IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE, and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION, as Next Friend, Petitioners, v. GEN. JAMES N. MATTIS, in his official capacity as SECRETARY OF DEFENSE, Respondent.	)	Civil Action No. 1:17-cv-2069 (TSC)

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

ACLUF opposes dismissal of its habeas petition for lack of standing. However, its arguments do not overcome the fact that ACLUF's petition seeks unprecedented relief in a manner that no court has previously allowed. ACLUF attempts to act on behalf of an individual, currently detained by the U.S. military in a theater of active military operations in a foreign country, with whom it has never conferred and admittedly has no preexisting relationship. ACLUF thus fails to meet the requirements for next friend standing as set forth by the Supreme Court in *Whitmore v. Arkansas*, 495 U.S. 149 (1990). ACLUF cites no instance where a court has granted next friend standing to someone who did not even know the name of the real party in interest, and its fails to support the notion that habeas relief is so flexible that Article III requirements can be ignored.

Nor does ACLUF succeed in showing that the circumstances of the individual's detention here warrant the extraordinary expansion of the next friend doctrine that it proposes. ACLUF suggests that this case presents "extreme circumstances." But, as ACLUF has effectively conceded, the detainee is being held under the law of war and Department of Defense ("Department") detention policies and procedures, including provisions for visits from International Committee of the Red Cross ("ICRC") representatives, who have visited the detainee twice during the less than two months he has been in U.S. military custody. ACLUF also acknowledges that other individuals could assert next friend standing, such as members of the detainee's family. Furthermore, in light of longstanding policy, it is unfounded to suggest that this detainee is at risk of transfer to a foreign government that would result in "likely torture, an unfair trial, and possible execution." ACLUF Opp. [ECF No. 13], at 1.

Far from demonstrating that this case presents any extraordinary circumstance, ACLUF

mischaracterizes anonymously-sourced, hearsay statements in a newspaper article in an effort to suggest that the Government has actively thwarted repeated attempts by the detainee to seek habeas relief. This suggestion is wholly unsupported. Even if newspaper articles could properly be relied upon to establish subject matter jurisdiction, and the anonymous statements in this article were accepted as true, nothing in the article indicates that the detainee has expressed a desire to pursue habeas relief, or asked for a lawyer in connection with such an effort. The article also does not suggest that the detainee wishes to retain ACLUF as his counsel. Other members of this Court have already rejected the notion that a court can simply assume that a detained individual wants to seek habeas relief or would welcome representation by an unknown putative next friend. Thus, even taking the article at its word, it fails to support the expansion of next friend standing that ACLUF seeks. Moreover, ACLUF's only other supposed evidence—the fact that no one else has yet sought habeas relief as the detainee's next friend—also fails to support such an expansion. Indeed, allowing a putative next friend who has no relationship with the real party to establish standing simply because no one else has yet sought it would completely undermine Article III principles and the Court's expressed concern in *Whitmore* that a next friend know and be truly dedicated to the real party's best interests. The Court therefore should dismiss ACLUF's petition for lack of standing.

The Court should also reject ACLUF's request that it be allowed to bypass standing requirements entirely by gaining access to the detainee—even while he remains held under the law of war in a location in a foreign country where access is restricted due to military and security concerns—in order to offer its legal services. Indeed, ACLUF cites no case recognizing that an attorney who has never met, much less represented, a detainee must be granted immediate

access to the detainee for the purpose of making such an offer. A holding requiring such access in this case could have far-reaching consequences whenever U.S. forces detain an individual while engaged in active military operations in a foreign country.

