

ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the
District of Columbia Circuit

—◆◆—
No. 20-5368
—◆◆—

KIFAH JAYYOUSI,

Plaintiff-Appellant,

– v. –

MERRICK GARLAND, Attorney General of the United States; MICHAEL
CARVAJAL, Director, Federal Bureau of Prisoners; ANDRE
MATEVOUSIAN, Assistant Director, Correctional Programs Division;
FEDERAL BUREAU OF PRISONS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFF-APPELLANT

RACHEL ANNE MEEROPOL
PARDISS KEBRIA EI
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6432

– and –

GREGORY SILBERT
EILEEN CITRON
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Plaintiff-Appellant

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties and *Amici*

Parties in the district court were plaintiffs Yassin Muhiddin Aref, Kifah Jayyousi, Daniel McGowan, Royal Jones, Avon Twitty, Jenny Synan, and Hedaya Jayyousi and defendants Eric Holder, Harley G. Lappin, Charles E. Samuels, Jr, D. Scott Dodrill, Leslie S. Smith, and the Federal Bureau of Prisons.

Parties in this Court include plaintiff-appellant Kifah Jayyousi and defendant-appellees Merrick Garland, Michael Carvajal, and Andre Matevousian.

Several parties moved to intervene in the district court. Those motions were denied on March 20, 2011 and June 25, 2020. No *amici* appeared in the district court. The Legal Aid Society of the City of New York, the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and Seton Hall University School of Law's Center for Social Justice appeared as a *amici* in a previous appeal to this Court.

2. Rulings Under Review

The ruling under review in this court is the Memorandum Opinion of the United States Court for the District of Columbia (Rothstein, J), dated October 13, 2020, Doc. 212, granting Defendant-Appellees' motion for summary judgment.

The ruling was not published in the official reporter, but is available on Westlaw at 2020 WL 7251386.

3. Related Cases

This case was previously before this Court as *Aref v. Lynch*, No. 15-5154.

Counsel is aware of no related cases pending in other courts.

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	3
STATEMENT OF ISSUES FOR REVIEW	4
STATEMENT OF THE CASE.....	5
A. CMU Conditions of Confinement.....	5
B. CMU Criteria & Procedures	7
C. Plaintiff’s Designation to a CMU	13
D. Proceedings Below.....	16
SUMMARY OF THE ARGUMENT	20
STANDARD OF REVIEW	23
ARGUMENT	23
I. Mr. Jayyousi Has a Significant Private Interest in Avoiding CMU Placement.	24
II. The Procedures Used to Designate Mr. Jayyousi to the CMU and Periodically Review His Placement Created a High Risk of Error.....	26
A. The BOP’s CMU Notice Procedure Violates Due Process	27
i. Notice of <i>Some of the Reasons</i> for Placement is Not the Same as <i>Some Notice of the Reasons</i> for Placement.....	28
ii. Failure to Document the Reasons for a Decision Creates an Unacceptably High Risk of Error.	30
B. The BOP’s Administrative Remedy Process Is Not an Adequate Hearing.	33
C. The BOP Failed to Provide Mr. Jayyousi with Adequate Periodic Review of his CMU Placement	42
III. The Government’s Interests Align with Mr. Jayyousi’s.....	49
IV. The District Court Failed to Properly Weigh the <i>Mathews</i> Factors.	50
CONCLUSION.....	52

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abdelfattah v. U.S. Dep’t. of Homeland Sec.</i> , 787 F.3d 524 (D.C. Cir. 2015).....	19
<i>Abourezk v. N.Y. Airlines, Inc.</i> , 895 F.2d 1456 (D.C. Cir. 1990).....	23
<i>Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury</i> , 686 F.3d 965 (9th Cir. 2011, as amended on Feb. 27, 2012)	30
<i>Baumann v. District of Columbia</i> , 795 F.3d 209 (D.C. Cir. 2015).....	23
<i>Baylor v. Mitchell Rubenstein & Assocs., P.C.</i> , 857 F.3d 939 (D.C. Cir. 2017).....	23
<i>Brown v. Plaut</i> , 131 F.3d 163 (D.C. Cir. 1997).....	42
<i>Fares v. Smith</i> , 901 F.3d 315 (D.C. Cir. 2018).....	29, 30, 51
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970).....	42
<i>Gray Panthers v. Schweiker</i> , 652 F.2d 146 (D.C. Cir. 1980).....	27, 33, 40
<i>Hatch v. District of Columbia</i> , 184 F.3d 846 (D.C. Cir. 1999).....	17
<i>Hewitt v. Helms</i> , 459 U.S. 460 (1983).....	18, 21, 29, 34, 42
<i>Kiareldeen v. Ashcroft</i> , 273 F.3d 542 (3d Cir. 2001)	51
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	20, 21, 24, 34, 42

<i>McQueen v. Tabah</i> , 839 F.2d 1525 (11th Cir. 1988)	42, 49
<i>Meachum v. Fano</i> , 427 U.S. 215 (1976).....	5
<i>Nat’l Council of Resistance of Iran v. Dep’t of State</i> , 251 F.3d 192 (D.C. Cir. 2001).....	41
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974), <i>overruled on other grounds by Thornburgh v. Abbott</i> , 490 U.S. 401 (1989).....	40
<i>Propert v. District of Columbia</i> , 948 F.2d 1327 (D.C. Cir. 1991).....	40
<i>Pub. Citizen v. U.S. District Court</i> , 486 F.3d 1342 (D.C. Cir. 2007).....	3
<i>Rafeedie v. INS</i> , 880 F.2d 506 (D.C. Cir. 1989).....	42
<i>Ralls Corp. v. Comm. on Foreign Inv.</i> , 758 F.3d 296 (D.C. Cir. 2014).....	41
<i>Reeve Aleutian Airways, Inc. v. United States</i> , 982 F.2d 594 (D.C. Cir. 1993), <i>as amended on denial of reh’g</i> (Mar. 26, 1993)	29
<i>Ross v. Blake</i> , 136 S. Ct. 1850 (2016).....	21, 35, 35 n.8
<i>Sandin v. Conner</i> , 515 U.S. 472 (1995).....	17, 23
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	42
<i>Toussaint v. McCarthy</i> , 801 F.2d 1080 (9th Cir. 1986)	42, 49
<i>UDC Chairs Chapter v. Bd. of Trs.</i> , 56 F.3d 1469 (D.C. Cir. 1995).....	34

<i>Wilkinson v. Austin</i> , 545 U.S. 209 (2005).....	21, 23, 24, 26, 27, 33, 34, 42, 49
<i>Williams v. Hobbs</i> , 662 F.3d 994 (8th Cir. 2011)	43, 49
<i>Wolff v. McDonell</i> , 418 U.S. 539 (1974).....	18
<i>Zevallos v. Obama</i> , 793 F.3d 106 (D.C. Cir. 2015).....	29
Statutes	
28 U.S.C. § 1291	3
28 U.S.C. § 1331	3
28 U.S.C. § 2201	3
28 U.S.C. § 2202	3
Other Authorities	
28 C.F.R. § 540.200 et seq.....	6
28 C.F.R. § 540.201	10
28 C.F.R. § 540.202	7, 7-8 n.3, 12-13 n.6
28 C.F.R. § 540.202(b)	9 n.4
28 C.F.R. § 540.203	7
28 C.F.R. § 540.204(a).....	7
28 C.F.R. § 540.205(a).....	6
Federal Bureau of Prisons, Program Statement No. 5214.02, Communication Management Units (Apr. 1, 2015), <i>available at</i> https://www.bop.gov/policy/progstat/5214_002.pdf	7, 7-8 n.3, 12-13 n.6

GLOSSARY

ARP – Administrative Remedy Program

BOP – Federal Bureau of Prisons

CMU – Communication Management Unit

CTU – Counter-terrorism Unit of the Federal Bureau of Prisons

PSI – Pre-Sentence Investigation Report

USP – United States Penitentiary

PRELIMINARY STATEMENT

In 2006 and 2008, the Federal Bureau of Prisons (“BOP”) established Communication Management Units (“CMUs”) in Terre Haute, Indiana and Marion, Illinois. The CMUs were purportedly put in place so the BOP could restrict the communications of higher-risk prisoners, such as those with terrorism-related convictions or multiple communications infractions while incarcerated. But the BOP failed to develop appropriate procedures or criteria for CMU designation. In fact, when Plaintiff Kifah Jayyousi was sent to the CMU, there were no written procedures or criteria at all.

People designated to a CMU experience severe restrictions. All avenues of communication with the outside world are strictly curtailed and monitored by the BOP’s Counter-Terrorism Unit (“CTU”). The burdens imposed by these restrictions are magnified tremendously by the long duration of CMU placement. There is no cap on CMU retention, and Mr. Jayyousi spent nearly five years in the units, during which time he was prohibited from having a single contact visit with his wife, aging parents, or young children.

CMU designation is not only restrictive, but also highly unusual. Once the BOP finally documented the supposed criteria for CMU designation, thousands of federal prisoners were eligible, but only a few hundred have ever been considered for designation.

Based on the CMU's duration, selectivity and uniquely restrictive communications restrictions, in 2016 this Court held that prisoners have a liberty interest in avoiding placement in the units, reversing the district court's decision to the contrary. The Court remanded for the district court to decide, in the first instance, whether the procedures used to designate plaintiffs to a CMU and periodically review their placement satisfy due process.

They do not. The law is clear that notice, an opportunity to be heard, and periodic review are the minimum requirements for designation to a restrictive prison unit. Yet the BOP official responsible for designating Mr. Jayyousi to the CMU did not even write down the reasons for his decision. Instead, Mr. Jayyousi received a one-page notice listing reasons *supporting* his placement in a CMU; when he notified the BOP of factual errors in this document, his concerns were ignored. The BOP lacked a procedure for periodic review of CMU placement when Mr. Jayyousi arrived at the unit, so he was not reviewed for potential release to general population by an individual empowered to order such release until more than three years after his CMU designation. Once a process for review was finally created, it was haphazard and opaque.

