IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BAY AREA UNITARIAN UNIVERSALIST CHURCH; DRINK HOUSTON BETTER, LLC d/b/a ANTIDOTE COFFEE; and PERK YOU LATER, LLC, *Plaintiffs*, v. KEN PAXTON, Attorney General for the State of Texas, in his official capacity; KIM OGG, District Attorney for Harris County, in her official capacity; CHRISTIAN MENEFEE, County Attorney for Harris County, in his official capacity; ED GONZALEZ, County Sheriff for Harris County, in his official capacity; PETE BACON, Acting Chief of Police for the Webster Police Department, in his official capacity; TROY FINNER, Chief of the Houston Police Department, in his official capacity; KIM LEMAUX, Presiding Officer for the Texas Commission on Law Enforcement, in her official capacity, *Defendants.*	CIVIL ACTION NO. 4:20-cv-03081

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO MODIFY SCHEDULING ORDER AND FOR LEAVE TO AMEND COMPLAINT

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NATURE AND STAGE OF PROCEEDING

On October 31, 2022, Plaintiffs sought leave to file an amended complaint in the wake of the Court's September 29th Order dismissing without prejudice claims against Defendant Finner for failure to plausibly allege standing. In their motion, Plaintiffs explained why their request met both the "good cause" standard of Rule 16(b)(4), and the "more liberal standard" of Rule 15(a). ECF No. 150. None of the arguments advanced in the opposition briefs filed by Defendant Troy Finner, Chief of the Houston Police Department, ECF No. 160, or by Defendants Pete Bacon, Chief of the Webster Police Department; Kim Ogg, District Attorney for Harris County; and Ed Gonzalez, Harris County Sheriff (the "Webster–Harris Defendants"), ECF No. 161, refute Plaintiffs' good cause for amendment or overcome the bias in favor of granting leave to amend.

Contrary to Defendants' arguments, good cause to modify the scheduling order exists where, as here, the need to amend the complaint arose only after the deadline for amendment had passed. This is an unusual case, where the Court had previously held that Plaintiffs had standing. *See* ECF No. 68. Only after this case was transferred to a new judge and *after* the amendment deadline had passed did Defendant Finner file his motion for judgment on the pleadings. *See* ECF Nos. 108, 115. On September 29, 2022, this Court took the "not ordinar[y]" step of vacating the previous judge's holding with respect to standing. ECF No. 147 at 11 n.4. Plaintiffs moved promptly thereafter to amend the complaint to address the issues raised by this Court in its September 29th Order. ECF No. 150. Defendants' suggestions that Plaintiffs should have amended their complaint earlier, when there was no need to do so, amount to revisionist history.

Rule 15(a)'s more liberal standard to allow amendment is also met here. Despite Defendants' efforts to confuse matters, there has been no undue delay, bad faith, or dilatory motive on the part of Plaintiffs, who moved expeditiously to cure the deficiencies identified by this Court in its September 29th Order.

And the proposed amendments to the complaint are not futile, as they plausibly allege each Plaintiff's standing to sue Defendants for enforcing the heightened notice provisions of §§ 30.06 and 30.07, which violate Plaintiffs' First Amendment rights. Here, the proposed amended complaint alleges, in detail, that each Plaintiff has been materially injured by having to purchase and post the overly burdensome signs described by the statutes, that those injuries are traceable to Defendants, and that those injuries would be redressed by a favorable decision in this case. *See e.g.*, Proposed Am. Compl. ¶¶ 33-56, 74-113. Therefore, contrary to Defendants' arguments, Plaintiffs have satisfied the standard of Rule 15(a), which "evinces a bias in favor of granting leave to amend." *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 566 (5th Cir. 2002) (citations omitted).

Finally, under binding Fifth Circuit precedent, if a dismissal order does not terminate the action, then a plaintiff may amend the complaint against the dismissed defendant under Rule 15(a), with the permission of the Court. *Whitaker v. City of Houston*, 963 F.2d 831, 835 (5th Cir. 1992). Here, where the September 29th Order did not dismiss Defendant Finner with prejudice, where there was no judgment entered, and where there has not been an adjudication of liability against all parties, the action has not been clearly terminated. Thus the relevant standard is Rule 15(a), not post-judgment Rules 59 and 60, as Defendant Finner argues. *See* ECF No. 160 at 4-5.

For the above reasons, this Court should grant Plaintiffs' motion for leave to file an amended complaint.