Nor does ACLUF justify its request for jurisdictional discovery. Yet again, ACLUF seeks to circumvent its burden of clearly establishing next friend standing, this time by requiring Respondent to disclose information about an individual whom no ACLUF attorney has ever met, and possibly even requiring Respondent to question the detainee in order to obtain the information ACLUF seeks regarding the detainee's relatives or other possible next friends. Such discovery would have no bearing on whether ACLUF has clearly established its own next friend status. The Court should address ACLUF's standing as an initial matter, and ACLUF's lack of any knowledge, at the time it filed its petition and continuing today, of the detainee's identity, whether the detainee wishes to pursue habeas relief, or whether the detainee wishes to retain ACLUF as his counsel in doing so, as well as the absence of any relationship between ACLUF and the detainee, warrant dismissal of its petition under well-established precedent. Jurisdictional discovery therefore should be denied, and ACLUF's petition should be dismissed.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER ACLUF'S PETITION BECAUSE ACLUF FAILS TO CLEARLY ESTABLISH ITS NEXT FRIEND STANDING

ACLUF lacks standing to act as next friend for a detainee whose identity it does not know, and with whom it has never conferred. Under the Supreme Court's decision in *Whitmore*, a third party may establish standing to act as the next friend of the real party in interest only if it can meet its burden "clearly to establish the propriety of [its] status and thereby justify the

jurisdiction of the court." *Whitmore*, 495 U.S. at 164. And this burden can be met only if the requirements that the Court set forth in *Whitmore* are satisfied. *Id.* Importantly, the Court in *Whitmore* made clear that, even though it is necessary to establish that "the real party in interest cannot appear on his own behalf to prosecute the action," that showing alone is not enough. *See id.* at 163-64. Rather, a would-be next friend must also clearly establish that it is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate," and that it has a "significant relationship with the real party in interest." *Id.*; *Cartner v. Davis*, 988 F. Supp. 2d 33, 36-37 (D.D.C. 2013); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 16 (D.D.C. 2010).

ACLUF concedes that the Supreme Court's decision in *Whitmore* controls the analysis of next friend standing here. ACLUF Opp. at 5. ACLUF further concedes that it has never met or conferred with the detainee on whose behalf it seeks to act as next friend. *Id.* Because ACLUF has not communicated with the detainee regarding whether the detainee desires to seek habeas relief, or whether he desires to be represented by ACLUF attorneys, it cannot show that it is "truly dedicated" to the detainee's best interests. *Cf. Al-Aulaqi*, 727 F. Supp. 2d at 20 (recognizing that a would-be next friend who has not conferred with a detainee cannot establish that it is acting in accord with the detainee's wishes and thus cannot meet *Whitmore*'s second prerequisite). In addition, ACLUF concedes that it has no relationship with the detainee. ACLUF Opp. at 5. ACLUF therefore fails to satisfy the second and third requirements set forth in *Whitmore*.

ACLUF argues that in fact it does know the detainee's wishes because, according to statements by anonymous sources reported in a *Washington Post* article, the detainee "has made his wishes clear" by requesting counsel while being questioned. ACLUF Opp. at 6. ACLUF's

assertion should be rejected at the outset because it is well settled that statements in newspaper articles generally "constitute inadmissible hearsay." *Atkins v. Fischer*, 232 F.R.D. 116, 132 (D.D.C. 2005). Here, moreover, the article fails to name the source of the alleged statements,[1] nor does ACLUF corroborate the alleged statements with any other evidence.

But even if anonymous hearsay statements reported in a newspaper article could properly be considered when evaluating whether ACLUF has clearly established its standing, ACLUF mischaracterizes the alleged statements reported in the article, as well as their significance. Indeed, contrary to ACLUF's suggestion, even if it were assumed that the statements in the article were true, nothing in the article suggests that the detainee expressed a desire to seek habeas relief, nor does it suggest that he requested an attorney for that purpose. Rather, the article indicates that the detainee "demanded a lawyer" in connection with efforts to question him, and in response to being read *Miranda* warnings. A request for a lawyer while being questioned most often means that someone does not wish to answer questions, at least not without a lawyer present. That is not the same as expressing a desire to file a habeas petition in a U.S. court, nor could such a request be construed as indicating that the detainee wished to retain ACLUF attorneys, in particular, whether in connection with such a petition or for any other purpose. Courts have rejected next friend standing on behalf of a detainee where it was unknown whether the detained individual was interested in seeking habeas relief or wanted the assistance of the purported next friend in doing so. *See Al-Aulaqi*, 727 F. Supp. 2d at 20 (emphasizing that "there may be reasons why detainees may not want to file habeas petitions" and that whether the

