15–16; *Nwachukwu*, 222 F.R.D. at 211. Nonetheless, Plaintiffs respectfully withdraw Claim II (Denial of the Right to a Full and Fair Custody Proceeding, in Violation of the Due Process Clause of the Fifth Amendment) from the proposed Second Amended Complaint, SAC ¶¶ 266-72. Defendants do not oppose withdrawal of the claim.

First Amendment: Plaintiffs' First Amendment claims on their own behalf and on Detained Clients' behalf, as alleged in the proposed Second Amended Complaint, are not futile. Defendants argue that the proposed complaint does not save Plaintiffs' First Amendment claims because Plaintiffs' claims are similar to those in *Ukrainian-American Bar Ass'n, Inc. v. Baker*, 893 F.2d 1374 (D.C. Cir. 1990), where the court concluded that "the First Amendment did not provide a legal services organization with a right to speak to *unrepresented* immigration detainees." *S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec. (SPLC III)*, No. 18-cv-760, 2023 WL 2564119, at *6 (D.D.C. Mar. 15, 2023) (citing *Ukr.-Am. Bar Ass'n*, 893 F.2d at 1381–82) (emphasis added). But Plaintiffs' First Amendment claims assert "the converse" of the D.C. Circuit's holding: "that an utter breakdown in attorney-client communications violates [Plaintiffs'] First Amendment right to speak with their clients." *SPLC III*, 2023 WL 2564119, at *6. Plaintiffs *represent* Detained Clients, and both Plaintiffs and Detained Clients hold First Amendment rights that include confidential communications with each other. *See*, *e.g.*, *Williams v. Price*, 25 F. Supp. 2d 623, 629 (W.D. Pa. 1998) (recognizing that prisoners' "right to freedom of speech under the First

Amendment" required "private rooms for attorneys to meet with their [incarcerated] clients in which they can be assured their conversations cannot be overheard by others").

Plaintiffs' First Amendment claims are not limited to the lack of confidential communications with clients. Defendants state, without citation, that Plaintiffs base their claims entirely on a "special right to communicate confidentially with their clients." Defs.' Opp. at 20. But Plaintiffs' proposed complaint contains numerous allegations about restrictions on scheduled phone calls, prohibitive costs and time limits on phone calls, and policies that effectively bar communications with clients with disabilities that raise concerns separate from confidentiality. *See, e.g.*, SAC ¶¶ 114–27, 140–41, 143–47, 174–84, 188, 194–98, 201, 205, 208. Even accepting Defendants' incorrect argument that Plaintiffs cannot base a First Amendment claim on the lack of *confidential* communications, these additional restrictions on communications impinge Plaintiffs' First Amendment right to engage in protected "political expression and political association" through their legal work. *See In re Primus*, 436 U.S. 412, 428 (1978) (citation and internal quotation marks omitted). Similarly, as to Plaintiffs' First Amendment claims asserted on behalf of their Detained Clients, detained people have a right to communicate with the outside world regardless of whether the recipients of those communications are their lawyers. *See* SAC ¶ 278; *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1067 (C.D. Cal. 2019) (holding that immigrant detainees "sufficiently alleged unreasonable restrictions on their right to communicate with the outside world").

In addition, despite Defendants' assertion to the contrary, Plaintiffs' allegations demonstrate injury. Plaintiffs allege that deficient attorney access conditions have precluded them from conducting their expressive and associational work and have precluded their clients from communicating with the outside world. *See, e.g.*, SAC ¶¶ 64 (FIRRP "unable to bring a case on

behalf of detained clients at Florence to challenge the lack of COVID-19 protections during the pandemic because of the attorney access barriers at the facility"); 98 (because Jaime "[wa]s fleeing violence and threats to his life," he was "afraid to reveal pertinent details to assist his attorney with his bond hearing due to the risk of being overheard"); 110 (alleging that because of the "[l]ack of flexibility in scheduling in-person visits" in an "emergent situation urgently requiring communication," ISLA was "never able to meet" with a "woman held at Basile"); 129 ("Lack of privacy, and clients' resulting hesitance to share information . . . results in FIRRP attorneys operating with incomplete or inaccurate information."); 146 (alleging that guards at Krome "forced [Jaime] to lose the opportunity to speak with his lawyer"); 203 ("AIJ was unable to proceed with . . . consultation and legal representation [of a prospective client at Krome] due to his concerns about whether the calls were monitored or recorded."); 217 ("Because it took six days for RAICES attorneys to be able to arrange for a second private call, RAICES was delayed in submitting Mary's parole request.").

Plaintiffs also allege that legal mail is "often opened and screened at the Four Detention Facilities before it is distributed" and, as an example, "at Laredo, guards open all mail, including mail marked 'legal,' outside the presence of the detained person, impairing the ability of attorneys to ensure that their communications with clients remain private." *Id.* ¶ 154; *see also id.* ¶ 281. Further detail about specific instances of this misconduct will be sought in discovery and is not needed at the pleading stage.

