IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YASSIN MUHIDDIN AREF, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0539 (BJR)
ERIC HOLDER, *et al.*	)	
Defendants.	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This action is brought by two inmates, Yassin Aref and Kifah Jayyousi, who were formerly housed in the Bureau of Prisons' Communications Management Units ("CMUs"). The CMU is a general population unit that is used by the BOP to effectively monitor the communications of high-risk prisoners, including inmates, like the plaintiffs, with terrorist convictions. To ensure such monitoring, inmates in a CMU receive somewhat less telephone and visiting time than inmates in a typical general population environment and are not permitted to have social contact visits. However, CMU inmates still have ample opportunities to communicate with persons in the community.

This Court has already dismissed all of the plaintiffs' claims attacking the legality of the CMU's communication restrictions, concluding that plaintiffs failed to plausibly allege that the restrictions are unrelated to the legitimate goal of effectively monitoring the communications of high-risk inmates. *Aref v. Holder* (*Aref* I), 774 F. Supp. 2d 147, 163 (D.D.C. 2011) (Urbina, J). The only claims left standing by the Court are plaintiffs' allegation that their past transfer to and

retention in a CMU violated their procedural due process rights, and Jayyousi's allegation that he was kept in a CMU in retaliation for protected religious or political speech.[1] Am. Compl. (ECF No. 88-1) (Counts I-II). As explained below, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the undisputed material facts support an award of summary judgment to the Government on both claims.

As an initial matter, the undisputed facts demonstrate that the Court lacks jurisdiction to grant equitable declaratory and injunctive relief arising out of Aref's and Jayyousi's past placement in a CMU in 2007 and 2008. It is undisputed that Aref has been out of the CMU for more than three years, while Jayyousi was transferred out of the CMU over a year ago. Consequently, they have received the injunctive relief sought in their complaint, while a declaratory judgment, having no present impact on their conditions, would amount to nothing more than an advisory opinion. Nor is there any reasonable prospect of future injury. Neither plaintiff will be placed back in a CMU based solely on their prior convictions and offense history, but instead some newly obtained information would be required to demonstrate that their communications pose a risk warranting the controls of a CMU. In the event this occurred, it is undisputed that, consistent with BOP policy, they would receive new notices setting forth the reasons for their placement in a CMU, they would have a right to appeal any future placement decision and they would receive an entirely new round of ongoing six-month reviews of their placement. The content of such hypothetical future notices and the outcome of such future appeals and program reviews cannot be known at this time. Thus, it is clear that the Court lacks jurisdiction over plaintiffs' claims, which arise out of placement decisions made years ago and which have no present impact on their current conditions.

[1] The Court has dismissed the claims of former plaintiffs Daniel McGowan, Royal Jones and Avon Twitty because they have been released from BOP custody and placed on parole. *See* Mem. of Law in Supp. of Pls. Mot. for Sum. J. ("Pls. Mem.") (ECF No. 138-1) at 1 n.1.

Even if the Court has jurisdiction, however, the undisputed facts demonstrate that the Government is entitled to summary judgment on the merits of both Counts I and II in the Amendment Complaint. With respect to their procedural due process claim, plaintiffs must show both that they have a protected liberty interest in avoiding CMU placement and that BOP's procedures failed to provide adequate protections. The undisputed facts make clear that this claim fails at both steps of the analysis.

First, a liberty interest triggering constitutionally-mandated process only exists where conditions are an "atypical and significant hardship" on an inmate judged against the "ordinary incidents of prison life." Plaintiffs fail to point to a single case holding that restrictions on contact visits, or reductions on visiting and telephone time comparable to those in a CMU, trigger liberty interests. Instead, courts consistently have held that the kinds of communication restrictions in place in the CMU, even when they are imposed for long periods of time, are not significant deprivations of liberty. In addition, the D.C. Circuit has indicated that a restriction will not trigger a liberty interest unless it is *more* restrictive than the *most* restrictive conditions routinely imposed in administrative detention on similarly-situated inmates. It is undisputed that, in contrast to CMU inmates who are free to move about the common areas of the unit throughout the day, inmates in administrative detention are typically confined to their cells for 23 hours per day, have less time to speak on the phone and to visit and, unlike CMU inmates, do not have access to email. This makes it clear that the routine conditions of administrative detention are far more restrictive than the conditions in place in a CMU, and thus that no liberty interests are implicated by the CMU restrictions at issue here.

Second, even if a liberty interest were triggered by CMU placement, the multi-level review process used by BOP to review whether an inmate is appropriate for transfer to a CMU

and, once there, continues to require CMU monitoring, provided adequate process to these plaintiffs. Here, the undisputed facts demonstrate that Aref and Jayyousi were not placed in a CMU based on insufficient evidence or for reasons that are inconsistent with CMU eligibility criteria. On the contrary, as made clear by their notices of transfer, plaintiffs were placed in a CMU based on their terrorism convictions and associated offense conduct. This Court has previously described plaintiffs' criminal history as providing the "obvious" legitimate explanation for their placement in a CMU. Further, it is undisputed that plaintiffs exercised their right to appeal their placement in a CMU, and that the Regional Director, who is the final decision-making authority with respect to CMU placement, had the authority to grant such appeals. It is also undisputed that plaintiffs were released from a CMU as a result of semi-annual program reviews, demonstrating that BOP's procedures for reviewing ongoing CMU placement are meaningful. Thus, the Government is entitled to summary judgment with respect to plaintiffs' procedural due process claim.

Finally, the Government is entitled to summary judgment with respect to Jayyousi's claim that BOP's Counter Terrorism Unit ("CTU") retaliated against him for engaging in protected speech when it recommended to BOP's Regional Director that he remain in a CMU. Under BOP policy, the CTU is required to consider all relevant facts in making its recommendation to the Regional Director about the appropriateness of CMU placement. In accordance with these requirements, the CTU reasonably concluded that certain of Jayyousi's statements, in conjunction with his past offense conduct and sensitive law enforcement reporting, indicated that CMU monitoring continued to be appropriate in his case. Accordingly, because the CTU's consideration of Jayyousi's statements furthered the legitimate penological goal of identifying inmate communications that warrant ongoing CMU placement, the First Amendment

was not violated. Moreover, the undisputed facts demonstrate that Jayyousi's statements were not the "but for" cause of the CTU's recommendation or the BOP's ultimate decision to temporarily keep Jayyousi in a CMU.

FACTUAL OVERVIEW

I. OVERVIEW OF CMUs.

A. The CMUs Are a Measured Response to Documented Security Risks.

The CMU was created in response to a September 2006 United States Department of Justice, Office of the Inspector General ("OIG") report, which reviewed the effectiveness of BOP's monitoring procedures for high-risk inmates. *See* Defendants' Statement of Material Facts in Support of Their Motion for Summary Judgment ("Defs.' SMF") ¶ 1. The OIG report revealed that, while incarcerated at BOP's most restrictive prison, the Federal "Supermax" in Florence, Colorado, three convicted terrorists involved in the first World Trade Center bombing had been able to correspond with extremists in Spain, including those with links to the March 2004 Madrid train bombings. *Id.* ¶ 2. Given this security breach, BOP recognized the need for new procedures to ensure that high-risk inmates could not use approved communication methods to further illicit activities while incarcerated. *Id.* ¶ 3.

In attempting to accomplish these security objectives, BOP was aware of the difficulties involved in monitoring the communications of inmates in a typical general population unit, given the many opportunities that exist to evade such monitoring. Defs.' SMF ¶ 4. For instance, an inmate subject to heightened monitoring might simply request that another inmate, not subject to such monitoring controls, pass along a prohibited message.[2] *Id.* ¶ 5. Given these concerns,

[2] *See also* Proposed Rule, "Communication Management Units," 75 Fed. Reg. 17324, 17325 (April 6, 2010) ("CMU Proposed Rule") ("It is difficult to police inmate communication in the 'open' context of a general prison population setting because it is harder to detect activity such as inmates sending mail under another's name, or using another's PIN number, without constant monitoring.").

CMU inmates are separated from other general population inmates, thereby preventing the inmates in the CMU from evading monitoring controls. *Id*. ¶ 7. Otherwise, as seen below, the CMU is designed, and in fact functions, as a general population unit.

B. The CMUs Operate As General Population Units.

The CMU is a "self-contained general population housing unit where inmates reside, eat, and participate in all educational, recreational, religious, unit management, and work programming" within the unit itself."[3] Defs. SMF ¶ 9. Like all general population inmates, other than at night and during security checks, CMU inmates are not confined to their cells and have access to common areas up to 16 hours per day. *Id*. ¶¶ 11-12. Placement in a CMU has no impact on the length of a prisoner's sentence, *id*. ¶ 15, nor does it have any impact on future housing or security classifications after an inmate completes the CMU step-down process, *id*. ¶ 196.

C. The CMU's Communication Restrictions.

In order to effectively monitor their communications, CMU inmates have somewhat less time to talk on the phone and to visit than inmates in a non-CMU general population environment. Defs. SMF ¶ 16. However, as seen below, CMU inmates still have ample opportunities to communicate:

Telephone Use. Since January 3, 2010, CMU inmates have been permitted to make two 15-minute social telephone calls per week for a total of 120 minutes every four weeks.[4] Defs.

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[3] Two CMUs exist: one at the Federal Correctional Institution in Terre Haute, Indiana, ("FCI Terre Haute") and the other at the United States Penitentiary in Marion, Illinois ("USP Marion"). Defs. SMF ¶ 8.

