ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the
District of Columbia Circuit

No. 15-5154

YASSIN MUHIDDIN AREF; KIFAH JAYYOUSI; DANIEL MCGOWAN,

Plaintiffs-Appellants,

– v. –

LORETTA E. LYNCH, Attorney General of the United States; CHARLES E. SAMUELS, JR., Director, Federal Bureau of Prisoners; D. SCOTT DODRILL, Assistant Director, Correctional Programs Division; LESLIE SMITH, Chief, Counter Terrorism Unit; FEDERAL BUREAU OF PRISONS,

Defendants-Appellees.

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

1. Parties and *Amici*

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

Parties in this Court include Yassin Muhiddin Aref, Kifah Jayyousi, Daniel McGowan, Loretta E. Lynch, Charles E. Samuels, Frank Strada, and Leslie S. Smith.

No *amici* or intervenors appeared in the district court, nor have any yet appeared in this Court.

2. Rulings Under Review

Memorandum Opinion of the United States Court for the District of Columbia (Rothstein, J), July 12, 2013, JA-275-297, 953 F. Supp. 2d 133;

Memorandum Opinion of the United States Court for the District of Columbia (Rothstein, J) March 16, 2015, JA-1649-1668, 2015 WL 3749621.

3. Related Cases

This case has not previously been before this Court. Counsel is aware of no related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

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* Authorities upon which we chiefly rely are denoted with asterisks.

United States Constitution:

Statutes:

Other Authority:

GLOSSARY

BOP – Federal Bureau of Prisons

CMU – Communication Management Unit

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

FCI – Federal Correctional Institution

PLRA – Prison Litigation Reform Act

PSR – Pre-Sentence Report

RPP – Release Preparation Program

USP – United States Penitentiary

PRELIMINARY STATEMENT

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

As a result, CMU designation was, and continues to be, haphazard and retaliatory. Most prisoners with a history of communications infractions are not even considered for CMU designation. Others are sent to a CMU even though they are low security and present no apparent communication risk. Plaintiffs were not told the actual reasons for their CMU designation and were denied a meaningful opportunity to contest their CMU placement. Through discovery, Jayyousi and McGowan learned that their placement and retention in the CMUs were based on their political and religious speech while incarcerated.

Once inside the CMUs, Plaintiffs and their fellow prisoners face severe restrictions on their activities. All avenues of communication with the outside world are strictly curtailed and monitored by the BOP's Counter-Terrorism Unit

(CTU). The burdens imposed by these restrictions are magnified tremendously by the long duration of CMU placement. Plaintiffs each spent three to five years in a CMU, partly because the BOP did not have adequate procedures for review and transfer out of the units. Other restrictive placements by the BOP have far shorter durations. Administrative segregation, for example, typically lasts just a few weeks.

The district court (Rothstein, J.) nonetheless granted summary judgment denying Plaintiffs' procedural due process and retaliation claims. This appeal follows.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. §§ 2201 & 2202 (Declaratory Judgment Act), as well as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because Plaintiffs seek injunctive, declaratory, and monetary relief from the unconstitutional actions of federal officers.

This Court has jurisdiction under 28 U.S.C. § 1291. The district court rendered a final judgment on March 16, 2015, in an order granting summary judgment to Defendants on Plaintiffs' official capacity procedural due process and retaliation claims. JA-1669. Plaintiffs filed a timely notice of appeal on May 14, 2015. JA-1670.

STATEMENT OF ISSUES FOR REVIEW

1. Did the district court err in holding that Plaintiffs lack a liberty interest in avoiding designation to a CMU, which results in years of segregation from the general prison population, during which all avenues of communication with the outside world are strictly curtailed?

2. Did the district court err in deferring to Defendant Smith's assertion that Plaintiff Jayyousi's 2008 sermon to his fellow CMU prisoners created a security risk, and thus holding that Jayyousi's comments were not protected under the *Turner v. Safely* standard, where the court failed to consider Plaintiffs' evidence that Smith's concerns were exaggerated and lacked credibility, and failed to analyze all the *Turner* factors?

3. Did the district court err in holding that Plaintiffs' allegations of injury through denial of release preparation programming, harm to reputation, denial of First Amendment opportunities, and harm to family relations could not be compensated under section 1997e(e) of the Prison Litigation Reform Act and could not give rise to a claim for nominal damages?

STATEMENT OF THE CASE

A. CMU Restrictions & Stigma

Most federal prisoners live in general population prison units, where they interact with a large population of fellow prisoners, receive 300 minutes of social

telephone calls per month, and can enjoy contact visits with family and friends limited only by visiting hours and visiting room space – for up to 49 hours per month. JA-298-299 (¶2-5). [1] The BOP encourages these prisoners to use social telephone calls, visits, and letters to stay in touch with family and other loved-ones, due to the critical role such communication plays in a prisoner's personal development and successful reentry back into society. JA-302 (¶19). Because general population units impose no unusual restrictions, prisoners may be transferred from one to another at the BOP's discretion, and without notice or a hearing. *See Meachum v. Fano*, 427 U.S. 215 (1976).

In contrast, the CMUs were designed for prisoners who "require increased monitoring of communications with persons in the community to ensure the safe, secure and orderly running of Bureau facilities, and to protect the public." JA-431. *See also,* 28 C.F.R. § 540.200 et seq.[2] From a 200,000-plus prison population, 175

[1] Throughout, Plaintiffs cite to their Statement of Undisputed Facts submitted to the district court in support of their motion for Summary Judgment and reproduced in the Joint Appendix at JA-298-371. All evidence supporting these facts can be found in the record. For ease of the parties and the court, Plaintiffs have only reproduced in the Joint Appendix evidence we anticipate the Court may want to review.

[2] The CMUs were opened without notice and comment rulemaking. A Proposed CMU Rule was pending between June 2010 and January 22, 2015, when a final rule was issued. *See* Mem. Op., Dkt. #37, at 34-35 (dismissing without prejudice Plaintiffs' APA claim), 80 Fed. Reg. 3168 (Jan. 22, 2015). CMU conditions and procedures have now been codified at 28 CFR § 540.200 et seq. This new regulation fails to correct the Constitutional violations at issue on appeal.

prisoners have thus far been singled out for designation to these unique units, where they will experience a host of stigmatizing restrictions. JA-1572.

CMU selectees live, program, and work separately from all other prisoners. JA-373, JA-383. All avenues of communication with the outside world are restricted and monitored. All CMU social visits are live-monitored by BOP staff and must occur in English, unless previously scheduled for simultaneous translation. JA-375-376, JA-386. These visits are strictly non-contact – meaning that prisoners and their visitors, including young children, meet in partitioned rooms separated by thick plexiglass, speak over a telephone, and are forbidden from hugging or even touching hands. JA-302 (¶20). Until January 3, 2010, CMU prisoners received only four hours of social visitation per month and could only schedule visits on weekdays. JA-303 (¶23). In January 2010, the BOP voluntarily increased CMU visitation to eight hours per month, in two four-hour blocks, excluding Saturdays. *Id.* (¶24). By regulation, visitation for CMU prisoners may be limited to four hours per month, with immediate family members only. 28 C.F.R. § 540.205(a).

Telephone restrictions are similarly harsh. Until January 10, 2010, CMU prisoners were allowed a single 15-minute social telephone call per week. JA-304 (¶27). Each call had to be pre-scheduled for a weekday between 8:30 a.m. and 2:00 p.m. – when prisoners' loved ones were generally at work or school. *Id*. After

voluntary changes by the BOP, CMU prisoners now receive two pre-scheduled 15-minute calls a week. *Id*. (¶28). Regulation allows for the restriction of CMU social calls to as little as three 15-minute calls per month, with immediate family only. 28 C.F.R. § 540.204(a). Like visits, all social calls are live monitored, and must occur in English unless they can be live translated. JA-375, JA-385.

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

There is no limitation on the duration of a prisoner's placement in a CMU, and most placements last for years. JA-470, JA-308 (¶57), JA-309 (¶58). Because CMU placement lasts so long, the communications restrictions have harsh consequences. Jayyousi was not able to hug his young daughters for almost *five years*. JA-304 (¶33), JA-309 (¶64). McGowan was unable to embrace his wife for nearly four years. JA-305 (¶34), JA-310 (¶66). Aref describes the lack of physical contact with his children for the 47 months that he spent at the CMUs as a "kind of torture." JA-305 (¶35).

B. CMU Criteria & Processes

The BOP opened the first CMU before establishing written criteria for CMU placement, or a process for designating prisoners. JA-640-642, JA-645-646, JA-

559-561. Only this year did the BOP finally codify CMU notice and designation procedures in a policy document, but the procedures lack critical detail and fail to correct the deficiencies uncovered in the course of discovery. JA-462-464, 28 C.F.R. § 540.202.[3]

CMU designation begins with referral of a prisoner to the CTU for consideration; referrals can come from "just about any source." JA-648. The CTU then creates a "designation packet," which includes a referral memo, summarizing the information that supports designation and recommending for or against CMU placement, and a proposed Notice of Transfer to be given to the prisoner. JA-647-648, JA-654-658, JA-1554. The CTU forwards the packet to the Office of General Counsel for a review of legal sufficiency and then to the Correctional Programs Division. JA-457-462, JA-648.