Despite Plaintiff's undisputed evidence of these fundamental failings, the district court (Rothstein, J.) nonetheless granted summary judgment denying Plaintiff's procedural due process claim. This appeal follows. The Court should

reverse the district court's grant of summary judgment to Defendants, grant summary judgment to Plaintiff, and remand with instructions for the district court to preside over Mr. Jayyousi's request for expungement.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiff's claim under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. §§ 2201 & 2202 (Declaratory Judgment Act) because Plaintiff seeks declaratory and injunctive relief from the unconstitutional actions of federal officers.

This Court has jurisdiction under 28 U.S.C. § 1291. The district court rendered a final judgment on October 13, 2020 in an order granting summary judgment to Defendants, denying Plaintiff's motion for summary judgment, and dismissing the case. [Doc. 212¹]; *see also Pub. Citizen v. U.S. District Court*, 486 F.3d 1342, 1345 (D.C. Cir. 2007) ("A denial of a motion for summary judgment typically is not a final order, so it is ordinarily not appealable. However, an order denying a motion for summary judgment may be reviewed on appeal where it is accompanied by a final order disposing of all issues before the district court." (citation and internal quotation marks omitted)).

¹ Until Plaintiff files the Deferred Joint Appendix the "Doc." citations refer to the ECF docket numbers in the district court and "COA" citations refer to docket numbers in this Court.

Plaintiff filed a timely notice of appeal on December 8, 2020. [Doc. 213].

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court undervalued Mr. Jayyousi's private interest in avoiding placement and retention in a Communication Management Unit, which this Court previously held imposes an atypical and significant hardship compared to the ordinary incidents of prison life.
2. Whether the district court erred in holding that the BOP's procedures satisfied due process despite the CMU decisionmaker's failure to document his reasons, and Mr. Jayyousi only receiving notice of some of the reasons supporting his placement, not having access to a hearing that could result in reversal of his placement decision or an opportunity to meaningfully rebut the factual basis for his placement, and receiving false information about how he could earn release to the general population.
3. Whether the district court erred in characterizing the Government's interest as its ability to maintain CMUs rather than its ability to implement certain procedural protocols for CMU designation.
4. Whether the district court erred by failing to perform the necessary balancing test to weigh the interests at stake with the value of additional procedures.

STATEMENT OF THE CASE

A. CMU Conditions of Confinement

Most federal prisoners live in general population prison units, where they interact with a large population of fellow prisoners, receive 300 minutes of social telephone calls per month, and can enjoy contact visits with family and friends limited only by visiting hours and visiting room space – for up to 49 hours per month. [Doc. 138-2 at 1-2, ¶¶ 2-5].² The BOP encourages these individuals to use social telephone calls, visits, and letters to stay in touch with family and other loved-ones, due to the critical role such communication plays in personal development and successful reentry back into society. [Doc. 138-2 at 5, ¶ 19]. Because general population units impose no unusual restrictions, people may be transferred from one to another at the BOP’s discretion, and without notice or a hearing. *See Meachum v. Fano*, 427 U.S. 215 (1976).

In contrast, the CMUs were designed for prisoners who “require communications monitoring beyond that which can feasibly be provided in the general [prison] population.” [COA 1631155 at 3, *Aref v. Barr*, D.C. Cir. 2016].

² Throughout, Plaintiff cites to his Statement of Undisputed Facts submitted to the district court in support of his motion for Summary Judgment and reproduced in the Joint Deferred Appendix at JA-[XXX]. All evidence supporting these facts, if not included in the Deferred Joint Appendix, can be found in the record.

See also, 28 C.F.R. § 540.200 et seq.³ While this broad description renders thousands of prisoners eligible for CMU placement, very few have been so designated. [COA 1631155 at 23].

CMU selectees live, program, and work separately from all other prisoners. [Doc. 138-2 at 4-5, ¶ 16]. All avenues of communication with the outside world are restricted and monitored. All CMU social visits are live-monitored by BOP staff and must occur in English, unless previously scheduled for simultaneous translation. [COA 1631155 at 3]. These visits are strictly non-contact – meaning that prisoners and their visitors, including young children, meet in partitioned rooms separated by thick plexiglass, speak over a telephone, and are forbidden from hugging or touching hands. [*Id.*]. Visitation for people in a CMU may be limited to four hours per month, with immediate family members only, but the BOP currently allows up to eight hours of visitation per month. [*Id.*]; 28 C.F.R. § 540.205(a).

Telephone restrictions are similarly harsh. CMU social calls can be limited to three 15-minute calls per month, with immediate family only. [COA 1631155 at

³ The CMUs were opened without notice and comment rulemaking. The BOP issued a Proposed CMU Rule in April of 2010 and a final rule on January 22, 2015. [COA 1631155 at 4 n.1]. CMU conditions and procedures have now been codified at 28 CFR § 540.200 et seq. The regulation was not put into place until after Mr. Jayyousi's time in the CMU.

4]; 28 C.F.R. § 540.204(a). The BOP voluntarily provides two pre-scheduled 15-minute calls a week. [COA 1631155 at 4]. Like visits, all social calls are live-monitored, and must occur in English unless they can be live-translated. [Doc. 138-2 at 6, ¶¶ 25, 26].

Written correspondence is read by CTU officials to determine whether it should be forwarded to the recipient. There is no current limit on correspondence, but the regulation authorizes limiting mail to six double-sided pages per week, to one recipient only. 28 C.F.R. § 540.203.

CMU placement is indefinite; there is no limitation on the duration of a prisoner's designation, and most placements last for years. [COA 1631155 at 6]; [Doc. 138-2 at 5, 12, 43, ¶¶ 17, 58, 59, 275, 277].

B. CMU Criteria & Procedures

The BOP opened the first CMU before establishing written criteria for CMU placement or a process for designating people to the unit. [COA 1631155 at 4 n.1], [Doc. 138-2 at 15-17, ¶¶ 84-86, 94]. Years later the BOP codified CMU notice and designation procedures in a policy document, but the procedures lack critical detail and fail to correct the deficiencies uncovered in the course of discovery. [Doc. 138-6 at 82-84]; 28 C.F.R. § 540.202.⁴ CMU procedures have been a moving target

⁴ The BOP's implementing Program Statement, (*see* Federal Bureau of Prisons, Program Statement No. 5214.02, Communication Management Units (Apr. 1,

throughout the course of this litigation; below we describe the procedures used to designate and review Mr. Jayyousi.

CMU designation begins with referral of a prisoner to the CTU for consideration; referrals can come from “just about any source.” [COA 1631155 at 5 n.2]; [Doc. 138-2 at 17, ¶ 98]; [Doc. 138-14 at 26]. The CTU then creates a “designation packet,” which includes a referral memo summarizing the information that supports designation and recommending for or against CMU placement, and a proposed Notice of Transfer to be given to the prisoner. [COA 1631155 at 5 n.2]; [Doc. 138-2 at 17-18, ¶¶ 99, 100]; [Doc. 138-14 at 25-26, 32-36]. The CTU forwards the packet to the Office of General Counsel for a review of legal sufficiency and then to the Correctional Programs Division. [COA 1631155 at 5 n.2].

Prior to the codification of a CMU rule, the packet was then forwarded to the Regional Director, who routed the designation packet through several administrators in his office, so each might opine on whether they concurred with CMU placement, after which the Regional Director made the final designation decision. [*Id.*]. The Regional Director did not document the reason for his decision

2015), available at https://www.bop.gov/policy/progstat/5214_002.pdf, hereafter “CMU Program Statement”), also fails to correct the CMUs’ myriad procedural deficiencies.

anywhere, and thus it may have been different from the reason listed by the CTU to be provided to the prisoner on the Notice of Transfer. [Doc. 138-2 at 19-20, ¶¶ 110-114]; [Doc. 138-4, at 33, 34, 56]; [Doc. 138-6 at 85-87]. The CTU does not have a policy or practice of including *all* of the reasons for their CMU recommendation on the Notice of Transfer. [Doc. 138-2 at 25, ¶ 145].⁵ If the CTU finds a prisoner eligible for placement in a CMU for multiple reasons the CTU “might not list them all . . . just because of space.” [Doc. 152-2 at 8].

Criteria for CMU placement have developed over time, and have changed to fit, post hoc, the type of prisoners who were being sent to the CMU. [Doc. 138-2 at 15, 16, 21-22, ¶¶ 85, 88, 125-127]; [Doc. 138-14 at 18-20]; [Doc. 138-6 at 212-16]. Thus, when Mr. Jayyousi was initially designated to the CMU, he could not compare the reasons for his placement against any criteria.

Today, there are five criteria for CMU placement:

- (a) The inmate’s current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;
- (b) The inmate’s current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a substantial likelihood that the inmate

⁵ Under the BOP’s final rule, CMU designation is decided by the Assistant Director of the Correctional Programs Division, rather than the Regional Director. 28 C.F.R. § 540.202(b). It does not appear that any other aspect of designation has changed, and the rule still includes no requirement that the decisionmaker document the reason(s) for her decision. *Id.*

will encourage, coordinate, facilitate, or otherwise act in furtherance of illegal activity through communication with persons in the community;

- (c) The inmate has attempted, or indicates a substantial likelihood that the inmate will contact victims of the inmate's current offense(s) of conviction;
- (d) The inmate committed prohibited activity related to misuse or abuse of approved communication methods while incarcerated; or
- (e) There is any other substantiated/credible evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's communication with persons in the community.