[4] BOP's regulations require that, absent a disciplinary sanction, inmates must receive a minimum of one three-minute call each month. 28 C.F.R. §§ 540.100, 540.101(d). Inmates in a non-CMU general population environment typically receive 300 minutes of social telephone time per month, Defs. SMF ¶ 20, while inmates in administrative detention, a potentially relevant point of comparison according to the D.C. Circuit, *see infra*, typically receive one 15-minute social call every 30 days, Defs. SMF ¶¶ 46-47.

SMF ¶ 18. All calls in the CMU are live-monitored by staff at BOP's Counter Terrorism Unit ("CTU") in West Virginia and are subject to recording. *Id*. ¶ 17.

Visiting. Since January 3, 2010, CMU inmates have been allowed up to eight hours of social non-contact visits per month, scheduled in increments up to four hours.[5] Defs. SMF ¶ 21. These visits are conducted "using non-contact facilities," which employ secure partitioned rooms where inmates and their visitors speak using telephone lines. *Id*. ¶ 23. Non-contact visits make it easier for BOP personnel to monitor, detect and control communications that pose a threat to security. *Id*. ¶ 26. For instance, because CMU inmates speak on the telephone during social visits, this allows their conversations to be live-monitored remotely by trained personnel at the CTU. *Id*. ¶ 24. The conversations are also recorded for later intelligence analysis. *Id*. ¶ 25. In addition, because inmates speak using a telephone line, if CTU personnel detect anything in an inmate's communications that poses a danger to institutional or public security, the conversation can be quickly terminated before a prohibited message is communicated. *Id*. ¶ 26.

Correspondence and Email. CMU inmates have access to social correspondence via both the U.S. mail and email. Defs. SMF ¶ 28. While all social correspondence is reviewed and screened before it is received by the inmate and before it is sent to the recipient, there are no general restrictions on the volume of such correspondence.[6] *Id*. ¶¶ 30-31.

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[5] Pursuant to BOP's regulations, the warden "shall allow each inmate a minimum of four hours visiting time per month." 28 C.F.R. § 540.43. Inmates in administrative detention at FCI Terre Haute and USP Marion are allowed four hours of social visits per months, which are all non-contact. Defs. SMF ¶¶ 50, 52.

[6] CMU inmates may receive magazines and other reading materials in the mail. Defs. SMF ¶ 33. Incoming special mail (i.e., addressed to an attorney, federal courts, probation officers) is inspected in the presence of the inmate for contraband, however, it is not read for content. *Id*. Outgoing special mail is not inspected. *Id*.

D. CMU Placement Criteria.

BOP formally codified the current criteria regarding which inmates are eligible for CMU placement in October 2009 in a memorandum from D. Scott Dodrill, then-Assistant Director of BOP's Correctional Programs Division, to North Central Regional Director Michael Nalley ("Dodrill memo").[7] Defs. SMF ¶ 93. As the Dodrill memo explains, an inmate is eligible for placement in a CMU if one or more of the following criteria are met:

> (i) The inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;
>
> (ii) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a propensity to encourage, coordinate, facilitate, or otherwise act in furtherance of, illegal activity through communication with persons in the community;
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> (iii) The inmate has attempted, or indicates a propensity, to contact victims of the inmate's current offense(s) of conviction;
>
> (iv) The inmate committed prohibited activity related to misuse/abuse of approved communication methods while incarcerated; or
>
> (v) There is any other 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.

Id. ¶ 96.

E. BOP's Multi-Level Review Process For Approving An Inmate's Placement In A CMU.

The CMU employs a multi-stage review process to ensure that inmates are only placed in a CMU if they satisfy the placement criteria set forth in the Dodrill memo. The first stage of review occurs when BOP's Counter Terrorism Unit ("CTU") becomes aware of information that suggests that an inmate may warrant placement in a CMU. Defs. SMF ¶¶ 100-01. The CTU

[7] Although the Dodrill memo specifically addresses procedures for reviewing CMU placement, it is also sets forth the criteria used for initial placement. Defs. SMF ¶ 94.

reviews available information about the inmate to determine if the inmate satisfies one or more of the CMU's eligibility criteria and whether, in the judgment of CTU staff, the inmate poses a sufficient security risk to warrant the monitoring controls of a CMU. *Id*. ¶ 102-03. If so, the CTU will prepare a recommendation memo for review by the Regional Director of the North Central Regional Office ("NCRO"), who is the final decision-maker with respect to CMU placement. *Id*. In addition, the CTU prepares a draft Notice of Transfer to Communication Management Unit ("Notice of Transfer") for the Regional Director's review, setting forth the basis for the inmate's placement in the CMU. *Id*. ¶¶ 105-06. The CTU then collects the referral memo, draft Notice of Transfer and supporting information, such as the inmate's sentencing documents and Presentence Investigation Report, into a referral or "designation" packet. *Id*. ¶¶ 108-09.

The referral packet is first sent to the Office of General Counsel ("OCG") for a legal sufficiency review. Defs. SMF ¶ 110. If OGC approves the packet, it is then routed to the Terrorism Branch Administrator at the Central Office before it is sent to the NCRO. *Id.* ¶ 111.

At the NCRO, a BOP employee will generate a review form that contains a summary of the CTU's referral memo. Defs. SMF ¶ 113. The NCRO review form and CTU referral packet are then sent to members of the Regional Director's staff, who review the information and record on the form whether they agree or disagree with the CTU's recommendation for placement. *Id*. ¶¶ 114-15. Finally, all of these materials (the completed review form, CTU memo, draft Notice of Transfer and supporting materials in the designation packet) are sent to the Regional Director for his review and final decision. *Id.* ¶ 116. The Regional Director assesses whether the inmate satisfies the CMU's eligibility criteria in the Dodrill memo, and if so, whether the evidence

presented demonstrates that CMU placement is warranted. *Id*. ¶ 118. The Regional Director then records his decision on the NCRO review form. *Id*. ¶ 117.

F. Notice and Opportunity To Challenge CMU Placement.

Upon being transferred to a CMU, inmates receive a Notice of Transfer, which sets forth a summary of the basis for their placement in the unit. Defs. SMF ¶ 126. While the notice is initially drafted by the CTU, *id*. ¶ 105, the NCRO Regional Director at the time of plaintiffs' placement in the CMU (Michael Nalley) explained that his practice was to review the notices to ensure that they provided an adequate summary of the reasons for the inmate's placement in the unit, *id*. ¶¶ 124-25.

The Notice of Transfer also informs inmates that they may appeal their transfer decision to the CMU, or any conditions of confinement while there, using the Bureau's Administrative Remedy Program. Defs. SMF ¶¶ 127. If the inmate's administrative appeal is denied by the institution, the inmate may appeal to the Regional Director. *Id.* ¶ 128-29. As the final-decision maker with respect to CMU placement, the Regional Director has the authority to grant the remedy and order the release of the inmate from a CMU. *Id.* ¶ 130.

G. BOP's Ongoing Semi-Annual Reviews of CMU Placement.

In addition to an inmate's ability to file an administrative appeal, BOP regularly reviews the appropriateness of an inmate's ongoing placement in a CMU. Defs. SMF ¶¶ 131-156. Pursuant to CMU-specific review procedures set forth in the October 2009 Dodrill Memo, *supra*, BOP reviews the placement of inmates in a CMU at six-month "program reviews," where the inmate meets with members of his Unit Team.[8] *Id*. ¶¶ 132, 134, 136.

[8] A notice summarizing these review procedures and outlining the CMU placement criteria were posted in the CMUs in late 2009. Defs. SMF ¶ 133.

The Dodrill memo directs the Unit Team to consider whether the inmate continues to "require the degree of monitoring and controls afforded at a CMU." Defs. SMF ¶ 137. To this end, the Unit Team "will consider whether the original reasons for CMU placement still exist," and whether the inmate continues to satisfy the criteria for CMU placement. *Id*. In addition, the Unit Team will assess "whether the original rationale for CMU designation has been mitigated" and "whether the inmate no longer presents a risk" warranting CMU monitoring *Id*. ¶ 138. In cases where the inmate's Unit Team recommends in favor of release, and the warden concurs, a written recommendation in favor of transfer (*i.e*., "re-designation") is prepared by the Unit Team for the Regional Director's review. *Id*. ¶ 139.

The institution's recommendation is initially sent to the CTU, which is required under the Dodrill memo to prepare its own independent recommendation to the Regional Director. Defs. SMF ¶ 141. The CTU follows the same review procedures used by the Unit Team (*i.e*., the CTU considers whether the inmate still satisfies the CMU's criteria for placement and whether the inmate continues to a pose a risk warranting CMU monitoring). *Id*. ¶ 142. The Regional Director then reviews the recommendations from the Unit Team, CTU, and his staff, as well as the packet of relevant materials assembled by the CTU, to determine whether the inmate continues to pose a security threat requiring ongoing CMU monitoring. *Id*. ¶¶ 143-48.

If the Regional Director orders the release of the inmate from a CMU, the inmate is placed into a 6 month "step-down" process.[9] Defs. SMF ¶ 149. In cases where an inmate is denied re-designation from a CMU, BOP policy requires that the inmate "be notified in writing by the Unit Team of the reason(s) for continued CMU designation." *Id*. ¶ 153. As with the

[9] Once they are released from a CMU, low and medium security inmates are ordinarily transferred to the non-CMU general population at FCI Terre Haute or USP Marion during the six-month "step-down" process. Defs.' SMF ¶ 150.

inmate's initial placement in the CMU, the inmate may appeal the decision using the Bureau's administrative remedy process. *Id*. ¶ 154.