[1] *See* https://www.washingtonpost.com/world/national-security/case-of-suspected-american-isis-fighter-captured-in-syria-vexes-us/2017/10/29/349c18ce-bca7-11e7-8444-a0d4f04b89eb_story.html .

real party in interest wanted "legal representation . . . specifically by counsel in the instant matter" was also a crucial inquiry) (quoting *Does 1-570 v. Bush*, No. Civ A 05-313, 2006 WL 3096685, at *5 (D.D.C. Oct. 31, 2006)).[2] ACLUF asserts that its interest here is simply to "uphold[] . . . the right to counsel of individuals detained by the U.S. military as enemy combatants," ACLUF Opp. at 5, and that it seeks only to afford the detainee "the opportunity of legal representation," *id.* at 13. But those assertions again are tantamount to a concession that in fact ACLUF continues to know nothing about the detainee's wishes, including whether the detainee wants its services.

In addition, although ACLUF contests the notion that next friends must show a significant relationship with the real party in interest in order to establish their standing, it cites no instance where a court applying *Whitmore* has granted next friend standing in the absence of such a relationship—much less where there is no relationship at all. To the contrary, in every

[2] ACLUF asserts that Respondent's arguments under *Whitmore*, after failing to grant ACLUF access to the detainee, amount to an attempt by the Government to "benefit from its own wrongdoing." ACLUF Opp. at 6. Such accusations should be soundly rejected. As discussed below, a request for counsel during questioning does not entitle an individual to immediate access by any attorney that wishes to offer legal services; indeed, "*Miranda* does not require the provision of legal services. It requires only that, until legal services are either provided or waived, no interrogation take place." *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 208 (2d Cir. 2008). Nothing in the newspaper article that ACLUF cites could be read to suggest that those requirements were violated here. Indeed, a two-stage interrogation process similar to that alleged in the newspaper article has been described and upheld in other cases. *United States v. Abu Khatallah*, No. 14-CR-141, 2017 WL 3534989, at *22 (D.D.C. Aug. 16, 2017) (describing initial questioning by an intelligence team "to acquire information essential to protect national security" prior to questioning for law enforcement purposes); *United States v. Khweis*, No. 1:16-CR-143, 2017 WL 2385355, at *13–14 (E.D. Va. June 1, 2017) (recognizing that a U.S. citizen "arrested on suspicion of terrorism, in an active war zone, near ISIS-controlled territory" presented "unique intelligence opportunities").

decision that ACLUF cites addressing next friend standing, the court recognized that a significant relationship with the real party was necessary—whether as a stand-alone requirement or as a crucial means of demonstrating that the would-be next friend was truly dedicated to the real party's best interests. *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1162 (9th Cir. 2002) (majority holding that "'*Whitmore* is thus most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest.'" (quoting *Hamdi v. Rumsfeld*, 294 F.3d 598, 604 (4th Cir. 2002)); *Sanchez-Velasco v. Sec'y of Dep't of Corr.*, 287 F.3d 1015, 1027 (11th Cir. 2002) (rejecting putative next friend's standing where he was "not related to" the real party, "ha[d] never represented him before," "had never spoken with him" prior to filing the habeas petition, and "ha[d] no more authority than any other attorney to represent" the real party); *Al-Aulaqi*, 727 F. Supp. 2d at 16 ("while not necessarily a 'firmly rooted prerequisite' to 'next friend' standing—a 'next friend' must also 'have some significant relationship with the real party in interest'"); *Does 1-570*, 2006 WL 3096685, at *7 ("Counsel also cannot point to any case in any context [outside of class actions] in which counsel has been allowed to pursue habeas (or other) relief on behalf of . . . unidentified plaintiffs or petitioners where plaintiffs' actual identity is unknown by counsel representing such plaintiffs at the time of filing.").[3] A holding by this Court that ACLUF has next friend standing to seek habeas relief on