STATEMENT OF ISSUES

As more fully explained in Plaintiffs' opening brief, there are two questions for the Court to resolve in this motion to amend: (i) may Plaintiffs amend their complaint when the Court granted a Defendant's motion for judgment on the pleadings after the deadline for amended pleadings had passed; and (ii) may Plaintiffs file an amended complaint against Defendant Finner, against whom the original complaint was dismissed without prejudice to refile. ECF No. 150 at 5-6.

With respect to the first question, the proper standard of review is whether Plaintiffs have met the "good cause" standard of Rule 16(b)(4) to modify the scheduling order, and if such good cause exists, "then the more liberal standard of Rule 15(a) will apply[.]" *Filgueira v. U.S. Bank Nat. Ass'n*, 734 F.3d 420, 422 (5th Cir. 2013) (internal citations omitted).

With respect to the second question, a plaintiff may move to amend a complaint against a dismissed defendant, with the permission of the Court and pursuant to the standards of Rule 15(a), as long as the dismissal was not "intended to terminate the action." *Whitaker*, 963 F.2d at 835. Contrary to Defendant Finner's contention, the standards of Rules 59 and 60 are not relevant here, as no judgment has been entered. *See* ECF No. 160 at 4-5.

ARGUMENT SUMMARY

First, Plaintiffs have established good cause under Rule 16(b)(4) to modify the scheduling order to allow amendment of their complaint. Plaintiffs have explained the timing of their motion, demonstrated the importance of the amendments, and shown that Defendants will not face any meaningful prejudice from defending against the amended complaint. That is good cause.

Second, Rule 15(a)'s standards are also met because Plaintiffs have not acted with undue delay, bad faith, or dilatory motive. Plaintiffs moved swiftly to amend their complaint as soon as the need first arose, and their proposed amendments only address the standing issues that the Court identified in its September 29th Order. *See* ECF No. 150 at 7-8. And the proposed amended complaint plausibly alleges Plaintiffs' standing to sue Defendants and is thus not futile.

Third, the complaint may be amended against dismissed Defendant Finner because the September 29th Order did not terminate the action. Defendant Finner's argument that the standards for a motion for reconsideration or a post-judgment reopening of the case apply here, *see* ECF No. 160 at 4-8, have no basis in the case law of this Circuit or the procedural posture of this case.

ARGUMENT

I. GOOD CAUSE EXISTS TO MODIFY THE SCHEDULING ORDER

Defendants have failed to refute Plaintiffs' showing of good cause to modify the scheduling order here, where the need to amend the complaint only arose after the amendment deadline had passed and the Court had previously held that Plaintiffs had standing to maintain their claims. In fact, all four factors relevant for determining good cause have been met by Plaintiffs: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 546 (5th Cir. 2003) (quoting *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 536 (5th Cir. 2003)).

A. The Proposed Amendment is Timely

The reason for the timing of Plaintiffs' motion for leave to amend is clear. Prior to the amendment deadline of December 15, 2021, this Court had held that Plaintiffs had standing to sue each Defendant. *See* ECF Nos. 108, 68. Indeed, when some Defendants moved to certify the motion to dismiss order for interlocutory appeal, the Court summarily denied their motion, meaning it did not view the issue as one as to which there was a "substantial ground for difference of opinion," 28 U.S.C. § 1292(b). *See* ECF No. 99. Only after this case was transferred to another judge, and *after* the amendment deadline had passed, did Defendant Finner file his motion for judgment on the pleadings, raising his standing arguments for the third time. ECF No. 115. Plaintiffs had no reason to expect that the motion would be granted on standing grounds because, as this Court acknowledged, "[w]hen a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the earlier decision." ECF No. 147 at 11, n.4 (quoting *Loumar, Inc. v. Smith*, 698 F.2d 759, 762-63 (5th Cir. 1983)).

After September 29, 2022, when the Court vacated the previous ruling on which Plaintiffs had up until then relied, the amendments became necessary. Plaintiffs then promptly sought leave to amend. This explains and justifies the timing of Plaintiffs' request. *See, e.g.*, *Butowsky v. Folkenflik*, 2020 WL 9936143, at *25 (E.D. Tex. Sept. 1, 2020) ("Because the amendment was prompted by the January 2020 Rule 11 motion for sanctions, the September 19, 2019 deadline for amendment could not be met despite the diligence of the party seeking the extension."), *report and recommendation adopted*, 2020 WL 9936140 (E.D. Tex. Sept. 21, 2020); *Skogen v. RFJ Auto Grp., Inc. Emp. Benefit Plan*, 2020 WL 6044143, at *2 (E.D. Tex. Oct. 13, 2020) (finding no undue delay where a new, significant issue arose nearly five months after the scheduling order's deadline to file amended complaint). Plaintiffs have thus shown that "despite [their] diligence, [they] could not reasonably have met the scheduling deadline." *Matamoros v. Cooper Clinic*, 2015 WL 4713201, at *2 (N.D. Tex. Aug. 7, 2015) (citing *S&W Enters.*, 315 F.3d at 535).