II. PLAINTIFFS

A. Yassin Aref

Aref is serving a fifteen-year sentence for money laundering, providing material support for terrorism, conspiracy, and making a false statement to the FBI. Defs. SMF ¶ 163. In May 2007, Aref was placed in the CMU at FCI Terre Haute based on his terrorist convictions and associated offense conduct. *Id*. ¶¶ 164-66. He received a Notice of Transfer within 24 hours of his placement, explaining that these convictions and offense history were the basis for his placement. *Id.* ¶¶ 167-68. Specifically, Aref's Notice of Transfer stated:

> Your current offenses of conviction include Providing Material Support & Resources to a Foreign Terrorist Organization, & Conspiracy to Use a Weapon of Mass Destruction. Your offense conduct included significant communication, association and assistance to Jaish-e-Mohammed (JeM), a group which has been designated as a foreign terrorist organization.

Id. ¶ 167.

Aref appealed his placement, and after the appeal was denied by the Terre Haute Warden, he appealed to the Regional Director's Office. *Id*. ¶ 169. In response, the Regional Director denied the remedy, informing Aref that his need for CMU monitoring was supported by his terrorist convictions. *Id*.

In accordance with BOP's six-month ongoing program reviews to determine whether CMU placement remains appropriate, Aref was transferred out of the CMU to the general population at USP Marion on April 11, 2011. Defs. SMF ¶¶ 175-78. Aref is currently incarcerated as a low security inmate at FCI Loretto in Pennsylvania. *Id.* ¶¶ 179, 181. He has been out of the CMU for over three years. *Id*. ¶ 180.

B. Kifah Jayyousi

Jayyousi was convicted of conspiracy to murder, kidnap and maim in a foreign country, and conspiracy to provide material support to terrorism. Defs. SMF ¶ 184. On June 2008, Jayyousi was placed in the CMU at FCI Terre Haute because of his terrorist convictions and associated offense conduct. *Id*. ¶ 183-85. Like Aref, within 24 hours of his placement, he received a Notice of Transfer, explaining that his convictions and offense history were the basis for his placement. *Id*. ¶¶ 186-87. His Notice of Transfer stated:

> Your current offenses of conviction are for Conspiracy to Commit Murder in a Foreign Country; Conspiracy to Kidnap, Maim, and Torture; and Providing Material Support to a Terrorist Organization. You 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 in this country as well as many countries abroad. Your offense conduct included significant communication, association and assistance to al-Qaida, a group which has been designated as a foreign terrorist organization.

Id. ¶ 187.

In response to Jayyousi's appeal of his placement, the Deputy Regional Director, Charles Lockett, acting in the capacity of the Regional Director, denied the remedy and informed Jayyousi that his placement in a CMU was deemed necessary in light of his terrorism convictions. Defs. SMF ¶ 188.

On May 14, 2013, in accordance with the Dodrill review procedures, Jayyousi was transferred from the CMU to the non-CMU general population unit at USP Marion. Defs. SMF ¶¶ 192-93. His security level was temporarily increased from low to medium because USP Marion is a medium security facility. *Id*. ¶ 194. However, his prior CMU designation has no effect on his current security level. *Id*. ¶ 195. Instead, pursuant to BOP policy, Jayyousi has been classified as a medium security inmate because of his terrorist convictions. *Id*. He is

currently incarcerated at FCI Oxford, Wisconsin, and has been out of the CMU for over a year. *Id*. ¶ 197.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS FOR EQUITABLE RELIEF.

A. In the Absence of An Actual Injury Or A "Real" and "Immediate" Threat of Future Injury, A Party Is Not Entitled To Prospective Relief.

As set forth in more detail below, because plaintiffs are no longer in a CMU, are not experiencing any ongoing injury and do not face any reasonable prospect of future injury, the Court lacks jurisdiction to order the prospective equitable relief sought in their complaint. The grant of subject matter jurisdiction to the federal courts found in Article III of the United States Constitution extends only to live "cases" and "controversies." U.S. Const., art. III, sect. 2; *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Accordingly, for a litigant to have a right to equitable relief under Article III (both injunctive and declaratory), the "threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (internal quotation marks omitted). Speculative worries about future injury are not enough to confer jurisdiction. Instead, the injury must be "certainly impending." *Clapper v. Amnesty Internat'l USA*, 133 S. Ct. 1138, 1147 (2013). Plaintiffs do not meet this standard, making it clear that the Court is without jurisdiction to order the injunctive and declaratory relief sought in their complaint.

B. Because The Prior Effects Of Plaintiffs' Former CMU Placement Have Been Eradicated And Because There Is No Reasonable Expectation Of Future Injury, Their Claims Are Moot.

For similar reasons, plaintiffs' claims are moot. A case is moot if a plaintiff is not experiencing an ongoing injury, which will be true if intervening events "have completely and irrevocably eradicated the effects of the alleged violations," and there is "no reasonable

expectation" of future injury. *See Aref v. Holder* ("*Aref* II"), 953 F. Supp. 2d 133, 143 (D.D.C. 2013) (Rothstein, J.). Both requirements are satisfied here.

First, plaintiffs are not suffering an ongoing injury. Aref was transferred from the CMU on April 11, 2011, and thus it is undisputed that he has been out of the CMU for over three years. Defs. SMF ¶¶ 178, 180. Jayyousi was released from the CMU on May 14, 2013 and has been out of the CMU for over a year. *Id*. ¶¶ 192, 197. As a result, they have received the very injunctive relief sought in their complaint. *See* First Amend. Compl. at 70 (seeking order "to transfer each Plaintiff from the CMU to the general population at a federal prison appropriate for each Plaintiffs' security classification *or* provide each Plaintiff with due process to ensure their designation to the CMU was appropriate and devoid of discriminatory animus") (emphasis added). This demonstrates that their request for injunctive relief is now moot. *See Schmidt v. United States*, No. 13-5007, 2014 WL 1643743 at *3 (D.C. Cir. April 25, 2014) (stating that case becomes moot when a "court can provide no effective remedy because a party has already obtained all the relief that it has sought") (citation, brackets and quotation marks omitted).[10]

Nor do Aref and Jayyousi have a live interest in a declaratory judgment. A declaratory judgment is moot where it "can no longer affect the behavior of the defendant towards the plaintiff, and thus affords the plaintiffs no relief whatsoever." *See NBC Housing, Inc., Twenty-Six v. Donovan*, 674 F.3d 869, 873 (D.C. Cir. 2012) (citation, brackets, and quotation marks omitted). Plaintiffs' past CMU placement has no ongoing impact on their conditions. It does not impact their present security level or the length of their sentence. Defs. SMF ¶¶ 15, 196. Consequently, because the effects of their prior CMU placements have been "completely and

[10] *See also Scott v. District of Columbia*, 139 F.3d 940, 941 (D.C. Cir. 1998) (stating that "[n]ormally, a prisoner's transfer or release from a prison moots any claim he might have for equitable relief arising out of the conditions of his confinement in that prison").

irrevocably eradicated," a declaratory judgment would have no effect on the plaintiffs and would amount to nothing more than an advisory opinion. *See ACLU v. United States Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) ("With limited exceptions . . . issuance of a declaratory judgment deeming past conduct illegal is also not permissible as it would be merely advisory."); *see also Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (test for issuing declaratory judgment is whether, under all the circumstances, "there is a substantial controversy, between parties having adverse legal interests, of *sufficient immediacy*") (emphasis added). For the same reason, Jayyousi's request for a declaratory judgment based on his allegation that BOP retaliated against him, and delayed his release from a CMU, is also moot. Am. Compl. (Count II).

Second, there is no "reasonable expectation" of future injury, and instead it is entirely speculative that (i) plaintiffs may someday be returned to a CMU, and, (ii), once there, subject to inadequate placement and review procedures. *Aref* II, 953 F. Supp. 2d at 143 (mootness analysis considers likelihood of future injury); *see also Clapper*, 133 S. Ct. at 1147 (right to equitable relief under Art. III requires actual or future injury that is "certainly impending"); *Lyons*, 461 U.S. at 101-02 (right to equitable relief requires that "threat of injury must be both real and immediate, not conjectural or hypothetical") (internal quotation marks omitted); *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975) (request for declaratory relief moot unless "there is a substantial controversy . . . of *sufficient immediacy and reality to warrant the issuance of a declaratory judgment*") (emphasis in original).

Aref has been out of the CMU for over three years, while Jayyousi has been out of the CMU for over a year. Defs. SMF ¶¶ 178, 180, 192, 197. These undisputed facts demonstrate that they do not face a sufficiently immediate prospect of being returned to a CMU. Although the Court has previously suggested that it is "plausible" to assume that Jayyousi might be placed

in the CMU again "for the very reasons that he was sent there in the first place," *Aref* II, 953 F. Supp. 2d at 144 (citing *Aref* I, 774 F. Supp. 2d at 158-59), the Government now explains at the summary judgment stage that Aref's and Jayyousi's criminal history, which formed the basis for their original placement in a CMU, would not lead by itself to their return to a CMU. Defs. SMF ¶ 271-72. After all, BOP released the plaintiffs *despite* this conduct. *Id*. Rather, as explained by Leslie Smith, Chief of the CTU, the plaintiffs only face a prospect of being returned to the CMU if some newly obtained information demonstrates that they require the CMU's monitoring controls. *Id.* Furthermore, they could only be placed back in a CMU after the Regional Director approved their placement following the inmate specific and lengthy multi-stage review process described above. *Id*. ¶¶ 93-125.

