IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Yassin Muhiddin AREF, et al.,	)	
Plaintiffs,	)	
	)	Case No. 1:10-cv-00539-BJR
-v-	)	
	)	**Oral Argument Requested**
Eric HOLDER, et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

In their opening brief, Plaintiffs showed that they were singled out for placement in a Communication Management Unit (CMU) based on a fundamentally flawed designation system, and then deprived of meaningful review of their ongoing CMU placement. Defendants ask the Court to disregard this broken system because, after years in segregation, and in the midst of litigation, Plaintiffs were eventually released from the CMU. But Plaintiffs remain eligible for redesignation to the CMU, may still be returned there like other former CMU prisoners before them, and documentation from the CMU's flawed processes follows them to this day. Thus Plaintiffs' claims are not moot.

Defendants also seek to avoid scrutiny of their failed procedures by arguing that Plaintiffs have no liberty interest in avoiding CMU placement, and thus are entitled to no procedural protections whatsoever. But their argument rests on cases involving minor alterations to a prisoner's communications with the outside world. The CMUs do not impose one or two temporary communications restrictions as a disciplinary measure for proven misconduct; instead, they work a fundamental change to a prisoner's conditions of confinement for years. No material factual dispute prohibits this Court from finding a liberty interest in avoiding CMU designation.

In the alternative, Defendants try to argue that current designation and review procedures provide CMU prisoners with all the process that is due. But while Plaintiffs received *a* notice of transfer, *used* the Administrative Remedy Program to protest their designation, and were *eventually* transferred out of the CMU, the analysis does not end there. Defendants ignore Plaintiffs' undisputed showing that none of these procedures actually functions to protect against erroneous and arbitrary decision-making. A patina of process does not satisfy the Constitution.

Finally, Defendants move for summary judgment on Kifah Jayyousi's retaliation claim against Leslie Smith, Chief of the BOP's Counter Terrorism Unit (CTU). Contrary to

Defendants' argument, Smith's discretion to perform his job, like that of every other prison official, is not limitless. Whether Smith recommended Jayyousi's continued retention at a CMU because of a legitimate penological concern, or instead out of distaste for Jayyousi's personal political and religious speech, is subject to sharp factual dispute. The claim is thus unsuited for summary judgment.

I. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF ARE NOT MOOT.

Defendants argue that this Court lacks jurisdiction to consider Plaintiffs' claims for equitable and declaratory relief because Plaintiffs' transfers from the CMU render their claims moot. This Court has already twice held that former CMU prisoners face a realistic threat of redesignation to the CMU. *See Aref I*, 774 F. Supp. 2d 147, 158-59 (D.D.C. 2011) (Royal Jones had standing to sue despite his transfer from the CMU because he faced a realistic threat of redesignation); *Aref II*, 953 F. Supp. 2d 133, 144 (D.D.C. 2013) (Jayyousi's claim not moot for the same reason). Defendants' new arguments do not change the Court's sound prior analysis.

As this Court explained, "[a]n intervening event may render a claim moot if Defendants can show "(1) there is no reasonable expectation that the conduct will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violations." *Aref II,* 953 F. Supp. 2d at 143 (citations omitted). Where potential mootness arises from a defendant's voluntary cessation of illegal activity, this inquiry is particularly stringent. *Fund for Animals v. Jones*, 151 F. Supp. 2d 1, 5 (D.D.C. 2001).

Defendants offer three sets of facts to overcome the Court's prior determination against mootness: first, that Jayyousi and Yassin Aref have been out of the CMU for one and three years respectively; second, that their "criminal history, which formed the based for their original placement in a CMU, will not lead *by itself* to their return to a CMU;" and third, that Plaintiffs'

past CMU placement has no "ongoing impact on their [detention] conditions." *See* Def. Br. at 15-17, *citing* SMF 15, 196, 178, 180, 192, 197, 271, 272.[1] These arguments do not meet Defendants' "heavy burden" of establishing mootness, *Fund for Animals*, 151 F. Supp. 2d at 5, and thus the Court has jurisdiction to order declaratory and injunctive relief.

A. Defendants Fail to Meet their Burden of Proving that Plaintiffs Face No Realistic Threat of Redesignation to the CMU.

Plaintiffs do not dispute that Jayyousi and Aref have been out of the CMU for some time. But Jones had been out of the CMU for a year when this Court held that he faced a realistic threat of redesignation. *See Aref I,* 774 F. Supp. 2d at 158-59. Thus, under this Court's prior decision, the mere passage of time cannot satisfy Defendants' burden. Both Jayyousi and Aref will be in BOP custody for years, and both were sent to the CMU because of their offense conduct. P. Exs. 127 (Jayyousi Program Reviews) 1; 110 (Aref 10/24/07 Program Review) 1; SUF 164, 181. Defendants do not dispute that each remains eligible for CMU redesignation for the same reason. *See* Def. Ex. 3 (Nalley Decl.) ¶ 4. Thus, reoccurrence is a real threat.

Though there is no dispute that Plaintiffs remain *eligible* for CMU redesignation, Defendants attempt to refute this Court's previous ruling that Jayyousi faced a realistic threat of redesignation to the CMU for "the very reasons he was sent there in the first place," by claiming that Plaintiffs will not be sent back to the CMU based *solely* on their prior convictions. *See* Def.

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[1] For ease of reference, Plaintiffs use the following citations: **P's Br. ISO SJ**: Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment; **Def. Br.**: Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment; **SUF**: Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment; **SMF**: Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment; **P. Ex.**: exhibits accompanying Plaintiffs' Motion for Summary Judgment; **Def. Ex.**: exhibits accompanying Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment; **P. Opp. Ex.**: exhibits accompanying Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment; **R-SUF**: Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment. For the Court's convenience, Plaintiffs have also filed a list of all their exhibits.

Br. at 17 (citing *Aref II*, 953 F. Supp. 2d at 144). The only factual support Defendants offer for this self-serving assertion is the declaration of Leslie Smith, Chief of the CTU, who states, in the midst of litigation, that *he* will not *recommend* redesignation of either Plaintiff without "some newly obtained information." Def. Ex. 2 (Smith Decl.) ¶¶ 1, 3, 14. This is cold comfort, given that it is the *Regional Director*, not Smith, who makes CMU designation decisions. SUF 110. The Regional Director considers all CMU referrals from all sources, even if the CTU recommends against designation, *see* Def. Ex. 1 (Schiavone Decl.) ¶¶ 20, 21, yet Defendants offer no evidence as to the Regional Director's plans. In *Wills v. United States Parole Comm'n,* 882 F. Supp. 2d 60 (D.D.C. 2012), this Court found a remarkably similar promise insufficient to moot an injunctive claim. There, a parole commission withdrew a prisoner's "sex offender" restriction and declared it would not be reimposed absent "a new act of sexual misconduct." *Id.* at 70-72. As the declaration came from an individual charged to "make recommendations to the Parole Commission, rather than to make the decision," the assurance, like Smith's, was "not sufficient to sustain the heavy burden required of defendants to invoke the mootness doctrine." *Id.* at 71-72.

Moreover, even if the Regional Director made a similar promise, this does not obviate the realistic threat of Plaintiffs' redesignation to a CMU. The risk remains given the wide range of information on which the BOP may rely in support of redesignaton, coupled with the BOP's failure to explain how one "mitigates" the original reasons for transfer and thus earns redesignation out of the CMU. *See*, *e.g.*, Def. Ex. 2 (Smith Decl.) ¶ 7 (CTU may consider "any other information or intelligence relevant to the referral"); P. Opp. Ex. 1 (Smith Dep.) 300:24-301:12,[2] *see also* P's Br. ISO SJ at 33-35 (summarizing problems with CMU review process).

[2] "Q. Can you tell me what exactly changed between March 22nd, 2011, when you recommended against [Jayyousi's] transfer [out of the CMU], and April 22nd, 2013, when the CTU recommended that transfer? I

Indeed, between March 1, 2010 and April 15, 2013, four prisoners were transferred out of a CMU and subsequently redesignated. *See* P. Opp. Ex. 2 (CMU Population Tracking).

Defendants cannot demonstrate that Jayyousi, in particular, faces no risk of redesignation because they have already acknowledged that risk. In recommending his transfer from the CMU in 2013, the CTU stated that Jayyousi should be closely watched:

> The CTU believes the original rationale for CMU designation has been mitigated as inmate Jayyousi has not maintained specific and direct communication with known terrorist associates, suspects or other extremists in the community. Inmate Jayyousi does, however, have a significant reputation for his participation in the offense conspiracy and is likely to radicalize or recruit other inmates while in Bureau custody. Thought [sic] *at this time* he may not warrant the monitoring levels afforded by a CMU, *he does warrant continuing monitoring and supervision* to preclude illicit activity.

P. Ex. 143 (Smith 4/22/13 Memo) 3 (emphasis added).[3] When questioned about Jayyousi's potential for redesignation, CTU staff was unable to rule it out, testifying that the CTU monitors inmates "*at least* for the first six months after they're released from the CMU," and that "*right now* we don't have any plans to refer [Jayyousi] for redesignation to the CMU." P. Opp. Ex. 3 (Schiavone Dep.) 261:1-261:13 (emphasis added). While the CTU did not express similar reservations about Aref's transfer out of the CMU, it stands by its analysis that Aref's limited communications with an undercover informant who pretended to be connected to a terrorist organization makes him a security risk. *See id.* at 282:21-283:12; *see also* Def. Ex. 3 (Nalley Decl.) ¶ 11. Notably absent is any evidence that the CTU now rejects this initial assessment, or has ceased monitoring either Plaintiff.

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understand that you're saying it mitigated, but what actually happened? A. Sensitive law enforcement information. Sorry, I can't. Q. I understand. So am I right in thinking that whatever that sensitive law enforcement issue was resolved itself? A. Safe assumption."

[3] Upon receiving this transfer recommendation from CTU senior intelligence analyst Schiavone, another CTU official responded "proceed with known hesitation." *See* P. Opp. Ex. 4 (Eternick email). When asked about this comment, Schiavone testified, "[m]y assessment is that he read our referral, which indicated the CTU, though we were recommending Inmate Jayyousi to step out of the CMU, believed the inmate still required heightened monitoring of his communications, and we had concerns that we wanted to continue to monitor him closely, even though we felt he was appropriate for general population." P. Opp. Ex. 3 (Schiavone Dep) 259:7-259:20.

Finally, Defendants make the confusing argument that even if Plaintiffs do face a realistic threat of redesignation to the CMU, they still have no live (or ripe) controversy because the "content of . . . future notices and outcome of . . . future appeals and program reviews remains purely speculative at this point." Def. Br. at 17, 18. But Plaintiffs challenge the *procedures* used to deprive them of liberty, not the *outcome* of such procedures. *Cf*, *Rezaq v. Nalley*, 677 F.3d 1001, 1010 (10th Cir. 2012) (relevant relief for procedural due process claim is new hearing with adequate procedural protections, regardless of likely outcome of that hearing). If Plaintiffs are considered for redesignation to the CMU they *will* again be subject to the challenged procedures.

B. Defendants Fail to Meet Their Burden of Proving the Effects of Plaintiffs' CMU Designation Have Been Completely and Irrevocably Eradicated.