The Webster–Harris Defendants argue that Plaintiffs' diligence should be measured from September 24, 2021, when certain state officials were voluntarily dismissed from the case. ECF No. 161 ¶ 20. But this is plainly incorrect. At that time, Defendant Finner had not even filed his Rule 12(c) motion; the decision on that motion did not issue until September 29, 2022; and the decision addressed only whether Plaintiffs had standing to pursue a lawsuit against Defendant Finner. It did not hold that dropping the state officials as defendants was a ground for dismissing the lawsuit or even discuss that erroneous argument. The issue of the state officials, and when they were dismissed, has no relevance here.[1]

[1] As a practical matter, many of the proposed additions to the complaint were not yet available to Plaintiffs on September 24, 2021, since they derive from disclosures made by Defendants in 2022, through the discovery process. *See, e.g.*, *Williams v. City of Denton*, 2020 WL 1158610, at *4 (E.D. Tex. Mar. 10, 2020) (finding no undue delay where party moved to amend complaint "at the first opportunity to do so" after "receiving a crucial piece of clarifying discovery").

Even more off-base is Defendant Finner's misleading argument that Plaintiffs' proposed amendment is untimely because Plaintiffs should have sought leave to amend in October 2021, following a statutory amendment to Texas's gun-signage scheme. Defendant Finner misrepresents an email exchange between counsel, implying that Plaintiffs considered the current proposed amendments as early as October 21, 2021. *See* ECF No. 160 at 11; ECF No. 160-1. However, as Defendant Finner's counsel is well aware, the potential amendment contemplated by Plaintiffs in 2021 involved adding a new claim that would have challenged a then-recently amended Texas statute (§ 30.05(c) of the Penal Code). As Plaintiffs' counsel explained at the time:

> It recently came to our attention that the State of Texas amended some of the provisions at issue in the above captioned case. … In light of this, we intend to amend our complaint to place in front of the court the new firearms signage requirements that will affect our clients.

July 2021 Email Thread, Ex. A at 8.

Plaintiffs later clarified further:

> Because Texas will now allow certain individuals to carry firearms without a license, property owners will need to put up a third large sign to keep firearms off their premises. See 30.05(c) (setting parameters for new sign). This means that if property owners want to keep all firearms off their property, they need to post at least three large signs: (i) a sign for unlicensed carry; (ii) a sign for licensed conceal carry; and (iii) a sign for licensed open carry. See 30.05(c), (f); 30.06(c)(3); and 30.07(c)(3). This adds to the burden imposed on our clients.

Id. at 5.

As Defendant Finner acknowledges, Plaintiffs ultimately opted not to add such a claim to the case in 2021 because one of the defendants stated that they would file a new motion to dismiss the complaint if such an amendment was made. *See* ECF No. 160 at 11. Having already obtained a ruling from the Court that Plaintiffs had plausibly alleged standing and the merits of their First Amendment claims, Plaintiffs elected to move forward to discovery rather than re-plead to add additional claims based on the recently amended law. Nor do Plaintiffs seek to add this claim now. *See* ECF No. 150 at

8 n.2; Proposed Am. Compl. ¶ 23 n.3 (explaining that, "[i]n the interest of judicial economy and to avoid prejudice to Defendants, Plaintiffs do not challenge the new Section 30.05(c)"). Thus, Defendant Finner's statement that the contemplated 2021 amendment was intended to "cure defects known to [Plaintiffs] since the case's inception," ECF No. 160 at 11, is simply false. Indeed, in October 2021, there were no apparent defects in Plaintiffs' standing allegations for them to cure. Thus, Defendant Finner's citation to caselaw regarding gamesmanship and parties' reversing their positions is wholly inapposite. *See id.* at 12.