As a consequence, in the unlikely event that they were returned to a CMU, Plaintiffs would receive notices detailing the *new* rationale for their placement, as was true of former plaintiff Daniel McGowan when he was returned to a CMU. Defs. SMF ¶¶ 126, 207-08. They would also have the right to administratively appeal the decision, *id*. ¶¶ 127-29, and would receive a new set of ongoing reviews of their placement, *id*. ¶¶ 131-156. The content of these future notices and outcome of such future appeals and program reviews remains purely speculative at this point, making it clear that there is not a "reasonable expectation" of future injury. *Aref* II, 953 F. Supp. 2d at 143. Such claims of injury that rely on a string of contingencies simply do not establish a live controversy. *Clapper*, 133 S. Ct. at 1148 (holding that the Court lacked jurisdiction to order equitable relief where plaintiffs' claim of injury rested on a "highly attenuated chain of possibilities"); *Lyons*, 461 U.S. at 105-06 (speculative fear of injury does not confer jurisdiction to issue future equitable remedies). Thus, the court is without jurisdiction to order the equitable relief sought by plaintiffs.

B. Any Due Process Challenge Based On The Adequacy Of Procedures That *Might* Be Applied To Plaintiffs In The Future Is Not Ripe.

Similarly, any challenge based on the speculative fear that plaintiffs might be subject to inadequate CMU designation and review procedures in the future is not ripe. [11] The ripeness doctrine counsels against premature adjudication by barring courts from "entangling themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 105 (1977). Two factors are key to the ripeness analysis: "[1] the fitness of the issues of judicial decision and [2] the hardship to the parties of withholding court consideration." *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1206 (D.C. Cir. 2013) (internal quotation marks omitted).

With respect to the first factor, plaintiffs' claim is too uncertain for it to be fit for a decision by this Court. The question of "fitness" concerns "whether the disputed claims raise purely legal questions and would, therefore, be presumptively suitable for judicial review." *Cronin v. FAA*, 73 F.3d 1126, 1131 (D.C. Cir. 1996) (citations omitted). Because the content of any future notices of transfer cannot be known at this point, and the outcome of any future administrative appeals and program reviews are uncertain, *see supra*, the adequacy of such hypothetical reviews and notices is clearly not fit for decision — indeed, the Court would be required to reach a ruling in the absence of any concrete facts. *Id.* at 1131-32 (case unlikely to be fit for judicial decision if "the court finds that resolution of the dispute is likely to prove unnecessary or that the court's deliberations might benefit from letting the question arise in some more concrete form") (internal citations and quotation marks omitted).

[11] Like mootness, ripeness has its source in Article III's "case" or "controversy" requirement. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

The second factor from the *Abbott Labs* analysis — the hardship to the parties of withholding court consideration — likewise strongly weighs in favor of a finding that plaintiffs' claim is unripe. The D.C. Circuit has explained that "a party's allegation of hardship will be found wanting if there are too many 'ifs' in the asserted causal chain linking the agency's action to the alleged hardship." *State Farm Mut. Auto Ins. Co v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986) (citations and internal quotation marks omitted). The "mere *potential* for future injury, moreover, is not enough." *Id.* (emphasis in original). Here, any fears of future injury depend on a long attenuated chain of speculation. In addition, "[i]t is well settled that for an institutional interest in deferral to be outweighed, postponing review must impose a hardship on the complaining party that is *immediate, direct, and significant*." *Cronin*, 73 F.3d at 1133 (internal quotation marks omitted) (emphasis added). Plaintiffs are not presently suffering any injury because they are both housed in general population units. Defs. SMF ¶¶ 178-179, 192, 197. This lack of hardship, combined with the lack of fitness for judicial review, renders any challenge based on the outcome of procedures that may or may not be applied in the future plainly unripe.

II. EVEN IF THE COURT HAS JURISDICTION, THE GOVERNMENT IS ENTITLED TO SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM.

Plaintiffs allege that their transfer to a CMU violated their rights to procedural due process. Am. Compl. ¶ 230. Such claims are analyzed in two steps: "the first [step] asks whether there exists a liberty or property interest which has been interfered with by the State." *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). If so, the second step of the analysis "examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* The Government is entitled to summary judgment because

placement in a CMU does not implicate a protected liberty interest. Even if it did, however, the procedures that plaintiffs received satisfied constitutional requirements.

A. Placement In A CMU Is Not An "Atypical and Significant" Deprivation Of Liberty Requiring Specific Due Process Protections.

"A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).[12] State imposed procedures in prisons may also create a liberty interest if a restriction "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 484 (1995). As the Government explains below, it is clear that the CMU's communications are not atypical and significant deprivations of liberty within the meaning of *Sandin*.

1. Courts Have Uniformly Held That Restrictions Comparable To Those In Place in a CMU on Contact Visits and Telephone and Visiting Time Do Not Implicate Protected Liberty Interests.

No case in this Circuit directly resolves whether the CMU's restrictions on contact visits and comparable limitations on telephone and visiting time are an "atypical" and "significant hardship" under *Sandin*. But every court of appeals that has addressed this issue post-*Sandin* has held that such restrictions are not "atypical" or "significant" deprivations of liberty.

With respect to restrictions on contact visits, it is settled that such restrictions do not trigger liberty interests, even where they are imposed for lengthy periods of time. *See, e.g., Joost v. Cornell Correction, Inc.*, No. 99-1496, 2000 WL 627652 at *2 (1st Cir. May 9, 2000)

[12] The Supreme Court has stated that "the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement." *Austin*, 545 U.S. at 221. For instance, the Due Process Clause does not create a liberty interest in avoiding a transfer from a medium to a maximum security prison because such a transfer is "within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum v. Fano*, 427 U.S. 215, 225 (1976). In *Meachum*, no liberty interest existed "even though the change of facilities involved a significant modification in conditions of confinement, later characterized by the Court as a 'grievous loss.'" *Hewitt v. Helms*, 459 U.S. 460, 467 (1983) (quoting *Moody v. Daggett*, 429 U.S. 78, 88 n.9) (1976)).

(restriction on contact visits "cannot be deemed an 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life' so as to implicate a constitutionally protected liberty interest."); *Henry v. Dep't of Corr*., 131 F. App'x 847, 849 (3d Cir. 2005) (permanent ban on contact visitation for an inmate serving a life sentence was not atypical and significant); *Bazzetta v. McGinnis*, 430 F.3d 795, 802-03 (6th Cir. 2005) (two-year visitation ban is not atypical).[13]

Similarly, the case law makes clear, as Judge Urbina determined here,[14] that there is no right to contact visits or a set amount of visiting and telephone time when such restrictions further legitimate penological purposes. *See, e.g.*, *Block v. Rutherford*, 468 U.S. 576, 589 (1984) ("[T]he Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility."); *Overton v. Bazzetta*, 539 U.S. 126, 130-136 (2003) (upholding restrictions on contact visits and leaving issue open whether any right to family association survives incarceration); *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997) (noting "the well-established principle that there is no inherent, absolute constitutional right to contact visits with prisoners"); *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002) (same).

[13] *See also Corley v. Burnett*, No. 95-6451, 1997 WL 178876 at *1 (6th Cir. April 11, 1997) ("Corley acknowledges, as he must, that he has no constitutional right to contact visits. . . . Nor is there a state-created liberty interest in such visits.") (citing *Sandin*); *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003) ("A prisoner does not have a liberty interest in contact visitation."); *Ware v. Morrison*, 276 F.3d 385, 387 (8th Cir. 2002) ("Ware's loss of visitation privileges is within the ordinary incidents of confinement and cannot be considered an atypical or significant hardship."); *Macedon v. Cal. Dept' of Corr*., 67 F. App'x 407, 408 (9th Cir. 2003) ("A refusal to permit an inmate family visits does not impose an atypical and significant hardship; rather an inmate's inability to visit with whom he wishes is an 'ordinary incident of 'prison life.'"); *Daniels v. Arapahoe County Dist. Court*, 376 F. App'x 851, 854-55 (10th Cir. 2010) (loss of contact visits does not violate process rights).

[14] *Aref* I, 774 F. Supp. 2d at 163 ("[T]he weight of the relevant case law supports the conclusion that the types of communication restrictions imposed by the CMUs are rationally related to the legitimate penological interest of promoting the safety of correctional institutions and the public.").

The same is true for restrictions on telephone and visiting time. *See, e.g., Perez v. Federal Bureau of Prisons*, 229 F. App'x. 55, 58 (3rd Cir. 2007) (explaining that "limits on telephone usage are ordinary incidents of prison confinement," and their restriction "do[es] not implicate a liberty interest protected by the Due Process Clause."). Indeed, the D.C. Circuit has held that the wife of an inmate did not have a liberty interest in the restoration of her visitation rights after a prison imposed a *permanent* ban on all visits with her husband after she attempted to smuggle marijuana into the prison. *See Robinson v. Palmer*, 841 F.2d 1151, 1155-1156 (D.C. Cir. 1988). In light of this precedent, the Court should find that the CMU's restrictions do not implicate a protected liberty interest.

2. Administrative Segregation Is By Design A Far More Restrictive Form of Confinement Than A CMU.

In addition to this overwhelming weight of prior authority, the standard established in *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999), for analyzing whether a particular prison restriction implicates a protected liberty interest further confirms that placement in a CMU does not require specific procedural protections.

Under *Sandin*, a protected liberty interest only exists where a challenged restriction "imposes atypical and significant hardship" on a prisoner "in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. In *Hatch*, the D.C. Circuit explained that the "ordinary incidents of prison life" should at least include the conditions imposed in administrative segregation — a restrictive form of confinement in which an inmate is typically confined to his cell for 23 hours a day for a variety of non-punitive reasons — because inmates "should reasonably anticipate" being subjected to such conditions "at some point in their incarceration." *Hatch*, 184 F.3d at 855, 856-858 (D.C. Cir. 1999) (internal quotation marks omitted); *id*. at 848 (describing "administrative segregation" as "a form of solitary confinement"). Specifically,

under *Hatch*, for a restriction to be atypical and significant, it must be more restrictive than "the most restrictive conditions" that are "routinely" imposed for administrative (*i.e.*, non-punitive) reasons on similarly-situated inmates. [15] *Id.* at 856. Because the *Hatch* analysis includes the conditions of administrative detention at the prison where the inmate is housed, *id*. at 847, the parties agree that, if the Court conducts this analysis, the experience of inmates in administrative detention at FCI Terre Haute (low security) and USP Marion (medium security), where the CMUs are located, are part of the analysis. Pls. Mem. at 13.

