ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the
District of Columbia Circuit

No. 20-5368

KIFAH JAYYOUSI,

Plaintiff-Appellant,

– v. –

MERRICK B. GARLAND, Attorney General of the United States; MICHAEL CARVAJAL, Director, Federal Bureau of Prisoners; ANDRE MATEVOUSIAN, Assistant Director, Correctional Programs Division; GUY PAGLI, Chief of Counter Terrorism Unit, Federal Bureau of Prisons; and FEDERAL BUREAU OF PRISONS,

Defendants-Appellees.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

RACHEL ANNE MEEROPOL
PARDISS KEBRIAEI
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6432
– and –
GREGORY SILBERT
EILEEN CITRON
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

GLOSSARY

ARP – Administrative Remedy Program

BOP – Federal Bureau of Prisons

CMU – Communication Management Unit

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

PSI – Pre-Sentence Investigation Report

USP – United States Penitentiary

SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Kifah Jayyousi (hereafter "Plaintiff") spent five years in restrictive Communication Management Units (CMUs) without notice of the *actual* reason(s) for his segregation, a meaningful opportunity to challenge the factual basis for that segregation, or adequate periodic review. Defendants-Appellees (hereafter "Defendants") argue that Plaintiff's challenge to these fundamental procedural deficiencies is moot, because in the midst of litigation Plaintiff was released from the Bureau of Prisons (BOP). But as the district court correctly held, documentation from the CMU's flawed processes follows him to this day. Mr. Jayyousi has requested expungement of erroneous and deeply prejudicial information, to keep the BOP from sharing it with other law enforcement agencies or a court. Thus Mr. Jayyousi's claim presents a live controversy.

Second, Defendants insist that the procedures used to designate Mr. Jayyousi to a CMU and retain him there for many years (procedures that are largely still in place today) provide all the process that is constitutionally due. This ignores the voluminous evidence Plaintiff presented in the opening brief, establishing that CMU procedures fail to protect against erroneous and arbitrary decision-making. The district court's decision must be reversed, and summary judgment ordered for Mr. Jayyousi.

ARGUMENT

I. MR. JAYYOUSI'S REQUEST FOR EXPUNGMENT PRESENTS A LIVE CONTROVERSY

This appeal marks the sixth time Defendants have sought to avoid judicial review of CMU procedures based on alleged mootness, including their unsuccessful attempt when the case was before this Court in 2016.[1] Defendants' current argument is identical to that which they recently presented to the district court in a motion to dismiss. *See* [Doc.189@9-10]. The district court's ruling that a live controversy remains is correct, and its reasoning should be adopted by this Court.

A case becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." [Doc.189@6], *quoting Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 307 (2012). If "the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 6-7, *quoting Knox*, 567 U.S. at 307-08, *quoting Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984). Mr. Jayyousi has a concrete interest in the outcome of this case, because his complaint includes a request for expungement of

[1] Defs' Supp. Mot. to Dismiss on Mootness Grds, Nov. 9, 2010, [Doc.29]; Consolidated Mot. to Dismiss, Feb. 12, 2013, [Doc.99@8-12]; Def's Mot. for Summary Judgment, May 21, 2014, [Doc.146@14-17]; Brief for Official-Capacity Appellees, 15-5154, Jan. 22, 2016, [Doc.1595149@29-35]; Defs' Mot. to Dismiss, Apr. 12, 2019, [Doc.183@2-8].

CMU-related information from BOP files. Amended Complaint, [Doc.88-1], ¶ 12. This material continues to impact him, and may cause further harm in the future despite his release from BOP custody.

A. A Request for Expungement Presents a Live Controversy When Threatened Harm from the Documents is Not Unduly-Speculative.

Defendants begin with the proposition that *normally* an individual's release from prison moots any claim for injunctive relief, but the cases Defendants rely on do not involve a request for expungement. *See* Initial Brief for Appellees, Doc. 1902717, ("IBA") at 19 (*citing Scott v. District of Columbia,* 139 F.3d 940, 941 (D.C. Cir. 1998); *Qassim v. Bush*, 466 F.3d 1073, 1077 (D.C. Cir. 2006)). Expungement requests are commonly made in prison cases, and while transfer or release from prison renders other forms of injunctive relief moot, expungement is the exception to that rule. *See, e.g.*, *Lazor v. Ingle*, 97 F. App'x 739, 740 (9th Cir. 2004) (case not moot where plaintiff sought expungement of disciplinary record); *Del Raine v. Carlson*, 826 F.2d 698, 707 (7th Cir. 1987) (same); *Black v. Warden*, 467 F.2d 202, 204 (10th Cir. 1972) (procedural due process challenge to placement in isolation unit not mooted by transfer because "there may be a continuing effect in the penal institutions from the use of records maintained concerning this punishment").

There is scant precedent in the D.C. Circuit specific to prison expungement claims, but analogous cases outside the prison context suggest no deviation from

this general rule. *See Abdelfattah v. U.S. Dep't. of Homeland Sec.*, 787 F.3d 524, 534 (D.C. Cir. 2015) (noting "[w]e have repeatedly recognized a plaintiff may request expungement of agency records for both violations of the Privacy Act and the Constitution," and collecting cases), *see also, Hedgepath ex rel. Hedgepath v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152-53 (D.C. Cir. 2004) (12-year-old's request for expungement of arrest records not mooted by change in policy that led to her arrest). Under these cases, a live controversy exists when the documents sought to be expunged have a "more-than-speculative chance of affecting [the plaintiff] in the future." *Abdelfattah,* 787 F.3d at 534 (citation omitted).