B. The Proposed Amendment is Important

Plaintiffs have also met the importance prong of the good-cause standard. As described more fully in Plaintiffs' opening brief, *see* ECF No. 150 at 7-8, the proposed amendments directly address the standing issues raised by the Court in its September 29th Order, alleging in detail how Plaintiffs are injured by the challenged statutes and why the injury is traceable to Defendants. The amended complaint relies on documents and testimony provided by Defendants to show how each Defendant trains its officers and prosecutors on the notice provisions of §§ 30.06 and 30.07 and how each Defendant is responsible for enforcing these statutes. *See e.g.,* Proposed Am. Compl. ¶¶ 33-56. The proposed amendments also demonstrate how a ruling in Plaintiffs' favor would redress their First Amendment injuries. *Id.* ¶¶ 74-85.

The Webster–Harris Defendants argue that Plaintiffs' proposed amendments are not important because they are "unlikely to change [the] motion's outcome," adopting their futility arguments from elsewhere in their brief. ECF No. 161 ¶ 21. For the reasons set forth below, Plaintiffs' proposed amendments are not futile. *See infra* Section II.B.

C. The Defendants Will Suffer Little, if Any, Prejudice from the Amendment

Defendants will not be meaningfully prejudiced if the Court allows the proposed amendment. As explained in Plaintiffs' opening brief, Plaintiffs are not seeking to add any new causes of action,

nor any new legal theories to the complaint. ECF No. 150 at 8. Plaintiffs are also not seeking any new discovery. *Id.* at 8-9. Plaintiffs' proposed amendment "merely [seeks] to conform the pleadings to the evidence and clarify the complaint with more specific facts as a result of admissions made in discovery." *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 (4th Cir. 1999); *see also Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 391 (5th Cir. 1985) ("That [plaintiff] endeavored chiefly to correct any flaws in its original statement of its claims and did not seek to allege new causes of action also cuts in favor of holding that justice requires allowing the amendment."). The court of appeals in *Edwards* ruled it an abuse of discretion to deny leave to amend in this situation. *See* 178 F.3d at 243 ("As Sergeant Edwards correctly points out, all of the allegations sought to be added in his first amended complaint derived from evidence obtained during discovery regarding matters already contained in the complaint in some form …. Prejudice to the Defendants could hardly flow from such an addition."). The situation is the same here. Plaintiffs have added evidence and allegations to their complaint that were obtained during the discovery process. Defendants are not prejudiced by this clarification.[2]

The Webster–Harris Defendants seek to have it both ways. On one hand, they argue that Plaintiffs' injury-in-fact allegations are "essentially unchanged" in the proposed amended complaint. ECF No. 161 ¶ 12. On the other, they argue prejudice and suggest that responding to the amended complaint would entail additional discovery costs. *Id.* ¶ 22. But they fail to explain what additional discovery would be necessary since none of Plaintiffs' legal theories have changed, and Plaintiffs have merely incorporated evidence and testimony gleaned from discovery to establish that they have standing to assert the causes of action already pled.

[2] Defendant Finner inaccurately characterizes the discovery conducted in this case as improper "jurisdictional discovery." ECF No. 160 at 6-7. Rather, the parties conducted ordinary discovery under this Court's scheduling order. That the developed record now reinforces Plaintiffs' standing is not a basis for denying them leave to amend their complaint to conform to the evidence.

All the cases cited by the Webster–Harris Defendants are distinguishable from this case. *See* ECF No. 161 ¶ 22. In *Wimm*, the Fifth Circuit determined that the plaintiffs were "engaging in tactical maneuvers to force the court to consider various theories seriatim," by adding facts to the complaint that had long been known to them. *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 141 (5th Cir. 1993) (citation omitted). The district court denied the plaintiffs' motion for leave to amend as an "obvious" "attempt to avoid summary judgment." *Id.* at 139 (citation omitted). The opposite is true here. Far from attempting to avoid summary judgment, Plaintiffs here are simply trying to bring all defendants to the summary-judgment stage and put the record evidence before the Court. As stated above, there are no additional discovery costs or new issues that come with Plaintiffs' proposed amendment, thus distinguishing *Campania Management Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 849 (7th Cir. 2002). Similarly, *Phelps v. McClellan* involves analysis of prejudice when *new claims* are added: "In determining what constitutes prejudice, the court considers whether the assertion of the new claim or defense would … significantly delay the resolution of the dispute …." 30 F.3d 658, 662-63 (6th Cir. 1994). Again, there are no new claims here, and, by their own admission, the Webster–Harris Defendants consider Plaintiffs' amended complaint "essentially unchanged." They could simply refile their already written Rule 12 and summary-judgment motions seeking dismissal on jurisdictional grounds. *See* ECF Nos. 152, 156.