Prior to the recent codification of a CMU rule, the packet was then forwarded to the Regional Director, who routed the designation packet through several administrators in his office, so each might opine on whether they concurred with CMU placement, after which the Regional Director made the final designation decision. JA-462, JA-403-405. While the Regional Director made the ultimate designation decision, he did not document the reason for his decision

[3] The BOP's implementing Program Statement, (*see* Federal Bureau of Prisons, Program Statement No. 5214.02, "Communication Management Units," available at https://www.bop.gov/policy/progstat/5214_002.pdf, hereafter "CMU Program Stmt"), also fails to correct the CMUs' myriad procedural deficiencies.

anywhere, and thus it may have been completely different from the reason listed by the CTU[4] and provided to the prisoner on the Notice of Transfer. JA-662, JA-533, JA-544.

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

Criteria for CMU placement have developed over time, and have changed to fit, post hoc, the type of prisoners who were being sent to the CMU rather than vice versa. JA-438, JA-564-568. Thus, when Plaintiffs (and many other prisoners) were initially designated to the CMU, they could not compare the reasons for their placement against any criteria.

Today, there are five criteria for CMU placement:

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[4] The CTU, in turn, does not have a policy or practice of including all of the reasons for their CMU recommendation on the Notice of Transfer. JA-1554. Leslie Smith, Chief of the CTU, sometimes omits one of the CTU's reasons for its recommendation. *Id*. When asked why, he responded that there is not enough space on the form. *Id.* A review of all CMU notices disclosed that relevant information regarding the CTU's reasons for recommending CMU placement was frequently excluded. JA-334 (¶232-233), JA-335 (¶234, 237, 238, 240, 241), JA-336 (¶242, 246-248), JA-337 (¶249, 251, 255, 256), JA-338 (¶258-260, 262-264), JA-339 (¶265, 267-269, 271). Such excluded information often related to the prisoner's religious or political views. JA-335 (¶234, 240), JA-336 (¶242, 244, 246), JA-338 (¶263), JA-339 (¶265, 267, 269, 271).

> (a) The inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;
> (b) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a substantial likelihood that the inmate will encourage, coordinate, facilitate, or otherwise act in furtherance of illegal activity through communication with persons in the community;
> (c) The inmate has attempted, or indicates a substantial likelihood that the inmate will contact victims of the inmate's current offense(s) of conviction;
> (d) The inmate committed prohibited activity related to misuse or abuse of approved communication methods while incarcerated; or
> (e) There is any other substantiated/credible evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's communication with persons in the community.

28 C.F.R. § 540.201. Not all prisoners who fit the criteria are recommended or approved for CMU placement, and the BOP has never developed guidance as to how the criteria should be applied. JA-572-573, JA-447.

CMU prisoners are told they can challenge their CMU placement by utilizing the BOP's administrative remedy process, but not a single CMU prisoner has ever been released from the CMU as a result of that process. JA-323 (¶152). Periodic reviews for release from the CMU are haphazard as well. Although the BOP did not admit it at the time, for the first three years the CMUs operated, there was no review process in place to allow for a transfer out of the unit. JA-342 (¶293), JA-343 (¶294-295), JA-477-478, JA-480-484. Thus, not a single prisoner was transferred from the CMU to a non-CMU general population unit. JA-340 (¶278).

On October 14, 2009, the BOP issued a memo indicating that CMU prisoners should be reviewed for potential redesignation at every program review, every six months. JA-688, JA-481-482, JA-342 (¶290). But for years after this policy began, both CMUs' institutional supplements included erroneous information about the timing and nature of those reviews. JA-343-345 (¶300-306), JA-484-490, JA-502-507.

Currently, review of CMU placement commences with the CMU unit team, which is tasked with determining whether continued CMU placement is still necessary by "consider[ing] whether the original reasons for CMU placement still exist" along with "whether the original rationale for CMU designation has been mitigated, whether the inmate no longer presents a risk, and that the inmate does not require the degree of monitoring and controls afforded at a CMU." JA-688-689. If the unit team recommends a prisoner for transfer out of the CMU, it passes this recommendation on to the warden for his/her review and recommendation. *Id*. If the warden disagrees with the unit team's recommendation, the review process ends. JA-500. If the warden concurs, s/he forwards that recommendation to the CTU, which then considers the facility recommendation and makes an independent

assessment. JA-689, JA-500-501. The CTU forwards its recommendation, and the facility's, to the Regional Director for a final decision. JA-689.[5]

Prisoners who are denied transfer from the CMU are supposed to be notified in writing by the unit team of the reason(s) for continued CMU designation. *Id*. In practice, however, the BOP notifies prisoners of transfer denials by sending a form memo that does not provide *any explanation* of why the prisoner was denied transfer. JA-770-771, JA-508-509.

C. Plaintiffs' CMU Placement

Yassin Aref was designated to the Terre Haute CMU in May 2007 after being convicted of conspiracy to provide material support to a terrorist organization through an FBI sting; Aref's offense conduct included interactions with an undercover informant working with the FBI and pretending to be a member of the terrorist group "JeM." JA-1693-1705, JA-677-678. It is undisputed that Aref had no *actual* contact with any *actual* JeM members. *Id.* Nonetheless, Aref received a one-page Notice of Transfer indicating that he was being designated to a CMU because his offense conduct included "significant communication, association, and assistance to Jaish-e-Mohammed [JeM]," a foreign terrorist organization. JA-705. Aref appealed his CMU designation through

[5] According to the BOP's new program statement, as of 2015 redesignation is determined by the Assistant Director of the Correctional Programs Division, rather than the Regional Director. Nothing else material appears to have changed with respect to the process. *See* CMU Program Stmt at 13.

the BOP's administrative remedy process, explaining that he never had any contact with any actual JeM members. JA-710-718. The appeal was summarily denied. *Id.*

Though he did not know it at the time, the CTU had a second reason for recommending Aref for CMU placement – alleged links to other terrorist organizations. JA-694. Information about these alleged links came from Aref's Presentence Report, which indicated that the information was disputed and was not proven or even presented at trial. JA-1693-1694 (n.1). Nevertheless, the Regional Director relied on these contested allegations in approving Aref for CMU designation. JA-414-415. Aref was not informed that this information was part of the reason for his CMU placement. JA-419-420, JA-720 (¶2).

Aref was initially told that he would remain in the CMU unless and until his criminal convictions were reversed, JA-714, but after 18 months of clear conduct at the Terre Haute CMU, his case manager told him he would be recommended for transfer. JA-351 (¶348-350), JA-720 (¶3). Unbeknownst to Aref, however, the BOP had not yet devised a system to review CMU prisoners for transfer back to general population. JA-342-343 (¶292-295), JA-477-484. So Aref was instead transferred to the Marion CMU, where he was told that he needed to achieve *another* 18 months of clear conduct in this new unit before he would be considered for a transfer out of the CMU. JA-351 (¶353), JA-352 (¶359).

At Aref's September 23, 2010, program review he was finally recommended for transfer by his unit team and warden. JA-353 (¶364), JA-773-774. The CTU disagreed, based on confidential information[6] from the Joint Terrorism Task Force. JA-776-777, JA-534-535, JA-679-682. The Regional Director relied on this information to deny Aref's transfer. JA-779-780. There may have been other reasons, but the Regional Director did not document them. JA-421-422.[7]

Aref received a memo stating that his transfer request had been denied, with no explanation why. JA-354 (¶373-375). He used the Administrative Remedy program to ask why his transfer had been denied despite his three years in the CMUs without a single disciplinary offense, and what he needed to do to be approved for a transfer out of the CMU. JA-354 (¶376). The BOP denied his remedy without answering his questions. JA-354 (¶377). At Aref's next program review, his unit team and warden again recommended him for redesignation to the general population. JA-354-355 (¶378-380). This time, the CTU concurred, and the Regional Director approved Aref's transfer without comment. JA-355 (¶381-383).

[6] This information was redacted from the documents produced to Plaintiffs, and has never been disclosed.

[7] For example, a correctional programs summary of Aref's offense conduct created to aid the Regional Director's decision-making described Aref as being "in constant contact with terrorist known sympathies (sic)," which has no support anywhere in the record. JA-779.

Aref was not told why, and thus has been provided with no guidance about how to avoid future redesignation to the CMU. JA-721 (¶6).

Kifah Jayyousi was designated to the Terre Haute CMU on June 18, 2008. JA-327 (¶176). His Notice of Transfer indicates that his offense conduct involved use of "religious training to recruit other individuals in furtherance of criminal acts in the country … and included significant communication, association and assistance to al-Qaida." JA-723. Jayyousi appealed his designation, arguing that neither his conviction nor offense conduct included religious recruitment or assistance to al-Qaida. JA-725-736. The BOP failed to respond to these factual questions, and merely parroted the purported reasons for his designation. *Id*.

Jayyousi was first considered for a possible transfer out of the CMU in December 2009, at which point he had achieved 18 months of clear conduct. JA-355-356 (¶386-390). At that time and at his next program review, Jayyousi's unit team and warden recommended against his transfer because of the nature and severity of his offense, the length of his sentence, and his offense conduct. JA-356-357 (¶391-392, 395, 396), JA-782.