[3] Indeed, ACLUF identifies only one instance, long before *Whitmore*, where a court in 1810 England allowed a third party with no relationship at all to the real party in interest to act as next friend. *See* ACLUF Opp. at 10 (citing *Case of the Hottentot Venus*, 13 East. 195, 104 Eng. Rep. 344 (K.B. 1810)). In that case, while petitioners sought to free a South African woman they believed to be held captive against her will, the woman evidently told the court's representatives that she did not want the relief that the petitioners sought on her behalf, and the writ was denied. *See id.* This example thus fails to show that those with no relationship to the real party can know or act in the real party's best interests. Moreover, ACLUF cannot credibly conclude from this single case that "[f]or hundreds of years, courts have recognized that" next friends do not need a

behalf of an unknown detainee therefore would be unprecedented. However, ACLUF fails to establish that such an extraordinary step is warranted here.

ACLUF attempts to gloss over the unprecedented nature of its request by emphasizing that the habeas remedy is flexible. *See* ACLUF Opp. at 10. However, the cases that ACLUF cites for this principle do not concern the prerequisite issue of the petitioner's standing. Rather, the flexibility of the habeas remedy has only come into play when the habeas petitioner had standing to seek habeas relief in the first place. *E.g.*, *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (holding that a petitioner with undisputed standing could challenge restrictions imposed by a parole board through his habeas petition); *Demjanjuk v. Meese*, 784 F.2d 1114, 1115-16 (D.C. Circ. 1986) (holding that the petitioner, who was himself the real party in interest, could file his habeas petition in the D.C. Circuit because his attorneys did not know where the U.S. Marshals were holding him in custody). Contrary to ACLUF's suggestion, courts have not treated next friend standing as a flexible requirement, within their discretion to modify as they deem appropriate. Instead, courts have emphasized that next friend standing "is jurisdictional and thus fundamental," and that "[t]he requirement of a significant relationship is . . . connected to" the values underlying Article III standing. *See Hamdi*, 294 F.3d at 605, 607. The decisions that ACLUF attempts to characterize as "flexibly appl[ying] the next friend standard," ACLUF Opp. at 11—including *Coalition of Clergy*, *Hamdi*, and *Al-Aulaqi*—instead have simply applied the requirements for next friend standing set forth in *Whitmore*—including the significant

"preexisting relationship," ACLUF Opp. at 10, when the Ninth Circuit's survey of early cases reached the opposite conclusion. *Coal. of Clergy, Lawyers, & Professors*, 310 F.3d at 1158 ("An examination of the pre-amendment cases demonstrates consistently that each time next-friend habeas standing was granted by a federal court, there was a significant pre-existing relationship between the prisoner and the putative next friend.").

relationship requirement. *See Coal. of Clergy, Lawyers, & Professors*, 310 F.3d at 1162 ("Certainly the absence of any connection or association by the Coalition with any detainee is insufficient even under an elastic construction of the significant relationship requirement to confer standing."); *Hamdi*, 294 F.3d at 604 (applying *Whitmore* as it is "most faithfully understood"); *Al-Aulaqi*, 727 F. Supp. 2d at 22 (holding that while the plaintiff may satisfy the "significant relationship" requirement, he could not "establish 'next friend' standing under the second prong of *Whitmore*").[4]

Even as ACLUF attempts to downplay the fact that it is asking this Court to deviate from well-established precedent by granting next friend standing in the absence of any relationship between ACLUF and the real party in interest, it also attempts to portray the situation here as presenting uniquely "extreme circumstances." ACLUF Opp. at 12. However, ACLUF fails to establish that this case presents a novel or extreme circumstance. ACLUF again seeks to rely primarily on the anonymously-sourced hearsay statements in the *Washington Post* article, again arguing that the detainee "has repeatedly invoked his right of counsel access," that the Government "has repeatedly refused him that right," and that ACLUF merely seeks to "provide [the detainee] with what he desires," in the form of legal representation for purposes of a habeas petition. ACLUF Opp. at 12-13. As explained above, however, the newspaper article did not suggest that the detainee requested an attorney in order to seek habeas relief. Rather, it asserted