Defendant Finner has an even lesser claim of prejudice, since Plaintiffs could refile a new lawsuit against him as an alternative to amending the complaint in this still-pending suit. However, restarting the litigation and discovery process would waste both judicial resources and the resources of the Parties, as compared to resolving this case, now, via summary judgment. In fact, a decision that Defendant Finner cites to support his argument for lack of good cause, *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981), supports Plaintiffs here. *See* ECF No. 160 at 10. As the *Dussouy* court stated,

> [M]ere passage of time need not result in refusal of leave to amend; on the contrary, it is only undue delay that forecloses amendment. Amendment can be appropriate as late as trial or even after trial. Instances abound in which appellate courts on review have required that leave to amend be granted after dismissal or entry of judgment.

Dussouy, 660 F.2d at 598 (citations omitted). Plaintiffs have acted much more diligently here. There were no "tactical maneuvers," as there were in *Wimm. Cf.* ECF No. 160 at 10. Once discovery closed and the Court vacated its prior ruling, Plaintiffs promptly sought leave to amend their complaint with facts obtained during discovery.

D. The Availability of a Continuance Cures Any Potential Prejudice to Defendants

Finally, the fourth factor of the good-cause test, the availability of a continuance to cure such prejudice, has not been meaningfully challenged by Defendants, and no party disputes that the Court has discretion to grant a continuance if necessary. *See, e.g.*, *S&W Enters.*, 315 F.3d at 537. As stated in Plaintiffs' opening brief, Plaintiffs are willing to negotiate a scheduling order that would forgo the need for any new discovery and to set a briefing schedule that is amenable to Defendants. ECF No. 150 at 9. In sum, all four factors demonstrate that Plaintiffs have satisfied the good cause standard of Rule 16(b).

II. PLAINTIFFS HAVE MET RULE 15(A)'S LIBERAL STANDARD FOR AMENDMENT

Having established good cause, Plaintiffs also satisfy "the more liberal standard" of Rule 15(a), which dictates when leave to file an amended complaint should be granted. *Sw. Bell Tel. Co.*, 346 F.3d at 546. "Rule 15(a) requires a trial court to grant leave to amend freely, and the language of the rule evinces a bias in favor of granting leaving to amend." *Marucci Sports, LLC v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014) (citation omitted). A court's discretion to grant leave is "severely" limited by the bias of Rule 15(a) favoring amendment. *Dussouy*, 660 F.2d at 597. Leave to amend should not be denied unless there is a *substantial reason* to do so. *Jacobsen v. Osbourne*, 133 F.3d 315, 318 (5th Cir. 1998). The court "may consider factors such as whether there has been 'undue delay, bad faith or dilatory motive

on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment.'" *Herrmann Holdings*, 302 F.3d at 566 (citation omitted). And even if such reason to deny leave did exist, courts in this circuit are instructed to "consider prejudice to the movant, as well as judicial economy, in determining whether justice requires granting leave." *Jamieson ex rel. Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985).

A. There Has Been No Bad Faith, Undue Delay, or Dilatory Motive on Plaintiffs' Part

For all of the reasons stated above, Plaintiffs' proposed amendments are made in good faith, are timely, and are not made for any dilatory purpose. Simply stated, as soon as the need arose to amend their pleadings, Plaintiffs did so, and they limited their amendments only to the issues raised by the Court's September 29th Order. Defendant Finner's assertion that Plaintiffs' conduct "raises an inference of bad faith," is unfounded hyperbole. ECF No. 160 at 10.

Strangely, Defendant Finner asserts that Plaintiffs "make no attempt to explain their failure to seek leave to amend until almost eleven months after the deadline expired, after discovery closed and motions for summary judgment had been filed." *Id.* at 12. In fact, Plaintiffs explained the timing clearly in their motion, and that motion was filed *before* any motions for summary judgment had been filed. *See* ECF No. 150 at 1-2.

Defendant Finner also attempts to analogize this case to *Wimm*, but in *Wimm*, the plaintiffs knew of the existence of a claim before filing their initial complaint and sought to add it only after the defendants filed for summary judgment. 3 F.3d at 139-40. Nothing like that has occurred here. As the Webster–Harris Defendants recognize, ECF No. 161 ¶ 12, Plaintiffs' claims and theories of liability remain exactly the same: the proposed amendments simply conform the complaint to the evidence obtained during discovery. For this reason, most of the decisions in Defendant Finner's string citation at pages 12-13 of his opposition are not analogous. *See* ECF No. 160 at 12-13.