28 C.F.R. § 540.201. Not all prisoners who fit the criteria are considered, recommended or approved for CMU placement, and the BOP has never developed guidance as to how the criteria should be applied. [Doc. 138-2 at 23, ¶¶ 131, 132]; [Doc. 138-6 at 220-21]; [Doc. 138-6 at 67].⁶

These vague criteria have allowed for a disturbing overrepresentation of Muslim men in the CMU. Of 178 total CMU designations, 101 (around 57%) have been of Muslim prisoners. [Doc. 138-2 at 42, ¶ 272]; [Doc. 138-22]. Compared to a Muslim population within the BOP of approximately 6% ([Doc. 138-2 at 43, ¶ 274]; [Doc. 138-25 at 30]), this marks a *vast* overrepresentation which cannot be explained away by virtue of the CMU's focus on terrorism. Of the first 55

⁶ Given this lack of guidance, it is unsurprising that one North Central Regional Office staff-member tasked with making recommendations to the Regional Director described the CMU criteria as far as she understood it as "very vague," and "never really established formally" or "set." The only guidance she received was just to look for prisoners who "needed their communication with the outside world limited." [Doc. 138-2 at 24, ¶ 141]; [Doc. 138-15 at 70, 71].

prisoners designated to the CMU, 45 were sent there because of their connection to terrorism, but the other ten were designated due to involvement in prohibited activities related to communication; of that ten, eight self-reported as Muslim. [Doc. 138-2 at 42, ¶ 273]; [Doc. 138-22 at 1-12].

CMU prisoners receive no hearing prior to placement; instead they are told they can challenge their CMU designation after the fact by utilizing the BOP's Administrative Remedy Program ("ARP"), but not a single CMU prisoner has ever been released from the CMU as a result of that process. [Doc. 138-2 at 26, ¶¶ 149, 152]; [Doc. 138-7 at 44-45, No. 19]. Periodic reviews for release from the CMU are haphazard as well. Although the BOP did not admit it at the time, for the first three years the CMUs operated, there was no review process in place to allow for a transfer out of the unit. [Doc. 138-2 at 43-44, 45-46, ¶¶ 280, 281, 293-295]; [Doc. 138-19 at 3-15]; [Doc. 138-8 at 137, No. 194]; [Doc. 138-6 at 97-98, 100-01, 103-04]. Thus, for those three years, not a single prisoner was transferred from the CMU to a non-CMU general population unit. [Doc. 138-8 at 135, No. 190].

On October 14, 2009, the BOP issued a memo indicating that CMU prisoners should be reviewed for potential redesignation at every program review, every six months. [Doc. 138-2 at 45-46, ¶¶ 293-297]; [Doc. 138-6 at 97-98, 100-02, 103-04]; [138-15 at 45-48]. But for years after this policy began, both CMUs' institutional supplements included erroneous information about the timing and

nature of those reviews. [Doc. 138-2 at 46-48, ¶¶ 300-306]; [Doc. 138-26 at 115]; [Doc. 138-6 at 104-09, 122-24, 125-27]; [Doc. 138-4 at 3]; [Doc. 138-4 at 14]; [Doc. 138-27 at 3]; [Doc. 138-27 at 9]; [Doc. 138-27 at 19].

From October of 2009 on, CMU periodic review commenced with the CMU unit team, which is tasked with determining whether continued CMU placement is still necessary by “consider[ing] whether the original reasons for CMU placement still exist” along with “whether the original rationale for CMU designation has been mitigated, whether the inmate no longer presents a risk, and that the inmate does not require the degree of monitoring and controls afforded at a CMU.” [Doc. 138-15 at 46-47]. If the unit team recommends a prisoner for transfer out of the CMU, it passes this recommendation on to the warden for his/her review and recommendation. [*Id.*]. If the warden disagrees with the unit team’s recommendation, the review process ends. [Doc. 138-6 at 120]. If the warden concurs, s/he forwards that recommendation to the CTU, which then considers the facility recommendation and makes an independent assessment. [Doc. 138-6 at 120-21]; [Doc. 138-15 at 45-48]. The CTU forwards its recommendation, and the facility’s, to the Regional Director for a final decision. [Doc. 138-15 at 45-48].⁷

⁷ According to the BOP’s new program statement, as of 2015, redesignation is determined by the Assistant Director of the Correctional Programs Division, rather

Prisoners who are denied transfer from the CMU are supposed to be notified in writing by the unit team of the reason(s) for continued CMU designation. [*Id.*]. In practice, however, the BOP notifies prisoners of transfer denials by sending a form memo that does not explain why the prisoner was denied transfer. [Doc. 138-28 at 8-10]; [Doc. 138-6 at 128-29].

C. Plaintiff's Designation to a CMU

Kifah Jayyousi was designated to the Terre Haute CMU in June of 2008. [COA 1631155 at 7]. His Notice of Transfer indicates that his offense conduct involved use of “religious training to recruit other individuals in furtherance of criminal acts in this country ... and included significant communication, association and assistance to al-Qaida.” [Doc. 138-19 at 1-2]. Mr. Jayyousi used the ARP to appeal his designation, arguing that neither his conviction nor offense conduct included religious recruitment or assistance to al-Qaida. [Doc. 138-19 at 13]. The BOP failed to respond to these factual questions. [COA 1631155 at 7].

Mr. Jayyousi was told he would be considered for redesignation to general population every six months, at every program review. [Doc. 138-2 at 43, ¶ 280]. As explained above, this was untrue as the BOP did not yet have criteria or a process to consider Mr. Jayyousi for release from the unit. [COA 1631155 at 5];

than the Regional Director. Nothing else material appears to have changed with respect to the process. *See* CMU Program Statement at 13.

[Doc. 138-2 at 45, ¶ 293]; [Doc. 138-6 at 97-98]. Instead, Mr. Jayyousi was first considered for a possible transfer out of the CMU in December 2009, after 18 months in the CMU. [Doc. 138-2 at 58-59, ¶¶ 386-390]; [Doc. 138-29 at 47-65]; [Doc. 138-29 at 66-78]; [Doc. 138-29 at 79-80]; [Doc. 138-29 at 81-82]. At that time and at his next program review, Mr. Jayyousi's unit team and warden recommended against his transfer because of the nature and severity of his offense, the length of his sentence, and his offense conduct. [Doc. 138-2 at 59-60, ¶¶ 391, 395, 396]; [Doc. 138-15 at 38-41]; [Doc. 138-29 at 92-93].

After almost two and a half years with clear conduct in the Terre Haute CMU, Mr. Jayyousi was transferred to the Marion CMU. [Doc. 138-2 at 60, ¶ 399]; [Doc. 138-30 at 10-12]. On February 22, 2011, Mr. Jayyousi's new unit team recommended him for transfer out of the CMU based on his clear conduct and good rapport with staff, and Warden Hollingsworth concurred. [COA 1631155 at 8]; [Doc. 138-2 at 60, ¶ 401]; [Doc. 138-30 at 18-19]; [Doc. 138-27 at 39-41]. The CTU, however, recommended against Mr. Jayyousi's transfer, reiterating the same contested information about Mr. Jayyousi's supposed support for al-Qaida, and including in their redesignation memo additional false statements that, while in the CMU: (1) Mr. Jayyousi was precluded from acting as the unit Muslim prayer leader and this restriction was never lifted (he was not: *compare* [Doc. 138-30 at 21] *with* [Doc. 152-6 at 102]); (2) Mr. Jayyousi "continued to espouse anti-Muslim

beliefs [sic] . . . [and] made inflammatory comments regarding the United States and other non-Muslim countries and cultures (he did not: *compare* [Doc. 138-30 at 21] *with* [Doc. 152-7]⁸); and (3) Terre Haute staff who reviewed Mr. Jayyousi's placement decided not to recommend him for transfer from the CMU "due to his continued radicalized beliefs and associated comments" (they did not: *compare* [Doc. 138-30 at 22] *with* [Doc. 138-29 at 81-82]; [Doc. 138-15 at 38-41]; [Doc. 138-29 at 88]; [Doc. 138-29 at 92-93]). Mr. Jayyousi received a short memo informing him that his transfer had been denied without any explanation why. [Doc. 138-2 at 61, ¶¶ 408, 409]; [Doc. 138-30 at 48].

Two years later, on March 28, 2013, Mr. Jayyousi's unit team and warden again recommended him for transfer based on his four and a half years of clear conduct in the CMU, and this time the CTU concurred. [Doc. 138-2 at 62-63, ¶¶ 418-420]; [Doc. 138-30 at 67-69]; [Doc. 138-30 at 70-73]. The Regional Director approved Mr. Jayyousi's transfer without explanation. [Doc. 138-2 at 63, ¶¶ 421-423]; [Doc. 138-30 at 74-75]; [Doc. 138-8 at 70, No. 26]. Mr. Jayyousi was finally released from the CMU in 2013, but the CTU's final redesignation memo noted

⁸ Plaintiff's Counsel have reviewed all the CTU's intelligence summaries which recount Mr. Jayyousi's communications, and the only statement he appears to have made that could even possibly fit this description is an email to his daughter, cited above, discussing a writing project for her school, in which Mr. Jayyousi criticized Israel's targeting of civilians in Gaza.

that he “is likely to radicalize or recruit other inmates while in BOP custody” and “does warrant continued monitoring and supervision to preclude illicit activity.” [Doc. 138-30 at 73]. All this erroneous information remains in the BOP’s files and may be shared with other law enforcement agencies.

Mr. Jayyousi was released from BOP custody in September of 2017, and is currently serving a 20-year term of supervised release. [Doc. 184-1 at 14, ¶ 3].

D. Proceedings Below

Mr. Jayyousi and several co-plaintiffs brought suit in 2010 to challenge their CMU placements, asserting six separate claims for relief. [Doc. 5]. On March 30, 2011, the Honorable Ricardo M. Urbina dismissed all but the procedural due process claim. [Doc. 37]. Discovery commenced, and on November 20, 2012, Plaintiffs were granted leave to file an Amended Complaint, adding retaliation claims on behalf of Plaintiffs McGowan and Jayyousi against Defendants in their official capacity and against Leslie Smith in his individual capacity. [Docs. 85, 88-1.] The Honorable Barbara J. Rothstein dismissed the damages claims on July 12, 2013, but allowed Mr. Jayyousi’s official-capacity retaliation claim to continue. [Doc. 115].