[4] ACLUF cites the district court's decision in *Coalition of Clergy* as support for the notion that next friend standing can be established without a significant relationship. ACLUF Opp. at 12. But the district court in fact held the opposite. *See Coal. of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1044 (C.D. Cal. 2002) (rejecting next friend standing by petitioners who "lack[ed] a 'significant relationship' with the detainees—indeed, any relationship" because, among other things, to grant standing in such a situation "would invite well-meaning proponents of numerous assorted 'causes' to bring lawsuits on behalf of unwitting strangers").

that the detainee "demanded a lawyer" in connection with efforts to question him, and in response to being read *Miranda* warnings. Again, even if it were assumed that these anonymous hearsay statements were true, they would suggest only that the detainee did not wish to answer questions. As explained in Respondent's opening brief, under the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 439 (1966), an individual may invoke his right to counsel during custodial police questioning in order to avoid giving a statement that would be admissible in a criminal prosecution of that individual. *See Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981) ("The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodian interrogation."). Nothing in *Miranda* suggests that, once an individual invokes this right, the Government must provide him with immediate access to any attorney who seeks to represent him. *See id.* (indicating that, "[a]bsent [any continuing law enforcement] interrogation," the lack of counsel does not violate an individual's Fifth Amendment rights).

Moreover, courts have repeatedly recognized that United States officials conducting law enforcement interrogations in other countries have no "heightened duty" to provide the individual with counsel, even though "the exigencies of local conditions" and other "practical obstacles" may hinder the individual's ability to obtain a lawyer on his own. *United States v. Clarke*, 611 F. Supp. 2d 12, 30 (D.D.C. 2009) (internal quotation omitted) (collecting cases); *see also In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d at 208 (even assuming *Miranda* applied to interrogations in foreign countries, "*Miranda* does not require the provision of legal services. It requires only that, until legal services are either provided or waived, no

interrogation take place.").[5] Nothing in the newspaper article suggested that the requirements of *Miranda* were violated here.

ACLUF suggests that there is an urgent need to grant it access to the detainee based on the notion that this case presents "extreme circumstances." However, ACLUF does not contest the information provided by Respondent's declarant that the detainee has been visited twice by ICRC representatives, in accord with applicable Department policies and procedures for detainees held under the law of war. *See* Dalbey Decl. ¶ 4. Moreover, as ACLUF's declarant Gabor Rona confirms, ICRC representatives provide the individuals whom they visit with the opportunity to communicate with relatives if they so wish. Rona Decl. [ECF No. 13-1] ¶ 10.

In the end, the only supposedly "extreme circumstance" that ACLUF identifies to justify its would-be next friend status is the fact that the detainee, less than two months after coming into U.S. military custody in a theater of active military operations in a foreign country, may not yet have secured his own legal representation. But that possibility alone should not lead this Court to deviate from longstanding precedent by allowing ACLUF to act as next friend to a stranger. The mere absence of existing litigation on the detainee's behalf does not mean that the detainee has no relative or other person who could appropriately act as next friend.[6] Such a next

[5] Although these cases involved U.S. officials questioning individuals while they were held in foreign, rather than U.S., custody, the situation here presents similar, if not greater, exigencies and obstacles, when it comes to facilitating the detainee's access to a lawyer while he remains in U.S. military custody in a theater of active military operations in a foreign country. As previously explained, the detainee is currently at a facility where access is restricted due to "military operational concerns, security concerns, and political sensitivities of the host nation," and the facility has no capacity for unmonitored videoconferencing between the detainee and attorneys elsewhere. Declaration of Steven W. Dalbey ("Dalbey Decl.") [ECF No. 11-1] ¶¶ 3, 6.

[6] ACLUF argues that the Government is relying "on multiple layers of speculation" regarding the possibility that the two visits from ICRC representatives provided an opportunity for the

friend may yet come forward if the detainee indeed wishes to seek habeas relief. At a minimum, ACLUF's expressed urgency is undermined when the Supreme Court has recognized the Government should be allowed a "reasonable period of time" to make a determination regarding the disposition of a detainee held under the law of war. *Boumediene v. Bush*, 553 U.S. 723, 795 (2008). ACLUF therefore has not met its burden to "clearly establish" that the circumstances here warrant the novel holding, granting it next friend standing, that it seeks. *See Whitmore*, 495 U.S. at 164.[7]