By contrast, *Auster Oil & Gas*—which Defendant Finner cites as a case distinguishable from the present circumstances—is actually on point. There, two months after the district court dismissed claims against defendants, the plaintiff sought to cure the deficiencies the court identified in its allegations. 764 F.2d at 391. The district court denied the motion to amend, and the Fifth Circuit overturned that decision as an abuse of discretion. *Id.* As the Fifth Circuit explained, "[t]hat Auster endeavored chiefly to correct any flaws in its original statement of its claims and did not seek to allege new causes of action also cuts in favor of holding that justice requires allowing the amendment." *Id.* The circumstances are identical here, except Plaintiffs waited less time—just one month after the dismissal of claims against Defendant Finner—to seek leave to amend.[3]

B. Plaintiffs' Proposed Amendment Is Not Futile

Defendants argue that the proposed amendment is futile because Plaintiffs lack standing.[4] *See* ECF No. 160 at 13-18; ECF No. 161 ¶¶ 11-18. But Plaintiffs' amended complaint plausibly alleges,

[3] Defendant Finner also complains that Plaintiff Bay Area Unitarian Universalist Church did not abandon its claims against him fast enough. *See* ECF No. 160 at 10-11. The relevance of this contention to the instant motion is unclear. But in any case, as the record shows, the Houston–Webster border runs near, if not through, the Church's property. *See* Rochen Dep. Tr., Ex. B, 81:14-19; 86:15-25. It was thus not unreasonable at the outset of litigation for the Church to assert official-capacity claims against the Chiefs of both the Houston and Webster Police Departments. As discovery progressed, the Church opted not to pursue claims against Defendant Finner, and he was notified of this. *See, e.g.*, Pls.' Resp. to Def. Finner's Interrog., Ex. C at 4 ("BAUUC does not have a claim against Troy Finner, Chief of the Houston Police Department, in his official capacity."). Further, despite Defendant Finner's assertion that the Church is outside the jurisdiction of the Houston Police Department, the record confirms that the Houston Police Department does have law-enforcement authority across the state of Texas. *See* Ex. 3 to Duplechain Dep., Ex. D at 3 ("Outside the city limits of Houston, but within the state of Texas, officers may arrest without warrant a person who commits an offense in the officer's presence or view ….''). In any event, the proposed amended complaint makes clear that the Church is not seeking to revive its claims against Defendant Finner. *See* Proposed Am. Compl. ¶ 9.

[4] An amendment may be adjudged futile where "the amended complaint would fail to state a claim upon which relief could be granted," *Stripling v. Jordan Prod. Co.,* 234 F.3d 863, 873 (5th Cir. 2000), or where "the evidence in support of the [proposed amendment] creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law," *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001).

and the record evidence establishes, all three requirements for standing: they have suffered an injury-in-fact, the injury is fairly traceable to the challenged actions of Defendants, and their injury would be redressed by a favorable decision by the Court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

First, Plaintiffs allege that they were injured even before they posted their §§ 30.06 and 30.07 signs: Persons subjected to a regime that burdens their speech in an "asymmetrical" manner are sufficiently injured for standing purposes, even if they have not yet engaged in the speech in question. *See, e.g.*, *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734-35 (2008). To exclude trespassers for any reason other than firearm possession, a property owner may provide "oral or written communication" or post any sign that is "reasonably likely" to notify entrants "that entry is forbidden." Tex. Penal Code Ann. § 30.05(b)(2)(A). Meanwhile, property owners wishing to exclude firearms have fewer, and more onerous, options. Such owners can provide notice via oral communication; written communication only if it follows a specific government script; or a sign that, again, must reproduce, word for word, a state-prescribed message (in both English and Spanish). *See* Tex. Penal Code Ann. §§ 30.06(c)(3), 30.07(c)(3). The signage requirements extend all the way down to font size and color. *See id.*

Plaintiffs are further injured because they have posted the signs, and being compelled to convey a message in a manner offensive or objectionable to the speaker is a cognizable First Amendment injury for standing purposes. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 573 (1995); *Meese v. Keene*, 481 U.S. 465, 473 (1987). And this injury is not self-inflicted, as Defendant Finner argues. *See* ECF No. 160 at 17.[5] In an unconstitutional-conditions case, a plaintiff that engages in unwanted speech in order to obtain a governmental benefit has not inflicted her own

[5] Defendant Finner also mistakenly asserts that "Antidote receives about fifty percent of its revenue from alcoholic beverage sales." ECF No. 160 at 17. This inaccurate statement is contrary both to the allegations in the proposed amended complaint, *see* Proposed Am. Compl. ¶ 107, and to the evidence in the record produced to Houston in the course of discovery, *see* Antidote 000039-49, Ex. E; Errata to D. Callaway Dep. Tr., Ex. F.

injury. *See, e.g., Agency for Int'l Dev. v. All. for Open Soc. Int'l, Inc.*, 570 U.S. 205, 219 (2013) (rejecting the government's suggestion that funding recipients who object to a program's conditions may decline the funds and thereby avoid being subjected to the condition).