Defendants assert that Plaintiffs' "past CMU designation has no ongoing impact on their "conditions," their "security level," or "the length of their sentence." Def. Br. at 15. But BOP documents corroborate what is also intuitive: once a prisoner has already been designated to a CMU, this shapes the way the BOP views, monitors, and treats him, and makes it much more likely that he will be redesignated to the CMU in the future. In this way, a former CMU prisoner does not start with a clean slate; rather, CMU-related restrictions follow him, and the BOP retains and uses information gained through the flawed CMU designation and review procedures. Thus, Defendants cannot meet their burden of proving that transfer out of the CMU "completely and irrevocably eradicated the effects" of CMU designation. *Aref I*, 774 F. Supp. 2d at 160.

First, CMU prisoners are treated differently than other prisoners even after they have left a CMU. The unusual restrictions placed on Jayyousi's religious activities at FCI Oxford, for example, conspicuously depart from official BOP policies on religious beliefs and practices, and thereby demonstrate how the CTU's findings continue to impact former CMU prisoners after transfer from the CMU. *See* P. Opp. Ex. 5 (Agathocleous Decl.) ¶¶ 3-5; *see also* SUF 508.

The continuing impact of the flawed CMU designation process is also illustrated by the BOP's paperwork accompanying redesignation to a CMU. In support of Daniel McGowan's redesignation, for example, the CTU created a packet and memo that reiterated all the old material on which it had relied to recommend McGowan's initial CMU designation. *See* P. Opp. Ex. 6 (McGowan Redesignation Packet).[4] The CTU memorialized a new allegation – that McGowan attempted to circumvent inmate communication monitoring after his release from the CMU – but also described McGowan's continued "support for anarchist and radical environmental terrorist groups . . . desire to remain in an influential and leadership position among these groups," and the (erroneous) details of his offense conduct, which formed the basis for McGowan's first designation. *Id.* at BOP CMU 003381-83. Similarly, the North Central Regional Office review form generated to assist the Regional Director's decision on McGowan's redesignation recited verbatim all the information relied upon to deny McGowan's transfer out of the CMU one year earlier. *Id.* at BOP CMU 003413. Finally, McGowan's second Notice of Transfer included the same factually incorrect information as his first. *Id.* at BOP CMU 002671.

McGowan's experience is not an outlier. The CTU's redesignation memo regarding Prisoner J, for example, also includes as part of the rationale for redesignation all the same information relied upon in their initial designation memo. *Compare* P. Ex. 166 (Prisoner J Designation Packet) BOPCMU067375-78 *with id.* at BOPCMU067372-74. And again, Prisoner J's second notice of transfer repeats all the same information from his first. *Compare id.* at BOPCMU060180 *with* P. Opp. Ex. 7 (Prisoner J's 2d Notice of Transfer).

[4] Tellingly, the first time Defendants argued that Plaintiffs' claims were moot, their argument focused on former-Plaintiff McGowan, who was transferred from the CMU to general population while Defendants' initial motion to dismiss was pending. *See* Def's Supp. Mot. to Dismiss on Mootness Grds, Dkt. No. 29. Defendants claimed there was no "reasonable expectation" or "demonstrated probability" that McGowan would be returned to the CMU. *Id.* at 6 n. 7. Just three months later, the Government was forced to withdraw its supplemental motion when McGowan was, in fact, redesignated to the CMU. *See* Notice Regarding the Memo. in Opp. to Def's Supp. Mot. to Dismiss on Mootness Grds., Dkt. No. 34.

Because the BOP retains and continues to rely on information generated in the flawed CMU designation and review process, transfer from the CMU does not "completely and irrevocably eradicate[] the effects" of that initial process. *Aref I*, 774 F. Supp. 2d at 160, *see also Rezaq*, 677 F.3d at 1009 (challenge to ADX designation procedures "is not moot [despite plaintiff's transfer] if the BOP made decisions under the old policies that have ongoing, long-term consequences for the plaintiffs that could be mitigated by an award of prospective relief"); *Hudson v. Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970) (cessation of disciplinary restrictions does not moot challenge given that a prisoner "is punished anew each time his record is used against him"); *Colvin v. Caruso*, 605 F.3d 282 (6th Cir. 2010) (transfer to new prison does not moot claims given that new facility relied upon on the old facility's findings); *West v. Cunningham*, 456 F.2d 1264, 1265 (4th Cir. 1972) (prisoner's challenge to placement in a maximum security unit not moot despite transfer to general population given "possibility" that the prisoners' time in segregation might lead to an adverse legal consequence); *Black v. Warden*, 467 F.2d 202, 204 (10th Cir. 1972) (challenge to placement in isolation unit not mooted by transfer because "there may be a continuing effect" from records about the punishment) (citations omitted).

"A case is not moot when there is some possible remedy, even a partial remedy or one not requested by the plaintiff." *Rezaq*, 677 F.3d at 1010 (*citing Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992)). Meaningful prospective relief remains available to Plaintiffs: namely, expungement of erroneous information used in the designation process, an injunction against future use of that information, and a declaration that Plaintiffs were designated to and retained at the CMU under constitutionally infirm procedures. *Cf. Preiser v. Newkirk,* 422 U.S. 395 (1975) (challenge to placement in maximum security prison mooted by prisoner's transfer to minimum security prison, and notation in prisoner's file indicating that the challenged

transfer should have no bearing on future parole board determinations); *Taylor v. McElroy*, 360 U.S. 709 (1959) (case moot where evidence in petitioner's file will not be used against him in the future and findings against him were expunged); *Davidson v. Stanley,* No. 02-190, 2003 U.S. Dist. LEXIS 13520, *12-13 (D.N.H. Aug. 4, 2003) (consent to court order, proposed expungement, and letter to parole board appeared to constitute effective amelioration).

C. Defendants' Voluntary Cessation Does Not Moot Plaintiffs' Claims.

Given that Defendants have failed to meet their burden of establishing mootness, *see supra*, this Court need not consider whether Plaintiffs' claims also survive under the voluntary cessation exception to mootness. However, a brief exploration of the exception's applicability here demonstrates the prudential considerations militating against a finding of mootness.

"[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Aref I*, 774 F. Supp. 2d at 161, *quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000). "[I]n order for this exception to apply, the defendant's voluntary cessation must have arisen *because of* the litigation." *Id.* (citation omitted). Here, there is evidence that Plaintiffs' transfers were at least partially related to this litigation.

First, it is undisputed that for the first three years of the CMUs' existence, no prisoner was transferred from a CMU into a general population unit. SUF 278. An *Aref* Plaintiff was the first CMU prisoner to be transferred, and his transfer occurred on the eve of the filing of this lawsuit, when the BOP must have been well aware that undersigned counsel were planning to bring major litigation. *See* P. Ex 80 (Prisoner D Designation Packet); P. Opp. Ex. 1 (Smith Dep.) 346:24-348:21; *see also* P. Opp. Ex. 5 (Agathocleous Decl.) ¶ 2 (CCR attorneys sent more than 80 letters to CMU prisoners in both CMU units in the six months leading up to the filing of this

case); P. Opp. Ex. 8 (Oct. 2, 2009 Memo) (BOP memo alerting "all concerned" to CCR legal visit to CMU). It is thus highly likely that the process for transferring prisoners out of the CMU was developed in response to imminent litigation.[5] And while Defendants have previously claimed that other plaintiffs' individual transfers had nothing to do with their status as plaintiffs, *see* Supp. Mot. To Dismiss on Mootness Grds., Dkt. No. 29 at 6 n. 7, it is noteworthy that the CTU has paid close attention to this lawsuit. For example, CTU intelligence summaries include a detailed description of both a June 2009 email between former-Plaintiff McGowan and undersigned counsel indicating that McGowan would be ready to file a lawsuit as soon as he finished exhausting his administrative remedies, and a November 2010 email from McGowan to undersigned counsel requesting that we include certain information in an opposition to Defendants' motion to dismiss on mootness grounds *along with* undersigned counsel's response that we intended to do so. *See* P. Opp. Ex. 9 (Intelligence Summary & Submission). Also telling is that Plaintiffs are referred to in BOP documents regarding CMU designation as plaintiffs. *See* P. Opp. Ex. 10 (Notice to Inmate of Transfer to CMU List) ("current CCR case" appears next to Jayyousi's and McGowan's names). The Court must not allow Defendants to defeat meritorious litigation through purposeful efforts to moot Plaintiffs' claims.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR PROCEDURAL DUE PROCESS CLAIM.

A. Placement in a CMU Implicates a Liberty Interest.

The parties agree that this Court must first consider whether placement in the CMU gives rise to a liberty interest requiring procedural protections. But in applying this analysis,

[5] The BOP has a history of this kind of maneuvering with respect to the CMU. BOP documents suggest that publication of the proposed CMU rule was a direct response to the ACLU's filing of an APA challenge to the BOP's failure to engage in notice and comment rulemaking when it created the CMU. *See* P. Opp. Ex. 11 (History of the CMU Proposed Rule). Plaintiffs here advanced the same claim, which was dismissed as moot after the BOP initiated notice and comment rulemaking. *See Aref I*, 774 F. Supp. 2d at 171; *see also* P. Opp. Ex. 12 (CMU Final Rule Summary) (bullet points on status of the CMU administrative rule include a section on *Aref v. Holder* and a listing of case deadlines). Years later, the rule has still not been finalized.

Defendants ignore the relevant question. Plaintiffs do not claim to have a liberty interest in retaining contact visitation or a specific amount of telephone minutes per month. *See* Def. Br. at 20-24. Rather, Plaintiffs claim a liberty interest in avoiding *designation to the CMU*, a uniquely restrictive segregation unit. Given Defendants' misunderstanding of the nature of Plaintiffs' claim, it is no surprise that the cases on which they rely are of no aid to their position.

i. The Restrictions in Place at the CMUs Are Unique.

In spite of the uniquely restrictive nature of the CMUs, Defendants take the position that placement in a CMU is not an atypical and significant deprivation of liberty and therefore does not warrant due process protections. No court in the D.C. Circuit has resolved the question, so Defendants rely on a number of out-of-circuit cases holding that fact-specific restrictions on a prisoner's telephone and social visits do not, standing alone, trigger a liberty interest. *See* Def. Br. at 20. But these cases address restrictions and circumstances that have little, if anything, in common with the CMU – for example, cases where an individual prisoner's visitation is temporarily restricted as punishment for a disciplinary infraction. In relying on these inapposite cases, Defendants fail to grapple with the reality that, "other than ADX, the CMUs are the most restrictive facilities in the federal system," *Rezaq v. Nalley*, 677 F.3d 1001, 1009 (10th Cir. 2012), and "[i]nmates in the CMU are subject to … restrictions unique to the CMU based on its unique mission and purpose." *Lindh v. Warden*, No. 2:09-cv-00215, 2013 U.S. Dist. LEXIS 4932, at *5 (S.D. Ind., Jan. 11, 2013).