After almost two and a half years with clear conduct in the Terre Haute CMU, Jayyousi was transferred to the Marion CMU. JA-357 (¶399). On February 22, 2011, Jayyousi's new unit team recommended him for transfer out of the CMU based on his clear conduct and good rapport with staff, and Warden Hollingsworth

concurred. JA-357 (¶401), JA-789-790. Chief of the CTU, Leslie Smith, however, recommended against Jayyousi's transfer, citing a 2008 Jumah prayer Jayyousi led while at the Terre Haute CMU. JA-791-793. According to Smith, Jayyousi's sermon "was aimed at inciting and radicalizing the Muslim inmate population in THA CMU," "encouraged activities which would lead to group demonstration and are detrimental to the security, good order, or discipline of the institution," and showed Jayyousi to be an individual who "elicits violence, terrorism or intimidation, and . . . disrespects or condemns other religious, ethnic, racial, or regional groups." JA-792. The parties have stipulated to the text of the sermon – it does none of these things. JA-834-836.

Disciplinary charges were brought against Jayyousi in connection with the sermon, but he was cleared of any wrongdoing through the disciplinary process long before Smith's recommendation. JA-812-813. Regardless, the Regional Director denied Jayyousi's transfer. JA-788. Jayyousi was not informed that his three-year-old Jumah sermon played any role in his continued CMU designation. JA-815 (¶2).

Two years later, on March 28, 2013, Jayyousi's unit team and warden again recommended him for transfer based on his four and a half years of clear conduct in the CMU, and the CTU concurred. JA-359-360 (¶418-420). The Regional

Director approved Jayyousi's transfer without explanation. JA-360 (¶421-423). Jayyousi was never told what he had done to finally earn release. JA-815 (¶5).

Daniel McGowan was convicted of conspiracy, arson, and attempted arson in 2006. JA-1733. He was designated to a low-security prison, where he served a year with clear conduct, JA-328 (¶186), before being abruptly designated to the Marion CMU on August 22, 2008. JA-310 (¶66). Though his Notice of Transfer does not indicate as much, a memorandum signed by Smith on March 27, 2008, and made available to McGowan for the first time in discovery, demonstrates that McGowan's CMU designation was based on his social correspondence about environmental issues while at FCI Sandstone. JA-741-744, JA-759, JA-514-516, JA-519-522. McGowan was never disciplined for these communications, told to stop engaging in such communication, or informed (prior to this lawsuit) that his communication was relevant to his CMU designation. JA-328 (¶190), JA-756 (¶2-4).

Instead, McGowan's Notice of Transfer indicates that he was sent to the CMU because of his offense conduct, which the CTU described as including "destruction of an energy facility," and "teaching others how to commit arson." JA-759. McGowan used the Administrative Remedy program to complain that these (and other) factual assertions were demonstrably false. JA-761-768. McGowan's Presentence Investigation Report ("PSR") establishes that he was a

participant in two arsons: one at Superior Lumber Company and one at Jefferson Poplar Farm. JA-1738-1740. There is no indication and the PSR does not suggest that McGowan destroyed (or had anything to do with) an energy facility. JA-1737-1768. And while the PSR indicates that McGowan attended meetings meant to train arsonists, it does not indicate that he was a trainer at such meetings (rather than a trainee). JA-1741 (¶ 38-40).

This erroneous information appears to be the result of the CTU carelessly cutting-and-pasting inapplicable facts from a different prisoner's Notice of Transfer. According to the PSR, one of McGowan's co-defendants trained others to commit arson, *and* received an aggravating role adjustment for his leadership role in the conspiracy (which McGowan did not). JA-1741-1742. The CTU drafted that individual's Notice of Transfer prior to McGowan's, and used it as a template for McGowan's. JA-671-672, JA-330 (¶202).

When confronted with the errors in McGowan's Notice, the BOP referred back to McGowan's PSR, ignoring the PSR's glaring silence with respect to the specific facts identified above. JA-761-768.

Just as McGowan was never informed that his prison communications about environmental issues were relevant to his CMU designation, he was also never told that continuing those communications would prolong his CMU designation. JA-756-757 (¶5, ¶13). Instead, McGowan was told that he would have to achieve 18

months of clear conduct prior to being considered for a transfer from the CMU. JA-360-361 (¶425-427, 429, 430, 432, 433, 435, 436). When he approached this mark his unit team recommended him for a transfer, and his warden concurred. JA-361-362 (¶437-439), JA-819-820. The CTU, however, recommended against McGowan's transfer because of his communications while incarcerated. JA-523-524, JA-822-823. Specifically, Smith noted in a secret March 22, 2010, memo that McGowan "continues to correspond with numerous associates of [radical environmental and anarchist groups] …. Through his communications, McGowan continues to provide guidance, leadership, and direction for activities, publications and movement practices in order to further the goals of radical environmental groups." JA-823. The Regional Director rejected McGowan's transfer,[8] and, in violation of BOP policy, McGowan received no explanation for his continued CMU designation. JA-826, JA-828, JA-526-527.

At his next program review, McGowan's unit team again recommended him for transfer, and again the CTU recommended otherwise. JA-364 (¶456-459). This time, the Regional Director granted McGowan's transfer. JA-364 (¶460).

[8] The correctional programs summary in McGowan's redesignation packet indicates that he was considered "the leader/organizer of the groups ALF/ELF," even though the BOP had no evidence that McGowan was the overall leader of either group, or even that the groups have an overall leader. JA-825, JA-669-670. The Regional Director understood McGowan's redesignation form to indicate that McGowan continued to correspond with ELF and ALF in code from prison. JA-825, JA-423-425. McGowan had no chance to challenge these completely false assertions, as he never learned of them. JA-828, JA-526-527.

McGowan was not told why he was being transferred out of the CMU, nor what he needed to do to avoid being transferred back. JA-365 (¶463). McGowan was re-designated to the Terre Haute CMU less than four months later, JA-364-366 (¶462, 464-466, 468-472), JA-830-832, JA-528, and served the remainder of his sentence there, prior to his release to a Residential Reentry Center in 2012. JA-366 (¶475).

D. Proceedings Below

Plaintiffs brought suit in 2010 to challenge their CMU placements, asserting six separate claims for relief. Dkt. No. 5 (Complaint). On March 30, 2011, the Honorable Ricardo M. Urbina dismissed all but Plaintiffs' procedural due process claim. Dkt. No. 37. Discovery commenced, and on November 20, 2012, Plaintiffs were granted leave to file an Amended Complaint, adding retaliation claims on behalf of Plaintiffs McGowan and Jayyousi against Defendants in their official capacity and against Leslie Smith in his individual capacity. Dkt. No. 85, JA-36-150. The Honorable Barbara J. Rothstein dismissed Plaintiffs' damage claims on July 12, 2013, but allowed Jayyousi's official-capacity retaliation claim to continue. JA-274.

After the close of discovery Plaintiffs moved for summary judgment on their procedural due process claim, and Defendants cross-moved for summary judgment on both the procedural due process and Jayyousi's official-capacity retaliation claim. *See* Dkt. Nos. 138, 145-157. On March 16, 2015, Judge Rothstein granted

Defendants' motion for summary judgment and denied Plaintiffs' motion. JA-1669. Because Judge Rothstein held that Plaintiffs have no liberty interest in avoiding CMU designation, she declined to consider the extensive evidence of procedural failings presented by Plaintiffs in support of their motion. JA-1664. This appeal followed. *See* JA-1670. Plaintiffs seek an order reversing the district court's grant of summary judgment, reinstating Plaintiffs' damage claims, and remanding to the district court for further proceedings.

SUMMARY OF THE ARGUMENT

I. Plaintiffs advance a procedural due process challenge to their CMU designation. Such a challenge requires a plaintiff to show (1) a liberty interest protected by the Due Process Clause and (2) inadequate procedural protections. *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *Wilkinson v. Austin*, 545 U.S. 209 (2005). Under *Hatch v. District of Columbia*, 184 F.3d 846, 851 (D.C. Cir. 1999), segregation in the CMU must be compared to a typical stay in administrative segregation to determine whether it is atypical and significant, and thus gives rise to a liberty interest. CMU placement is much harsher than a typical stay in administrative segregation, because it is uniquely stigmatizing, lasts an average of 55 times as long, and involves prolonged restrictions on all avenues of communication with the outside world. Given the far graver consequences of CMU

designation, as compared to a short stay in administrative segregation, the lower court erred in finding no liberty interest in avoiding CMU placement.

II. Jayyousi brings an official capacity retaliation claim stemming from his retention in the CMU based on First Amendment protected speech. A First Amendment retaliation claim requires proof that (1) the plaintiff engaged in speech or conduct protected by 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) the plaintiff's protected activity was the but-for cause of the defendant's adverse action. The district court erroneously deferred to Defendants' assertion that the speech in question—Jayyousi's 2008 Jumah prayer sermon—posed a security risk, and thus held that Jayyousi's speech was not protected by the First Amendment under *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). Summary judgment should be reversed, because the district court failed to consider and credit Plaintiff's evidence that Defendants' risk assessment was exaggerated and lacked credibility, and also failed to consider the final three elements of the *Turner* test.

III. Jayyousi and McGowan also bring retaliation claims for damages against Defendant Smith in his individual capacity. The Prison Litigation Reform Act bars claims for compensatory or punitive damages based on mental or emotional injury without a prior showing of physical injury. 42 U.S.C. § 1997e(e).

The district court found Plaintiffs' allegations of injury through denial of release preparation programming, reputational harm, denial of First Amendment opportunity, and harm to family relations as too speculative or based on the abstract importance of their constitutional rights. But these allegations are concrete and compensable and not within the ambit of § 1997e(e). Regardless, Plaintiffs McGowan and Jayyousi are entitled to nominal damages.