Plaintiffs have alleged (and have evidence to prove) that all Defendants enforce the laws as written. Proposed Am. Compl. ¶¶ 33-56. Indeed, all law-enforcement officers and prosecutors employed by Defendants are trained on the signage scheme mandated by §§ 30.06 and 30.07 and are instructed that if any one of the statutory requirements for proper signage is not met, notice is insufficient and probable cause to support arrest and prosecution is lacking. *Id.* ¶¶ 37-43, 51-56.[6] The challenged statutory scheme thus requires Plaintiffs to choose between exercising their First Amendment rights or receiving a governmental benefit: the criminal law's protection of their right to exclude. *See Reno v. ACLU*, 521 U.S. 844, 872 (1997) (recognizing "[t]he severity of criminal sanctions," especially when combined with "the opprobrium and stigma of a criminal conviction," results in criminal law's having an "increased deterrent effect" over and above that of civil regulations).[7] Contrary to the assertions of the Webster–Harris Defendants, this injury is ongoing and will extend into the future, satisfying the injury-in-fact requirements for injunctive or declaratory relief. *Cf.* ECF No. 161 ¶ 13 (citing *Waller v. Hanlon*, 922 F.3d 590, 603 (5th Cir. 2019)).

[6] Defendant Finner insists that his officers lack authority to make any "arrests" without first consulting the district attorney's office. *See* ECF No. 160 at 15. That's because, in Defendant Finner's parlance, an individual is not "arrested" until the district attorney has accepted charges; until then, the individual has just been "detained." *See, e.g.*, Duplechain Dep. Tr., Ex. G, 33:6-34:10, 36:22-37:20. *But see Arrest*, *Black's Law Dictionary* (11th ed. 2019) ("A seizure or forcible restraint, esp. by legal authority."). Word games aside, Plaintiffs allege—and the record reflects—that Defendants' police officers may not and will not remove a trespasser from Plaintiffs' property unless the trespasser is violating the law, including, when applicable, §§ 30.06 or 30.07.

[7] Defendant Finner misstates Plaintiffs' position by suggesting that the government benefit sought by Plaintiffs is the right to secure the arrest or prosecution of others, rather than the assistance of police and prosecutors in enforcing Plaintiffs' right to exclude others from private property (which is vindicated through the deterrent effect of the criminal law). *See* ECF No. 160 at 16.

Second, Plaintiffs' injuries are fairly traceable to Defendants. The relevant question is whether Defendants are "among those who cause [Plaintiffs'] injury." *Air Evac EMS, Inc. v. Texas, Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 514 (5th Cir. 2017). The Fifth Circuit has held the traceability requirement satisfied where a defendant applies an allegedly invalid legal standard to decide a fee dispute involving the plaintiff. *See id.* Plaintiffs allege that all Defendants enforce the (unconstitutional) law as written; in other words, before making an arrest or detaining a suspect for a violation of §§ 30.06 or 30.07, police officers employed by Defendants must have probable cause to believe that all elements of the relevant statute, including the heightened notice requirements, are satisfied. *See* Proposed Am. Compl. ¶¶ 33-49.[8] And prosecutors employed by the Harris County District Attorney's Office must ascertain probable cause as to all elements, including the heightened notice requirements, before accepting charges or pursuing prosecution for violations of §§ 30.06 or 30.07. *See* Proposed Am. Compl. ¶¶ 50-56.[9] Under Plaintiffs' allegations and the record evidence, Plaintiffs' injuries are fairly traceable to Defendants.