Defendants significantly downplay the unique constellation of restrictions in the CMUs in an effort to paint a benign picture of the units, focusing only on the fact that CMU prisoners have restricted communication with the outside world. *See* Def. Br. at 24. Such a compartmentalized analysis is not the law. In evaluating liberty interest, the court must "take[]

together" all facts presented. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). As the undisputed facts demonstrate, and counter to general BOP policy, the CMUs certainly do impose sharp restrictions on the duration, frequency, and nature of social telephone calls, visitation, and written correspondence. SUF 19-28, 32. They also impose a blanket ban on any physical contact during social visits. SUF 20.[6] But additionally, all calls and visits at the CMU are live-monitored by the CTU, and all areas in the CMU are audio-surveilled. SUF 22, 25; *Lindh*, 2013 U.S. Dist. LEXIS 4932, at *5. CMU prisoners are isolated from other prisoners at all times. SUF 16. CMU placement carries significant stigma. SUF 18. The CMUs are used as a substitute for discipline. SUF 126, 214, 219-21, 404, 405, 464, 468, 471, 472; *see also* P's Br. ISO SJ at 41-43. There is no expected duration of CMU designation – Plaintiffs and other CMU prisoners have served *years* at a time in this restrictive environment.[7] SUF 17, 64-69. And finally, even when they are eventually released, the taint of CMU designation follows prisoners to their new institutions. *See* Section I(B), *infra.*

Instead of engaging in the factually-rigorous analysis of the totality of restrictions at the CMUs that is required by *Wilkinson*, 545 U.S. at 224, and D.C. Circuit law,[8] Defendants superficially assert that "every court of appeals that has addressed [restrictions on telephone and visiting time] post-*Sandin* has held that such restrictions are not 'ayptical' or 'significant'

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[6] Indeed, the BOP is currently seeking authority to make these restrictions even stricter than they already are, and significantly harsher than communications limitations in administrative segregation. SUF 29, 31.

[7] Defendants acknowledge that there is no expected duration for CMU placement, but attempt to manufacture a factual dispute by stating that CMU prisoners "are subject to periodic review and only retained in CMU so long as is necessary." R-SUF 17. Defendants' 30(b)(6) witness testified that there is no expected duration for CMU placement, no general range for such designations, and that CMU prisoners are not provided with any information regarding how long they can expect to spend in a CMU "because there is no range, there is no way to provide them with an expectation." P. Ex. 12 (Schiavone 30(b)(6) Dep.) 100:12-100:22. The fact that CMU prisoners receive periodic does not meaningfully dispute this testimony.

[8] "The District of Columbia Circuit[] ha[s] developed a fact-intensive approach to applying the *Sandin* test by virtue of having seriously considered the issue of what constitutes an 'atypical and significant' hardship." Donna H. Lee, *The Law of Typicality: Examining the Due Process Implications of* Sandin v. Conner, 72 FORDHAM L. REV. 785, 813 (2004).

deprivations of liberty." Def. Br. at 20. But Defendants' cases arise from situations in which a prisoner is deprived of visitation or contact visitation, without other communications restrictions, (a) with specific individuals (such as someone who assisted them in committing an infraction), (b) after disciplinary process, which includes a hearing, and/or (c) for a brief, finite, or announced period of time. *See Joost v. Cornell Correction, Inc.*, 215 F.3d 1311, 2000 WL 627652 at *1, 4, 5 (1st Cir. May 9, 2000) (denial of contact visits for 140 days while prisoner was attending trial, without other communications restrictions, is not atypical and significant); *Henry v. Dep't of Corr.*, 131 F. App'x 847, 848, 850 (3d Cir. 2005) (no liberty interest where prisoner lost contact visits, without other communications restrictions, after a narcotics-related disciplinary infraction and a hearing); *Bazzetta v. McGinnis*, 430 F.3d 795, 802-03 (6th Cir. 2005) (no liberty interest where visitation restrictions, without other communications restrictions, were imposed after two major substance abuse misconduct violations because such restrictions are a "regular means of effecting prison discipline"); *Corley v. Burnett*, No. 95-6451, 1997 U.S. App. LEXIS 7181 at *2 (6th Cir. Apr. 11, 1997) (no liberty interest where prisoner lost contact visits with a specific visitor, without other communications restrictions, as a result of his escape attempt and the fact that the visitor previously worked at the prison); *Phillips v. Norris*, 320 F.3d 844, 846 (8th Cir. 2003) (no liberty interest where prisoner was denied contact visits for 37 days, without other communications restrictions, as a result of a disciplinary infraction); *Ware v. Morrison*, 276 F.3d 385, 386-88 (8th Cir. 2001) (no liberty interest where a prisoner's visitation with three individuals was banned for 18 months, without other communications restrictions, after those individuals smuggled contraband into the prison); *Macedon v. Cal. Dep't of Corr.*, 67 Fed. App'x 407, 408 (9th Cir. 2003) (refusal to permit an inmate family visits, without other communications restrictions, is not an atypical and significant hardship); *Daniels v. Arapahoe*

County Dist. Court, 376 Fed. App'x 851 (10th Cir. 2010) (loss of contact visits resulting from prisoner's classification as a sex offender, without other communications restrictions, does not violate due process). These cases reflect the simple fact that loss of visitation may be temporarily imposed, or can be used as punishment for an infraction, without implicating a liberty interest. This is not controversial, nor does it speak to the far-reaching, indefinitely-imposed restrictions and consequences that flow from CMU designation.[9]

Defendants fail, in other words, to point to *any* case law that resolves the liberty interest analysis in this case. Plaintiffs, by contrast, have engaged in the fact-intensive analysis required by *Hatch*, and have demonstrated that, based on the unique restrictions in place at the CMUs, which vastly outlast administrative segregation, there is a liberty interest in avoiding CMU designation. *See* P's Br. ISO SJ at 11-18.

ii. When Compared to Administrative Segregation, as *Hatch* Requires, Conditions at the CMUs, and the Prolonged Duration of CMU Designation, Create a Liberty Interest.

In light of *Hatch*'s requirement that conditions at the CMU be compared to conditions in administrative segregation, Defendants next argue that, "both nationally, and at FCI Terre Haute and USP Marion," administrative segregation is more restrictive than the CMUs. Def. Br. at 22,

[9] Defendants make the throwaway argument that "there is no right to contact visits or a set amount of visiting and telephone time when such restrictions further legitimate penological interests." Def. Br. at 21. This also fails to resolve the matter. First, Defendants do not cite any case that holds that the existence of a liberty interest requires the withdrawal of a *right*. Furthermore, the cases they do cite are inapposite. Four are not procedural due process cases and thus lend no insight into whether CMU designation gives rise to a liberty interest. *See Block v. Rutherford*, 468 U.S. 576 (1984) (substantive due process challenge); *Overton v. Bazzetta*, 539 U.S. 126 (2003) (substantive due process, First Amendment, and Eighth Amendment challenge); *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997) (substantive due process challenge); *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) (addressing the right to procreate while incarcerated). The remaining two cases are irrelevant to the analysis here because they involve the imposition of only one specific type of restriction upon a prisoner, where other conditions of confinement were unaffected. *See Perez v. Federal Bureau of Prisons*, 229 Fed. App'x 55, 56, 58 (3d Cir. 2007) (finding that restricting a prisoner's telephone calls after imposition of a serious telephone abuse public safety factor, without other communications restrictions, does not implicate a liberty interest); *Robinson v. Palmer*, 841 F.2d 1151 (D.C. Cir. 1988) (finding that the state did not create a liberty interest where a prisoner's wife's visits were suspended after she attempted to smuggle drugs into the prison facility). More significantly still, *Robinson* does not even apply *Sandin*'s "atypical and significant" analysis as it pre-dates *Sandin*. It is thus of no aid whatsoever.

24, *see also Hatch v. District of Columbia*, 184 F.3d 846, 855 (D.C. Cir. 1999). In an effort to prove this, Defendants insist that the CMU "operates as a general population unit." *Id*. at 23. This euphemistic branding ignores the many "restrictions unique to the CMU based on its unique mission and purpose." *Lindh*, 2013 U.S. Dist. LEXIS 4932 at *2, and is contradicted by the BOP's own documents, which state that "[r]estrictive conditions of confinement programs currently in use by this agency include the Communications Management Unit (CMU), Special Management Unit (SMU) and Administrative Maximum (ADX)," and refer to "inmates confined in all forms of housing restricted from the general population, i.e., ADX, CMU, SMU." SUF 38, 39; *see also* Section II(A)(i), *supra*. And it is belied by the Tenth Circuit's finding that "other than ADX, the CMUs are the most restrictive facilities in the federal system." *Rezaq*, 677 F.3d at 1009.

Defendants nonetheless insist that "inmates in administrative detention exist in conditions that are more restrictive in every meaningful sense compared to the experience of inmates in a CMU." Def. Br. at 24. But Plaintiffs have shown that communications restrictions in administrative segregation are frequently less onerous than those in place at the CMUs: for example, more than half of the relevant administrative segregation units permit contact visits, and some allow prisoners a full 300 minutes of phone calls per month. SUF 80, 81. And while Plaintiffs have acknowledged that some conditions in administrative detention are harsher than at a CMU, *see* P's Br. ISO SJ at 14, the stigma associated with CMU designation, and the fact that CMU designation is frequently used as a substitute for discipline, SUF 18, 126, 214, 219-21, 404, 405, 464, 468, 471, 472, make the CMUs qualitatively different than administrative segregation. *See*, *e.g.*, *Hewitt v. Helms*, 459 U.S. 460, 473 (1983) (recognizing that "the stigma of wrongdoing or misconduct does not attach to administrative segregation").

Additionally, Plaintiffs have submitted an extensive analysis of the significance of duration in this case – as *Hatch* requires. 184 F.3d at 856 ("[w]hen we compare [the plaintiffs'] confinement to administrative segregation, we must … look not only to the nature of the deprivation … but also to its length"). The undisputed facts establish that CMU designation *vastly* outlasts administrative segregation, whether one looks to administrative segregation at FCI Terre Haute and USP Marion, or administrative segregation units nationally.[10] SUF 48-53, 58-60, 82, 83; *see also* P's Br. ISO SJ at 14-18. Confinement in the uniquely harsh conditions of the CMU for a matter of years is far worse than being subject to administrative segregation for a matter of days. CMU designation works "a major disruption in [a prisoner's] environment," *Sandin*, 515 U.S. at 486; a short spell in administrative segregation does not.

Defendants offer no more than a footnote in response to Plaintiffs' factual showings regarding duration, noting that "many inmates routinely spend far longer in administrative segregation than plaintiffs' focus on *median* placement times suggest." Def. Br. at 25 n.17. But their footnote fails to rebut Plaintiffs' expert's explanation of why median is the preferred unit to measure duration. SUF 54; *see also* P. Opp. Ex. 13 (Beveridge Decl.) ¶ 16. Moreover, no matter how you look at the statistics, the outcome is the same: the typical duration of CMU designation is *much* longer than the typical duration of administrative segregation. As Dr. Beveridge explains, even if the median is not used, the data shows that 76.47% of prisoners who were sent to administrative segregation at FCI Terre Haute and USP Marion between February 1, 2012 and August 2, 2013 spent less than four weeks there, 93.92% spent less than 12 weeks there, and

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[10] Defendants do not rebut Plaintiffs' expert's statistical analysis, nor present expert testimony of their own, but instead attack some of Dr. Beveridge's conclusions as "speculation, not a material fact or proper expert opinion." *See e.g.,* R-SUF 56, 57. They are incorrect. With respect to SUF 56 and 57, Dr. Beveridge came to his conclusions based on his analysis of Defendants' own data, which demonstrates that some prisoners arrived at the CMU before the reporting period start date, or were transferred out after the reporting period stop date – leading to the logical conclusion that the actual duration of CMU designation is longer than the median suggests. SUF 56. He also based his conclusion on Defendants' own data from a longer reporting period. SUF 57.