II. ACLUF FAILS TO SHOW THAT ITS ASSERTED RIGHT OF "ACCESS TO COUNSEL" INCLUDES ACCESS TO ATTORNEYS THAT THE DETAINEE HAS NOT RETAINED AS HIS COUNSEL

Because ACLUF has failed to establish its next friend standing, the Court should dismiss its petition without any further consideration of the relief that it seeks. However, the Court should also reject ACLUF's attempt to invoke a "right to counsel access" because—whatever the contours of such a right in other circumstances—here, simply put, ACLUF is not the detainee's

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detainee to contact his family. *See* ACLUF Opp. at 7. However, the Government does not bear the burden of proof in regard to ACLUF's standing; rather, ACLUF must clearly establish its standing. *Whitmore*, 495 U.S. at 164. The ACLUF has not met its burden and instead incorrectly assumes that the only possible reason the detainee has not sought habeas relief is that he has not had access to an attorney. As discussed above, "there may be reasons why detainees may not want to file habeas petitions." *Al-Aulaqi*, 727 F. Supp. 2d at 20 (quoting *Does 1-570*, 2006 WL 3096685, at *6).

[7] ACLUF's expressed concern that the detainee may face torture or death if transferred to the custody of another country ignores existing United States policy and is not appropriate for adjudication in this proceeding. Indeed, it is the policy of the United States not to transfer an individual to another country where it is more likely than not that the individual would be tortured. *See* Foreign Affairs Reform and Restructuring Act ("FARRA"), Pub. L. No. 105-277, Div. G., Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998), codified as note to 8 U.S.C. § 1231; *see also, e..g.*, *Munaf v. Geren*, 553 U.S. 674, 700-02 (2008) (noting U.S. policy regarding transfer and explaining that treatment concerns are ones "to be addressed by the political branches, not the Judiciary").

counsel. ACLUF essentially asks the Court to conclude that wartime detainees held abroad in theaters of active military operations have an automatic right to court-ordered access by volunteer attorneys with no existing relationship with the detainee, for purposes of helping the detainee decide whether he wants to pursue habeas relief, and whether he wants those attorneys to represent him in doing so. Although courts have concluded that they have the authority under the habeas statute to facilitate counsel representation of detainees who already have sought habeas relief through cases filed by individuals with standing, *e.g.*, *Al-Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004), ACLUF's assertions go far beyond such holdings and again amount to a request for unprecedented relief that is unwarranted under the circumstances here.

ACLUF cites a number of cases for the proposition that those seeking habeas relief must have access to their counsel in order to present their claims. ACLUF Opp. at 13-14. However, none of those cases held that attorneys who had not been retained as counsel, but simply wanted to offer their services, could compel the Government to facilitate their access to would-be clients who had not brought a habeas case.[8] Indeed, ACLUF spends nearly two pages discussing *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), but in that case, the court granted Padilla's attorney next friend standing because she "had a preexisting relationship with Padilla that involved directly his apprehension and confinement" and had previously conferred

[8] Rather, in *Omar*, the petition had been filed by counsel retained by the detainee's wife and son. *See Munaf*, 553 U.S. at 682-83. The district court held that "the scope of [any right to counsel] remains ill-defined" and declined to grant the petitioner's motion to compel the Government to transfer the detainee to the United States in order to facilitate counsel access. *Omar v. Harvey*, 514 F. Supp. 2d 74, 77–78 (D.D.C. 2007). In *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 21, 28 (D.D.C. 2012), the court held that six Guantanamo detainees who already had filed habeas petitions that had been either dismissed or denied could continue to have access to their counsel for purposes of exploring the possibility of filing new habeas petitions in the future.

with him and his family. *See id.* at 576. The court then directed that Padilla be permitted to consult with counsel—meaning, the counsel already representing him and acting as next friend for purposes of his habeas petition. *See id.* at 605.[9] Thus, nothing in *Padilla* supports ACLUF's asserted right of access here.