ARGUMENT

This Court's review of the district court's judgment is *de novo*. *See Baumann v. District of Columbia*, 795 F.3d 209, 215 (D.C. Cir. 2015). "The court must view the evidence in the light most favorable to [Plaintiffs], draw all reasonable inferences in [their] favor, and eschew making credibility determinations or weighing the evidence." *Id.*

I. The District Court Erred in Holding that Plaintiffs' Lack a Liberty Interest in Avoiding CMU Designation.

A procedural due process challenge to prison segregation involves two steps. First, the court must inquire whether the prisoner's segregation implicates a liberty interest protected by the Due Process Clause. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Second, if such an interest exists, the court must then consider what process is due. *Wilkinson v. Austin*, 545 U.S. 209 (2005). With respect to the first question, the law is clear that prisoners have a liberty interest in avoiding that

which "imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. But this test has proven "easier to articulate than to apply," *Hatch v. District of Columbia*, 184 F.3d 846, 851 (D.C. Cir. 1999), largely because the "ordinary incidents" of prison life vary greatly by prison and by jurisdiction.

In *Hatch*, this Court surveyed national precedent and took care to describe "the ordinary incidents of prison life" so as to identify a proper baseline for determining atypicality and significance. *Id.* at 853-56. It held that the conditions of Mr. Hatch's confinement should be compared to a typical stay in administrative segregation, as that is the type of restriction "that prison officials routinely impose … for non-punitive reasons related to effective prison management." 184 F.3d at 855. In coming to this conclusion, the Court looked to the way such segregation was described in *Hewitt v. Helms*, 459 U.S. 460, 468 (1983):

> It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. The phrase "administrative segregation," as used by the state authorities here, appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. See 37 Pa. Code §§ 95.104 and 95.106…. Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.

Id.

Because the "'incidents of prison life' encompass more or less restrictive forms of confinement depending on prison management imperatives," the term "'ordinary' limits the comparative baseline to confinement conditions that prison officials routinely impose." *Hatch*,184 F.3d at 856. Thus in *Hatch*, this Court was careful to clarify that any comparison must take into account not just segregation conditions, but also the duration of segregation and its typicality given the sentence the individual prisoner is serving. *Id.* at 856.

The district court failed to rigorously apply this careful standard, incorrectly concluding that Plaintiffs have no liberty interest in avoiding CMU placement, and thus granting summary judgment to Defendants. JA-1663-1664.[9] The district court reasoned that the "*only* factor that establishes that designation to the CMU is equally harsh or harsher than administrative segregation is the typical length of designation to the CMU," and that this duration is counterbalanced by the ways in which the CMU is less restrictive than administrative segregation. JA-1663. This analysis erroneously undercounts the significance of Plaintiffs' lengthy time in the CMU, ignores the atypical and stigmatizing nature of CMU designation, and relies on unpublished, irrelevant decisions. It should thus be reversed, and the case

[9] Although Plaintiffs are no longer designated to the CMU, Aref and Jayyousi remain in BOP custody, and the district court properly held that their claims for injunctive relief are not moot, because Defendants did not meet their heavy burden of establishing that there is no "reasonable expectation" that Jayyousi and Aref will be placed back in a CMU. JA-1653-1657.

remanded to the district court to determine whether Plaintiffs received all process to which they are due.

A. CMU Designation is Prolonged and Significant

Under *Hatch*, this Court must compare the CMUs to administrative segregation at FCI Terre Haute and USP Marion. *Hatch*, 184 F.3d at 847, JA-298 (¶1). The district court was certainly correct that *conditions* in administrative segregation at Terre Haute and Marion are harsh. Prisoners there generally receive one 15-minute social telephone call per month (though prison officials have discretion to provide more upon request). JA-305-306 (¶40). Until March 1, 2013, prisoners in administrative segregation at FCI Terre Haute were routinely allotted seven contact visits per month, but now these visits are non-contact and appear to be limited in frequency and duration. JA-306 (¶42). Similarly, prisoners in administrative segregation at USP Marion receive a minimum of four hours of non-contact social visitation per month. JA-306 (¶45). Most significantly, and unlike CMU prisoners, prisoners in administrative segregation are locked into their cells at least 23 hours a day. JA-307 (¶47).

However, the harshness of administrative segregation is mitigated by its relatively short duration. Plaintiffs' statistical expert, Professor Andrew Beveridge, calculated the median duration of both CMU confinement and confinement in administrative segregation at FCI Terre Haute and USP Marion during the period

of February 1, 2012, to August 2, 2013. JA-606-607 (¶14-16).[10] The median time spent in administrative segregation at FCI Terre Haute and USP Marion during the 78-week period studied was only 1.07 weeks and 3.59 weeks, respectively. JA-606-607 (¶16), JA-633.

Thus, to determine if CMU designation is atypical and significant, the Court must compare it to a *typical* administrative segregation experience of being locked down in a cell and deprived of contact visits and full social telephone access for one to three weeks, for routine administrative matters.

CMU prisoners are not locked down in solitary cells, but they are specially selected to be placed in a prison unit that is segregated from the rest of the prison; all their communications are monitored, live-recorded, and analyzed by the CTU; they receive only two 15-minute calls per week and only two four-hour visits per month, are allowed no physical contact during visits, and are subject to the possible imposition of even harsher conditions. JA-302-304 (¶20, 24, 28, 32); JA-375-376, JA-385-386, 28 C.F.R. §540.203-205. Unlike administrative segregation, these restrictions last for years.

Jayyousi spent 232 weeks (almost five years) at the CMUs, JA-309 (¶64), while Aref spent 188 weeks (almost four years), JA-310 (¶65), and McGowan

[10] Dr. Beveridge also examined CMU stays over a lengthier period of time, but data regarding the duration of all administrative segregation stays during the longer time period was not available; thus no direct comparison could be made. JA-309 (¶61).

spent 182 weeks (three and a half years) there. JA-310 (¶66). These lengthy stays are no aberration. During the 78-week period studied, low- and medium-security prisoners[11] spent a median time of 66.78 weeks in the CMU.[12] JA-606. This is 55 times as long as a typical stay in administrative segregation. And, as plaintiffs' experiences show, the *actual* duration of CMU confinement is generally much longer. Between January 1, 2007, and June 30, 2011, for example, low- and medium-security prisoners spent a median of 138.71 weeks (over two and a half years) in a CMU. JA-607.

Precedent and logic dictate that being singled out to spend *years* in a unique, restrictive unit works a "major disruption" to the prison experience not caused by a routine four-week stay in administrative segregation, even though conditions in administrative segregation may be worse. *Sandin*, 515 U.S. at 486; *see also Hatch*, 184 F.3d at 856 ("we must … look not only to the nature of the deprivation … but also to its length"), *Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999) (citation omitted) ("conditions and their duration must be considered, since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical"), *Wilkerson v. Stadler*, 639 F. Supp.

[11] Plaintiffs were all classified as low- or medium-security while at the CMUs. JA-311 (¶73-75).

[12] There was little difference between the experience of prisoners at the Terre Haute and Marion CMUs. At Terre Haute, the median stay during this time period was 59.57 weeks; at Marion it was 61.43 weeks. JA-606-607 (¶14, 16).

2d. 654, 684 (M.D. La. 2007) (the "emphasis on duration in all these [prison] cases is in direct response to the acknowledged severity of the deprivation …. With each passing day its effects are exponentially increased, just as surely as a single drop of water repeated endlessly will eventually bore through the hardest of stones").[13]

While unpleasant, brief stays in administrative segregation do not fundamentally alter a prisoner's environment. *Years* of CMU confinement, without a single opportunity to hug one's spouse or cradle one's child, do. This drastic difference establishes CMU confinement as "atypical and significant" as a matter of law. *Hatch*, 184 F.3d at 856.

B. CMU Designation Is Atypical and Stigmatic

Along with undercounting the relevance of the CMU's prolonged duration, the district court erred by ignoring the stigma that attaches to CMU designation, and the related atypicality of such designation, both of which stand in marked contrast to the BOP's use of administrative segregation.

[13] Following *Sandin*'s framework, every circuit has recognized the critical importance of the duration of a restraint to post-*Sandin* due process analysis. *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. Appx. 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. 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), *amended by* 135 F.3d 1318 (9th Cir. 1998).

Stigmatizing prison classifications give rise to a liberty interest.[14] *See e.g.*, *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997) (prisoner had liberty interest in avoiding classification as a sex offender); *Chambers v. Colo. Dep't of Corr.*, 205 F.3d 1237 (10th Cir. 2000) (same). This is so even if the concrete repercussions of the stigmatizing classification might not give rise to a liberty interest on their own. In *Kritenbrink v. Crawford*, 457 F. Supp. 2d 1139, 1148 (D. Nev. 2006), for example, a prisoner brought a procedural due process challenge to his classification as a sex offender, which rendered him ineligible for minimum custody status and work camp assignments. The court held that denial of such privileges alone mirror deprivations experienced by prisoners in administrative segregation (and thus would not give rise to a liberty interest), but the "stigmatizing label *in conjunction* with these disadvantages goes beyond the typical hardships of prison life." *Id.* at 1149 (emphasis added). *See also*, *Houston v. Cotter*, 7 F. Supp. 3d 283, 300 (E.D.N.Y. 2014) (denying summary judgment because factual questions remained regarding whether specific conditions of relatively short time on suicide watch, combined with stigma and questionable justification for placement, might amount to an atypical and significant deprivation).