Defendants claim that some of the attorney access restrictions are "common-sense safety precautions" and therefore satisfy the legitimate interest test articulated in *Turner v. Safley*, 482 U.S. 78, 89 (1987). Defs.' Opp. at 22. For similar reasons articulated in Plaintiffs' opposition to the motion to dismiss, the *Turner* factors all weigh in Plaintiffs' favor, and the attorney access

restrictions at the Four Detention Facilities are not legitimately related to a legitimate government purpose. *See* MTD Opp. at 42–45.

Administrative Procedure Act: Plaintiffs' amendments with respect to its *Accardi* claims are not futile. Defendants contend that Plaintiffs "do not identify an 'overarching agency decision,'" but that is mistaken. Defs.' Opp. at 23. Plaintiffs allege that Defendants made a final agency decision to forego compliance with the attorney access provisions of the Detention Standards. *See* Pls.' Br. at 16 (citing SAC ¶¶ 240–41, 249). At this pre-discovery stage of litigation, allegations concerning Defendants' inadequate policies and procedures (which fail to require routine inspections for attorney access provisions), awareness of these inadequacies, and continued noncompliance with attorney access provisions, *see id*. (citing SAC ¶¶ 236–37, 240–48), collectively make plausible the allegation that Defendants "made [a] concerted, final decision to affirmatively cause" their noncompliance with attorney access provisions. *SPLC III*, 2023 WL 2564119, at *5. Moreover, the proposed Second Amended Complaint is distinct from the pleadings in *SPLC III*, where this Court dismissed the plaintiff's APA claim, because the plaintiff there did "not plead[] that Defendants have made any concerted, final decision" in connection with their "arbitrary, capricious, or otherwise not in accordance with [the] law" APA claim. *Id.* at *4–5.

Defendants also argue, in a footnote, that Plaintiffs' claim under Section 706(2)—which, in the proposed Second Amended Complaint, is a separate claim from Section 706(1)—does "not change the viability of [the] APA claims" because Plaintiffs "do not plead any discrete agency action, much less adequately plead a mandatory action." Defs.' Opp. at 23–24. Not only do Defendants effectively concede that Plaintiffs need not demonstrate *final* agency action in connection with the 706(1) claim, but also, Defendants' position is inconsistent with the facts. First, the proposed complaint sufficiently alleges that the Detention Standards are binding, which

Defendants all but conceded in their motion to dismiss. *See* Defs.' MTD at 10; *see also* SAC ¶¶ 71, 228. Second, Plaintiffs' amendments adequately allege the discreteness of the Detention Standards. *See* Pls.' Br. at 12; *see also* SAC ¶ 234 (listing examples of discrete requirements for attorney-client access that "provid[e] little room for discretion").

Rehabilitation Act: Plaintiffs' Rehabilitation Act claim, as pled in the proposed Second Amended Complaint, is not futile. Defendants do not dispute that Plaintiffs have adequately alleged that Detained Clients have significant disabilities. Rather, Defendants argue only that it is "unclear" from Plaintiffs' allegations with respect to Donovan and Mario—two of AIJ's Detained Clients at Krome—and Hilda (at Basile) "whether the appropriate accommodation request process was used, who denied the request, or whether it was appropriately denied." Defs.' Opp. at 24. This futility argument fails for two reasons.

First, Defendants misunderstand the law. Plaintiffs need not allege—or even prove at trial—that they made any particular request for accommodations. To the contrary, "a public entity's duty to provide accommodations" does not "arise[] only by request." *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 270 (D.D.C. 2015) (holding that "the legal significance of the request requirement is merely to put the entity on notice that the person is disabled," and so a prison cannot "wield the inmate's failure to request accommodation like some sort of talisman that wards off Section 504 . . . liability"). Here, Defendants have notice of Plaintiffs' Detained Clients with Disabilities, as these clients are either represented under the NQRP or have disabilities that are known to Defendants based on receipt of treatment, confinement in special facility units, or scheduling of a psychological evaluation. *See* SAC ¶¶ 29, 31, 33, 37, 47–48, 50, 52, 53. Accordingly, allegations that Defendants fail to provide accommodations to Detained Clients with Disabilities suffice.

Second, Defendants misread Plaintiffs' allegations, which plead specific requests for accommodations and denials of those request. *See, e.g.*, *id.* ¶¶ 175–76, 179, 184 ("Mario has asked guards at Krome to allow him to make calls from a private room in his unit that contains a phone. However, that request was denied, and he was told that the private call room is only for emergencies.")[10], 187 ("Hilda's attorney at ISLA has specifically requested to meet with her by VTC, but Basile has not accommodated those requests."), 198 ("Defendants have assured FIRRP that messages requesting call-backs are conveyed to Detained Clients with Disabilities and have stated that these clients are simply refusing to call back, but Defendants rarely provide any specific information about the alleged refusal and they have declined to offer possible accommodations."), 200 ("Even though FIRRP has requested accommodations—such as permission to see Detained Clients in the medical unit, facility transfers, or scheduled and facilitated phone calls—Florence generally does not provide these accommodations."). Thus, even if Defendants are correct that Plaintiffs had to plead specific requests for accommodations and denials of those requests, then Plaintiffs' allegations are adequate.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Leave to File a Second Amended Complaint.

[10] Defendants cite no authority for the proposition that it matters whether it is a detainee or their attorney who makes an accommodation request. *See* Defs.' Opp. at 24.

Respectfully submitted this 17th day of April, 2023.

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