ACLUF's arguments regarding counsel access are circular, in that it seeks access to the detainee in order to offer him legal representation in connection with a habeas petition that ACLUF has already filed, purportedly on the detainee's behalf. It also evidently seeks to moot the question of its next friend standing by using the petition itself (along with an order from the Court) as the mechanism by which to contact the detainee and secure his agreement to be represented by ACLUF attorneys. Filing a habeas petition in the name of a stranger—or indeed, as here, anonymously—is an inappropriate way to offer legal services. *Cf. Does 1-570*, 2006 WL 3096685, at *7 (holding that petitioning attorneys' attempt to use the petition "as a vehicle to determine the identities of the individuals" whom the attorneys sought to represent was "improper" and, if allowed, would be an unprecedented extension of the next friend doctrine). ACLUF's arguments thus provide no support for the relief that it seeks, and indeed further undermine its claim to next friend standing.

ACLUF further asserts that "[o]nly the ACLUF has filed a habeas petition" on the detainee's behalf. ACLUF Opp. at 13. But ACLUF has no unique entitlement to file such a

[9] Significantly, Padilla was not being held in a theater of military operations in a foreign country but instead was in custody at the Consolidated Naval Brig in Charleston. *See id.* at 599. Nevertheless, the court took into account the Government's security concerns by suggesting that the conditions for counsel access should be designed so as to "foreclose, so far as possible, the danger that Padilla will use his attorneys for the purpose of conveying information to others." *Id.* at 605.

petition, and the fact that, in this instance, it apparently filed a petition more quickly than all the other lawyers in this country who also have no relationship to and have never met the detainee should not entitle it to a Court order that would require Respondent to facilitate ACLUF's efforts to secure the detainee as a client. This is particularly true given the military operational and security concerns regarding the location in Iraq where the detainee is currently in custody. *See* Dalbey Decl. ¶¶ 3, 6. While ACLUF characterizes its request for access as urgent, the Supreme Court has made clear that the "[t]he Executive is entitled to a reasonable period of time to determine a detainee's status" before a habeas petition is appropriate. *See Boumediene*, 553 U.S. at 795. As explained, although the Government intends to make a final determination regarding the detainee's disposition in an expeditious manner, it has not yet made that determination. Dalbey Decl. ¶ 5. The circumstances of this case therefore do not warrant granting the relief that ACLUF seeks. *See Munaf*, 553 U.S. at 693 (a habeas court "is not bound in every case to issue the writ," but instead should determine based on equitable principles whether the power of habeas corpus "ought to be exercised"). The Court therefore should reject ACLUF's request for attorney access to the detainee, particularly given the potential far-ranging implications of such a ruling in wartime circumstances.

III. THE COURT SHOULD NOT ALLOW JURISDICTIONAL DISCOVERY

ACLUF suggests that, if the Court cannot determine whether it has subject matter jurisdiction, it should allow ACLUF to conduct jurisdictional discovery on the questions of whether the detainee "indeed has expressed his desire to have counsel" and whether he "lacks a next friend better-situated than the ACLUF to press a habeas claim" on his behalf. ACLUF Opp. at 21, 23. However, the Supreme Court has recognized that, in general, it is a plaintiff's "burden

to prove standing by pointing to specific facts, not the Government's burden to disprove standing" by revealing information that is otherwise not public. *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1149 n.4 (2013) (holding that the Government need not reveal whether it had intercepted the plaintiffs' communications in order to help them demonstrate standing to challenge an alleged surveillance program). Here, because next friend standing is already one step removed from a case filed by the real party in interest, the petitioner has a heightened burden, which similarly should not be transferred to the Government. *See Whitmore*, 495 U.S. at 164 (party asserting next friend standing has the burden of clearly establishing that the requirements for such standing are satisfied). Moreover, "jurisdictional discovery to establish standing" is inappropriate where "no amount of discovery will cure" the jurisdictional defect. *Gerber Prod. Co. v. Perdue*, 254 F. Supp. 3d 74, 85 (D.D.C. 2017). It is also well established that "a request for jurisdictional discovery cannot be based on mere conjecture or speculation." *See FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1093–94 (D.C. Cir. 2008).