[14] As *Amici* will argue, stigmatizing prison placements may also violate procedural due process under the "sitgma plus" test established in *Paul v. Davis*, 424 U.S. 693 (1976).

The relevance of stigma to the liberty interest analysis is consistent with *Hatch*'s reliance on administrative segregation as a baseline; prisoners are placed in such segregation routinely, for a variety of reasons – for example, while their security classification is pending, or when they are transferred from one prison to another. JA-305-306 (¶40). Because administrative segregation is so commonplace, and is used for such a wide variety of reasons, it is not stigmatizing in any way. *See Hewitt*, 459 U.S. at 473 (recognizing that "the stigma of wrongdoing or misconduct does not attach to administrative segregation"). Rather, it "is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Id.* at 468.

Designation to the CMU, on the other hand, is stigmatizing both because it is rare and because the CMU is perceived as a unit for terrorists. The CMU was created as a direct response to the BOP's concerns about convicted terrorists continuing to conspire inside the prisons. JA-838-839 (¶1-3). And while prisoners can be sent to the CMU for communications infractions having nothing to do with terrorism, as late as 2009, former Attorney General Eric Holder publicly described the CMUs as housing inmates "who have a history of or nexus to international terrorism." JA-302 (¶18); JA-553-554. The BOP's Counter-Terrorism Unit is tasked with initial evaluation of whether a prisoner belongs in a CMU and analysis

of all communication by CMU prisoners, whether or not they have a connection to terrorism. JA-842-843 (¶17, 24-25), JA-853-854 (¶100).

CMU placement is also extremely uncommon. In 2012 there were 218,687 federal prisoners.[15] Yet between 2006 and 2014 there were only 178 *total* CMU designations. JA-339 (¶272). Thus, only a tiny minority of federal prisoners will ever be sent to the units. This atypicality persists even when considering only prisoners eligible for CMU placement. In 2012 there were over 4,351 prisoners eligible for CMU placement by virtue of a terrorism-related conviction or repeated communication violations. JA-319-320 (¶130). Presumably hundreds more are eligible under other CMU criteria, *see* 28 C.F.R. § 540.201. Less than 4% will go there. JA-319-320 (¶130), JA-339 (¶272). Indeed, only 205 prisoners have ever even been *considered* for CMU placement (of that small group, 175 were so designated, 30 were rejected for CMU placement). JA-1572.

In contrast, administrative segregation is used so routinely that most prisoners will spend at least a day in administrative segregation at some point in their sentence.

The disproportionate use of CMU segregation for Muslim prisoners increases the stigma and atypicality of the experience. Of the 178 total CMU designations, 101 have been of Muslim prisoners. JA-339 (¶272). Compared to a

[15] https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops

Muslim population within the BOP of approximately 6%, JA-340 (¶274), this marks a *vast* overrepresentation, which cannot be explained away by virtue of the CMU's focus on terrorism. Of the first 55 prisoners designated to the CMU, 45 were sent there because of their connection to terrorism, but the other ten were designated due to involvement in prohibited activities related to communication; of that ten, eight self-reported as Muslim. JA-339 (¶273). Being singled out for years of segregation with a small group of men, who primarily come from a single minority religion, in a unit unambiguously associated with terrorism, is simply not a typical prison experience.

C. The Court Erred by Relying on Irrelevant Decisions Concerning Individual Communication Restrictions.

Instead of grappling with the novel question presented by prolonged segregation in a restrictive and stigmatizing prison unit, the district court relied on two unpublished Third Circuit cases reviewing lengthy restrictions on individual avenues of communication for individual prisoners. JA-1663. These cases cannot bear the weight placed upon them. In *Henry v. Department of Corrections*, 131 F. App'x 847 (3d Cir. 2005), a prisoner challenged a lifetime ban on contact visits imposed as punishment for a disciplinary infraction. Contrary to the district court's characterization, (JA-1663), the Third Circuit did not *hold* that a permanent ban on contact visitation stated no liberty interest; rather, the Circuit reasoned that some loss of visitation privileges as a means of effecting prison discipline is an ordinary

incident of prison life, and concluded that it need not decide if a permanent loss of one type of visitation was atypical, because the prison's disciplinary procedures provided all process that was due regardless. *Henry*,131 F. App'x at 850. *Perez v. Federal Bureau of Prisons*, 229 F. App'x. 55 (3d Cir. 2007) (per curiam), also involved a challenge to an individual limitation on *one* form of communication – a prisoner was limited to one telephone call per week given his proven history of using the telephone to conduct criminal activity. But narrow restrictions on one form of communication bear little in common with indeterminate and prolonged designation to a segregated and stigmatizing prison unit where all communication is restricted and monitored.

This is not simply a case about loss of contact visitation, or a decrease in telephone minutes. Rather, Plaintiffs and 172 other federal prisoners, alone among a 200,000-plus prison population, were singled out for placement in a segregated and predominately Muslim unit with unique and harsh restrictions on *all forms* of communication. These individuals are completely isolated from the general prison population and subject to a host of unusual restrictions, including having all their conversations recorded and scrutinized by terrorism analysts. The Court must compare this exceptional experience to the BOP's routine use of administrative segregation, which is admittedly harsh but is short-lived and commonplace, and carries no hint of stigma. The result is clear: CMU designation works a

fundamental disruption to normal prison life, such that prisoners have a liberty interest in avoiding it. This Court should thus reverse and remand for the district court to consider what process is due.

II. The District Court Erred in Granting Summary Judgment on Jayyousi's Retaliation Claim.

Despite Jayyousi's three years of clear conduct and his unit team and warden's recommendation for transfer, in 2011 Defendant Smith recommended that Jayyousi continue to be held in the CMU based on the content of his August 15, 2008, Jumah prayer sermon. *See* JA-834-836. Because the sermon was core political and religious speech which posed no security risk, it is protected under the First Amendment, and Smith's recommendation amounts to unconstitutional retaliation. Am. Compl. JA-104 (¶238).

A First Amendment retaliation claim requires proof (1) that the plaintiff engaged in speech or conduct protected under the First Amendment; (2) that the defendant took retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again; and (3) that the plaintiff's exercise of the constitutional right was the but-for cause of the defendant's adverse action. *Doe v. District of Columbia*, 796 F.3d 96, 106 (D.C. Cir. 2015).

With respect to the first element, the test developed in *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), determines whether a prisoner's speech or conduct is protected by the First Amendment or may be legitimately suppressed. Under

Turner, the Court must examine (a) whether there is "a 'valid, rational connection' between the prison [action] and the legitimate governmental interest put forward to justify it;" (b) whether "alternative means of exercising the right . . . remain open to prison inmates;" (c) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (d) whether there are any alternatives to the prison action. 482 U.S. at 89-90 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

The district court held that Jayyousi's sermon was not protected by the First Amendment and thus granted summary judgment to Defendants. JA-1668. In so holding, the court made three errors. First, it misapplied the *Turner* standard by granting excessive deference to Defendant Smith's claimed justification for the challenged action. Second, it failed to consider—as required on a motion for summary judgment—Jayyousi's substantial evidence that the action taken against him was not rationally connected to a legitimate governmental interest. And third, it considered only the first *Turner* factor, ignoring the other three factors in the *Turner* test. For each of these reasons, the district court erred in finding that Jayyousi's speech was not protected by the First Amendment.

A. The District Court Excessively Deferred to Defendant Smith When Determining Whether There Was a Valid, Rational Connection Between the Prison Retaliatory Action and a Legitimate Penological Interest.

Under *Turner* and its progeny, courts must defer to a prison official's administrative action "to preserve internal order and discipline and to maintain institutional security," but such deference is only due when the prison response is not exaggerated. *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) ("*in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response* to [security] considerations, courts should ordinarily defer to their expert judgment in such matters") (emphasis added) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

Deference is built into the *Turner* test, insofar that it only requires "a 'valid, rational connection' between the prison [action] and the legitimate governmental interest put forward to justify it," *Turner*, 482 U.S. at 89, instead of the strict scrutiny standard usually required for the curtailment of a constitutional right. *See Johnson v. California*, 543 U.S. 499, 504, 506, 509-11 (2005); *see also Hatim v. Obama*, 760 F.3d 54 (DC Cir. 2014).

When applying this already deferential *Turner* standard, the court is not meant to also defer to a defendant's assertion that there is, in fact, a valid, rational connection between his actions and the legitimate governmental interest. *See Salaam v. Lockhart*, 905 F.2d 1168, 1171 (8th Cir. 1990) (observing that it "would

misconstrue" *Turner* to "defer[] not only to the choices between reasonable policies made by prison officials but to their justifications for the policies as well"). *See id.* ("We must make sure after an independent review of the evidence that the regulation is not an exaggerated response to prison concerns.").

Put differently, "while *Turner* requires [a court] to defer to the expertise of prison officials, that deference is not absolute. In order to warrant deference, prison officials *must present credible evidence* to support their stated penological goals." *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002). If the evidence suggests that a prison official's justifications for a challenged prison action are exaggerated, the court must reject the official's decision. *See Flagner v. Wilkinson*, 241 F.3d 475, 487 (6th Cir. 2001) ("[W]e afford no deference to the policies and judgments of prison officials if there is 'substantial evidence in the record to indicate that the officials have exaggerated their response'" (quoting *Pell*, 417 U.S. at 827)).