96.88% spent less than 16 weeks there. *See id*. ¶ 7, Table 1. With respect to administrative segregation nationally, the correctly-calculated data[11] demonstrates that 53.20% of inmates between the same dates spent less than four weeks there, and 76.78% spent less than 10 weeks there. *Id*. at ¶ 11, Table 2. By contrast, in the same time period, 69.74% of CMU prisoners spent *more than 40 weeks* at a CMU, *see id*. at ¶ 13. This statistic, of course, massively undercounts the actual duration of CMU designation because it only examines an 18-month period, which is shorter than most CMU designations. A roster of all CMU inmates reveals that the shortest stint *any* prisoner has *ever* served at the CMU before being transferred to general population is 40 weeks; *the next shortest stint is 79 weeks*. *See* P. Opp. Ex. 14 (CMU Inmate Release Roster).

In light of this massive durational disparity, Defendants attempt to downplay *Hatch*'s clear admonition that a court must examine duration as part of the liberty interest analysis, *Hatch*, 184 F.3d at 856, arguing:

> *To the extent that duration is also a factor in this case*, whether a liberty interest is a [sic] stake cannot turn on a mechanical comparison of duration alone. 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*.

Def. Br. at 25 (emphasis added). Defendants provide no citation for this assertion, nor any examples of such restrictions. More to the point, Plaintiffs have already acknowledged that transfer to a generic general population unit does not implicate a liberty interest. *See* P's Br. ISO SJ at 4. Instead, Plaintiffs have shown that the CMU imposes a unique constellation of restrictions that are unparalleled elsewhere in the prison system, and have established that these

[11] Defendants' statistics regarding administrative segregation in low and medium security prisons nationally are incorrectly calculated and significantly exaggerate the duration of administrative segregation. *See id*. at ¶¶ 8, 11 (replicating Defendants' methodology); R-SMF 64, 65.

restrictions are imposed for *dramatically* longer periods of time than administrative segregation. This is what gives rise to a liberty interest in avoiding CMU designation.[12]

Notably, Defendants fail to cite to any case that holds that the restrictions at issue must be of precisely the same nature as those in administrative segregation under *Hatch*, and that a liberty interest can only be found if each individual restriction is worse than its correlate in administrative segregation. This stands to reason: such a mechanical application of *Hatch* would mean that no prison unit, no matter how restrictive, would trigger a liberty interest unless a rigid apples-to-apples comparison to administrative segregation were possible. That is why *Hatch* emphasizes duration as a guiding metric. *Hatch*, 184 F.3d at 856 (citing *Sandin*, 515 U.S. at 486). The totality of restrictions at the CMUs, including the critical factor of their duration, must be examined and meaningfully compared to administrative segregation in order to determine whether a liberty interest exists. While some conditions at the CMUs might be less onerous than some conditions in administrative segregation, the fact that CMU designation as a whole is uniquely stigmatizing and restrictive, and lasts so much longer than administrative segregation, makes it atypical and significant – even though it does not precisely mirror and amplify restrictions in administrative segregation. In failing to address this, Defendants neither take into account the full scope of conditions in the CMUs, *see supra*, nor do they meaningfully account for the significance of duration in the analysis.[13]

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[12] Defendants suggest that the *Hatch* framework might not apply here, citing to two cases, each of which involve loss of some programming in a general population setting. *See Tanner v. Fed. Bureau of Prisons*, 433 F.Supp. 2d 117 (D.D.C. 2006); *Perez v. Lappin*, 672 F. Supp. 2d 35 (D.D.C. 2009). But that is not what is at issue in this case; instead, Plaintiffs challenge their transfer to one of "the most restrictive facilities in the federal system [other than ADX.]" *Rezaq*, 677 F.3d at 1009. The *Hatch* test applies to a transfer to restrictive confinement.

[13] Like the D.C. Circuit in *Hatch*, every single circuit has emphasized the importance of duration in post-*Sandin* procedural due process cases. *See*, *e.g.*, *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008); *Hernandez v. Velasquez*, 522 F.3d 556, 563 (5th Cir. 2008); *Jordan v. Fed. Bureau of Prisons*, 191 Fed. App'x. 639, 650 (10th Cir. 2006); *Skinner v. Cunningham*, 430 F.3d 483, 487 (1st Cir. 2005); *Lekas v. Briley*, 405 F.3d 602, 612 (7th Cir. 2005); *Magluta v. Samples*, 375 F.3d 1269, 1282 (11th Cir. 2004); *Portley-El v. Brill*, 288 F.3d 1063, 1066 (8th Cir.

Defendants complain that Plaintiffs do not cite any cases that hold that long-term restrictions "comparable … to those in place in a CMU constitute significant deprivations of liberty within the meaning of *Sandin*," and conclude that, in light of the authority on which they rely, "it would be unprecedented for this Court to find that the environment of a CMU … is more restrictive than administrative segregation merely because it lasts longer." Def. Br. at 25, 26. Plaintiffs have already distinguished the cases upon which Defendants rely. *See* Section II(A)(i). And while it is true that there is not ample precedent applying *Hatch*, Defendants ignore the precedent that does exist: *Brown v. District of Columbia*, 66 F. Supp. 2d 41, 46 (D.D.C 1999), discussed in Plaintiffs' opening motion. *See* P's Br. ISO SJ at 16.

Brown provides this Court with a roadmap for the fact-intensive comparison required here. In *Brown*, the D.C. District Court addressed whether ten months in administrative segregation might implicate a liberty interest, and held that, standing alone, the conditions the plaintiff faced "cannot be found to impose an 'atypical and significant hardship,' for the simple reason that his confinement was not only comparable to but was in fact administrative segregation." 66 F. Supp. 2d at 46. But, the court held, *ten months* of such segregation might implicate a liberty interest under *Hatch*. *Id*. The court thus requested the development of a factual record about the typical duration of administrative segregation. *Id*.

The question in *Brown* appears to have never been resolved. But *Brown* affirms the principle that, under *Hatch*, conditions that might not trigger a liberty interest when imposed for a short duration may do so if imposed for a sufficiently lengthy period of time. Plaintiffs have supplied this Court with an uncontested record about the uniquely harsh restrictions in place at the CMU, and the ways in which CMU designation involves substantial stigma, and is used as a

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2002); *Griffin v. Vaughn*, 112 F.3d 703, 708 (3d. Cir. 1997); *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997); *Brooks v. DiFasi*, 112 F.3d 46, 48 (2d. Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996).

substitute for punishment. *See supra*. As other courts have found, these units are more restrictive than any other setting in the federal system except for ADX, and uniquely so. *See Rezaq*, 677 F.3d at 1009; *Lindh*, 2013 U.S. Dist. LEXIS 4932, at *5. But even if this Court were to conclude that these restrictions do not, standing alone, trigger a liberty interest, Plaintiffs have also supplied the Court with an uncontested record about the prolonged duration of CMU designation and the fact that it significantly outlasts administrative detention. *Brown* thus points this Court to the conclusion that, under *Hatch*, CMU designation triggers a liberty interest.

B. CMU Designation and Review Procedures Are Inadequate.

Defendants insist that even if there is a liberty interest in avoiding CMU designation, the BOP has met due process requirements by providing CMU prisoners notice, a hearing (through the Administrative Remedy program), and periodic review. Def. Br. at 27-31. But Defendants rely almost exclusively on the fact that Plaintiffs received *a* notice, *filed* administrative remedies, and were *eventually* released from the CMU. *Id*. Defendants fail to explain or even address Plaintiffs' undisputed showings that CMU notice does not include the actual decision-maker's reasons for CMU placement, that the generic Administrative Remedy program provides no fair opportunity to rebut the factual basis for CMU placement, and that CMU reviews are so arbitrary and opaque as to be meaningless. *See infra*; *see also*, P's Br. ISO SJ at 20-41.

i. <u>Notice</u>

Defendants concede that due process requires "a brief summary of the factual basis for placement" in a CMU. *See* Def. Br. at 27 (*quoting Wilkinson*, 545 U.S. at 225-26). But they also concede that the Notice of Transfer provided to CMU prisoners "lists some but not necessarily all of the reasons an inmate was placed in a CMU." *See* SUF 144, 145; R-SUF 144, 145. Indeed the BOP has "no specific criteria to identify what gets included in the [notice of transfer]." P. Opp. Ex. 15 (Schiavone 30(b)(6) Dep.) 69:22-69:24. Notice that provides *some* but not *all* of the

reasons for designation is insufficient for an obvious reason: a successful challenge to the listed reason would presumably not result in release from the CMU, as the prisoner could be retained based on other non-listed reasons which he was hopeless to challenge. *See Childs v. U.S. Bd. Of Parole,* 511 F.2d 1270, 1281 (D.C. Cir. 1974) (if information must be excluded from notice for security reasons, notice should "indicate the fact of the omission"); *Brown*, 66 F. Supp. 2d at 45 (notice must provide prisoner with decision-maker's basis); *Taylor v. Rodriquez*, 238 F.3d 188, 192-93 (2d Cir. 2001) (notice must apprise prisoner of what he is alleged to have done).

Defendants do not and cannot account for this failing. *See* Def. Br. at 28. Instead, they "clarify" that the "notice is intended as a summary of the reasons supporting the inmate's placement in the CMU," R-SUF 145, and that "the Regional Director at the time of plaintiffs' placement reviewed the notice to ensure it adequately summarized the reasons for the inmate's placement." Def. Br. at 28, SMF 119, 124-25. The only factual support for this general statement is the former Regional Director's declaration. *Id.*, *citing* (Nalley Decl.) ¶ 9. But this self-serving, eleventh-hour submission contradicts Defendants' concession that the Notice of Transfer does not list all of the reasons for placing an inmate in the CMU. Unless it is Defendants' position that it is possible to "summarize the reasons" for CMU placement while excluding any mention of some of those reasons, this is an irreconcilable contradiction.

Indeed, Michael Nalley, the former Regional Director who approved Plaintiffs' designations to the CMU, testified repeatedly that the Notices need only provide "sufficient" information to *support* CMU designation, even if that information did not comprise all of the reasons for CMU designation. For example, despite testimony that Aref's "links" to individuals affiliated with al Qaeda was part of the *basis* for his CMU placement, P. Opp. Ex. 16 (Nalley Dep.) 138:9-139:9 (referring to P. Ex. 55 at BOPCMU003287), Nalley now swears in his

declaration that Aref's Notice of Transfer, which excludes mention of these links, "accurately summarizes" the reasons why he ordered Aref's placement in the CMU. D. Ex. 3 (Nalley Decl.) ¶ 10.[14] At his deposition, Nalley rationalized excluding this reason from Aref's notice because there was enough information in the notice to "justify his placement in the [CMU]." P. Opp. Ex. 16 (Nalley Dep.) 154:14-155:17; *see also id.* at 76:3-76:24.

Defendants' failure to summarize all reasons for CMU placement in the Notice of Transfer is especially problematic in light of the undisputed facts suggesting the BOP routinely excludes pivotal and objectionable reasons for designation from the Notice. *See*, *e.g.*, P. Ex. 12 (Schiavone 30(b)(6) Dep.) 213:11-214:17 ("Q. Why is there no reference in this notice [of Transfer] to Daniel McGowan's communications while incarcerated? A. I wish I had a specific answer. It certainly was relevant in the referral. And through review, a determination was made that this was the most relevant information to put in this notice in the limited space available."); *see also* P's Br. ISO SJ at 23 (excluded information frequently related to religious or political views) (*citing* SUF 234, 240, 244, 246, 263, 265, 267, 269, 271). Defendants have little dispute with these facts. *See* R-SUF 244 (disputed), 263 (disputed in part).