A comparison of the respective conditions in the CMU with those of administrative segregation demonstrates that the conditions of administrative segregation are far more restrictive. The CMU operates as a general population unit. Defs. SMF ¶¶ 7, 9-15. Consequently, like all general population inmates, except at night and for security counts, CMU inmates are typically free to leave their cells when they chose. *Id*. ¶ 11. On average, they have access to the common areas in the CMU for approximately 16 hours per day. *Id*. ¶ 12. In addition, CMU inmates have numerous opportunities to communicate with persons in the community. *Id*. ¶¶ 17-19, 21-33.

While placement in administrative segregation undoubtedly serves important penological goals — for instance, inmates may be placed in segregation because they are at risk in general population, Defs. SMF ¶ 35 — the reality of life there is vastly different from the conditions of a

[15] *Hatch* stated that this comparison includes the conditions routinely imposed for administrative reasons on "inmates serving similar sentences." *Hatch*, 184 F.3d at 856. The BOP typically makes housing decisions by matching the security level of an inmate to the security level of an institution. *See* Stipulation ¶ 2 (ECF No. 142). Sentence length is only one part of determining an inmate's security level. *Id*. Because plaintiffs are low and medium security inmates, Defs'. SMF ¶¶ 178, 188, for purposes of identifying a set of similarly situated inmates, it is appropriate to consider the conditions imposed on other low and medium security inmates. *Hatch* also explains that the Government may point to "more restrictive conditions at other prisons if it is likely both that inmates serving sentences similar to [the inmate's] will actually be transferred to such prisons and that once transferred they will actually face such conditions." *Id*. Because low and medium security inmates are typically eligible to be placed in a facility that matches their security level, *see* Pls. SMF ¶ 71; Stipulation ¶ 2, the Government may also point to the conditions imposed on low and medium security inmates in administrative segregation at other BOP institutions as part of the *Hatch* analysis.

CMU. Both nationally, and at FCI Terre Haute and USP Marion, inmates who are placed in administrative segregation units, referred to by BOP as Special Housing Units ("SHUs"), remain in their cells 23 hours per day, either by themselves or with another inmate. *Id*. ¶¶ 34-36. They may exercise for one hour every five days, but when they leave their cells they are moved in restraints. *Id*. ¶¶ 37-38.

Consistent with national policy, inmates in administrative detention at Terre Haute and USP Marion also have far fewer opportunities to communicate than CMU inmates. They typically receive one fifteen-minute phone call every 30 days compared to the 120 minutes CMU inmates receive every four weeks. Defs. SMF ¶¶ 18, 46-47. They are not allowed social contact visits at either facility, which is a common restriction at BOP facilities throughout the country for low and medium security inmates placed in administrative detention.[16] *Id*. ¶ 50. In fact, inmates in administrative detention at USP Marion do not even sit in the same room with their visitors, but instead social visits are conducted using video monitors. *Id*. ¶ 51. Inmates in administrative detention at these facilities also have less time for such visits: only four hours compared to the eight hours of visiting time permitted in a CMU. *Id*. ¶¶ 21, 52. And unlike CMU inmates, they cannot communicate with persons outside the prison walls using email. *Id*. ¶¶ 28, 53.

In short, inmates in administrative detention exist in conditions that are more restrictive in every meaningful sense compared to the experience of inmates in a CMU. Therefore, no fair assessment of the totality of the conditions in a CMU and administrative segregation could reasonably lead to the conclusion that the conditions of a CMU are *more* restrictive than the conditions of administrative detention. Indeed, it is clear that, under the *Hatch* framework, that a CMU does not impose atypical and significant deprivations of liberty.

[16] Indeed, 41 of 95 low and medium security institutions restrict contact visits for inmates in administrative segregation. Defs. SMF ¶ 63.

Given this stark contrast, plaintiffs focus their entire argument for the existence of a liberty interest based on the longer median duration of placement in a CMU compared to administrative segregation.[17] Pls. Mem at 14-18. In *Hatch*, the court observed that in determining whether plaintiff's placement in administrative segregation was an atypical and significant deprivation, information regarding the length of time other similarly-situated inmates spent in administrative segregation was relevant. *Hatch*, 184 F.3d at 856. But *Hatch* compared the length of duration for the same type of unit — administration segregation. To the extent duration is also a factor in this case, whether a liberty interest is a stake cannot turn on a mechanical comparison of duration alone. [18] After all, most restrictions in place in a general population environment will typically last longer than any comparable restriction imposed in administrative detention, but that cannot mean that they are necessarily significant deprivations of liberty under *Sandin*.[19] It is striking, therefore, that Plaintiffs do not cite a single case holding that long-term restrictions on contact visits or comparable restrictions on telephone and visiting time to those in place in a CMU constitute significant deprivations of liberty within the meaning of *Sandin*.

[17] Many inmates routinely spend far longer in administrative segregation than plaintiffs' focus on *median* placement times suggests. *See* Defs. SMF ¶¶ 64-65.

[18] While *Hatch* provides the framework for analyzing whether an inmate's placement in administrative detention is atypical and significant, courts in this circuit routinely dismiss claims that alterations in some aspect of a general population inmate's life require due process without applying the *Hatch* framework or comparing the duration of such restrictions to the typical length of administrative segregation at the prison. *See, e.g., Tanner v. Fed. Bureau of Prisons*, 433 F. Supp. 2d 117, 123 (D.D.C. 2006) (holding that neither denial of participation in education and vocation programs nor transfer causing a significant modification in condition of confinement were atypical); *Perez v. Lappin*, 672 F. Supp. 2d 35, 42 (D.D.C. 2009) (assignment of public safety factor was not atypical, even though it disqualified inmate from certain programs).

[19] Indeed, this would run counter to the express goal of *Sandin* in limiting liberty interests to restrictions on liberty that are severe and out of the norm of prison life. As *Hatch* explained, *Sandin*'s use of administrative segregation as the "baseline for identifying constitutionally protected liberty interests ensures that 'the day-to-day management of prisons' will remain in the hands of prison administrators, not federal judges." *Id*. (quoting *Sandin*, 515 U.S. at 482).

In contrast, the Government has demonstrated that the overwhelming and apparently uniform body of judicial authority that has addressed this question concludes that restrictions on contact visits and reductions of visiting and telephone time comparable to those in the CMU, even when imposed for lengthy periods of time, do not trigger protected liberty interests. *See, e.g*., *Henry*, 131 F. App'x at 849 (permanent ban on contact visitation for an inmate serving a life sentence was not atypical and significant); *Bazzetta*, 430 F.3d at 802-03 (complete ban on visits, renewable every two year at warden's discretion, is not atypical and significant); *see also Robinson* , 841 F.2d at 1155-1156 (D.C. Circuit case, holding that there is no liberty interest triggered by permanent ban on all visits between husband and wife). Therefore, it would be unprecedented for this Court to find that the environment of a CMU, which is far closer to a typical general population unit than administrative segregation, is *more* restrictive than administrative segregation merely because it lasts longer.

Plaintiffs also ignore their own experiences in administrative detention prior to their transfer to a CMU, which further demonstrate that administrative detention is more restrictive than placement in a CMU. For instance, Jayyousi was housed at FDC Miami in pre-trial status in administrative detention for almost a year before being released on bail. *Id*. ¶ 74-75. After he was returned to prison, he was again placed back in administrative detention, this time for more than a year. *Id*. ¶ 76-78. In total, he spent more than two years in administrative detention prior to his transfer to a CMU in June 2008. *Id*. ¶¶ 79-80. Jayyousi characterized the conditions he experienced during those two years in administrative detention as "horrific" and "pretty devastating." *Id*. ¶81. Similarly, Aref, who was in holdover status in administrative detention prior to his transfer to a CMU from March 28, 2007 to May 11, 2007, *id*. ¶¶ 66-67, described the conditions there as like "being in a box," *id*. ¶ 68.

In sum, placement in a CMU does not trigger protected liberty interests, as prior case law makes clear and as the routine conditions in administrative segregation and plaintiffs' own prior experience in these conditions confirms.

B. The Undisputed Facts Demonstrate That The Existing CMU Procedures Are Constitutionally Adequate.

Even assuming that the plaintiffs have a liberty interest in not being placed in a CMU, the undisputed facts demonstrate that they received constitutionally adequate process, and that the CMU placement and review procedures fully satisfy the procedural requirements established by the Supreme Court that govern placement in the far more restrictive environment of administrative segregation.

1. BOP's CMU Procedures Provide Meaningful Notice And A Meaningful Opportunity To Contest The Inmate's Placement.

In *Hewitt v. Helms*, the Supreme Court held that "[a]n inmate [placed in administrative segregation] must merely receive some notice of the charges against him." 459 U.S. 460, 476 (1983), *disapproved on other grounds* in *Sandin*, 515 U.S. at 483. The notice must merely provide "a brief summary of the factual basis" for placement. *Wilkinson*, 545 U.S. at 225-26. In addition, within a reasonable amount of time following his transfer, the inmate must have "an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Hewitt*, 459 U.S. at 476. No formal hearing is required, however. Instead, "[o]rdinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective." *Id*. According to the Supreme Court, "[s]o long as this occurs, and the decisionmaker reviews the charges and then-available

evidence against the prisoner, the Due Process Clause is satisfied."[20] *Id*. All of these requirements were met here.