Here, the district court failed to correctly apply *Turner*. After summarizing the parties' positions regarding whether or not the challenged prison action (recommending Jayyousi's retention in the CMU) had a valid, rational connection to the identified prison interest (identification of security risks), the district court simply explained that it would defer to Defendant Smith's determination, and not

"substitute its judgment for that of prison administrators in determining what constitutes a security risk warranting continued CMU monitoring." JA-1667.

This affords excessive deference. Tellingly, the district court cited *Hatim* and *Bell*'s instruction to "accord '[p]rison administrators . . . wide-ranging deference in the adoption and execution of policies and practices that *in their judgment* are needed to preserve internal order and to maintain institutional security,'" (JA-1667) but ignored *Bell*'s explicit admonition that such judicial deference applies only "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." *Bell*, 441 U.S. at 547-48, *see also*, *Hatim*, 760 F.3d at 59-60 (reviewing evidence to determine whether the government's security assertion is reasonable).

The district court failed to conduct its own analysis of the evidence and make an independent determination of whether the challenged action was rationally connected to a legitimate penological interest, and thus worthy of deference, or based on exaggerated concerns, thus meriting no deference. That failure constitutes a misapplication of the *Turner* test and merits reversal. *Cf.*, *e.g.*, *Abu-Jamal v. Price*, 154 F.3d 128, 132-35, 137 (3d Cir. 1998) (conducting a thorough analysis of the record, finding no evidence of a "valid, rational connection," and reversing the district court).

B. The District Court Erred in Granting Summary Judgment Against Plaintiff Without Considering Plaintiff's Evidence.

The district court's grant of wholesale deference to Defendants is all the more erroneous in light of the case's procedural posture. On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Moreover, the law is clear that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are functions performed by the fact-finder at trial, not by the court on summary judgment. *Id.*; *accord Harris v. U.S. Dep't of Veterans Affairs*, 776 F.3d 907, 915 (D.C. Cir. 2015); *Farmland Indus., Inc. v. Grain Bd. of Iraq*, 904 F.2d 732, 738 (D.C. Cir. 1990).

This rule is no less applicable in the deferential world of *Turner*. *See Jacklovich v. Simmons*, 392 F.3d 420, 428 (10th Cir. 2004) ("On summary judgment, we must view the evidence and inferences therefrom in the light most favorable to the party that did not prevail—we may not resolve credibility disputes."); *see also Beard v. Banks*, 548 U.S. 521, 529-30 (2006) (plurality opinion) ("We recognize that at this stage we must draw 'all justifiable inferences' in [Plaintiff's] 'favor.'" (quoting *Anderson*, 477 U.S. at 255)).

Here, the district court relied wholesale on Smith's determination that "Jayyousi's speech to other CMU inmates posed a security risk." JA-1666-1667. In

evaluating that justification, the district court failed to consider—let alone accept and draw all appropriate inferences from—Jayyousi's evidence indicating Defendants' concern was exaggerated and lacked credibility. As shown below, Plaintiff's evidence is substantial.

First, Jayyousi's sermon was directly observed by prison officials, who did not attempt to interrupt or curtail it. *See* JA-797, JA-802. That fact strongly suggests that the sermon was not perceived to create a security risk at the time. Second, although Smith two and a half years later called Jayyousi's sermon a security risk, because it "encouraged activities which would lead to a group demonstration," JA-792, a charge of encouraging a group demonstration had already been brought to a disciplinary hearing and then dismissed and expunged from Jayyousi's record. JA-812-813. Third, the notion that any of Jayyousi's activities gave rise to a security risk is belied by his unit manager's 2011 recommendation that Jayyousi be transferred out of the CMU, in light of his "clear conduct." JA-785. In addition, Jayyousi's warden reported that Jayyousi "has acted within the regulations set forth [and] has not presented issues which cause . . . concern." *Id.* All of the foregoing constitutes substantial evidence that Jayyousi's speech did not pose any actual security risk and, thus, that Defendants' purported security concerns were exaggerated.

Additionally, the memo by Defendant Smith, which the district court relied upon, *see* JA-1666-1667, lacks credibility in several important ways. First, it mischaracterizes the content of Jayyousi's speech. We urge the Court to read Jayyousi's sermon in its entirety; Jayyousi criticized the BOP, and exhorted his fellow Muslim inmates to hold fast to their faith, but he did not elicit violence or disrespect other religions. *Compare* JA-791-792, JA-834-836. Second, Smith's memo indicates that "Jayyousi continued to espouse anti-Muslim beliefs [sic] as well as made inflammatory comments regarding the United States and other non-Muslim countries and cultures." JA-792. This is untrue. Plaintiffs' counsel have reviewed all the CTU's intelligence summaries recounting Jayyousi's communications, and there is nothing that supports this charge. Third, Smith's memo wrongly states that "Jayyousi was precluded from acting as the Muslim inmate prayer leader while at THA CMU, a restriction which was never lifted." *Compare* JA-792 *with* JA-1584. Fourth, Smith's memo indicates that Terre Haute CMU staff who reviewed Jayyousi at each of his unit team meetings "decided not to recommend [him] for transfer from a CMU due to his continued radicalized beliefs and associated comments." JA-793. This too is false. Jayyousi's Terre Haute unit team recommended against Jayyousi's transfer from a CMU based on his conviction and offense conduct, *not* his institution conduct. *See* JA- 356-357 (¶390-398), JA-782. Smith's mischaracterization of the sermon itself, other staff

members' reactions to the sermon, and Jayyousi's other statements is strong evidence that Smith *knew* the sermon as actually delivered did not justify CMU retention, and thus exaggerated the threat it posed to provide cover for his dislike of Jayyousi's criticism of the BOP.

In sum, the district court ignored the factual disputes raised by Jayyousi's evidence, instead deferring wholesale to Smith's purported security concerns. This is inappropriate on a motion for summary judgment. The existence of a valid, rational connection to a legitimate governmental interest, and thus whether Jayyousi's speech was protected by the First Amendment, is a disputed factual matter that must be resolved at trial.

C. The District Court Erred in Considering Only the First *Turner* Factor.

After declaring that the first *Turner* factor was satisfied in this case, the district court explicitly declined to consider the other three *Turner* factors. JA-1667-1668. That too was error.

Although satisfying the first *Turner* factor is *necessary* for the government's case, it is not *sufficient*. *Casey v. Lewis*, 4 F.3d 1516, 1523 (9th Cir. 1993). In passing over the other three *Turner* factors, the district court relied on this Court's language in *Amatel v. Reno*, which states that "the first factor looms especially large. Its rationality inquiry tends to encompass the remaining factors . . . ." JA-1667 (quoting *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998)). However, the

district court omitted by ellipsis the crucial completion of the Court's thought, that "some of its criteria are apparently *necessary conditions*. Nothing can *save* a regulation that promotes an illegitimate or non-neutral goal." *Amatel*, 156 F.3d at 196 (emphasis added). In other words, the first *Turner* factor is only dispositive when the government *fails* to satisfy it. *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1051 (9th Cir. 2011); *Jacklovich*, 392 F.3d at 427; *DeHart v. Horn*, 227 F.3d 47, 53 (3d Cir. 2000) (en banc); *see also Lindell v. Frank*, 377 F.3d 655, 658, 660 (7th Cir. 2004) (prison regulation violated the First Amendment where first *Turner* factor was satisfied but the remaining factors all cut against the prison). Indeed, in *Amatel* itself, this Court found that the first factor was satisfied, and then it proceeded to evaluate the other three factors before rendering its decision. *Id.* at 201.

Jacklovich demonstrates the proper approach. There, plaintiffs brought a First Amendment challenge to certain prison regulations, and the parties moved for summary judgment. 392 F.3d at 425. The district court found that the first *Turner* factor was satisfied and then "concluded that it need not consider the three remaining *Turner* factors" before granting summary judgment to the defendants. *Id.* at 427. The Tenth Circuit reversed, finding that "[t]he district court erred in not considering the remaining three *Turner* factors in the context of summary judgment" and going on to identify material factual disputes with respect to the other three factors. *Id.*

Here as well, an examination of the other three *Turner* factors supports Jayyousi's contention that his speech was protected by the First Amendment. With regard to the second factor—the existence of "alternative means of exercising the right that remain open to prison inmates," *Turner*, 482 U.S. at 90—there are no such alternative means. Defendants object to the *content* of Jayyousi's sermon to his fellow inmates, which concerned their confinement in the CMU. *See* JA-834-836. There are no alternative means for Jayyousi to communicate his views on the CMU to his fellow prisoners.

The third *Turner* factor—"the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," 482 U.S. at 90—also cuts against Defendants. There is no evidence that Jayyousi's speech had any negative impact on guards or other inmates. To the contrary, Jayyousi was later praised by his unit manager for his "good rapport with staff and other inmates." JA-790. As for the allocation of prison resources, keeping Jayyousi in the CMU in fact entailed a *greater* use of prison resources, as prison staff are required to monitor all of the telephone calls, JA- 842 (¶17), and personal visits, *id.* ¶23, of the CMU inmates. Considering that Defendants' purported security concerns centered on the proposition that Jayyousi might "incit[e] and radicaliz[e] the Muslim inmate population' in the CMU," JA-1667 (quoting JA-792), monitoring all of Jayyousi's communications with the

outside world was a waste of resources that Jayyousi's requested transfer out of the CMU would have avoided.