After the close of discovery all Plaintiffs moved for summary judgment on their procedural due process claim, and Defendants cross-moved for summary judgment on both the procedural due process and Mr. Jayyousi’s official-capacity

retaliation claim. *See* [Docs. 138, 154, 157]. On March 16, 2015, Judge Rothstein granted Defendants' motion for summary judgment and denied Plaintiffs' motion. [Doc. 161]. Because Judge Rothstein held that Plaintiffs have no liberty interest in avoiding CMU designation, she declined to consider the extensive evidence of procedural failings presented by Plaintiffs in support of their motion. [*Id.* at 16].

Plaintiffs Jayyousi, Aref and McGowan appealed to this Court on May 13, 2015 [Doc. 163], and on August 19, 2016 this Court unanimously reversed [COA 1631155 at 2]. The Court scrutinized the restrictive conditions in the CMU, including the limitations on telephone calls and visits and the indefinite and prolonged duration of CMU confinement as compared to administrative segregation, which generally only lasts a few weeks. [*Id.* at 23-24]. The Court paid special attention to the selective nature of CMU designation, finding it "atypical because even though several thousand inmates could be designated to CMUs based on their commitment offenses, only a handful are placed under these restrictions." [*Id.*]. Applying the analysis previously established in *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999), the Court determined that the CMUs' duration and selectivity, along with the BOP's recognition that some process is necessary in making designations, pushed CMU designation over *Sandin v. Conner's* atypical and significant hardship standard. [COA 1631155 at 24 (citing *Sandin v. Conner*, 515 U.S. 472 (1995))].

Acknowledging that the parties had not focused their briefing on the subsequent question of what process is due, the Court remanded for the district court to consider in the first instance whether the BOP's CMU designation and review procedures satisfy due process. [COA 1631155 at 26]. In its remand, the Court noted the predictive nature of CMU designation decisions, which would likely render appropriate the minimal procedural protections set forth in *Hewitt v. Helms*, 459 U.S. 460, 472 (1983), as opposed to the more formal process required for disciplinary decisions set forth in *Wolff v. McDonell*, 418 U.S. 539 (1974). *See* [COA 1631155 at 26].

The Court also addressed Plaintiff Jayyousi and McGowan's damages claims against Defendant Smith based on their allegedly retaliatory placement and retention in the CMU. The Court reversed the district court's erroneous interpretation of the Prison Litigation Reform Act to bar such claims absent evidence of physical injury, but nevertheless granted qualified immunity. [COA 1631155 at 33-40]. This dispensed with Mr. McGowan's sole remaining claim, leaving Messrs. Jayyousi and Aref as the only remaining plaintiffs.

Upon remand to the district court, and after Messrs. Jayyousi and Aref were both released from BOP custody, Defendants once more moved to dismiss, arguing that release rendered their claims moot. *See* [Doc. 183]. Plaintiffs opposed, explaining that the BOP created inaccurate and highly prejudicial documents

during the flawed CMU designation and review process, and the continued impact of this material on their lives post-prison rendered their request for expungement of the material a live controversy between the parties. *See* [Doc. 184]. The district court granted the motion to dismiss Mr. Aref's claim, finding that his removal from the United States to Iraq rendered the possibility that he would be negatively impacted by the existence or dissemination of BOP records remote and speculative. [Doc. 189 at 12]. As for Mr. Jayyousi however, the district court denied the motion. [*Id.* at 11.] The district court relied on Mr. Jayyousi's evidence of the continuing consequence of BOP-created documents, including deposition testimony regarding the BOP's practice of sharing such information with outside government agencies, the FBI's attempts to interview Mr. Jayyousi since his release from prison, and the potential impact of CMU information on Mr. Jayyousi's ability to seek modification of his 20-year term of supervision. [*Id.*]; *see also* [Doc. 138-4, at 1-10]; [Doc. 138-4 at 11-19]. Relying on *Abdelfattah v. U.S. Department of Homeland Securities*, 787 F.3d 524 (D.C. Cir. 2015), the district court concluded that Mr. Jayyousi alleged "sufficient ongoing consequences from the continued existence of the CMU-related documents such that his request for expungement constitutes a live controversy." [*Id.*].

Having denied Defendants' motion to dismiss Mr. Jayyousi's procedural due process claim, the district court noted its readiness to determine the issues

remaining in the parties' pending cross-motions for summary judgment, but provided the parties with an opportunity to request additional briefing. [Nov. 4, 2019 Minute Order]. Neither party sought additional briefing, and on October 13, 2020 the district court granted summary judgment for Defendants, holding that the BOP's CMU designation and review procedures satisfy due process. [Doc. 212]. This appeal follows.

SUMMARY OF THE ARGUMENT

I. Mr. Jayyousi brings a procedural due process challenge to his CMU placement and retention. When an individual is deprived of a liberty interest, the court must determine whether the procedures employed satisfy due process demands by balancing “the private interest that will be affected by the official action” and “the risk of an erroneous deprivation of such interest” against the Government’s interest. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In concluding that Mr. Jayyousi had a liberty interest in avoiding CMU placement, this Court emphasized that CMU placement amounts to an atypical and significant hardship due to “its selectivity and duration, not its severity.” *See* [COA 1631155 at 24]. However, the lower court did not consider the selectivity and duration of CMU placement when assessing the weight of Mr. Jayyousi’s interest, focusing solely on this Court’s previous determination that CMUs are “less extreme in terms of deprivation” than administrative segregation. *See* [Doc. 212 at 8-10]. The lower

court improperly assessed Mr. Jayyousi's liberty interest in avoiding CMU placement under the first *Mathews* factor.

II. Based on the procedures employed, the risk of erroneous deprivation is high. *See Mathews*, 424 U.S. at 335. Notice of the “factual basis” for placement and a “fair opportunity” to rebut *that basis* “are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.” *Wilkinson v. Austin*, 545 U.S. 209, 225–26 (2005). The BOP's procedures deprived Mr. Jayyousi of both. The Supreme Court has held that “[a]n inmate must merely receive *some notice* of the charges against him.” *Hewitt*, 459 U.S. at 476 (emphasis added). But as the lower court acknowledged, the BOP only provided Mr. Jayyousi with notice of “some, but perhaps not all, of the reasons” for his CMU placement. The lower court erred in overlooking the distinctions between the notice provided to Mr. Jayyousi (notice of *some of the charges*) and the notice required by *Hewitt* (some notice of *the charges*). In addition, the BOP's ARP, which has never resulted in CMU redesignation, provided Mr. Jayyousi with a meaningless opportunity to rebut his designation and essentially “operate[d] as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.” *See Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016). Finally, due process requires a meaningful periodic review of continued designation. *See Hewitt*, 459 U.S. at 477 n.9. Mr. Jayyousi's periodic reviews (which did not begin

until 18 months after his CMU designation) did not satisfy due process: he received false information about the process and no information about the basis for his denials.

III. For the final *Mathews* factor, the district court improperly characterized the Government's interest. Mr. Jayyousi's procedural due process claim challenges the procedures implemented by the Government, not the Government's right to operate CMUs. The Government's interest therefore concerns its *ability to implement existing CMU designation and review procedures*. The district court erroneously identified the Government's interest as "maintaining CMUs." [COA 1631155 at 8, 14].

IV. The district court failed to weigh the burdens against the value of additional procedural safeguards, which the *Mathews* balancing test requires. A proper balancing leads to the conclusion that, with little burden on the Government, additional procedural safeguards will ensure that only those prisoners whose communications require monitoring are designated to the CMU. Thus, additional procedures both advance the Government's interest and protect Mr. Jayyousi's.

STANDARD OF REVIEW

This Court’s review of the district court’s judgment is *de novo*. See *Baumann v. District of Columbia*, 795 F.3d 209, 215 (D.C. Cir. 2015). The court “must be sure that the district court has not overlooked or impermissibly resolved any disputed material facts” and “must ensure that the judge correctly applied the relevant law to these undisputed facts.” *Abourezk v. N.Y. Airlines, Inc.*, 895 F.2d 1456, 1458 (D.C. Cir. 1990). “The court must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in his favor, and eschew making credibility determinations or weighing the evidence.” *Baumann*, 795 F.3d at 215. Similarly, on cross-motions for summary judgment, each motion is viewed separately, in the light most favorable to the non-moving party. See *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 952 (D.C. Cir. 2017).

ARGUMENT

A procedural due process challenge to prison segregation involves two steps. First, the court must inquire whether the prisoner’s segregation implicates a liberty interest protected by the Due Process Clause. *Sandin*, 515 U.S. at 484. Second, if such an interest exists, the court must then consider what process is due. *Wilkinson*, 545 U.S. at 224. Having held in 2016 that prisoners have a liberty interest in avoiding placement in a CMU, the Court need only consider the second question.

The district court correctly identified the relevant approach: to balance “the private interest that will be affected by the official action,” and “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards” alongside “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335; [Doc. 212]; [COA 1631155 at 8]. However, the district court erred in drawing this balance. It undervalued Mr. Jayyousi’s interest in avoiding CMU placement, made stark and obvious factual errors, and completely ignored the impact of Plaintiff’s undisputed facts regarding the sham nature of the procedures used to designate Mr. Jayyousi to the CMU and periodically review his placement.

I. Mr. Jayyousi Has a Significant Private Interest in Avoiding CMU Placement.

The first *Mathews* factor—the private interest at stake—is to be evaluated “within the context of the prison system and its attendant curtailment of liberties.” *Wilkinson*, 545 U.S. at 225. That said, the nature of *Sandin*’s liberty interest standard means that a prisoner who is entitled to any level of due process is necessarily challenging placement in a unit that imposes “an atypical and significant hardship” in comparison to the curtailment of liberties one could reasonably expect from the prison system in general. The district court erroneously

minimized the nature of Mr. Jayyousi's interest by selective citation to this Court's prior liberty interest decision.