BOP policy requires that CMU inmates receive a "Notice to Inmate of Transfer to Communication Management Unit" within five calendar days of their placement, which sets forth the basis for their placement in the unit. Defs. SMF ¶ 125. The notice is drafted by officials at the CTU, but the Regional Director at the time of plaintiffs' placement reviewed the notice to ensure it adequately summarized the reasons for the inmate's placement in the CMU. *Id*. ¶¶ 119, 124-25. BOP's also grants inmates the right to contest their designation to the CMU by filing an administrative appeal. *Id*. ¶ 128-29. If the appeal is denied by the institution, the inmate has the right to appeal to the Regional Director. *Id*. ¶ 129. As the final decision-maker with respect to CMU placement, the Regional Director has the authority to grant the remedy and order the release of the inmate. *Id*. ¶ 130.

Consistent with these procedures, there is no dispute that Aref and Jayyousi received Notices of Transfer within twenty-four hours of their placement in the CMU, explaining that their placement was based on their terrorism convictions and associated offense conduct. Defs. SMF ¶¶ 167-69, 186-87. Plaintiffs acknowledge that they were convicted of terrorism-related offenses, Am. Compl. ¶ 76, and there is no dispute that this conduct is an appropriate basis for CMU placement. *Aref I*, 774 F. Supp. 2d at 170. Indeed, this Court has previously concluded that plaintiffs' terrorism convictions provided the "obvious" explanation for their placement. *Id*.

There is also no dispute that Aref and Jayyousi exercised their right to appeal their placement in a CMU. Defs. SMF ¶¶ 169, 188. The BOP, including the Regional Director's

[20] See *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005) (recognizing that *Hewitt*'s discussion of the procedures used for placing inmates in administrative detention remains "instructive"); *Hatch*, 184 F.3d at 851-852 (stating that, where a liberty interest exists, *Hewitt* provides the minimum constitutional requirements for placing an inmate in administrative detention).

Office, reviewed their appeals, confirmed that they had in fact engaged in terrorism-related conduct, and explained that the factual basis for their placement was set forth in their sentencing documents and PSR. *Id*.

In sum, Aref and Jayyousi received meaningful notice and a meaningful opportunity to contest their placement in a CMU.

2. BOP's Ongoing Six-Month Reviews Of CMU Placement Satisfy Due Process Requirements.

To further guard against the risk of erroneous designations, CMU inmates receive regular ongoing reviews of their placement. Defs. SFM ¶¶ 131-156. Such reviews are designed to ensure that an inmate's placement in a unit is not the result of any sort of pretext. *Hewitt*, 459 U.S. at 477 n.9. At the same time, the reviews do "not necessarily require that prison officials permit the submission of any additional evidence or statements." *Hewitt*, 459 U.S. at 477 n.9.

Pursuant to CMU procedures established in October 2009 in the Dodrill memo, an inmate's Unit Team reviews whether CMU placement continues to be appropriate in conjunction with the inmate's regularly scheduled six-month program reviews. Defs. SMF ¶ 134-38. During these reviews, members of the Unit Team meet with the inmate and, based on available information, such as the inmate's institutional conduct in the unit, assess whether the inmate continues to pose a security risk warranting CMU placement. *Id*. If the unit team recommends in favor of placement, and with the approval of the warden, a written recommendation is prepared for the Regional Director's review, which includes space for any comments by the inmate. *Id*. ¶ 139. In addition, the Dodrill memo requires the CTU to prepare its own independent recommendation based on its review of available evidence, including any intelligence or law enforcement information that may not be known to the inmate's Unit Team given its sensitivity. *Id.* ¶ 142-45. The Regional Director then reviews these recommendations,

as well as the recommendations of his staff at the North Central office and the materials in the CTU re-designation packet, to determine whether CMU placement remains warranted. *Id*. ¶ 148. If the Regional Director denies the re-designation request, BOP policy requires that the inmate be informed in writing of the reasons for the denial, which the inmate may then appeal. *Id*. ¶¶ 153-54.

Plaintiffs acknowledge, as they must, that inmate transfers out of the CMU have become "commonplace" as a result of the review process set forth in the Dodrill memo. *See* Amend. Compl., ECF No. 88, ¶ 77; Decl. of Leslie Smith, ECF No. 69-1, ¶ 6 n.1 (noting that as of May 16, 2012, 162 BOP inmates had been designated to a CMU, and of those, 75 had been transferred out of the CMU). Moreover, it is undisputed that both Aref and Jayyousi were released from the CMU pursuant to this very review process.

In 2010, in connection with a routine program review, Aref's Unit Manager in the CMU submitted a memo to the Regional Director recommending in favor of his release because he had maintained clear conduct in the CMU. Defs. SMF ¶ 172. The Regional Director denied the request based on the existence of an investigation. *Id*. ¶ 174. Later, in 2011, pursuant to the Dodrill review procedures, the CMU's Unit Manager and Warden again recommended in favor of releasing Aref from the CMU. *Id*. ¶ 175. Because the prior law enforcement concerns had abated, the CTU concurred with the request and the Regional Director approved Aref's release from the CMU in April 2011. *Id*. ¶¶ 176-77.

Similarly, in 2011, in connection with a routine program review, Jayyousi's Unit Team submitted a recommendation in favor of his transfer from the CMU. Defs. SMF ¶ 237. The Regional Director denied the request. *Id*. ¶ 261-62. Later, in 2013, in connection with another regular program review, the CMU Unit Manager and Warden again supported Jayyousi's release

from a CMU. *Id*. ¶ 260. After the CTU concurred, the Regional Director approved Jayyousi's release from a CMU. *Id*. ¶¶ 265, 270.

Thus, it is indisputable that the review process in place here led to plaintiffs' release from a CMU, demonstrating that it was not a "sham," as they allege, Pls. Mem. at 40, but instead constituted a meaningful assessment of whether their placement in the CMU continued to be warranted.

3. No Additional Procedures Were Required Under the Mathews Factors.

As seen above, the CMU placement and review procedures fully satisfy the requirements established by the Supreme Court governing placement in administrative detention. Again ignoring that CMUs are less restrictive environments than administrative detention, plaintiffs request that this Court impose additional requirements on CMU placement beyond those that apply to administrative detention. *See* Pls. Mem. at 43-44. Specifically, plaintiffs propose that BOP procedures that govern the placement of inmates in the Federal Supermax prison ("ADX") and Special Management Units ("SMUs,"), which are designed to manage violent gang offenders, among others, be grafted onto the CMU designation process. *Id*. However, the pre-transfer notice, formal adversary hearings and other more elaborate procedures that apply to the ADX and SMU units are not required here and would not improve the quality of BOP's decision-making.

The "'fundamental requirement' of due process is that an individual receive 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Aref I*, 774 F. Supp. 2d at 164 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The requirements of due process, however, are "flexible and call[] for such procedural protections as the particular

situation demands."[21] *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). To determine what procedures are required, three factors are relevant: "First, the private interest that will be affected by the official action; second, 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; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. The *Mathews* factors do not require additional or substitute procedures here.

i.) "Private interest" of plaintiffs that will be affected by "official action."

The Supreme Court has described an inmate's private interest in avoiding placement in the far more restrictive environment of administrative detention as not one of "great consequence" given the already restrictive environment of prison. *Hewitt*, 459 U.S. at 473. While plaintiffs complain about the CMU's communication restrictions, and argue that these restrictions create a strong private interest in receiving formal procedures, Pls. Mem. at 19-20, the Government has demonstrated that CMU inmates have ample opportunities to communicate with persons in the community. *See supra.* Plaintiffs also suggest that they are entitled to elaborate procedural protections because they have been stigmatized as "terrorists," but any such stigma is attributable to the findings of juries that they were guilty of serious terrorist offenses, not their prior placement in a CMU. *Id*. Finally, plaintiffs are mistaken that their prior placement in the CMU has any impact on their present conditions. While Jayyousi appears to

[21] The Supreme Court has recognized that "[i]n determining what is 'due process' in the prison context, . . . 'one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a [unit transfer] in a [] prison." *Hewitt*, 459 U.S. at 472 (quoting *Wolff v. McDonnell*, 418 U.S. at 560) (second ellipsis in original). Thus, "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve the internal order and discipline and to maintain institutional security." *Id*. (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

suggest that his security level is due to his prior placement in a CMU, *see* Pls. SMF ¶¶ 504-508, it is the result of his terrorist convictions, not his past designation to a CMU. Defs. SMF ¶ 195. Accordingly, the first *Mathews* factor does not warrant the imposition of any particular procedural requirements here.

ii.) "Risk of an erroneous deprivation" of liberty, and "probable value, if any, of additional or substitute" procedures.

The CMU designation process consists of multiple layers of review, *see supra*, which guard against erroneous placement decisions. As the Supreme Court has stated with respect to placement in a State "supermax" prison, "[r]equiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards the inmate's being mistaken for another or singled out for insufficient reason." *Wilkinson*, 545 U.S. at 225-26. In this case, there can be no reasonable dispute that plaintiffs' Notices of Transfer specifically informed them that they were placed in the CMU based on their terrorism convictions and associated conduct. Defs. SMF ¶¶ 164-68, 183-87. Nor is there any dispute that this criminal history, which was amply supported by documents to which they had access (*e.g.*, Judgment & Conviction and PSR), satisfied the CMU's eligibility criteria because it was "related to international or domestic terrorism." *Id.* ¶ 96. Accordingly, the procedures in place ensured that Aref and Jayyousi were not mistaken for other inmates, and that there was a sufficient factual basis for their placement under the CMU's eligibility criteria. *Wilkinson*, 545 U.S. at 225-26.

iii.) Government's interest in avoiding "burdens [ ] of additional or substitute procedural requirement[s]."