Even more significant is the fact that the Notice of Transfer does not reflect the reasons actually relied on by the decision-maker for CMU placement. To dispute this fact, Defendants again rely on Nalley's declaration that he "reviewed the Notice [of Transfer] to ensure it adequately summarized the reasons for the inmate's placement in the CMU." *See* SUF 113, 114,

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[14] Defendants use this statement to dispute SUF 171 and 172 (stating that the Regional Director relied on Aref's links to terrorism in approving him for CMU designation, but this additional basis for CMU placement was excluded from Aref's notice of transfer). But a declarant cannot create a genuine issue of material face by baldly contradicting his prior sworn testimony. *Pyramid Secur. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991). Courts must give prior sworn statements "controlling weight unless the [offering] party can offer persuasive reasons for believing the supposed correction." *Id.*

146; R-SUF 113, 114, 146 (disputing, citing Nalley Decl. ¶ 9).[15] But Nalley's assertion is very carefully phrased. There is no question that he, as Regional Director, is the sole decision-maker regarding CMU designation, and that he may or may not make his decision based on the CTU's recommendation. *See* SUF 110, 112, SMF 116, 117. Yet he does not state that he reviewed the Notice to ensure it adequately summarized *his* final reasons for CMU designation, nor does he assert that he ever actually edited a single notice so that it would do so. D. Ex. 3 (Nalley Decl.) ¶ 9 ("If as a result of my review of the draft notice, I concluded that it did not accurately summarize *the* reasons for placement, I *would have* requested that a change be made.")

To put this vague assurance in context, Nalley acknowledged at his deposition that he did not document the reason(s) he, personally, approved a prisoner for CMU designation.[16] This is corroborated by the CMU review forms themselves, where the Regional Director approves or disapproves of CMU placement and occasionally explains his reasoning, but usually does not. *Compare* P. Opp. Ex. 17 (CMU Review Form with Reason) *with* P. Exs. 76, 78-85 (Prisoner A-I's Designation Packets).[17]

That neither the Notice of Transfer nor any other document reflects the Regional Director's reasoning is also corroborated by Nalley's acknowledgment that the only way to find out his personal reasons for a prisoner's CMU placement is to ask him:

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[15] Defendants also rely on Nalley's Deposition to dispute SUF 146 ("The Notice is not drafted, edited, or finalized by the Regional Director, and does not reflect his reason(s) for approving CMU designation.") But the cited pages do not actually refute any of these well-supported facts; rather, Nalley merely testified that he if he had any question about whether the information on the notice was *specific* enough, he would follow up. Def. Ex. 12 (Nalley Dep.) 75:5-77:18.

[16] When Nalley was asked, "Let's say a particular inmate you were given ten different reasons why they might be sent to the CMU, but you only thought two of them were relevant. Did you document those two reasons that you used to make your decision anywhere at all?," he answered, simply, "[n]o." P. Ex. 3 (Nalley Dep.) 250:14-250:19 (cited as support for SUF 114).

[17] This failing was not limited to former Regional Director Nalley. *See*, *e.g.*, P. Exs. 81, 82, 85 (Prisoner E, F and I's Designation Packets).

> Q. [Plaintiffs' Counsel] just asked you essentially how can we know what your reasons were for making your decisions with respect to CMU placement. And we've spent today, among other things, asking you what your reasons were for placing Yassin Aref, Kifah Jayyousi and Daniel McGowan into the CMU. In your view is that the appropriate way to learn what your reasons were for placing those individuals in the CMU?
>
> A. From your questions today?
>
> Q. Yes.
>
> A. Yes.

P. Ex. 3 (Nalley Dep.) 250:22-251:9. The Court would not have to rely on the Regional Director's memory alone if the Notices of Transfer reflected his reasons for CMU placement.

Moreover, the BOP's 30(b)(6) witness[18] corroborated these damning facts, testifying that there is no requirement that the Regional Director document his/her personal reasons for CMU placement, P. Ex. 12 (Schiavone 30(b)(6) Dep.) 89:17-90:8, and that the Notice of Transfer does *not* reflect Nalley's personal reasons for approving designation:

> Q. Please turn to the sixth page of the exhibit, which is the notice to inmate of transfer to Communications Management Unit, Bates stamped P1199 . . . Does this notice indicate the reasons why Mr. Nalley approved Yassin Aref for designation to the CMU?
>
> A. No, this document doesn't.
>
> Q. What does this document indicate? Whose reasons does this document reflect?
>
> A. No. This document reflects information which supports the inmate's placement in a CMU.
>
> Q. But it's possible that Mr. Nalley approved him for designation to the CMU based on a completely different reason?
>
> A. You'd have to ask Mr. Nalley what his reasoning was.

P. Ex. 12 (Schiavone 30(b)(6) Dep.) 264:5-264:23. Schiavone testified to exactly the same thing with respect to Jayyousi's and McGowan's Notices: that the Regional Director could have based

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[18] David Schiavone was identified by Defendants to testify to policy and practice in designating and re-designating BOP prisoners to a CMU during the relevant period; paperwork generated to nominate, consider, review and approve BOP prisoners' designation and re-designation to a CMU, and the reason(s) for each Plaintiffs' designation and re-designation. P. Opp. Ex. 18 (Plaintiffs' 30(b)(6) Notice); P. Opp. Ex. 15 (Schiavone 30(b)(6) Dep.) 11:4-11:14.

his decision on reasons other than those that appear in the Notices, and that one would have to ask the Regional Director what those reasons were. P. Ex. 12 (Schiavone 30(b)(6) Dep.) 285:3-285:17; P. Opp. Ex.15 (Schiavone 30(b)(6) Dep.) 222:12-223:17.

Finally, while Nalley declares that he "would have requested that a change be made" if the Notice did not "adequately summarize the reasons for placement," Def. Ex. 3 (Nalley Decl.) ¶ 9, both he and Defendants' 30(b)(6) witness testified that they did not recall the Regional Director *ever* changing or requesting a change to the language in a Notice of Transfer. P. Opp. Ex. 16 (Nalley Dep.) 77:14-77:18; P. Opp. Ex. 15 (Schiavone 30(b)(6) Dep.) 217:21-218:11.

Given this clear and undisputed factual record, Nalley's ambiguous statement that he "reviewed" the Notices to "ensure" their accuracy fails to create a genuine issue of material fact as to whether or not the Notice of Transfer reflects the decision-maker's actual reason(s) for CMU placement. Without knowing the true reasons he is designated to the CMU, a prisoner can neither meaningfully rebut those reasons nor understand what behavior to avoid to earn release.

Defendants do not explain how a notice which reflects only (some of) the CTU's reasons for *recommending* transfer to a CMU satisfies due process. Instead, Defendants assert that (1) both Aref and Jayyousi received a Notice of Transfer explaining that their CMU designation was based on their terrorism convictions and offense conduct, (2) that Plaintiffs were indeed convicted of terrorism-related offenses, and (3) that there is no dispute that "this conduct" is an appropriate basis for CMU placement. Def. Br. at 28. Defendants seem to be making the point that because Plaintiffs were told *a reason* for their CMU designation that is arguably[19] substantively valid, it does not matter for due process purposes whether or not it was the *actual* reason for the their CMU designation. This cannot be true. "Obviously, the Due Process Clause

[19] Though of course, the BOP did not even succeed in accurately describing Plaintiffs' convictions and offense conduct in their Notices of Transfer. *See* Section ii, *infra*.

requires not simply that the prisoner have an opportunity to address the decisionmaker, but that he have an opportunity to address the basis on which the decisionmaker reasonably expects to make its determination." *Brown*, 66 F. Supp. 2d at 45.

ii. Hearing

As Plaintiffs explained in their opening brief, due process also demands that a prisoner transferred to a restrictive unit receive a "fair opportunity" to rebut the factual basis for his segregation. *Wilkinson*, 545 U.S. at 226. According to Defendants, the Administrative Remedy program provides this fair opportunity because (1) Aref and Jayyousi used it, and (2) the BOP, in response, "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." Def. Br. at 28-29 (*citing* SMF 169, 188). But the facts and exhibits that Defendants rely on instead confirm that the Administrative Remedy program is nothing like a meaningful hearing.

Aref's experience makes this clear. Defendants do not dispute that Aref's Notice of Transfer indicates he was sent to the CMU because his offense conduct included "significant communication, association, and assistance to JeM." SUF 164. But Defendants also do not dispute that Aref's Pre-Sentence Report (PSR) shows that he never actually had any contact with anyone from JeM. SUF 160-162. And finally, Defendants do not dispute that Aref used the Administrative Remedy program to bring this mischaracterization to the BOP's attention, and in their responses, the BOP failed to address Aref's factual question. SUF 173, 174.[20] Thus, the Administrative Remedy program failed to provide Aref a "fair opportunity" to rebut the factual basis for his placement, a basis that Defendants now concede was *factually erroneous*.

[20] On page 27 of their opening brief, Plaintiffs mistakenly cited SUF 169 for the proposition that, at each level of Administrative Review, the BOP failed to address or respond to Aref's claim that the information in his notice of Transfer was factually inaccurate. Plaintiffs should have cited to SUF 174, which Defendants do not dispute.

Instead of accounting for these undisputed facts, Defendants assert that the BOP "reviewed [Aref's] appeals … and explained that the factual basis for [his] placement was set forth in [his] sentencing document[] and PSR." Def. Br. at 28-29 (*citing* SMF 169, *supported* by Def. Ex. 21).[21] This is beyond ironic, given that Aref repeatedly asked the BOP to look at his PSR, but they declined to do so and left his request unaddressed in their Administrative Remedy response. *See* Def. Ex. 21 (Administrative Remedy – Yassin Aref). Indeed, one can tell from Aref's Administrative Remedy packet exactly what type of "review" the BOP conducted because, as required by policy, the packet attaches the two documents the BOP consulted. *See* Def. Ex. 21 (Administrative Remedy – Yassin Aref) BOPCMU075725-27, P. Opp. Ex. 19 (Albright 30(b)(6) Dep.) 22:22-23:10. First, the BOP apparently consulted Aref's Judgment, which lists his conviction counts but does not indicate that he had any communication with JeM. Def. Ex. 21 (Administrative Remedy – Yassin Aref) BOPCMU075725-26. Second, they consulted a CMU referral form, which is simply a summary *created by the North Central Regional Office* when it initially designated Aref to the CMU. *Id.* at BOPCMU075727. Thus it is clear the BOP's "review" in response to Aref's CMU appeal involved looking at exactly two documents: one which was silent as to the facts Aref disputed, and another which summarized the *source* of those disputed facts. Although Aref stated repeatedly that his PSR would prove he had no communication with JeM, *see id.* at BOPCMU075720, 075722, it appears that no one in the BOP bothered to consult that crucial document in response to his appeal.[22]

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[21] SMF 169 actually cites to Def. Ex. 20 (Relevant Excerpts from Deposition of Avon Twitty), but this is incorrect. Plaintiffs assume that Defendants meant to cite to Def. Ex. 21 (Administrative Remedy – Yassin Aref).