The district court rested its analysis on this Court's prior finding that CMUs are "less extreme in terms of deprivation" than administrative segregation, [COA 1631155 at 23], and thus reasoned that Mr. Jayyousi's interest is less weighty than that of individuals placed in administrative segregation or other forms of solitary confinement. [Doc. 212, at 9]. This ignores key aspects of this Court's previous analysis.

When concluding that prisoners have a liberty interest in avoiding CMU placement, this Court noted that some administrative segregation conditions are harsher than corresponding conditions in a CMU, but went on to find that unlike administrative segregation, which generally lasts a few weeks, CMU placement lasts *years* and is selective—several thousand people are eligible for CMU designation, but only a small fraction are placed there. [COA 1631155 at 23]. Moreover, the types of communications restrictions in place at the CMU "increase in severity over time.... Inmates housed in CMUs, by contrast [with administrative segregation], may spend years denied contact with their loved ones and with diminished ability to communicate with them. The harms of these deprivations are heightened over time, as children grow older and relationships with the outside become more difficult to maintain." [*Id.* at 24].

Mr. Jayyousi spent 232 weeks (almost five years) in a CMU. [Doc. 138-2 at 12-13, ¶ 64]. He explains, “My five children grew up while I was in the CMU. Not being able to talk with them regularly, or hug them and my wife, siblings and parents, during the five years I was in a CMU was a torture I will never recover from.” [Doc. 184-1 at 14, ¶ 1].

It is not only the emotional harm of CMU designation that lingers. Inaccurate and highly prejudicial information about Mr. Jayyousi generated through faulty CMU designation and review procedures continues to present a false picture of Mr. Jayyousi to law enforcement and other government agencies. [Doc. 189 at 11]. Mr. Jayyousi’s interest is thus more than minimal.

II. The Procedures Used to Designate Mr. Jayyousi to the CMU and Periodically Review His Placement Created a High Risk of Error.

The second *Mathews* factor addresses “the risk of an erroneous placement under the procedures in place.” *Wilkinson*, 545 U.S. at 224–25. Since the CMUs opened in 2006, designation and review of CMU prisoners has been marred by systemic failures at every level, leading to an unconscionably high risk of erroneous placements. First, the one-page “Notice of Transfer” the BOP provides CMU prisoners after designation fails to reveal the reason(s) the prisoner was actually approved for the CMU, rendering the prisoners powerless to challenge reasons for placement. Second, the BOP offers no hearing before or after CMU placement; instead CMU prisoners are left to challenge their designation through

the BOP's ARP. But the ARP is futile: it offers no prospect of relief as it does not allow for substantive reevaluation of CMU placement. Third, for the first three years of the CMU's existence, the BOP had *no* process to review CMU prisoners for potential transfer out of the CMU; when the BOP finally put a summary process into place, it proved arbitrary and insufficient. CMU procedures are, in short, a sham. The district court did not find against these facts or discount their impact; it simply ignored them.

A. The BOP's CMU Notice Procedure Violates Due Process.

Notice of the "factual basis" for placement and a "fair opportunity" to rebut *that basis* "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson*, 545 U.S. at 225–26. "Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose and resembles more a scene from Kafka than a constitutional process." *Gray Panthers v. Schweiker*, 652 F.2d 146, 175 (D.C. Cir. 1980). Yet the undisputed facts presented to the district court and described below show that at the time of Mr. Jayyousi's designation to the CMU, the BOP only provided people in prison with notice of *some of the reasons* they were eligible for CMU designation and the CMU decisionmaker did not document the *actual* reasons for his placement decision. This is a system that creates an unacceptably high risk of error.

i. Notice of *Some of the Reasons* for Placement is Not the Same as *Some Notice of the Reasons* for Placement.

Mr. Jayyousi received a one-page “Notice to Inmate of Transfer to a Communications Management Unit” shortly after arriving at the unit. [Doc. 138-19 at 1-2]. The notice contained a short paragraph purporting to provide the basis for his transfer. [*Id.*]. Defendants concede that it was BOP practice for this notice to “list[] some but not necessarily all of the reasons the inmate was placed in a CMU.” [Doc. 146-1 at 10, No. 144]. According to the head of the CTU, some reasons were excluded due to lack of space on the form. [Doc. 152-2 at 8]. As the Regional Director responsible for CMU designation decisions testified, the notice was meant to provide “enough” information to “justify” CMU designation, even if that information did not comprise all of the reasons for CMU designation. [Doc. 152-6 at 67-68, 154:14-155:17]. As for the reasons that were excluded, it is also undisputed that the CTU, which drafts the Notice of Transfer, routinely excludes pivotal and potentially objectionable reasons for designation from the Notice. *See, e.g.*, [Doc. 138-6 at 141-42, 213:11-214:17] (“Q. Why is there no reference in this notice [of Transfer] to [former plaintiff] Daniel McGowan’s communications while incarcerated? A. I wish I had a specific answer. It certainly was relevant in the referral. And through review, a determination was made that this was the most relevant information to put in this notice in the limited space available.”); *see also* [Doc. 138-2 at 38, 39, 41, 42 ¶¶ 234, 240, 244, 246, 263, 265, 267, 269, 271]

(evidencing that excluded information on nine CMU prisoners' notices related to religious or political views).

The district court acknowledged that the notice of CMU placement “contained some, but perhaps not all, of the reasons” for Mr. Jayyousi’s designation, but nevertheless found this adequate under the Supreme Court’s guidance that “[a]n inmate must *merely receive some notice* of the charges against him.” [Doc. 212 at 11], *quoting Hewitt*, 459 U.S. at 476 (emphasis added). This confuses “some notice of *the charges*” with “notice of *some of the charges*.” The two are distinct.

While it is clear that notice under *Hewitt* need not be particularly detailed or include classified information that cannot be disclosed for security reasons, it does not follow that a determinative reason for placement may be omitted altogether *due to inadequate space on a form*. “[W]hen a notice requires its target to guess among several possible bases for adverse government action, it has not served” the fundamental purposes of due process. *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599 (D.C. Cir. 1993), *as amended on denial of reh’g* (Mar. 26, 1993).

As this Court has previously acknowledged, “agency disclosure of some but not all of the allegations against [designees] impairs their ability to fully clear their names . . . leaving them ‘stumbling towards a moving target.’” *Fares v. Smith*, 901

F.3d 315, 322 (D.C. Cir. 2018), *quoting Zevallos v. Obama*, 793 F.3d 106, 118 (D.C. Cir. 2015); *see also, Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 986 (9th Cir. 2011, as amended on Feb. 27, 2012) (holding that OFAC's disclosure of "only one of three reasons for its investigation and designation" rendered the notice "incomplete" such that it did "not meet the requirements of due process").

The purpose of this requirement is obvious: When an individual is provided with some but not all of the reasons for his placement in a CMU, refuting the reasons provided will not result in his release from the unit.

ii. Failure to Document the Reasons for a Decision Creates an Unacceptably High Risk of Error.

The Notice provided to Mr. Jayyousi fails for another reason as well, completely ignored by the district court: the CMU decisionmaker failed to reduce to writing his reasons for designating Mr. Jayyousi to the CMU. This glaring and inexplicable oversight cannot be reconciled with the demands of due process.

The facts are undisputed: At the time of Mr. Jayyousi's placement, BOP policy did not require the Regional Director to document his reasons for a CMU designation decision ([Doc. 138-2 at 20, ¶ 113]; [Doc. 138-6 at 86-87]) and Mr. Nalley, in keeping with this policy, did not document his reasons for designating Mr. Jayyousi to the CMU. [Doc. 138-2 at 20, 30, ¶¶ 113-115, 180]; [Doc. 138-4 at 55-57]; [Doc. 138-18]. Mr. Nalley testified to this clearly at his deposition,

explaining that he did not write down the reasons for his CMU placement decisions anywhere, and the only way to discover the reason a particular person was put in the CMU is to ask Mr. Nalley about it after the fact. [Doc. 138-4 at 55-57]; [Doc. 152-6 at 43]. Thus, when shown Mr. Jayyousi's Notice of Transfer, the BOP's 30(b)(6) witness conceded that it *did not* provide the Regional Director's reason for designating Mr. Jayyousi to the CMU. *See* [Doc. 138-6 at 164]: "Q: Does this notice indicate the reasons why Mr. Nalley approved Kifah Jayyousi for designation to a CMU? A: No. Q: What does this notice indicate? A: This notice indicates to the inmate the reasons that support his placement in the CMU. Q: Mr. Nalley could have based his approval of Mr. Jayyousi's designation on completely different reasons, correct? A: Mr. Nalley could have based his decision on what he felt was important in the referral packet and the information available to him to make that decision."

If more evidence of this fundamental oversight were needed, Mr. Nalley's failure to reduce to writing his reasons for individual CMU designation decisions is also apparent on the face of the relevant documents. The Regional Director documents his decision to designate an individual to the CMU on a "CMU review" form. [Doc. 138-18]. While others in the regional office write the reasons for their recommendation on this form and there is space on the form for the Regional Director to follow suit; he did not. [*Id.*].