Not only do the existing CMU procedures guard against erroneous deprivations of liberty, but as explained in more detail in the declaration of Senior CTU Intelligence Analyst, David Schiavone, plaintiffs' proposal of a pre-transfer notice and a formal, adversary hearing,

see Pls. Mem. at 43-44, would impose additional burdens with no obvious improvement in the quality of BOP's decision-making. For instance, a requirement for a pre-transfer hearing could alert the inmate to the fact that they are being considered for CMU designation and encourage them to engage in prohibited communications prior to transfer — a concern that is heighted with respect to CMU placement. Defs. SMF ¶ 159. In addition, while a Hearing Officer conducts a hearing with respect to ADX placement, the official is not likely to have the intelligence background or training needed to assess whether an inmate warrants enhanced communications monitoring. Defs. SMF ¶¶ 161-62. In contrast, the counter terrorism professionals at the CTU have the training and background to make these precise assessments. *Id*.

In sum, it is clear that the multi-tiered review process currently in place, which BOP adopted to ensure that reliable decisions are made, satisfies due process requirements.

III. THE GOVERNMENT IS ENTITLED TO SUMMARY JUDGMENT ON JAYYOUSI'S RETALIATION CLAIM.

Plaintiff Jayyousi alleges that the Chief of BOP's CTU, Leslie Smith, unlawfully retaliated against him by recommending to BOP's North Central Regional Director that he should remain in a CMU based on protected First Amendment speech. Am. Compl. (ECF No. 88-1) ¶ 238. This claim is without merit and should be rejected.

A prisoner bringing a First Amendment claim of retaliation must establish that "(1) he engaged in conduct protected under the First Amendment; (2) the defendant took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again; and (3) a causal link [exists] between the exercise of [the] constitutional right and the adverse action taken against him." *Aref* II, 953 F. Supp. 2d at 144 (internal quotation marks omitted).

With respect to the first element, an inmate bringing a First Amendment retaliation claim must establish that he "engaged in speech in a manner consistent with legitimate penological interests"; otherwise, his speech is not protected. *Aref* II, 953 F. Supp. 2d at 145. "[B]ecause a prison's interest in security is "central to all other corrections goals," *Pell v. Procunier*, 417 U.S. at 823, speech that threatens security is not protected by the First Amendment. *See, e.g., Turner*, 482 U.S. at 90, 92. In addition, given the Supreme Court's focus on whether a prison's actions are reasonably related to legitimate penological interests, an inmate "must do more than allege retaliation because of the exercise of his first amendment rights," *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985); he must also establish that "that the retaliatory action does not advance legitimate penological goals.'" *Aref* II, 953 F. Supp. 2d at 145 (quoting *Byrd v. Mosely*, 942 F. Supp. 642, 645 (D.D.C. 1996)); *see also Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (same); *Smith v. Bradley*, 53 F.3d 332 at *4 (6th Cir. 1995) (same)].

As set forth below, there was no First Amendment violation here in the treatment of Mr. Jayyousi. Mr. Smith's consideration of Jayyousi's speech advanced the legitimate penological goal of identifying inmate communications that pose a security risk warranting CMU monitoring. In addition, and for related reasons, the portions of Jayyousi's speech that were considered by the CTU in recommending against his release were not protected under the First Amendment because they posed a threat to security. Finally, the Government is also entitled to summary judgment on this retaliation claim because Jayyousi's statements were not the "but for" cause of BOP's decision to temporarily keep him in a CMU. *Aref II*, 953 F. Supp. 2d at 144 ("To satisfy the causation link [of First Amendment retaliation claim], a plaintiff must allege that his or her constitutional speech was the 'but for' cause of the defendants' retaliatory action." (internal quotation marks omitted).

A. The First Amendment Did Not Prevent Mr. Smith From Considering Jayyousi's Statements For the Purpose of Determining Whether His Communications Posed A Security Risk Warranting CMU Monitoring.

As Chief of the CTU, Mr. Smith is responsible for making recommendations to BOP's Regional Director about whether CMU monitoring is warranted. Defs.' SMF ¶ 102. Mr. Smith's consideration of Jayyousi's statements, as part of his overall assessment of the risk posed by Jayyousi's communications, furthered the legitimate penological goal of identifying prisoners that require CMU monitoring. As a result, the First Amendment was not violated. *See Aref* II, 953 F. Supp. 2d at 145 (inmate must establish "that the retaliatory action does not advance legitimate penological goals") (internal quotation marks omitted).

Jayyousi's allegations of retaliation are based entirely on the CTU's March 22, 2011 Memorandum, signed by Mr. Smith, recommending to BOP's Regional Director, Michael Nalley, that Jayyousi remain in the CMU. First Am. Compl. ¶¶ 196-99, Second Cause of Action. The CTU's March 2011 memo was prompted by the recommendation of the CMU's Unit Manager at Marion, who concluded that Jayyousi was appropriate for release under the Dodrill review procedures based on his clear institutional conduct while at the Marion CMU. Defs.' SMF ¶ 237. In accordance with these procedures, Mr. Schiavone, Senior Intelligence Analyst at the CTU, drafted a memorandum for Mr. Smith's review, which recommended that Jayyousi should remain in the CMU. *Id.* ¶ 239. After Mr. Smith approved and signed the memorandum, it was forwarded to the Regional Director. *Id*. ¶ 240.

The CTU's memo explained that Jayyousi was placed in the CMU because of his terrorism-related convictions and offense history, which involved Jayyousi's participation in a conspiracy along with his co-defendants to provide various forms of support, including money, physical assets and recruits, to terrorist and mujahideen groups in various overseas conflicts.

Defs.' SMF ¶¶ 242-43. The memo stated that the defendants "have extensive influence to radicalize and recruit others." *Id*. ¶ 244. The memo also included sensitive law enforcement information. *Id*. ¶ 250.

In addition, the memo discussed certain statements Jayyousi had made on August 15, 2008, when he was the rotational leader of a Muslim Jumah prayer in the Terre Haute CMU. Defs.' SMF ¶ 245. These statements were summarized in the memo as follows:

> [I]nmate Jayyousi claimed that inmates were sent to CMU because they were Muslim, and not that they were criminals. Inmate Jayyousi purported that the unit was created by something evil, and not even the staff understood or accepted the purpose of the unit. Inmate Jayyousi directed Muslim inmates to stand together in response to being sent to CMU, that Muslims should not compromise their faith by cooperating with the government and Muslims should martyr themselves to serve Allah and meet hardships in their lives. Claiming Muslim inmates in CMU are being tortured psychologically, inmate Jayyousi further purported that criminal cases against Muslims inmates were fabricated, intended to destroy good U.S. citizens and to tear them away from their families.[22]

Id. According to the memorandum, Jayyousi's statements were disruptive and threatened a group demonstration and appeared directed at "inciting and radicalizing the Muslim inmate population in THA CMU." *Id*. ¶ 247.

At his deposition, Plaintiffs' counsel asked Mr. Smith to review a transcript of Jayyousi's August 15, 2008, speech, and identify any statements that raised security concerns. Defs.' SMF ¶ 251. Consistent with the March 22, 2011 CTU memo, Mr. Smith pointed to Jayyousi's claim that Muslim inmates were placed in the CMU not for any legitimate purpose but because of their religion. *Id*.; *see also* Parties' Stipulation ¶ 6 (agreeing that Jayyousi stated that "you have to remember you are here because you are Muslim. Not because you are a criminal," and that "[t]he only reason they are upset is because we are believers"). In addition, Mr. Smith testified that Jayyousi's reminder to his fellow inmates about "why we martyr" also raised security

[22] An audio recording of the speech has been provided to Plaintiffs, and the parties have been able to stipulate to virtually the entirety of the speech. *See* Stipulation ¶ 6.

concerns. Defs.' SMF ¶ 252; *see also* Parties Stipulation ¶ 6 (agreeing that Jayyousi stated, "[Y]ou are going to return to your lord to meet him with your hard work and the hardships that you have faced and done in this life. This is why we martyr . . . .").

Mr. Smith testified that Jayyousi's charge that Muslim inmates had been placed in the CMU because of their religion appeared to be an attempt to incite the inmates in an effort to further radicalize the population. [23] Defs.' SMF ¶ 251. As noted above, it was the CTU's understanding that Jayyousi had been convicted of a conspiracy to recruit and provide support to terrorists in various overseas conflicts. *Id*. ¶ 242-43. With respect to Jayyousi's statement about martyrdom, Mr. Smith testified that "[t]o me, that's a very significant statement coming from him. His ability to recruit and radicalize – he's the rock star." *Id*. ¶ 246. While this statement might not pose similar concerns if made by an inmate without his criminal history, "[w]hen Jayyousi is talking about [martyrdom] with his documented history," Mr. Smith testified that he had "serious concerns." *Id*. ¶ 252. According to Mr. Smith, Jayyousi is "one of the more influential terrorists I have in custody," noting that "[t]his is not your average inmate." *Id*. It was reasonable, therefore, for Mr. Smith to conclude that these statements, in conjunction with Jayyousi's criminal history, suggested that Jayyousi's communications posed a security risk.