[22] The nature of this review corroborates SUF 153, stating that the regional office responds to CMU appeals by "reviewing the reasons for the prisoner's designation and reminding the prisoner of those reasons" but that the office does not "reconsider their decision to designate the prisoner to the CMU." It also goes some ways toward reconciling SUF 153 with the evidence offered by Defendants to dispute it. *See* R-SUF 153. Defendants rely on deposition testimony from one North Central Regional Office staff-member, who stated that his office would sometimes review documents submitted by the inmate in reviewing CMU appeals. *Id.* (*citing* Def. Ex. 13 (Pottios

Aref is not the only example. Defendants do not dispute nor make any effort to explain the fact that former Plaintiff Twitty and "Prisoner A" each used the Administrative Remedy program to ask the meaning of the vague allegations of "recruitment and radicalization" that appeared on their Notices of Transfer, but received no information in return. *See* P's Br. ISO SJ at 28-29. And Defendants do not even deign to concede or dispute the facts regarding McGowan's attempt to use the Administrative Remedy program. Plaintiffs show, for example, that McGowan's PSR disproves facts from his Notice of Transfer – namely that his offense conduct included destroying an energy facility and teaching others arson. *See* SUF 197, 198. When McGowan pointed out these factual errors in his Administrative Remedy, the BOP falsely claimed the information came from his PSR. *See* SUF 206, 207. Defendants sidestep this clear failure of the Administrative Remedy program by "disput[ing]" each fact "to the extent Plaintiffs' characterization differs from the cited document, which speaks for itself." *See* R-SUF 197, 198, 206, 207. Rather than concede the fairness of Plaintiffs assessment *or* point the Court to any contradiction within the document, Defendants would instead have the Court to read the entire PSR itself in search of a dispute. The Court will find none in the document.

Indeed, Defendants focus exclusively on Aref's and Jayyousi's experiences, declining to engage with Plaintiffs' arguments regarding other CMU prisoners (including former-Plaintiffs). But as this Court previously explained, when granting Plaintiffs' motion to compel production of non-party CMU designation documents, "'procedural due process rules are shaped by the risk of error inherent in the [] process as applied to the generality of cases, not the rare exceptions.'" Mem. Op. and Order, Dkt. No. 87 at 20 (*citing Mathews*, 424 U.S. at 344; *Walters v. National*

Dep.) 51:1-52:3). Defendants also rely on Nalley's deposition testimony that he looks at "information in the packet" when responding to a CMU appeal. *Id.* (*citing* Def. Ex. 12 (Nalley Dep.) 127:10-127:17). Both these statements, and the testimony relied on by Plaintiffs, indicate that the Regional Office may review its *own* prior CMU documentation, and might also consider information provided by a prisoner, but *will not* conduct a new, independent, investigation.

Ass'n of Radiation Survivors, 473 U.S. 305, 321 (1985); *Rafeedie v. INS*, 880 F.2d 506, 524 (D.C. Cir. 1989)); *see also, Kuck v. Danaher*, 600 F.3d 159, 165 (2d Cir. 2010) (explaining that plaintiff's due process challenge to a delay in gun permitting procedures did not turn on the merits of plaintiff's application denial, but rather on "the overall risk of erroneous deprivation for permit applicants"); *Meza v. Livingston*, 607 F.3d 392, 403 (5th Cir. 2010) (considering risk of deprivation to non-plaintiffs). In this regard, it is highly suggestive that the Administrative Remedy program has never resulted in a *single* release from the CMU. SUF 152.

iii. Review

Procedural due process also requires periodic review. *Hewitt,* 459 U.S. at 477 n. 9 (1983). Defendants neither dispute nor address the vast majority of Plaintiffs' showings regarding the total lack of any review process between 2006 and 2009, or the erroneous information provided to CMU prisoners (and others) about the review process both before *and after* it was finally instituted. *See* P's Br. ISO SJ at 30-32.[23] Instead, Defendants point to the better-late-than-never review policy set forth in the 2009 Dodrill memo, and the fact that both Jayyousi and Aref were eventually transferred from the CMU. Def. Br. at 29-31. But Defendants' happy ending ignores the undisputed facts that, contrary to BOP policy, Jayyousi and Aref were never given an explanation for the BOP's repeated denials, or the eventual grant, of their CMU transfer requests. *See e.g.,* SUF 373-377, R-SUF 377, SUF 395-398, 406, 408-411, R-SUF 409, 411, SUF 382, 384-385, 421, 423-424. Defendants try to dispute that the BOP consistently fails to provide

[23] Defendants dispute as hearsay, inadmissible for the truth of the matter, several of Plaintiffs' facts regarding information provided to them by members of their unit team regarding the review process. *See* R-SUF 351, 415, 426, 432, 435; *see also* R-SUF 507 (disputing as inadmissible hearsay Jayyousi's recounting of the FCI Oxford Chaplain's instructions regarding limitations on Jayyousi's ability to participate in or lead group religious services). However, in each instance the information in question involved statements by BOP employees on matters within the scope of their employment, and thus are non-hearsay opposing party statements under Fed. R. Evid. 801(d)(2)(D). *See e.g., Ware v. Howard Univ., Inc.*, 816 F. Supp. 737, 741 n.5, 746 n.10 (D.D.C. 1993).

CMU prisoners with such reasons, but the dispute fails because they provide *absolutely no evidence* to the contrary. SUF 338, 340, R-SUF 340.

Precedent is clear that prisoners denied transfer must be apprised in writing of the reason for continued segregation. *Wilkinson*, 545 U.S. at 225-226. “This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior.” *Id.*; *Childs*, 511 F.2d at 1282 (“reasons requirement can serve the important function of promoting rehabilitation by relieving inmates’ frustrations and letting them know how they might, by improving their prison behavior or taking steps with respect to some other factor in doubt…better their chances for release”); *Williams v. Hobbs*, 662 F.3d 994, 1008 (8th Cir. 2011) (review meaningless because of failure to explain with “reasonable specificity” why the prisoner continued to constitute threat to prison security). The BOP did not provide any such explanation to Plaintiffs, and it continues to fail to provide such explanation to other CMU prisoners. Even if the CMU review process were otherwise adequate, this failing requires summary judgment for Plaintiffs.

But of course, the review process is flawed in other ways as well. Defendants have no substantive response to Plaintiffs’ arguments about the lack of clarity around the CMU designation and review criteria. P’s Br. ISO SJ at 8-11, 33-34. They insist, for example, that “the CMU designation process is documented in the Dodrill memo,” R-SUF 96, but the Court need only look at this pivotal document to see that it mentions nothing about that process. Similarly, Defendants’ 30(b)(6) witness testified, illogically, that the first criterion (“the inmate’s current offense(s) of conviction, or offense conduct, included association, communication, or involvement related to international or domestic terrorism”) includes *incarceration conduct*

related to terrorism. SUF 128, *citing* P. Ex. 12 (Schiavone 30(b)(6) Dep.) 72.25-73.23. The BOP now claims that criterion should be interpreted as written. SMF 97, R-SUF 128.[24] This last minute change makes better sense, but it conflicts with other BOP officials' testimony. *See e.g.,* P. Opp. Ex. 1 (Smith Dep.) 110:14-113:7, P. Opp. Ex. 20 (Lockett Dep.) 150:5-152:11. Where Defendants themselves cannot coherently explain the correct and operative meaning of their own criteria, it is hard to imagine how Plaintiffs, or this Court, are to do so.

C. Defendants Have Not Meaningfully Disputed Plaintiffs' Argument that Additional Process Is Due.

Plaintiffs have shown beyond any factual dispute that the CMU does not provide the minimum notice, hearing, and periodic review required by *Hewitt* and *Wilkinson*. Moreover, as Plaintiffs argued in their opening brief, the CMU is used so frequently as a substitute for disciplinary process that even more robust procedures are required. *See* P's Br. ISO SJ at 41-42.

Defendants disagree, and attempt to downplay Plaintiffs' private interest in avoiding placement in a CMU by claiming that CMU prisoners "have ample opportunities to communicate with persons in the community." Def. Br. at 32. That claim is belied by, for example, the undisputed fact that ADX prisoners are eligible for more than four times the amount of visitation as CMU prisoners. SUF 7; *see also* SUF 19-28, 32 (cataloging CMU communications restrictions). The importance of social telephone calls and visitation in maintaining community and family ties that will contribute to an inmate's personal development, morale, and preparation for reentry into society is undisputed. SUF 19. And yet, the communications restrictions at the CMU are imposed for *years* at a time. *See*, *e.g.*, SUF 64-69. These restrictions have led courts to recognize that "other than ADX, the CMUs are the most

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[24] Defendants also dispute that North Central Regional Office staff other than Potts used the incorrect "criteria." SUF 133-139, R-SUF 139, *see also* P's Br. ISO SJ at 9-10. But Plaintiffs cited testimony from Nalley's deposition, indicating that he too relied on the incorrect "criteria," SUF 133, and Defendants produce no facts to suggest otherwise. R-SUF 133, 139.

restrictive facilities in the federal system." *Rezaq*, 677 F.3d at 1009. Defendants' benign characterization of the impact of the CMU is unavailing.

Next, Defendants insist that any stigma associated with CMU designation actually arises from Plaintiffs' convictions. Def. Br. at 32. But Defendants ignore the undisputed fact that the U.S. Attorney General has publicly described the units as designed to hold terrorist inmates despite the fact that not all CMU inmates have terrorism-related convictions. SUF 18; *see also* P. Ex. 52 (Twitty Designation Packet) BOPCMU076157. They also fail to address the "stigma of wrongdoing or misconduct" associated with a prison unit that is used as a substitute for discipline. *Hewitt*, 459 U.S. at 473; *see also Brown v. Plaut*, 131 F.3d 163, 171 n.8 (D.C. Cir. 1997); SUF 126, 214, 219-21, 404, 405, 464, 468, 471, 472.

Finally, Defendants misapprehend Plaintiffs' argument regarding the ongoing impact of prior CMU placement. Def. Br. at 32-33. Plaintiffs do not complain that their security level has been affected by CMU designation. Instead, they point to facts indicating that, once released from the CMU, they are treated differently than other prisoners. SUF 507, 508; *see also* P. Opp. Ex. 5 (Agathocleous Decl.) ¶¶ 3-5. Moreover, former CMU prisoners continue to be subject to ongoing monitoring, making them more vulnerable to CMU redesignation than other prisoners. *See* Section I, *supra*. Thus, Plaintiffs have a strong interest in avoiding CMU designation.

In arguing against more robust process, Defendants claim that "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." Def. Br. at 34. But this alarmism rings hollow. The Chief of the CTU has testified that ADX houses "the most incorrigible" and "most dangerous" inmates in BOP custody, P. Opp. Ex. 1 (Smith Dep.) 159:2-159:4. And yet, ADX designation involves a pre-transfer hearing. P. Ex. 8 (Control

Unit Programs) 7-11. Defendants do not explain why concerns about prohibited communications prior to transfer could not be allayed by restricting a prisoner's communications between the CMU hearing and arrival at a CMU – for example, by placing that prisoner in the SHU on holdover status, as is orthodox. *See* P. Ex. 21 (Special Housing Units) at BOPCMU000257.

Defendants' attempt to differentiate between ADX and CMU designation is similarly unconvincing. They complain that the hearing officers involved in ADX designation are "not likely to have the intelligence background or training needed to assess whether an inmate warrants enhanced communications monitoring." Def. Br. at 34. But Plaintiffs do not demand that any particular BOP official need be involved in a CMU hearing, *see* P's Br. ISO SJ at 41-44, simply that Defendants must provide such hearings in accordance with constitutional requirements. The BOP may identify who is best suited to officiate such hearings.

For these reasons, the Court should find that CMU designation requires *Wolff*-style procedures. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 563, 566 (1974). But of course, if the Court disagrees, it must still issue summary judgment for Plaintiffs, as the BOP fails to provide even the minimal *Hewitt* requirements of meaningful notice, hearing, and periodic review.