Finally, "the absence of ready alternatives" or "the existence of obvious, easy alternatives" is the fourth *Turner* factor. 482 U.S. at 90. Here, the obvious, easy alternative was to transfer Jayyousi out of the CMU, as he requested. The recommendation against this transfer was "not reasonable, but . . . an 'exaggerated response' to prison concerns." *Id.* None of the four *Turner* factors were satisfied by the government, and so summary judgment for Defendants was inappropriate and should be reversed.

III. The District Court Erred in Dismissing McGowan and Jayyousi's Claim for Damages under the PLRA.

Finally, the district court erred in finding that Plaintiffs alleged only mental or emotional injury resulting from their retaliatory placement in the CMUs, and thus dismissing their claims for compensatory and punitive damages against Defendant Smith under the Prison Litigation Reform Act. JA-292-295. It further erred in denying Plaintiffs the opportunity to seek nominal relief. JA-295-296. While Plaintiffs alleged mental and emotional injuries resulting from their confinement in the CMUs, they also alleged myriad other harms—to their post-release prospects, reputations, First Amendment interests, and primary family relationships—that are distinct and compensable. And even if the Court finds that Plaintiffs have not shown actual injury apart from mental or emotional harm,

Plaintiffs' request for nominal damages is apparent in their complaint and other submissions to the district court. Their claims should be reinstated.

A. Plaintiffs Have Alleged Actual Injuries that Are Distinct from Mental or Emotional Harm.

Section 1997e(e) of the PLRA bars compensatory damages for claims of mental or emotional injury without a showing of underlying physical injury. 42 U.S.C. § 1997e(e). It does not preclude compensation for claims of distinct harms. *See Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) ("Section 1997e(e), as its wording makes clear, is applicable only to claims for mental or emotional injury. It has no application to a claim involving another type of injury."). To be sure, a plaintiff must show actual injury in order to recover more than nominal damages for a deprivation of constitutional rights. *See Carey v. Piphus*, 435 U.S. 247, 254-55 (1978). But a plaintiff alleging non-mental and emotional harms, whose claim thus falls outside the scope of section 1997e(e), need not demonstrate physical injury in order to receive compensatory damages. *See King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015) ("[T]he plain language of the statute does not bar claims for constitutional injury that do not also involve physical injury."), *petition for cert. filed* (U.S. Aug. 31, 2015) (No. 15-259); *accord id.* at 212 ("It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits") (citing *Robinson*, 170 F.3d at 748). Indeed, as this

Court has recognized, even "intangible interests"—not limited to mental or emotional harm—"must be compensated if they can be conceptualized and if harm can be shown with sufficient certainty." *See Hobson v. Wilson*, 737 F.2d 1, 61-62 (D.C. Cir. 1984) (applying *Carey* and discussing First Amendment harms as compensable injuries apart from "pain and suffering" and "emotional distress"); *see also Kerman v. City of New York*, 374 F.3d 93, 124-25, 128 (2d Cir. 2004) (awarding compensatory damages for plaintiff's loss of "intangible" interest in liberty resulting from wrongful confinement, as distinct from "emotional suffering").

Plaintiffs have articulated specific injuries, separate from mental and emotional injury, resulting from their retaliatory placement and retention in the CMUs by Defendant Smith. These include the disadvantage of being denied, over the course of years, essential programming provided by the BOP to prepare prisoners for release and successful reintegration; the stigma of being designated to facilities known throughout the BOP as "terrorist" units; the prolonged deprivation of First Amendment rights to political speech and activity exercised by non-CMU prisoners; and the undue damage to their primary family relationships because of the CMUs' uniquely restrictive conditions. Contrary to the district court's finding, these harms are not speculative, nor based on the abstract importance of Plaintiffs'

constitutional rights. JA-293-294. They are actual losses that merit fair compensation, to which section 1997e(e) does not apply.

Denial of Release Preparation Programming. In considering Plaintiffs' alleged injury for lack of access to the BOP's "Release Preparation Program" ("RPP") during their CMU confinement, the district court found that the harm was "too speculative." JA-293 ("[I]t is not clear either that Plaintiffs will actually be unable to participate in this programming or that such a contingency would actually have an effect on their employment prospects."). But Plaintiffs clearly alleged that they were actually unable to participate in this programming in the CMUs. JA-57 (¶68). The RPP is meant to be available to and utilized by all general population prisoners *throughout* their incarceration. *See* Federal Bureau of Prison, Program Statement No. P5325.07, "Release Preparation Program," at 6 (Dec. 31, 2007)[16] ("[I]nmates are encouraged to participate in RPP courses throughout their confinement."); *accord id*. at 1 ("The Bureau of Prisons recognizes that an inmate's preparation for release begins at initial commitment and continues throughout incarceration …."). Although, as the district court noted, Jayyousi presumably can access the program now that he is out of a CMU, he was denied access for the four-plus years of his confinement. The same was true for McGowan during his three and a half years in a CMU. Critically, McGowan was denied

[16] Available at https://www.bop.gov/policy/progstat/5325_007.pdf.

access when he was within 30 months of release in the Terre Haute CMU, when the BOP in fact mandates prisoners to enroll in the program. *Id*. at 6 ("Inmates should enroll in the RPP no later than 30 months prior to direct release.").

Plaintiffs' inability to access RPP during their years in a CMU rendered McGowan, and renders Jayyousi, at an actual disadvantage at the point of release, which plainly has an effect on their reintegration process and prospects, contrary to the district court's finding. The RPP's purpose is "to prepare each inmate to re-enter the community successfully and particularly, the work force." *Id*. at 1. The program is based on a comprehensive curriculum covering six general categories, including employment, personal finance and consumer skills, and information and community resources. *Id*. at 11-12. Courses are taught in a formal classroom setting and offered throughout the year. *Id*. at 7, 11. At the conclusion of the program, participants are expected to have created an "employment folder" containing documents such as a resume and an education transcript to aid their job search upon release. *Id*. at 16. A highly practical aspect of the RPP is the staging of mock job fairs. *Id*. at 17. Local employers hold mock interviews at these fairs and, in some cases, offer participants job opportunities upon release. *Id*. at 17. The RPP also tasks staff with helping prisoners obtain proper identification prior to release. *Id*. at 12.

Plaintiffs did not have access to any of these resources during their confinement in the CMUs, whether as part of the formal RPP program or otherwise. JA-57 (¶68). This Court has acknowledged that "prisoners have a right not to be subjected to conditions (apart from the reasonable incidents of incarceration itself) that reduce their ability to earn a living and otherwise to conduct themselves in the world following their release." *Doe v. District of Columbia*, 697 F.2d 1115, 1124 n.23 (D.C. Cir. 1983). The BOP itself recognizes that release preparation programming is essential to successful reintegration. BOP Program Statement at 1, 5. The denial of all such programming during Plaintiffs' years in the CMUs plainly impacts their reintegration process and prospects, and constitutes an actual injury, which, if proven, warrants adequate compensation.

Harm to Reputation. Plaintiffs have also suffered the distinct injury of reputational harm as a result of the retaliatory CMU recommendations by Smith. JA-56 (¶66). Plaintiffs alleged that the CMUs are known and referred to throughout both prisons, and the BOP as a whole, as "terrorist units." *Id*. The stigma of being labeled a "terrorist" follows prisoners even after their release. *Id*. Such harm is compensable and distinct from mental or emotional injury. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (identifying "impairment of reputation" as a compensable harm separate from "mental anguish and suffering"); *accord Hobson*, 737 F.2d at 60; *see also* Charles T. McCormick,

HANDBOOK ON THE LAW OF DAMAGES 422 (1935) (recognizing damages for "injury to reputation" as a class of damages separate from "wounded feelings"). Courts have specifically found that such injury is not foreclosed by the PLRA. *See, e.g.*, *Jacobs v. Pa. Dep't of Corr.*, No. 04-1366, 2011 WL 2295095, at *24 (W.D. Pa. June 7, 2011) (finding that an award for harm to reputation is distinct from damages for mental anguish and humiliation, and thus is "not specifically precluded under the PLRA.").

These reintegration-related and reputational injuries resulting from Plaintiffs' placement and conditions in the CMUs correspond closely to harms redressed by common law tort rules, which the Supreme Court has explained is the starting point for evaluating constitutional damages claims. *See Hobson*, 737 F.2d at 60 (discussing *Carey v. Piphus*, 435 U.S. 247 (1978)). Applying these rules, this Court's findings that "impairment of … prospects for future employment proximately caused by … unconstitutional conduct" and injury to reputation are compensable interests, distinct from emotional distress, have "require[d] little elaboration." *Hobson*, 737 F.2d at 61 (citation omitted).

First Amendment Harms. Other of Plaintiffs' injuries – namely, the infringement of their First Amendment rights and the damage to their family relationships – though no less compensable, do not necessarily lend themselves to the same straightforward application of common law tort rules. *See Stachura*, 477

U.S. at 314 (Marshall, concurring) (explaining that "[f]ollowing *Carey*, the Courts of Appeals have recognized that invasions of constitutional rights sometimes cause injuries that cannot be redressed by a wooden application of common-law damages rules" and taking *Hobson* as an example). In such instances, as this Court has recognized, "[w]here the common law offers no protection to an interest analogous to that protected by a constitutional right, we must adapt those rules to assure adequate compensation." *Hobson*, 737 F.2d at 60.