Mr. Smith's concerns were also shared by a number of other BOP employees. David Schiavone, CTU Senior Intelligence Analyst and author of the March 2011 recommendation memo, testified that he believed that Jayyousi's August 2008 statements suggested an attempt "to incite other inmates, to radicalize them to a like mindset" with the goal of "elevat[ing] inmate Jayyousi to a position where he would have authority among other inmates." *Id*. ¶ 254. He explained that when an inmate "attempts to assume a position of leadership over other inmates,

[23] Jayyousi also told his audience, "You are not the target, I am not the target. It is not U.S. versus Jayyousi; it is U.S. versus Islam." Parties Stipulation ¶ 6.

it's a very significant security concern," *id.*, because it could lead to "circumventing the authority of the institution." *Id*.

The Warden at the Terre Haute facility, Brian Jett, likewise believed the speech raised security concerns, and for this reason ordered Timothy Coleman, Intelligence Research Specialist, to issue Jayyousi an incident report. Defs.' SMF ¶ 255. For his part, Mr. Coleman, who issued Jayyousi an incident report for encouraging a group demonstration, testified that it appeared to him as if Jayyousi "was trying to stir the inmates up." *Id*. ¶ 256. Based on his extensive institutional experience, Mr. Coleman was concerned that Jayyousi's statements could lead to "having those inmates rise up against staff." *Id***.**

The Unit Disciplinary Committee, which reviewed Jayyousi's first incident report, similarly found that his speech raised security concerns. Defs.' SMF ¶ 230. While the UDC did not conclude that Jayyousi had encouraged a group demonstration, it did sanction Jayyousi for "conduct which disrupts" and suspended his phone, visiting and email privileges be suspended for 30 days. *Id*.

After Mr. Coleman issued a second incident report, in response to the direction of the Regional Director's office to include an excerpt of the relevant portions of Jayyousi's speech in the report, Defs.' SMF ¶¶ 231-32, a Discipline Hearing Officer ("DHO") concluded that charge of encouraging a group demonstration was not supported, writing that he "did not find that any other inmates acted on the sermon which caused a disruption in the unit or at the meeting." *Id*. ¶¶ 234, 258. The fact that the speech did not result in an actual riot or prison disturbance, however, does not mean that Jayyousi's speech did not create an increased risk of such a result, or that BOP officials were not justified in their assessment that such a risk existed. Moreover, the DHO was not asked to address, and thus did not assess, Mr. Smith's separate concern that the

speech was evidence of Jayyousi's possible efforts to recruit and radicalize other inmates and that this supported keeping Jayyousi in the CMU. *Id.*

Finally, CMU staff at the Terre Haute CMU, who had observed Mr. Jayyousi since his placement there in 2008 until his transfer to Marion in October 2010, had never recommended in favor of his release. Defs.' SMF ¶ 259. Although personnel at the Marion CMU did recommend in favor of Jayyousi's release based on his institutional conduct at Marion, he had only been at the Marion CMU for four months at the time of the recommendation. *Id*. ¶ 248. In the judgment of the CTU, as reflected in their March 22, 2011 memo, this was not long enough for staff at Marion to have adequately evaluated Jayyousi. *Id*.

The fact that Mr. Smith's concerns were shared by a number of other BOP employees confirms that they were reasonable. As the Supreme Court has explained, prison administrators are entitled to "appropriate deference and flexibility" when attempting to manage the volatile environment of a prison. *Sandin*, 515 U.S. at 482. Courts must afford deference to prison officials "in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). As an experienced prison official, Mr. Smith's judgment that Jayyousi's statements made it more likely that his communications required CMU monitoring was reasonable, entitled to deference, and should not be found in any way to constitute an act of retaliation for the exercise of a First Amendment right. *See Anderson–Bey v. District of Columbia*, 466 F. Supp. 2d 51, 65 (D.D.C.2006) (explaining that an inmate bringing a retaliation claim under the First Amendment must allege that the adverse "action did not reasonably advance a legitimate correctional goal") (citations omitted).

B. The Statements Jayyousi Made That Were Considered By The CTU Were Not Protected Under the First Amendment.

For related reasons, the Government is also entitled to summary judgment because Jayyousi cannot show that any of the statements relied upon by the CTU were protected under the First Amendment.

An inmate bringing a retaliation claim has the burden of proving that his speech was consistent with legitimate penological interests for it to be protected by the First Amendment. *Aref* II, 953 F. Supp. 2d at 145. In order to determine whether an inmate's speech is protected, a court analyzing a retaliation claim should be guided by the factors set forth in *Turner v. Safley*, 482 U.S. 78 (1987), used to assess the legality of a prison regulation that restricts speech. *Crawford-El v. Britton*, 93 F.3d 813, 825-26. The *Turner* factors make clear that the portions of Jayyousi's speech that were considered by the CTU were not protected under the First Amendment. *Overton*, 539 U.S. at 132.

The first *Turner* factor requires that "there must be a 'valid, rational connection' between the prison [action] and the legitimate governmental interest put forward to justify it."[24] *Turner*, 482 U.S. at 89 (quoting *Block*, 468 U.S. at 586). As discussed at length above, there was a "valid, rational connection" between BOP's consideration of Jayyousi's speech and the legitimate penological goal of assessing all relevant evidence that bears on whether an inmate's communications pose a security risk warranting CMU monitoring.

The second *Turner* factor asks "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 89. Here, Jayyousi had "alternative means" of bringing his views about the CMU to the attention of both BOP officials and individuals outside the prison system without endangering institution security, as indicated

[24] Although the factors are intended as a single reasonableness standard, the first factor "looms especially large." *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998).

by the numerous administrative remedy requests he filed complaining about various aspects of the CMU. Defs.' SMF ¶¶ 188-90.

The third *Turner* factor assesses "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner,* 482 U.S. at 89. BOP's concerns in this instance were based on the fear that Jayyousi's inflammatory statements would have a disruptive impact on other BOP inmates leading to a security disturbance in the prison — exactly the sort of disruptive "ripple effect" the Supreme Court warned against in *Turner*. *See Turner*, 482 U.S. at 90, 92 ("[W]hen speech "will have a significant 'ripple effect' effect on fellow inmates" – typically potentially disruptive inmate-to-inmate speech – "courts should be particularly deferential to the informed discretion of corrections officials). Because a prison's interest in security is "central to all other correctional goals," *Pell*, 417 U.S., at 823, speech that threatens to harm legitimate interests in security is not protected by the First Amendment.[25] *Id*.

The final *Turner* factor addresses "the absence of ready alternatives," which may serve as "evidence of the reasonableness" of the prison's action. *Turner*, 482 U.S. at 89. Mr. Smith is required to make recommendations to BOP's North Central Regional Director under the circumstances here, Defs.' SMF ¶¶ 100, 102, 141-44, and he had legitimate concerns about the dangers posed by Jayyousi's speech. As with any intelligence professional, he is called upon to make predictive judgments about which inmates' communication pose a security risk, and thus cannot turn a blind eye to statements, such as a reminder about "why we martyr" from a

[25] Indeed, in a variety of settings, courts have recognized that speech is not protected if it encourages inmates to engage in disruptive activities or to not cooperate with prison officials given the significant danger such speech poses to the good order and discipline of a prison. *See, e.g., Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 131-33 (1977) (observing that "encouragement of adversary relations with, institution officials, surely would rank high on anyone's list of potential trouble spots" and that such speech is contrary to legitimate penological interests).

convicted terrorist – a statement that alone suggests that the inmate's communications continue to pose a security threat. *Cf. Holder v. Humanitarian Law Project,* 561 U.S. 1, 34-35 (2010) (recognizing that Executive Branch officials are entitled to deference when drawing inferences concerning potential terrorist threats and may rely on "informed judgment").

In sum, the undisputed facts demonstrate that the Mr. Smith's concerns were reasonable, that they were related to Jayyousi's past criminal history, and that were not pretextual or otherwise designed to disguise some hidden animus. The First Amendment did not prohibit Mr. Smith's rational consideration of Jayyousi's statements, in conjunction with his offense history, in order to make a recommendation about whether his communications were dangerous and require continued monitoring.

C. Jayyousi's Statements Were Not the "But For" Cause of BOP's Decision To Delay Jayyousi's Release From the CMU.

The Government is also entitled to summary judgment because Jayyousi's statements were not the "but for" cause of Mr. Smith's recommendation or the Regional Director's final decision. *Aref II*, 953 Supp. 2d at 144 ("To satisfy the causation link [of First Amendment retaliation claim], a plaintiff must allege that his or her constitutional speech was the 'but for' cause of the defendants' retaliatory action." (internal quotation marks omitted).

Even without Jayyousi's statements on August 15, 2008, Mr. Smith has testified that he would have recommended in favor of his placement based on sensitive and privileged law enforcement information. Defs.' SMF ¶ 253. Indeed, when these law enforcement concerns abated, Mr. Smith concurred with the CTU's 2013 recommendation to release Jayyousi from the CMU. *Id.* ¶¶ 265-69.

Likewise, Michael Nalley, the Regional Director at the time of the March 2011 re-designation request, testified that while he could not recall at his deposition whether he

considered Jayyousi's statements, he would have denied Jayyousi's request if there were any law enforcement concerns. Defs.' SMF ¶¶ 261-62. Thus, the Government is entitled to summary judgment for the separate and independent reason that Jayyousi's speech was not the "but for" cause of either the CTU's March 2011 recommendation or BOP's March 2011 decision to keep Jayyousi in a CMU.

CONCLUSION

For the aforementioned reasons, the Court lacks jurisdiction over plaintiffs' claims for equitable relief, and even if the Court has jurisdiction, the undisputed material facts demonstrate that plaintiffs are not entitled to summary judgment but instead that the Government is entitled to summary judgment with respect to all remaining claims.

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