III. MATERIAL FACTUAL DISPUTES FORECLOSE SUMMARY JUDGMENT ON JAYYOUSI'S RETALIATION CLAIM.

Defendants move for summary judgment on Kifah Jayyousi's retaliation claim against Leslie Smith in his official capacity as Chief of the CTU. Def. Br. at 34. That claim asserts that "[b]y recommending that Plaintiff Jayyousi be retained in the CMU, on the basis of his protected political and religious speech and beliefs, Defendant Smith unlawfully retaliated against Plaintiff Jayyousi." Am. Compl., Dkt. No. 88-1, ¶ 238. The speech in question involved Jayyousi's statements on August 15, 2008, while serving as rotational prayer leader at the Terre Haute CMU. *See* Stipulation, Dkt. No. 142, ¶ 6. The CTU, under Smith's direction, relied on this

sermon in recommending, two and a half years later, that Jayyousi should remain in the CMU. P. Ex. 137 (Jayyousi Redesignation Packet) 5-7. The Regional Director subsequently concurred with this recommendation, and Jayyousi's transfer request was denied. *Id.* at 2.

Defendants advance three general arguments in support of their motion: (1) that Smith's consideration of Jayyousi's speech advanced a legitimate penological goal; (2) that 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; and (3) that Jayyousi's statements were not the "but for" cause of the BOP's decision to retain him in the CMU. Def. Br. at 35, 36, 41, 43. None of these arguments support summary judgment.

A. Defendants' First Argument Relies on a Misstatement of the Law.

As this Court has previously explained:

> "A prisoner alleging a First Amendment claim of retaliation must allege 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 between the exercise of a constitutional right and the adverse action taken against him." *Aref I,* 774 F. Supp. 2d at 169 (citing *Banks* v, *York,* 515 F. Supp. 2d 89, 111 (D.D.C.2007); *Rauser* v. *Horn,* 241 F.3d 330,333 (3d Cir. 2001); *Friedl* v. *City of New York,* 210 F.3d 79,85 (2d Cir. 2000)). "To satisfy the causation link, a plaintiff must allege that his or her constitutional speech was the 'but for' cause of the defendants' retaliatory action." *Id* (citing *Hartman* v. *Moore,* 547 U.S. 250, 256 (2006)).

Aref II, 953 F. Supp. 2d 133, 144 (D.D.C. 2013).

Before turning to these elements, Defendants argue that "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 [and] [a]s a result, the First Amendment was not violated." Def. Br. at 35, 36. Though difficult to parse, this argument is distinct from Defendants' second argument – that Jayyousi's speech is not protected by the First Amendment. Instead, Defendants seek summary judgment *even if Jayyousi's protected*

speech was the but-for cause of his transfer denial, on the theory that Smith considered the speech in pursuit of a noncontroversial penological goal. *See* Def. Br at 35, 36.

This would shortcut the *Turner* standard, which controls the question of whether prisoner speech is protected by the First Amendment. *See Turner v. Safely*, 482 U.S. 78 (1987). *Turner* demands consideration of whether there is a "valid, rational connection" between Jayyousi's speech and Smith's recommendation of CMU retention. *Id*. at 89. If such a connection exists, and the other *Turner* factors are satisfied, than Jayyousi had no First Amendment right to engage in such speech, and Smith could impose an adverse consequence upon Jayyousi in response to that unprotected speech. *See Aref II,* 953 F. Supp. 2d at 144-45 (*citing Pell* v. *Procunier,* 417 U.S. 817, 822 (1974)). But if under *Turner* the speech is protected, then the First Amendment prohibits cognizable retaliation because of that protected speech. *Id.* (relaying the basic elements of First Amendment retaliation); *Simmat v. Manson*, 535 F. Supp. 1115, 1117-18 (D. Conn. 1982) ("[F]irst [A]mendment right to freedom of expression encompasses the right to express himself without punitive retaliation").

Accordingly, if the Court finds a material dispute regarding (1) whether Jayyousi's speech is protected by the First Amendment, and (2) whether Jayyousi's speech was the "but for" cause of his CMU retention, the Court cannot grant summary judgment on the theory that Jayyousi's retention in the CMU was nevertheless lawful because it was done in pursuit of a legitimate penological goal, as Defendants would have it. *See* Def. Br at 35, 36; *Banks v. York*, 515 F. Supp. 2d 89, 110-113 (D.D.C. 2007) (an "ordinarily permissible exercise of discretion may become a constitutional deprivation if performed in retaliation for the exercise of a [F]irst [A]mendment right"); *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003) ("if, in fact, the defendants abused [a penologically-legitimate anti-prison] gang validation procedure as a cover

or a ruse to silence and punish the plaintiff, because he filed grievances, [the defendants] cannot assert that the plaintiff's validation [as a gang member] served a valid penological purpose, even though he may have *arguably* ended up where he belonged”).

B. Jayyousi’s Sermon Is Protected by the First Amendment.

Next, Defendants argue that “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[.]” Def. Br. at 35, 41. Before applying the *Turner* factors, one clarification is necessary: Plaintiffs do not challenge Smith’s “consideration” of Jayyousi’s sermon; rather, Plaintiffs challenge Smith’s *reliance* on Jayyousi’s sermon as the basis for retaining Jayyousi in the CMU. As shown below, the sermon was merely an expression of Jayyousi’s political and religious beliefs, and posed no threat to institution security.

Turner identifies four factors to determine whether an prisoner has a First Amendment right to engage in a particular type of speech: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact accommodation of the asserted right will have on guards and other inmates, and on the allocation of prison resources; and (4) whether there are ready alternatives to the restriction to secure the penological interest. *See Turner*, 482 U.S. at 89-90. An examination of these factors confirms that Jayyousi’s speech was protected.

i. First *Turner* Factor

Smith’s testimony does not articulate a “valid, rational connection” between Jayyousi’s speech and his retention at the CMU for two separate reasons. First, Smith’s (and other BOP officials’) characterization of Jayyousi’s speech is exaggerated, inaccurate, and purposefully

deceptive; and second, Smith's characterization of Jayyousi's conviction and offense conduct – which purportedly supplies context that legitimizes his concerns – is similarly flawed.

Smith's description of the sermon in the CTU memo recommending against Jayyousi's transfer from the CMU stands in stark contrast to the actual text of the sermon. P. Ex. 137 (Jayyousi Redesignation Packet) 5-7. According to Smith, the sermon "was aimed at inciting and radicalizing the Muslim inmate population in THA CMU," showed Jayyousi to be "a charismatic individual, who makes highly inflammatory commentaries which elicit violence, terrorism or intimidation, and speech that disrespects or condemns other religious, ethnic, racial, or regional groups," and "encouraged activities which would lead to group demonstration and are detrimental to the security, good order, or discipline of the institution." *Id.* at 6. But as this Court has already found,

> [J]ayyousi's speech does not obviously 'confront institutional authority,' [...] While the sermon was arguably inflammatory, it does not, on its face, advocate 'violence, terrorism or intimidation' or 'disrespect or condemn other religious, ethnic, racial, or regional groups.' One interpretation of a large portion of the sermon as transcribed is that it is dedicated to an inspirational comparison with U.S. government officials John McCain and Jim Scotsdale, as well as Nelson Mandela. [...] Indeed, again granting Jayyousi the benefit of all inferences, there is arguably a disparity between the actual content of the sermon and Smith's description of it. [...]."

Aref II, 953 F. Supp 2d. at 146-47; *see also* Stipulation, Dkt. No. 142, ¶ 6 (text of sermon).

Smith disagrees, and characterizes Jayyousi's statement that Muslim inmates were put in the CMU because of their religion as an attempt to incite and radicalize the CMU population. Def. Br. at 38. But the statement simply recounts Jayyousi's personal view that Muslims are singled out for CMU placement, a view which happened to be shared by the press at the time, *see* P. Opp. Ex. 21 (Raw Story Article), and later formed the basis of one of the claims in this case.

See Complaint, Dkt. No. 5, ¶ 273.[25] In *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119 (1977), the Supreme Court drew a distinction between a prisoner's speech that involves "the simple expression of individual views" and "an invitation to collectively engage in legitimately prohibited activity," noting that the former is protected by the First Amendment while the latter is not. *Id*. at 131-32. Defendants have not explained how Jayyousi's speech might fall into the latter category.

Smith also focused on Jayyousi's use of the word "martyr," though its meaning in Jayyousi's sermon is far from clear. *See* Def. Br. at 37-38. The CTU memo indicates that Jayyousi said "Muslims should Martyr themselves to serve Allah and meet hardships in their lives." P. Ex. 137 (Jayyousi Redesignation Packet) 6. But the stipulated transcription reads: "[y]ou are, you 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, but [*Arabic*]." Stipulation, Dkt. No. 142, at ¶ 6. Since the CTU did not bother to translate Jayyousi's Arabic comments it is hard to take any definitive meaning from these sentences, but the context suggests Jayyousi is merely expounding on the theory that life is hard, and the hardship of being in the CMU is one more thing that Muslims must endure. Nowhere does he encourage CMU prisoners toward violent conduct.

Beyond mischaracterizing Jayyousi's speech, the CTU memo is also purposefully deceptive in several other ways. It states that "Jayyousi was precluded from acting as the Muslim prayer leader while at THA CMU, a restriction which was never lifted." P. Ex. 137 (Jayyousi Redesignation Packet) 6. But this is untrue. *See* P. Opp. Ex. 23 (Jett Dep.) 149:5-149:15. The CTU memo states that "Jayyousi continued to espouse anti-Muslim beliefs [sic] as well as made

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[25] Indeed, Jayyousi's beliefs were apparently widely enough shared that the BOP felt it necessary to develop talking points answering the question "Are the Communication Management Units primarily for housing terrorist inmates? Muslim inmates?" P. Opp. Ex. 22 (Talking Points Two).

inflammatory comments regarding the United States and other non-Muslim countries and cultures," P. Ex. 137 (Jayyousi Redesignation Packet) 6, but this too is untrue. Plaintiffs have reviewed all the CTU's intelligence summaries which recount Jayyousi's communications, and the only statement he appears to have made that could even possibly fit this description is an email to his daughter, discussing a writing project for her school, in which Jayyousi criticized Israel's targeting of civilians in Gaza. *See* P. Opp. Ex. 24 (Feb. 9, 2009 Intelligence Summary). Even if this opinion were inflammatory, it was shared in a private communication with his daughter and did not work to radicalize the CMU population. Even more tellingly, the CTU memo indicates that Terre Haute CMU staff who reviewed Jayyousi at each of his team meetings "decided not to recommend the inmate for transfer from a CMU due to his continued radicalized beliefs and associated comments." P. Ex. 137 (Jayyousi Redesignation Packet) 7. This too is false. Jayyousi's unit team recommended against Jayyousi's transfer from a CMU based on his conviction and offense conduct, *not* his institution conduct. *See* SUF 390-398. That Smith mischaracterized the sermon itself, other staff members' reactions to the sermon, and Jayyousi's other statements, is strong evidence that he *knew* the sermon as actually delivered could not be used to justify CMU retention, and thus exaggerated the threat it posed to provide cover for his illegitimate reliance on Jayyousi's protected religious and political beliefs and statements.