Before the district court, Defendants objected to Plaintiff's undisputed facts (regarding Mr. Nalley's failure to document his reasons for CMU placement of Mr. Jayyousi and others) as "vague" and contradicted by the assertion that Mr. Nalley "reviewed the inmate's Notices of Transfer to ensure that they adequately summarized the reason for the inmate's placement." [Doc. 146-1 at 7, ¶¶ 113-115 and at 13, ¶ 180]. But Mr. Nalley's self-serving and carefully phrased declaration does not create a factual dispute in the face of Plaintiff's overwhelming evidence. Mr. Nalley and Mr. Schiavone both acknowledged that Mr. Nalley does not write down the reasons for his decision; *and that the only way to learn his reasons is to ask him.* [Doc. 138-4 at 55-57]; [Doc. 138-6 at 164]. Moreover, Mr. Nalley's declaration is notable in what it does not say. He does not state that he reviewed the Notice to ensure it adequately summarized *his* reasons for CMU designation, nor does he assert that he ever actually edited a single notice so that it would do so. [Doc. 147-2 at 5, ¶ 9] ("If as a result of my review of the draft notice, I concluded that it did not accurately summarize *the* reasons for placement, I *would have* requested that a change be made") (emphasis added). Mr. Nalley's deposition testimony makes it clear that he reviewed such notices to ensure they included a sufficient reason for CMU placement, without ensuring that *his* reason, or *all* reasons were summarized. [Doc. 152-6 at 67-68]; [Doc. 154:14-155:17].

Thus, when asked what would happen if Mr. Nalley was provided with ten different reasons why a particular prisoner should be sent to the CMU and Mr. Nalley only found two of those reasons relevant, Mr. Nalley admitted that he would not document those two reasons anywhere. [Doc. 138-4 at 56]. This failure to notify the individual of the reasons found determinative by the decisionmaker means that the individual “is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether.” *Gray Panthers*, 652 F.2d at 168–69. When the decisionmaker’s reasoning is not disclosed, an individual has not received the “factual basis” for his placement and has no opportunity to rebut *that basis*. *Wilkinson*, 545 U.S. at 225–26.

The ease with which BOP practices could be modified to provide proper notice cannot be overstated. When deciding to place Mr. Jayyousi in the CMU, Regional Director Nalley could simply have used the pre-existing space on the BOP’s CMU review form to document the reasons for his decision [Doc. 138-18], and Mr. Jayyousi could have been provided a non-classified summary of all of these reasons.

B. The BOP’s Administrative Remedy Process Is Not an Adequate Hearing.

The district court correctly acknowledged that, along with notice, due process requires that Mr. Jayyousi have a “fair opportunity for rebuttal” of the

factual basis for his placement. [Doc. 212 at 10], *see also Wilkinson*, 545 U.S. at 226 (opportunity for rebuttal among the most important procedural mechanisms for purposes of avoiding erroneous deprivations). Whether oral or written, the opportunity for rebuttal must provide a mechanism to present one's side of the story in a meaningful time and meaningful manner. *Mathews*, 424 U.S. at 333; *UDC Chairs Chapter v. Bd. of Trs.*, 56 F.3d 1469, 1472-73 (D.C. Cir. 1995).

CMU prisoners who wish to challenge their designation may do so by using the BOP's ARP, under which they may file a grievance and appeals regarding any aspect of prison life. [Doc. 145-1 at 21, ¶¶ 127, 128]. According to the district court, the ARP satisfies due process because Mr. Jayyousi had "an opportunity to present his views to the prison official charged with deciding whether to transfer him," and "the decisionmaker review[ed] the charges and then-available evidence against the prisoner." [Doc. 212 at 11], *quoting Hewitt*, 459 U.S. at 476. But this analysis ignores Plaintiff's undisputed evidence regarding the nature of that "review." The undisputed facts show that the ARP available to Mr. Jayyousi, which remains in effect to this day, could not possibly have resulted in his release from the CMU and was not a meaningful opportunity for rebuttal.

The Supreme Court has made it clear that the mere existence of a grievance procedure is not the end of an inquiry. "[D]espite what regulations or guidance materials may promise" one must ask if an administrative remedy "operates as a

simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.” *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016).⁹ If the recipient of prisoner grievances “disclaims the capacity to consider those petitions” or “[has] apparent authority, but decline[s] ever to exercise it” there is no possibility of relief and the administrative remedy process is a sham. *Id.*

The ARP available to and used by Mr. Jayyousi fits this description. First, and most importantly, Defendants concede that no CMU prisoner has *ever* been released from the CMU through the ARP. [Doc. 138-2 at 26, ¶ 152]; [Doc. 138-7 at 44-45, No. 19]. This, itself, is strong evidence that the process is meaningless, but it is far from the only evidence.

Under the BOP’s process, prisoners who have been transferred to the CMU may appeal that designation by submitting a short description of their concern to their unit team; if they are dissatisfied with the unit team’s response they may appeal to the warden, then to the Regional Director, and finally to BOP General Counsel. [Doc. 138-2 at 26, ¶¶ 150, 151]. Neither the unit team nor the warden have authority to order a prisoner redesignated from the CMU, so the first two levels of review are not even theoretically meaningful. [Doc. 138-2 at 19, ¶ 110].

⁹ *Ross* is not a procedural due process case, but rather involves the “availability” of administrative remedies such that exhaustion under the Prison Litigation Reform Act is required. *Id.* at 1862. The analysis, however, is directly relevant.

The Regional Director could theoretically respond to an administrative appeal by *reconsidering* his earlier placement decision, but the undisputed evidence shows that his office responds to such requests by *reviewing* the reasons for the prisoner's designation and then *reminding* the prisoner of the previously provided reasons. [Doc. 138-2 at 26, ¶ 153]; [Doc. 138-15 at 72]. The Regional Office *does not* reconsider the initial decision. [*Id.*]. Documentary evidence confirms this: the Regional Director routes a CMU "review form" through subject matter experts at his office every time he considers a prisoner for redesignation to or from the CMU; no such review forms are created in response to ARPs. [Doc. 138-2 at 19, 26, ¶¶ 109, 154, 155]; [Doc. 138-15 at 28]; [Doc. 138-15 at 83]; [Doc. 138-15 at 59]; [Doc. 138-4 at 37].

And because the Regional Director has final say on BOP designations, the General Counsel can only make a recommendation to the Regional Director about release, they cannot order it. [Doc. 138-2 at 27, ¶ 157]; [Doc. 138-4 at 41-42].

As detailed below, Mr. Jayyousi's experience confirms that the ARP does not provide a meaningful opportunity to rebut the factual basis for CMU placement. The undisputed evidence shows that while Mr. Jayyousi did have "an opportunity to present his views to the prison official charged with deciding whether to transfer him," and "the decisionmaker review[ed] the charges and then-available evidence against the prisoner," [Doc. 212 at 11] this paper review offered

no meaningful opportunity for factual rebuttal. None of the responses Mr. Jayyousi received addressed or acknowledged the factual errors he raised regarding his Notice of Transfer. [Doc. 138-19 at 3-15].

Mr. Jayyousi's Notice of Transfer indicates that he was designated to the CMU based on his offense conduct, which allegedly included "religious training to recruit other individuals in furtherance of criminal acts in this country ... [and] included significant communication, association and assistance to al-Qaida." [Doc. 138-19 at 1-2]. As required by policy, Mr. Jayyousi began the administrative process by submitting an "informal resolution form" or "BP8" disputing the factual basis for his transfer as described in his Notice of Transfer. [Doc. 138-19 at 15]. The BP8 response Mr. Jayyousi received from his case manager repeated *verbatim* the general language about the CMU provided to all designees and stated that Mr. Jayyousi's transfer was approved by the Central Office. [Doc. 138-19 at 14].

Mr. Jayyousi appealed using a "Request for Administrative Remedy" or "BP9" form, in which he identified the specific factual errors concerning him: that information in his Notice of Transfer did not accurately reflect his charges, conviction, or pre-sentence report ("PSI"), and that he was never claimed nor found to have assisted or associated with al Qaeda or recruited anyone. [Doc. 138-19 at 13]. The BP9 response, signed by Mr. Jayyousi's warden, repeats *verbatim* the BP8 response, states Mr. Jayyousi's crime of conviction, reports that he was

sentenced with a terrorism enhancement and indicates that Mr. Jayyousi's PSI clearly defines his association to terrorism. [Doc. 138-19 at 12]. It also states that "sensitive reporting from other law enforcement agencies was used to determine [his] placement in the CMU." [Id.]. This response fails to acknowledge or address Mr. Jayyousi's factual disputes about al-Qaeda or recruitment. [Id.]; see also [Doc. 138-14 at 75-76] (Warden Jett conceding that his response did not address Mr. Jayyousi's factual disputes). Instead, the warden's response provides a new reason for Mr. Jayyousi's CMU placement, not listed in the Notice of Transfer. In fact, there is nothing in Mr. Jayyousi's confidential CMU referral packet indicating the existence of any sensitive reporting from other agencies. [Doc. 138-18]; [Doc. 138-6 at 162-63].¹⁰

Mr. Jayyousi followed BOP procedures and filed a "BP10 Regional Administrative Remedy Appeal," noting that the warden's response did not address the factual issues raised in his BP9. The response, from CMU decisionmaker and Regional Director repeats, *verbatim*, the same information from the BP9 and BP8 response, repeats Mr. Jayyousi's crime of conviction, again ignores Mr. Jayyousi's

¹⁰ The district court noted this new reason as evidence of the BOP's review of the evidentiary record, without expressing concern that it was not included in the Notice of Transfer, and without checking to determine if it did, in fact, appear in the designation packet. [Doc. 212 at 11].

factual dispute regarding al Qaeda and recruitment, and ignores the new (false) reason for CMU placement provided in the BP9 response. [Doc. 138-19 at 9].

The final level of the ARP is a Central Office Appeal, or BP11. In response to Mr. Jayyousi's appeal, the national administrator apprised Mr. Jayyousi that he had "no due process rights" related to his CMU transfer and that he saw no need to "elaborate" on the responses provided to Mr. Jayyousi by the warden and Regional Director. [Doc. 138-19 at 5]. Mr. Jayyousi's administrative appeal was thus denied without any of the four BOP officials involved responding to or even acknowledging Mr. Jayyousi's factual points, and with the introduction of a new, undocumented reason for the placement that did not appear in Mr. Jayyousi's Notice of Transfer. In this context, the district court's conclusion that the process was constitutionally sufficient because Mr. Jayyousi was given "a chance to 'present his views'" and the decisionmakers "reviewed the charges and 'then-available evidence,'" [Doc. 212 at 12], is startlingly myopic.