Thus in *Hobson*, the plaintiffs claimed that federal officials violated their First Amendment rights to political assembly, association, and speech. 737 F.2d at 13. As Justice Marshall discussed in his concurrence in *Stachura*, this Circuit "held that that injury to a First Amendment-protected interest could itself constitute compensable injury wholly apart from any 'emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish' suffered by [the] plaintiffs." 477 U.S. at 315 (Marshall, concurring) (discussing *Hobson*). To be sure, such injury may only be compensated with substantial damages to the extent it is "reasonably quantifiable." *Hobson*, 737 F.2d at 62. But it is separable from mental or emotional harm and compensable despite section 1997e(e). *See, e.g.*, *King*, 788 F.3d at 213 (holding that a prisoner's alleged First Amendment harms are distinct from mental or emotional injury, and that compensatory and punitive damages are thus not foreclosed by section 1997e(e)).

Contrary to the district court's finding, Plaintiffs have articulated First Amendment harms, distinct from mental or emotional injury, that warrant both compensatory and punitive damages. They do not, as the court below suggested, rely on the abstract importance of their First Amendment rights. JA-294. McGowan, an activist, alleged that he was effectively denied lawful communication with other activists, which he was not denied as a non-CMU prisoner, owing to the CMU's uniquely harsh restrictions on prisoners' non-legal phone calls and visits. JA-81-82 (¶149-50). He was also consistently denied reading materials relating to his activism, which he had routinely been able to receive in other BOP facilities. JA-82 (¶150). These are First Amendment losses "in their most pristine and classic form," *Stachura*, 477 U.S. at 315 (Marshall, concurring) (internal citations omitted). "'When a plaintiff is deprived, for example, of the opportunity … to express his political views, "[i]t is facile to suggest that no damage is done.'" *Id*. (quoting *Dellums* v. *Powell*, 566 F.2d 167, 195 (D.C. Cir. 1977)). "There is no reason why such an injury should not be compensable in damages," notwithstanding that "the award must be proportional to the actual loss sustained." *Stachura*, 477 U.S. at 315 (Marshall, concurring).

McGowan and Jayyousi also allege that Smith recommended their CMU placement and retention in retaliation for the exercise of their First Amendment right to political speech. JA-103-104 (¶237-238). With respect to Jayyousi, as

discussed in Section II above, Smith specifically recommended against his transfer from the Marion CMU, prolonging his confinement therein, because of political comments Jayyousi made while leading a prayer session for fellow Muslim prisoners in the unit. JA-93(¶189-191), JA-95 (¶197). In denying Plaintiffs punitive damages, the district court cited *Davis*, finding that the PLRA bars such relief where the only compensable harms are mental or emotional. JA-295. But Plaintiffs have alleged distinct First Amendment injuries resulting from Smith's conduct, as discussed above. The district court thus erred in finding that Plaintiffs cannot recover punitive damages under the PLRA. Even if Plaintiffs had not shown injury warranting more than nominal damages, punitive damages would still be available. *See* Restatement 2d of Torts, § 908 ("[I]t is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical.").

Harm to Family Relationships. Like the loss of speech, the loss of Plaintiffs' family relationships is also a compensable injury distinct from mental or emotional injury. *See* Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 TREATISE ON THE MEASURE OF DAMAGES 50-51 (8th ed. 1891) (identifying "injuries to family relations" and "mental injuries" as distinct categories of harm); *Cf. Kerman*, 374 F.3d at 125 ("The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as

physical harm, embarrassment, or emotional suffering."); *accord id*. at 130 (discussing the availability of compensable damages for the "loss of time" at common law, "in the sense of loss of freedom"). Plaintiffs have alleged in detail the impact of the CMUs' particular restrictions on prisoners' phone calls and visitation in burdening their spousal relationships and, in the case of Plaintiff Jayyousi, damaging his relationship with his young children. JA-39 (¶ 9-10), JA-49 (¶38), JA-51 (¶42), JA-53 (¶49), JA-54 (¶54), JA-55-56 (¶61-62, 64), JA-82-84 (¶151-155), JA-96-97 (¶200-204). While Plaintiffs did allege mental and emotional injury as a result, they also alleged damage to the quality and integrity of their primary family relationships as a separate and distinct injury. JA-51 (¶ 42), JA-104 (¶240). The district court erred in failing to recognize such harm as compensable. JA-294.

The dismissal of Plaintiffs claims for compensatory and punitive damages is inconsistent with the purpose of the PLRA, which intended to weed out frivolous lawsuits while allowing legitimate claims for constitutional violations to proceed.[17]

[17] Introducing the bill, former Senator Bob Dole stated that the purpose was to "address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners." He cited such claims as "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and … being served chunky peanut butter instead of the creamy variety." 141 Cong. Rec. S. 14408 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). The bill was not intended to bar meritorious constitutional claims. As Senator Hatch affirmed during hearings on the bill, "Indeed, I do not want to prevent inmates from raising legitimate claims.

It also undermines *Bivens'* purpose of deterring unconstitutional conduct by individual federal officials. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *see also Doe*, 697 F.2d at 1124 (discussing the important deterrent function of *Bivens* in considering damages for a prisoner's Eighth Amendment claim); *accord id*. ("While … it is improper to award damages merely for the purpose of discouraging future constitutional violations by other governmental officials, protection of constitutional rights requires that compensation for actual injuries be adequate.").

B. Plaintiffs Have Sought and Should Be Allowed to Pursue Nominal Damages for the Constitutional Violations They Allege.

Even if the Court finds that Plaintiffs have not alleged compensable injuries under the PLRA, they have the right to seek nominal damages for the constitutional violations they allege – recovery that is not precluded by the statute. *See, e.g.*, *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) ("The violation of certain constitutional rights, characterized by the Supreme Court as 'absolute,' will support a claim for nominal damages without any showing of actual injury.") (citing *Carey v. Piphus*, 435 U.S. at 266-67); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) ("[S]ection 1997e(e) does not limit the

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This legislation will not prevent those claims from being raised." 141 Cong Rec S 14611 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).

availability of nominal damages for the violation of a constitutional right ….”). The district court erred in denying this basic relief.

Relying on *Davis*, the district court found that Plaintiffs could not recover nominal damages because they did not specifically plead a request for such relief in their complaint. JA-295-296. But this Court’s holding in *Davis* was based on the plaintiff’s failure to seek nominal damages in the complaint or include a request in any of the submissions by or on behalf of the plaintiff to the Court. *Davis*, 158 F.3d at 1349 (“Davis never sought nominal damages. Nor do his or amicus’s submissions to this court ever mention a claim to nominal relief.”); *accord id*. (“We would thus confront the issue only if we strained to find inferences that are not available on the face of the complaint or in the briefs submitted to this Court.”). Unlike the plaintiff in *Davis*, Plaintiffs here included a specific request for nominal damages in their opposition to Defendants’ motion to dismiss in the district court. Dkt. No. 102 at p. 36. Moreover, separate from their requests for compensatory and punitive damages, they included a broad prayer for other just and proper relief in their complaint, *see* JA-105 (¶f), which encompasses a request for nominal damages. This, too, was absent from the complaint in *Davis*. *See*, Complaint, *Davis v. District of Columbia*, No. 97-cv-00092 (D.D.C. Jan. 14, 1997).

The bulk of the circuit courts have interpreted broad prayers for relief such as that in Plaintiffs’ complaint to include a request for nominal damages. *Mitchell*

v. Horn, 318 F.3d 523, 533 n.8 (3d Cir. 2003) (construing "other relief as it may appear the plaintiff is entitled" to encompass a claim for nominal damages); *Yniguez v. Arizona*, 975 F.2d 646, 647 n.1 (9th Cir. 1992) (per curiam) (holding that a request for "'all other relief that the Court deems just and proper under the circumstances.'… is sufficient to permit the plaintiff to pursue nominal damages"); *see also Kuhr v. Millard Pub. Sch. Dist*., 2011 WL 5402658, at *6 (D. Neb. Nov. 8, 2011) (holding that nominal damages are available where a plaintiff requests "all such further relief as the Court may deem just and proper"). The Fourth Circuit has held that even a broad prayer for relief in a counterclaim, and not the complaint, is a sufficient request for nominal damages. *Minn. Lawyers Mut. Ins. Co. v. Batzli*, 442 F. App'x 40, 52, n.19 (4th Cir. 2011).

The *Davis* Court's approach of searching the complaint and the plaintiff's other pleadings for a request for nominal damages, and the approach of other circuits in locating such a claim in a broad prayer for just relief, foreclose the notion that a request for nominal damages must be specifically pled or otherwise lost, as the district court held. These more flexible approaches reflect the importance of such damages for the protection of constitutional rights. *See Carey*, 435 U.S. at 266 ("By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed."). They also accord

with the principle in Rule 54(c) of the Federal Rules of Civil Procedure, which empowers courts to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c); *Cf. People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005) (finding support for an award of damages for breach of contract in the plaintiff's broad prayer for relief and Rule 54(c)). Plaintiffs have demanded nominal damages through a general plea in their complaint and specific mention in their other pleadings. "Giving Plaintiffs the benefit of all the inferences to which they are entitled," it does not follow that there is nothing in their complaint that can survive the pleading stage. *Compare Davis*, 158 F.3d at 1349. The district court's dismissal of Plaintiffs' damage claims was in error.

CONCLUSION

For the reasons explained above, Plaintiffs respectfully request that this Court reverse the district court's grant of summary judgment, reinstate Plaintiffs' damage claims, and remand for further proceedings.

Dated: October 28, 2015

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 13,832 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.

Dated: October 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October 2015, I electronically filed the foregoing *Brief for Plaintiffs-Appellants* with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the registered CM/ECF users listed below.

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