Defendants next argue that Jayyousi's sermon was particularly troubling to Smith based on Smith's belief that Jayyousi is a "rock star" terrorist. Def. Br. at 38. But Smith's characterization of Jayyousi as "one of the more influential terrorists I have in custody," is based on a demonstrable misunderstanding of Jayyousi's conviction and offense conduct, establishing that they very premise of Smith's decision making was flawed and cannot serve as a legitimate penological rationale for his subsequent actions. Smith's characterization of Jayyousi is based in

part on his belief that Jayyousi had been "credited with recruiting [Jose Padilla] to some form of violent action." P. Opp. Ex. 1 (Smith Dep.) 283:22-284:7. When asked what he was basing this on, he testified: "Something I read. I just can't remember where it's at." *Id.* at 284:4-284:7. In response to Plaintiffs' subsequent request that Defendants produce all documents the CTU considered in reviewing Jayyousi's eligibility for release from the CMU, and that substantiate the assertion that he played a role in recruiting Padilla to engage in terroristic acts, Defendants produced only Jayyousi's superseding indictment; but that document indicates that Jayyousi's *co-defendant* recruited Padilla. *See* P. Opp. Ex. 25 (Plaintiffs' Fourth Set of Production Requests for all Defendants); P. Opp. Ex. 26 (Jayyousi Superseding Indictment). Smith's erroneous understanding of Jayyousi's criminal history does not establish a legitimate government interest here; the connection must be "valid" and "rational" in order to suffice. *Turner*, 482 U.S. at 90, *see also* Def. Br. at 38 (admitting that Jayyousi's "statement might not pose similar concerns if made by an inmate without his criminal history").

Defendants seek to buttress Smith's exaggerated interpretation of the sermon by asserting that other BOP employees found the sermon equally troubling. Def. Br. at 40. But this is not universally the case. The sermon was "directly observed" by CMU staff, P. Ex. 137 (Jayyousi Redesignation Packet) 7, yet no one intervened. *Cf. Freemen v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 858 (5th Cir. 2004) (prisoner was ordered to stop reciting speech in question and escorted from the chapel). And when a BOP Discipline Hearing Officer (DHO) reviewed the incident report that resulted from Jayyousi's sermon, he decided that the sermon did not support the charge of encouraging a group demonstration.[26] SUF 404. *See*, *e.g.*, *Bennett v. Goord*, 343

[26] On this, Defendants come surprisingly close to misleading the Court. They indicate that the Unit Disciplinary Committee sanctioned Jayyousi for "conduct which disrupts" in connection to the sermon, but neglect to explain in their brief that this charge was later expunged for a procedural infirmity – that the excerpts from the sermon on which the UDC relied were not shared with Jayyousi, and thus he had no opportunity to explain what he

F.3d 133, 138 (2d Cir. 2003) (prisoner's retaliation claim was supported by the fact that disciplinary charges were unjustified); *Rodriguez v. McClenning*, 399 F. Supp. 2d 228, 240 (S.D.N.Y. 2005) (same).

Given Smith's unfounded characterization of Jayyousi's speech, his inaccurate assessment of Jayyousi's conviction and offense conduct, and the fact that in the two and a half years between the speech and Smith's memorandum there is not a shred of evidence of any security issue arising from that speech, it is apparent that the connection between the speech and any valid penological purpose in retaining Jayyousi at the CMU is "so remote as to render [that decision] arbitrary or irrational." *Turner*, 482 U.S. at 89-90.

ii. Second *Turner* Factor

Defendants argue that Jayyousi had alternative means of exercising his First Amendment right because he could have brought "his views about the CMU to the attention of both BOP officials and individuals outside the prison system without endangering institution security, as indicated by the numerous administrative remedy requests he filed complaining about various aspects of the CMU." Def. Br. at 41-42. Tellingly, Defendants cite to no case in support of this assertion. Jayyousi's speech was plainly addressed to his follow CMU prisoners, and he has explained "the idea of the sermon was to instill hope, to make people be patient, to be steadfast on their principles that they believe in and sooner or later this shall pass." *See* P. Opp. Ex. 27 (Jayyousi Dep.) 162:14-162:17. Jayyousi's ability to file an administrative remedy, or write to someone outside the CMU, does not protect his First Amendment right to express his individual

meant by the sermon. Def Br. at 39, SMF 231. Defendants acknowledge that the second attempt to charge Jayyousi with a disciplinary offense related to his sermon resulted in a DHO finding that the charge was not supported, but they only provide the Court with one of the reasons for that finding – e.g. that he "did not find that any other inmates acted on the sermon which caused a disruption in the unit or at the meeting." Def. Br. at 39. Defendants' exclude the DHO's other statement: that "after careful consideration," the sermon "did not support the charge." P. Ex. 138 (Discipline Hearing Officer Report).

views to, and instill hope in, his fellow CMU prisoners. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939); *see also Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 323-24 (1968) (same).

iii. Third *Turner* Factor

Next, Defendants argue that the BOP's concerns were based on "the fear that Jayyousi's inflammatory statement would have a disruptive impact on other BOP inmates leading to a security disturbance in the prison." Def. Br. at 42. But, as this Court has already recognized, Jayyousi's sermon did "not obviously 'confront institutional authority,'" and, contrary to Smith's characterization, did "not, on its face, advocate 'violence, terrorism or intimidation' or 'disrespect or condemn other religious, ethnic, racial, or regional groups.'" *Aref II*, 953 F. Supp 2d. at 146-47. A trier of fact could therefore reasonably disagree that Jayyousi's statements were inflammatory. Second, the sermon was "directly observed" by CMU staff, P. Ex. 137 (Jayyousi Redesignation Packet) 7, yet no one intervened; and Jayyousi was cleared of charges that he encouraged a group demonstration. Defendants have presented no evidence that Mr. Jayyousi's speech has strained prison resources, contributed to unrest among the inmate population, enhanced his status as a prisoner, or resulted in danger to himself or others. *See Abu-Jamal v. Price*, 154 F.3d 128, 134 (3d Cir. 1998) (finding no significant impact of a prisoner's speech in the absence of these factors). Whether the BOP's "concerns" were reasonable, or merely pretextual, is a matter of factual dispute.

iv. Fourth *Turner* Factor

Finally, Defendants argue that they had an absence of ready alternatives because Smith 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 convicted terrorist." Def. Br. at 42-43. But as explained above, Jayyousi does not challenge Smith's *consideration* of his speech, but rather reliance on that speech to unjustly recommend his retention in the CMU. Plaintiffs have pointed to numerous disputes of fact about whether Smiths' assertions about the contents of Jayyousi's sermon and his offense history are supported by the record and therefore valid, rational, and credible. *See supra*. In light of that sharp dispute, a factfinder could find that, where Jayyousi's speech has not "attain[ed] a special status, threaten[ed] corrections officers, or incite[d] the inmate population, a more narrow [restriction] could sufficiently protect the [BOP's] security interests." *Abu-Jamal*, 154 F.3d at 135. Summary judgment is thus inappropriate on each of the *Turner* factors.

C. Whether Jayyousi's Sermon Was the But-For Cause of Smith's Recommendation is the Subject of a Material Factual Dispute.

Lastly, Defendants assert that "Jayyousi's statements were not the 'but for' cause of BOP's decision to temporarily keep him in a CMU." Def. Br. at 35, 43. Their argument is based on Smith's deposition testimony and declaration that he would have recommended denial of Jayyousi's transfer from the CMU regardless of the sermon, based on "sensitive and privileged law enforcement information" from the National Joint Terrorism Task Force (NJTTF) presented in (but redacted from)[27] the CTU memo. Def. Br. at 43, SMF 253; P. Ex. 137(Jayyousi Redesignation Packet) 5-7. This testimony is not credible, does not establish the absence of a factual dispute, and thus is insufficient to support summary judgment.

First, the balance of evidence suggests that the sermon was the primary motivation for the CTU's recommendation. The CTU memo reiterates that Jayyousi was sent to the CMU based on

[27] The redaction at issue was one of the subjects of a motion to compel previously denied by this Court. *See* Mem. Op. and Order, Dkt. No. 87. The Court had not yet accepted Plaintiffs' First Amended Complaint (adding Jayyousi's retaliation claim) at the time of the motion, so the Court did not consider the impact of the redaction on Jayyousi's retaliation claim.

his conviction and offense conduct, and details both. P. Ex. 137 (Jayyousi Redesignation Packet) 5-7. After four paragraphs describing Jayyousi's offense conduct, the CTU devotes three paragraphs to a detailed analysis of the sermon. *Id.* Of all the information in the memo, the sermon is described in the greatest detail, and arguably in the strongest language. *Id.* That the sermon was of paramount importance is underscored by the fact that 17 out of 24 pages of the redesignation packet are devoted to that issue. *Id.*; *see also* Def. Ex. 4 (Pottios Decl. Ex. E). Moreover, the evidence indicates that the CTU's description of the sermon had a real impact: the CMU referral form subsequently generated by North Central Regional staff included a detailed description of the sermon, and two of the North Central Regional staff's comments strongly suggest that the sermon was the dispositive factor in their analysis. *Id.* at 1.[28]

Second, David Schiavone's testimony directly contradicts Smith's assertion that the NJTTF information (rather than the sermon) was the "but for" cause of the CTU's recommendation. Schiavone (who authored the CTU memo *and* served as Defendants 30(b)(6) witness) testified that the CTU's recommendation was based on their belief "that the inmate still warranted the controls and monitoring of a CMU … based on his incarceration conduct and his offense conduct and the additional information noted in the presentence report." P. Ex. 12 (Schiavone 30(b)(6) Dep.) 293:21-294:12. Schiavone did not testify that information from the NJTTF was *the* (or even *a*) *reason* for this recommendation. *Id.* Indeed, when asked directly about the redacted information, Schiavone denied that it was the "primary reason" for the recommendation against transfer. *Id.* at 301:17-301:24. Even more tellingly, when questioned at length on the redaction, Schiavone refused to explain whether it was a basis for the

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[28] Defendants offer a declaration from Michael Nalley, the Regional Director at the time of the March 2011 redesignation request, stating that, while he "could not recall at his deposition whether he considered Jayyousi's statements" he speculates that he would have found "any law enforcement concerns" dispositive. Def. Ex. 3 (Nalley Decl.) ¶ 14. That piece of speculation adds little, if anything, to Defendants' case and may be barred both as speculation and because it is not based on personal knowledge. Fed. R. Evidence 602.

recommendation or simply relevant background information. *See* P. Opp. Ex. 15 (Schiavone 30(b)(6) Dep.) 295:4-301:24, R-SMF 253.

Smith attempts to demonstrate the primacy of the NJTTF information by asserting that, once the law enforcement concerns abated, Smith concurred with the CTU's 2013 recommendation to release Jayyousi. Def. Br. at 43, Def. Ex. 2 (Smith Decl.) ¶ 13, SMF 267-68. But again, the author of the CTU recommendation contradicts him: when Schiavone was asked "what had changed since the last time you reviewed Mr. Jayyousi's eligibility for designation out of the CMU," he responded "[j]ust a continued assessment of his conduct, his behavior, his communications, his overall actions;" asked if he could point to something specific, he answered, "No. It's an assessment of the overall behavior and conduct of the inmate." P. Opp. Ex. 3 (Schiavone Dep.) 258:19-259:6. Schiavone made no mention of resolution of NJTTF concerns.

Given the above-described documentary evidence, Smith's testimony can only raise a question of disputed fact regarding causation. Summary judgment is thus inappropriate.

CONCLUSION

For the reasons stated above, and in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, Plaintiffs' motion should be granted and Defendants' Motion for Summary Judgment should be denied.

Dated: June 18, 2014

By: /s/ Alexis Agathocleous

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