The experiences of other CMU prisoners confirm that the BOP's procedures provide no meaningful opportunity for rebuttal. *See* [Doc. 138-2 at 32, 33, 34 ¶¶ 195, 197, 198, 205, 206, 207] (evidencing Daniel McGowan's attempt to use the ARP to show that his Notice of Transfer indicated that he had been convicted of destroying an energy facility and training others to commit arson, when his PSI demonstrates that those acts were committed by McGowan's co-defendant, not

McGowan); [Doc. 138-2 at 27-28, 29 ¶¶ 160-164, 169, 173] (evidencing that Yassin Aref tried to use the ARP to explain that, contrary to his Notice of Transfer, he never had any communication with a member of a foreign terrorist organization, yet this demonstrable error was ignored).

Due process does not always require a formal in-person hearing, but when an individual designated to a restrictive unit contests the factual basis for his placement, due process requires that the decisionmaker *respond* to the factual points raised, rather than presenting a moving target. *See Gray Panthers*, 652 F.2d at 165 (due process requires “a *genuine* opportunity to explain”) (emphasis added). Moreover, the process must allow for the possibility of reversal. The ARP does not, perhaps in part because the only individual with authority to change the decision is the one who made the decision in the first place. *See, e.g., Propert v. District of Columbia*, 948 F.2d 1327, 1333–34 (D.C. Cir. 1991) (Requirement of an unbiased decisionmaker not met when officer to whom appeal may be made is the same officer who decides that the vehicle is “junk” in the first place), *see also Procunier v. Martinez*, 416 U.S. 396, 418–19 (1974) (noting with approval district court decision that the author of a letter rejected by prison officials be given a reasonable opportunity to protest that decision before a prison official other than the one who originally disapproved the correspondence), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

At the end of the day, the district court seems to have rested its analysis of the notice and “hearing” provided to Mr. Jayyousi on its comfort with the *outcome* of the BOP’s procedures: Mr. Jayyousi’s notice indicates he was sent to the CMU because he “acted in a criminal conspiracy to raise money to support mujahideen operations and used religious training to recruit other individuals in furtherance of criminal acts,” and his “offense conduct included significant communication, association and assistance to al-Qaida, a group which has been designated as a foreign terrorist organization,” and “under standards later memorialized in the Dodrill Memo, these facts met the criteria for CMU designation.” [Doc. 212 at 10].

Perhaps the district court believed that Mr. Jayyousi’s attempts to contradict these facts would not have prevailed under a meaningful process, but this is not the proper analysis. Uncertainty that more process would have led to a different decision in a given case does not excuse a procedural violation. *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 320 (D.C. Cir. 2014); *see also, Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (“We have no reason to presume that the petitioners in this particular case could have offered evidence which might have either changed the Secretary’s mind or affected the adequacy of the record. However, without the due process protections which we have outlined, we cannot presume the contrary either.”) The adequacy of the procedures used to send Mr. Jayyousi to the CMU must be assessed “not

merely with reference to a single case, but having in mind the type of case it is, with regard to the run of such cases.” *Rafeedie v. INS*, 880 F.2d 506, 524–25 (D.C. Cir. 1989) (citing *Santosky v. Kramer*, 455 U.S. 745, 761-68 (1982), *Mathews*, 424 U.S. at 340–50, *Goldberg v. Kelly*, 397 U.S. 254, 264–68, (1970)). The notice and hearing procedures under which Mr. Jayyousi was designated to the CMU violate due process; whether a legitimate reason existed to designate Mr. Jayyousi to the CMU is not relevant.

C. The BOP Failed to Provide Mr. Jayyousi with Adequate Periodic Review of his CMU Placement.

Along with notice and an opportunity to be heard, due process requires periodic review of the continued need for segregation. *See Hewitt*, 459 U.S. at 477 n.9, *Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997). There is no settled rule as to how frequently review must occur, but annual review is probably insufficient. *McQueen v. Tabah*, 839 F.2d 1525, 1529 (11th Cir. 1988) (11 months without review stated a due process claim); *Toussaint v. McCarthy*, 801 F.2d 1080, 1101 (9th Cir. 1986) (12 months without review violated due process).

If redesignation is denied, the prisoner must be apprised in writing of the reason for continued segregation. *Wilkinson*, 545 U.S. at 225–226. “This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior.” *Id.*;

see also Williams v. Hobbs, 662 F.3d 994, 1008 (8th Cir. 2011) (review was meaningless because of the failure to explain with “reasonable specificity” why the prisoner continued to constitute threat to prison security).

In finding the BOP’s periodic review of Mr. Jayyousi adequate, the district court simply got the facts wrong. Inexplicably, the district court called it “undisputed that Jayyousi’s designation was reviewed in December 2008 . . . again on June 18, 2009 . . . and so on, approximately every six months, until he was released in conjunction with the periodic review process.” [Doc. 212 at 14]. This is incorrect: this Court has already recognized that the BOP did not institute periodic review of CMU prisoners until 2009—three years after the first CMU opened. [COA 1631155 at 5]. As the BOP’s 30(b)(6) witness explained, the BOP began considering redesignation of one CMU prisoner before 2009, but that process was paused until D. Scott Dodrill issued a memo creating a CMU review process in October of that year. [Doc. 138-6 at 104]. Mr. Jayyousi was first reviewed for potential release from the CMU in December of 2009, more than 18 months after his designation. [Doc. 138-2 at 30, 59, ¶¶ 176, 389-394]; [Doc. 138-29 at 79-82]. While Mr. Jayyousi was told he would be reviewed for redesignation every six months and, like all federal prisoners, he did receive *program reviews* every six months during this period, no review of the appropriateness of Mr. Jayyousi’s

CMU placement was undertaken at those reviews. [Doc. 138-2 at 43, 58, ¶¶ 80, 386, 387]; [Doc. 138-29 at 47-65].

CMU prisoners were also told they would be eligible for redesignation after 18 months in the unit without any disciplinary infractions. [Doc. 138-2 at 43-44 ¶ 281]; [Doc. 138-8 at 137, No. 194]. Mr. Jayyousi requested transfer upon attaining this milestone in December of 2009. [Doc. 138-29 at 79-80]. The warden disapproved redesignation based upon Mr. Jayyousi's offense conduct, despite his 18 months without a disciplinary offense. [Doc. 138-29 at 81-82]. Mr. Jayyousi filed an administrative remedy about the denial, noting that he was given no justification for the decision, that there was no clear policy around transfer, and pleading to be transferred to a prison closer to his home, where he would be able to hug his children. [*Id.* at 85-91]. In response to Mr. Jayyousi's concerns about the lack of a clear route out of the CMU, the Regional Director referred him to BOP Program Statement 5100.08 "Inmate Security Designation and Custody Classification." [*Id.* at 85]. That program statement indicates that BOP prisoners are eligible for a "nearer release" transfer after spending 18 months with clear conduct at a given facility. [Doc. 138-2 at 45, ¶ 291]; [Doc. 138-10 at 25]. However, in reality, 18 months of clear conduct was not sufficient for redesignation from a CMU. [Doc. 138-2 at 45, ¶ 293]; [Doc. 138-6 at 97-98].

Mr. Jayyousi's unit team denied redesignation from the CMU again in May of 2010 because "the original reasons for CMU designation and placement still exist." [Doc. 138-2 at 59-60, ¶ 395]; [Doc 138-29 at 92-93]. Mr. Jayyousi filed an administrative grievance noting that there was not a clear policy regarding redesignation from the CMU, that he did not understand the transfer review process and asking why he was being kept in the CMU. [Doc. 138-2 at 60, ¶ 397]; [Doc. 138-30 at 1-9]. The BOP declined to respond to these questions, stating that Mr. Jayyousi's grievance was repetitive of the one he filed after his first transfer request rejection, and would not be considered. [Doc. 138-2 at 59-60, ¶¶ 393, 394, 398]; [Doc 138-29 at 85-91]; [Doc. 138-30 at 5, 7, 9].

Under BOP policy, the Regional Director—the decisionmaker regarding potential CMU release—did not review prisoners for potential release from the CMU unless the unit team and warden recommended the individual for release. [Doc. 138-2 at 51, ¶ 327]; [Doc. 138-15 at 47]. Because Mr. Jayyousi's unit team and warden repeatedly opined against his release, Mr. Jayyousi was not reviewed by anyone with the capacity to release him until nearly three years after his CMU placement. [Doc. 138-2 at 20, 60-61, ¶¶ 176, 402, 406]; [Doc. 138-30 at 19-22]; [Doc. 138-6 at 165-66].

On February 22, 2011, after being transferred to the Marion CMU, Mr. Jayyousi's new unit team recommended him for transfer out of the CMU based on

his clear conduct and good rapport with staff, and Warden Hollingsworth concurred. [Doc. 138-2 at 60, ¶¶ 399, 401]; [Doc. 138-30 at 10-12, 18-19]; [Doc. 138-27 at 39-41]. The CTU, however, recommended against Mr. Jayyousi's transfer and included in its supporting memo and packet to the Regional Director a substantial amount of information about Mr. Jayyousi leading a Friday Jumah prayer while at the Terre Haute CMU in 2008. [Doc. 138-2 at 61, ¶ 403]; [Doc. 138-30 at 21, 23-38]. The Regional Director denied Mr. Jayyousi's transfer without explanation and without any documentation of his reasons. [Doc. 138-2 at 61, ¶¶ 406-409]; [Doc. 138-30 at 16-17]; [Doc. 138-6 at 167-68]; [Doc. 138-30 at 48].