In support of its request for jurisdictional discovery, ACLUF cites *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004). However, the circumstances in *Abu Ali* are far removed from those here. For one thing, in *Abu Ali*, a habeas petition had been filed by a detainee's parents, and there was no dispute regarding their standing to act as the detainee's next friends. *See id.* at 30. Rather, the jurisdictional dispute had to do with whether the detainee, imprisoned in Saudi Arabia, was in fact in the actual or constructive custody of the United States. *See id.* at 50, 67-68.

In addition, in *Abu Ali*, the court found it significant when allowing jurisdictional discovery that the petitioners "have not only alleged, but have presented some unrebutted evidence, that [the individual's] detention is at the behest and ongoing direction of United States

officials." *Abu Ali*, 350 F. Supp. 2d at 67. ACLUF has failed to present comparable evidence regarding any issue that, even under its theory, could be relevant to its next friend standing. Rather, as discussed above, ACLUF mischaracterizes anonymously-sourced hearsay statements in a newspaper article in support of its assertion that the detainee has expressed a desire for habeas representation. And its suggestion that the detainee has no relative or other person who could more appropriately act as next friend is sheer speculation.

Moreover, a request for jurisdictional discovery is properly denied where there is no reason to believe the information will materially affect the court's jurisdictional analysis. *Estate of Klieman v. Palestinian Auth.*, 467 F. Supp. 2d 107, 115 (D.D.C. 2006) ("When the Court '[does] not see what facts additional discovery could produce that would affect [its] jurisdictional analysis,' the district court does not abuse its discretion in denying the request for such discovery and dismissing the action." (quoting *Mwani v. Bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005))); *see also Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090 (D.C. Cir. 1998) ("[I]t is reasonable for a court . . . to expect the plaintiff to show a colorable basis for jurisdiction before subjecting the defendant to intrusive and burdensome discovery." (internal quotation omitted)).

Here, the information that ACLUF proposes to seek through jurisdictional discovery would not allow it to establish next friend standing. As explained above, even if the detainee did ask for a lawyer when being questioned, that would not entitle ACLUF to act as his next friend in the absence of a significant relationship. Furthermore, whether a "better-situated" next friend may exist could not imbue ACLUF with next-friend standing. In addition, it is unclear to whom ACLUF's proposed questions regarding other possible next friends of the detainee would be

directed. To the extent ACLUF's proposed jurisdictional discovery would seek to require Respondent to ask the detainee for information or to provide the detainee with information about ACLUF's petition, it would again serve as another attempt by ACLUF to bypass next friend standing requirements entirely by gaining access to the detainee even though it has no preexisting relationship with the detainee and does not represent the detainee. ACLUF's request for jurisdictional discovery therefore should be denied.

IV. ACLUF'S VIOLATION OF LOCAL RULES REGARDING ANONYMOUS FILINGS ONLY REINFORCES THE IMPROPRIETY OF ITS PETITION

As explained in Respondent's opening brief, ACLUF failed to follow Local Rules when it filed the instant petition in the name of an anonymous "John Doe" without prior leave from the Court to do so. ACLUF now concedes that it did not follow the applicable rules, but argues that the rules need not be enforced in this instance because enforcement would not serve their underlying purpose "to protect the interests of the public." ACLUF Opp. at 3. Contrary to ACLUF's argument, adherence to the requirement that pleadings be filed using parties' real names would have served the public interest here because it would have prevented ACLUF from filing a petition on behalf of an individual its attorneys have never met when it lacks standing to do so. Indeed, under the circumstances here, the interests protected by the next friend standing limitations, as recognized in *Whitmore*, are aligned with the interests protected by the prohibition on anonymous filings. And while ACLUF argues in the alternative that the Court should grant it permission nunc pro tunc to file its petition anonymously, it again fails to explain how such a holding would be consistent with other cases discussing the rare circumstances where anonymous filings are permissible. *See, e.g.*, *Qualls v. Rumsfeld*, 228 F.R.D. 8, 10 (D.D.C.

2005). Once again, ACLUF seeks an unprecedented holding that it fails to justify, and its petition therefore should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss ACLUF's petition for lack of subject matter jurisdiction and should deny ACLUF's request for attorney access.

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