Finally, a favorable decision from this Court would redress Plaintiffs' injuries, contrary to Defendants' arguments. *See* ECF 161 ¶ 17. The Webster–Harris Defendants maintain that "[t]he court may take judicial notice that Defendants have no control over any aspect of the statute and that a judgment against the remaining Defendants would have no effect on any aspect of the statute," *id.* ¶ 16, but this is incorrect. As noted above, Plaintiffs allege that Defendants are responsible for enforcing the unconstitutional scheme, and an injunction against the enforcement of the unconstitutional provisions of §§ 30.06 and 30.07 would prevent Defendants from enforcing the statutes and thereby redress Plaintiffs' ongoing injury. Where, as here, Defendants have "definite

[8] These allegations are all supported by record evidence. *See* ECF No. 155-2, App. 12-49, 122-188; Ex. D; Ex. 2 to Duplechain Dep., Ex. H; Ex. G, 33:25-34:10.
[9] These allegations too are supported by record evidence. *See* Wilhelm Dep. Tr., Ex. I, App. 34:23-36:20; 39:21-44:25.

responsibilities relating to the application of [the statute]," and "wield influence" relevant to Plaintiffs' injury, redressability is satisfied. *Air Evac EMS*, 851 F.3d at 507.

Air Evac EMS also disposes of Defendant Finner's argument that he cannot be sued under the *Ex Parte Young* doctrine, ECF No. 160 at 14. All *Ex parte Young* requires is that the defendant "ha[ve] some connection with the enforcement of the [challenged] act." *Air Evac EMS*, 851 F.3d at 519 (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). That standard is easily met here, and Plaintiffs' injuries would be fully redressed by an injunction from this Court.

For the reasons stated above, Plaintiffs' proposed amended complaint is not futile.

III. AMENDMENT IS PERMITTED WITH RESPECT TO DISMISSED DEFENDANT FINNER

As Plaintiffs explained more fully in their opening brief, "[i]n this Circuit, when a district court dismisses the complaint, but does not terminate the action altogether, the plaintiff may amend under Rule 15(a) with permission of the district court." ECF No. 150 at 13 (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003)). Here, the action was not terminated, as the complaint against Finner was not dismissed with prejudice, judgment was not entered, the statute of limitations has not run, and multiple parties remain in the case.

An order from the district court terminates the action only when it "states or clearly indicates that no amendment is possible—e.g., when the complaint is dismissed with prejudice or with express denial of leave to amend—or when circumstances otherwise indicate that no amendment is possible—e.g., when the limitations period has expired." *Whitaker*, 963 F.2d at 835. Defendant Finner attempts to recast Plaintiffs' motion for leave to amend the complaint as a motion for reconsideration or a motion for relief from judgment in order to impose a more exacting legal standard. ECF No. 160 at 4-8. But this argument runs directly counter to binding Fifth Circuit precedent. *See Whitaker*, 963 F.2d at 835. In any case, the Sixth Circuit case cited by Defendant Finner is readily distinguishable. *See* ECF No. 160 at 4-5 (citing *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615-16 (6th Cir.

2010)). In *Leisure Caviar*, the complaint at issue was dismissed with prejudice, judgment was entered, and the Clerk was directed to close the case. *Leisure Caviar v. U.S. Fish & Wildlife Servs.*, 2008 WL 5245898, at *10-11 (E.D. Tenn. Dec. 15, 2008). None of that has occurred here.

Defendant Finner alternatively argues that the Court's September 29th Order "terminated claims against Chief Finner." ECF No. 160 at 6. Even if this was true—which it is not since the order was entered without prejudice—the termination of claims against one defendant in a multi-defendant action does not terminate the entire action. *Askanase v. Livingwell, Inc.*, 981 F.2d 807, 810 (5th Cir. 1993) ("When an action involves multiple parties," as this case does, "any decision that adjudicates the liability of fewer than all of the parties does not terminate the action ….").

Finally, despite Defendant Finner's suggestion to the contrary, *see* ECF No. 160 at 8, Fifth Circuit precedent confirms that Plaintiffs may seek leave to amend despite not having requested it in their response to Defendant Finner's motion for judgment on the pleadings. *See, e.g.*, *Louisiana v. Litton Mortg. Co.*, 50 F.3d 1298, 1302 (5th Cir. 1995) (stating that it was error for district court to deny leave to amend simply because complaint had already been dismissed). Thus, this Court should evaluate the motion to amend the complaint against Defendant Finner, under the same standards that it evaluates the motion with respect to the Webster–Harris Defendants, namely under Rules 16(b)(4) and 15(a). As explained above, in Sections I and II, the standard for amending under both rules has been met.

CONCLUSION

For the foregoing reasons, Plaintiffs request the Court grant their motion for leave to file the amended complaint.

Dated: December 5, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2022, I electronically filed a true and correct copy of the foregoing document with the Clerk of the District Court of the Southern District of Texas by using the CM/ECF system, which will send notification to all participants in the case who are registered CM/ECF users.

/s/ William R. Taylor
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