Prisoners who are denied transfer from the CMU are supposed to be notified in writing by the unit team of the reason(s) for continued CMU designation. [Doc. 138-2 at 53, ¶ 338]; [Doc. 138-15 at 47]. This is especially important if a prisoner's conduct while at the CMU is the (or a) reason for ongoing retention there. [Doc. 138-2 at 53, ¶ 339]; [Doc. 138-6 at 112-14]. In practice, however, the BOP notifies prisoners of transfer denials by sending a form memo that does not explain why the prisoner was denied transfer. [Doc. 138-2 at 53, ¶ 340]; [Doc. 138-28 at 8-10]; [Doc. 138-6 at 128-29]. Without information about why they are being kept in the CMU, the prisoner cannot meaningfully challenge the review outcome, nor can he change his behavior (if relevant) to eventually earn release.

In keeping with this pattern, Mr. Jayyousi was not informed that his three-year-old Jumah sermon played any role in his continued CMU retention. [Doc. 138-2 at 52, ¶ 412]; [Doc. 138-30 at 57, ¶ 2]. Using the ARP to try to learn the reasons for his denial again bore no fruit. [Doc. 138-2 at 62, ¶¶ 410, 411]; [Doc. 138-30 at 44-55]. The BOP's failure to identify the relevance of the Jumah prayer is particularly troubling, as Mr. Jayyousi was initially brought up on disciplinary charges for leading that prayer, but was ultimately cleared of any wrongdoing through the disciplinary process. [Doc. 138-2 at 61, ¶ 404]; [Doc. 138-30 at 41-42]. Indeed, the BOP *expunged* the charge from his record. [*Id.*].

Shortly thereafter, Warden Hollingsworth was replaced by Warden Roal Warner, and under her leadership, Mr. Jayyousi's unit team recommended against his transfer from the CMU at his next three program reviews. [Doc. 138-2 at 62, ¶¶ 413, 414]; [Doc. 138-30 at 60-66]. Though BOP policy requires the unit team to make an independent recommendation for review by the warden, Mr. Jayyousi's unit team told him that Warden Roal Warner herself decided that he would not be recommended for transfer. [Doc. 138-2 at 51, 52, 62 ¶¶ 326, 329, 415]; [Doc. 138-15 at 45-48]; [Doc. 138-27 at 48-49]; [Doc. 138-30 at 57, ¶ 3]. BOP documentation of those decisions state only that the reasons for Mr. Jayyousi's original placement continued to exist. [Doc. 138-2 at 62, 416]; [Doc. 138-30 at 60-66]. Because the

warden disapproved transfer, Mr. Jayyousi was again not considered for release from the CMU by anyone authorized to order his release for another 18 months.

Finally, on March 28, 2013, Mr. Jayyousi's unit team recommended him for transfer based on his four and a half years of clear conduct in the CMU, and a new warden and the CTU concurred. [Doc. 138-2 at 62-63, ¶¶ 418-420]; [Doc. 138-30 at 67-73]. The Regional Director approved Mr. Jayyousi's transfer without explanation, and he was transferred to a non-CMU general population unit at USP Marion in May of 2013. [Doc. 138-2 at 63, ¶¶ 421-423]; [Doc. 138-30 at 67-69]; [Doc. 138-8 at 70, No. 26]. Mr. Jayyousi was never told what he had done to finally "mitigate" the original reasons for his CMU designation, almost five years later. [Doc. 138-2 at 63, ¶ 424]; [Doc. 138-30 at 57, ¶ 5].

The district court ignored all these undisputed facts, reasoning that because Mr. Jayyousi received CMU reviews every 6 months (he did not), the CMU procedures were adequate. [Doc. 212 at 14]. The court failed to consider evidence that Mr. Jayyousi was provided false information about how to earn release from the CMU ([Doc. 138-2 at 43, ¶ 280]; [Doc. 138-19 at 12]), did not receive any review of his designation to the CMU for the first 18 months of his placement ([Doc. 138-2 at 58, ¶¶ 386, 387]; [Doc. 138-29 at 47-65]), did not receive a review by an individual authorized to order his release for the first 36 months of his placement ([Doc. 138-2 at 30, 60-61, ¶ 176, 402, 406]; [Doc. 138-30 at 20-22]);

[Doc. 138-6 at 165-66]), did not receive explanations for his denials ([Doc. 138-2 at 61, ¶¶ 407-409]; [Doc. 138-30 at 16-17]; [Doc. 138-30 at 48]; [Doc. 138-6 at 165-66]) and was not told that he needed to change his institution conduct to earn release from the CMU ([Doc. 138-2 at 62, ¶ 412]; [Doc. 138-30 at 57, ¶2]).

Reviews of this nature violate due process. *See Williams*, 662 F.3d at 1009

(prisoner was deprived of due process because defendants “failed to apprise [him] of the reasons that he continued to pose a threat to the security and good order of the prison”); *McQueen*, 839 F.2d at 1529; *Toussaint*, 801 F.2d at 1101.

III. The Government’s Interests Align with Mr. Jayyousi’s.

The final *Mathews* factor is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Wilkinson*, 545 U.S. at 224–25.

This Court has already opined that “the Government’s legitimate interests in *maintaining CMUs* must be accorded substantial weight,” [COA 1631155 at 26 (emphasis added)]. The district court interpreted this to mean that the

government’s interest for *Mathews* balancing is “substantial.” [Doc. 212 at 15.]

However, the BOP’s right to operate a CMU is not at issue in this case, nor is the Court being asked to second-guess any CMU security protocols. Rather, the third factor requires this Court to identify the Government’s interest—including fiscal and administrative concerns—in *its CMU designation and review procedures*.

Based on the Declaration of David Schiavone, the Government's main interests with respect to CMU procedures appear to include (1) the proper identification of prisoners whose communications pose a security threat warranting CMU monitoring [Doc. 149, at 13-14, ¶ 38], (2) provision of a notice to prisoners setting forth the reason(s) for their CMU placement without providing detail that would implicate sensitive law enforcement information [*id.* at 10, ¶ 27], (3) a hearing that would not alert CMU designees to the possibility of transfer prior to transfer itself, so as to avoid incentive to engage in prohibited communications prior to transfer [*id.* at 12, ¶ 36], and (4) review every 6 months to determine if the prisoner no longer requires the enhanced monitoring of a CMU [*id.* at 11, ¶ 30].

As explained in more detail below, all these interests align with Mr. Jayyousi's.

IV. The District Court Failed to Properly Weigh the *Mathews* Factors.

The District Court concluded its opinion with a section entitled "*Government's Interest; and Burdens and Value of Additional Process*," but no actual examination of the burdens and values of additional process follows. [Doc. 212 at 14-15]. Had the district court actually weighed the three factors, this appeal might not have been necessary, as Mr. Jayyousi and the BOP's interests barely diverge. The BOP has an interest in notice which provides a summary of the reasons for CMU placement; requiring the CMU decisionmaker to document the

reasons for his decision and summarize each of those reasons on the Notice to Inmate provides significant value to the prisoners, with minimal additional burden to the BOP. The BOP raises concerns that sensitive law enforcement information not be disclosed to the prisoner [Doc. 149 at 12, ¶35]; but the possibility that some sensitive law enforcement information might need to be summarized rather than fully disclosed provides no reason to deviate from full notice in the general course. *See, e.g., Fares*, 901 F.3d at 324 (opining that due process does not require “all-or-nothing” when there is the possibility classified information may be involved, as unclassified summaries that provide the “who, what, when and where of the allegations” may provide sufficient notice in certain limited circumstances) (internal quotation marks omitted) *quoting Kiareldeen v. Ashcroft*, 273 F.3d 542, 548 (3d Cir. 2001)).

As for an opportunity to be heard, again, Mr. Jayyousi and the BOP share an interest in ensuring that only those prisoners whose communications require monitoring are designated to the CMU, so a procedure that allows for the correction of any factual error in designation is of value to both parties. Requiring a neutral decisionmaker (not the individual who made the designation decision in the first place) to *respond* to arguments about factual error will obviously reduce the risk of such error, and is not particularly burdensome, especially since the process need not require an in-person hearing.

Finally, the BOP apparently recognizes the value of periodic review every six months, since that is the current procedure. [Doc. 149 at 11, ¶ 30]. All the BOP must do to bring its periodic review procedures in line with due process is (1) provide for 6 month review by an individual authorized to actually make CMU release decisions, rather than allowing the unit team who is unlikely “to have the background and knowledge to adequately assess all available intelligence and law enforcement information relevant to the question of whether an inmate warrants the monitoring and controls of a CMU” ([*Id.* at 13, ¶ 38]) to block review for years on end, and (2) *follow* its current procedures requiring that prisoners denied redesignation to general population receive an explanation why.

These minimal additional procedures will go far toward reducing erroneous deprivations of liberty, without unduly burdening the BOP’s ability to run the CMUs.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court’s grant of summary judgement to Defendants, grant summary judgment to Plaintiff, and remand for the district court to preside over Mr. Jayyousi’s request for expungement.

Dated: April 7, 2021

Respectfully submitted,

/s/ Rachel Meeropol

Rachel Meeropol
Pardiss Kabraei
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6432
Fax: (212) 614-6499
rachelm@ccrjustice.org

Gregory Silbert
Eileen Citron
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
gregory.silbert@weil.com

Kenneth A. Kreuzscher
Kenneth A. Kreuzscher Law LLC
1130 SW Morrison Street, Suite 407
Portland, OR 97205
Tel: 971-303-9453
KennethKreuzscher@gmail.com

Attorneys for Plaintiff-Appellant

**Certificate of Compliance with Type-Volume Limitation
Typeface Requirements and Type Style Requirements**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced type face using Microsoft Office Word 2010 in 14-point Times New Roman.

Dated: New York, NY
 April 7, 2021

s/Rachel Meeropol
Rachel Meeropol

CERTIFICATE OF SERVICE

I, Rachel Meeropol, hereby certify that on this seventh day of April 2021, the foregoing Brief for Plaintiff-Appellant was filed using the CM/ECF system, which shall send notice to all counsel of record.

/s/ Rachel Meeropol
Rachel Meeropol