Defendants mostly ignore expungement precedent, instead insisting the Court lacks jurisdiction because Mr. Jayyousi cannot "prove" a continuing consequence from his CMU designation. IBA at 22, *quoting Gul v. Obama*, 652 F.3d 12, 17 (D.C. Cir. 2011). For support, Defendants rely on three habeas corpus cases—*Gul*, *Spencer v. Kemna,* 523 U.S. 1 (1998), and *Lane v. Williams*, 455 U.S. 624 (1982)—that have nothing to do with expungement but instead involve the doctrine of presumed versus proven collateral consequences.

The district court agreed with Plaintiff that *Abdelfattah*, rather than habeas precedent, presents the proper framework for considering Mr. Jayyousi's expungement request. [Doc.189@10]. In *Abdelfattah*, a non-citizen challenged

allegedly inaccurate information about him maintained in a government database that negatively impacted his ability to obtain permanent residence status and find employment. 787 F.3d at 531-32. Along with money damages (which were denied), Mr. Abdelfattah sought expungement. *Id.* at 532. By the time the appeal was heard, Mr. Abdelfattah had obtained permanent residence and was working; the Government thus argued his claims were moot. *Id.* at 534. This Court disagreed, explaining that the case remained a live controversy so long as a "threat remains that the maintenance and use of the TECS records will lead to future deprivation of [Mr. Abdelfattah's] rights." *Id.* at 534-35, [Doc.189@10].

In *Abdelfattah*, the Government characterized the threat of future harm posed by the material sought to be expunged as "mere speculation." 787 F.3d at 535. Holding otherwise, this Court relied on *Hedgepath*, 386 F.3d at 1152, and *Doe v. U.S. Air Force*, 812 F.2d 738, 740-41 (D.C. Cir. 1987). *Id.* In the former, a false arrest case was not moot because expungement would relieve the plaintiff of the burden of having to respond affirmatively to a future question on an employment application or security form as to whether she had ever been arrested. *Hedgepath*, 386 F.3d at 1152. The child plaintiff was not made to "prove" her arrest record was currently impacting her, as would a habeas petitioner under the *Gul* collateral consequences doctrine; rather this Court considered whether there

was a not unduly-speculative chance the information in question might impact the plaintiff in the future. *See id.*

Similarly, in *Doe,* the potential expungement of files regarding a discharged servicemember presented a live controversy despite the Government's argument that the files could not be used against the servicemember in the future because he was ineligible to re-enlist. 812 F.2d at 740. The case was remanded in recognition that "the threat of harm and the balancing of relevant interests are fact-laden determinations that must be confided to the discretion of the district court." *Id.* at 741, *quoting Reuber v. United States*, 750 F.2d 1039, 1069 (D.C. Cir. 1984), Bork, J., concurring, *overruled on other grounds by Kauffman v. Anglo-Am. Sch. of Sofia*, 28 F.3d 1223, 1226 (D.C. Cir. 1994). Under *Abdelfattah, Doe,* and *Hedgepath* Mr. Jayyousi must merely show a not unduly-speculative threat of future harm from the information in question.

According to the Government, the threatened future harm recognized in *Abdelfattah* is distinguishable from that faced by Mr. Jayyousi, because the "maintenance and use" of the challenged records in *Abdelfattah* were "sufficiently linked" to "future deprivations of [Mr. Abdelfattah's] rights" such that jurisdiction to order expungement was appropriate. IBA at 31. But there is no substance to this conclusion; Defendants identify no consequences experienced by Mr. Abdelfattah (or the plaintiffs in *Hedgepath* and *Doe*) more definite than those described by Mr.

Jayyousi below. *See* [Doc.189@11] ("Here, Plaintiffs—like the plaintiff in Abdelfattah—allege that the government has created and is maintaining documents that are both inaccurate and highly prejudicial to them. They assert—like the plaintiff in Abdelfattah—that the continued existence of the records may impact them in the future . . .").[2]

Anyanwutaku v. Moore, 151 F.3d 1053 (D.C. Cir. 1998), is in accord. There, this Court held that if a plaintiff fails to identify *any* interest to be served by expungement, the remedy is unavailable. *Id.* at 1057. Importantly, the Court contrasted Mr. Anyanwutaku's failure to do so with *Kerr v. Farrey*, 95 F.3d 472, 476 (7th Cir. 1996), involving a prisoner's request for expungement from his prison records of any references to his unwillingness to attend an NA program. *Anyanwutaku*, 151 F.3d at 1057. Mr. Kerr was not required to *prove that he would suffer* an adverse consequence, all that was required was an explanation of how the records *might* affect him in the future. *Kerr*, 95 F.3d at 476. Other cases follow this same approach. *See, e.g.*, *Lira v. Cate*, No. C 00-0905 SI, 2009 WL 10677792, at *22 (N.D. Cal. Sept. 30, 2009), *aff'd Lira v. Herrera,* 448 F. App'x 699, 700 (9th Cir. 2011) (expungement of prisoner's gang validation would mitigate plaintiff's

[2] *See also, id.* at n.5 (outcome would be the same if the court treated the motion as one for summary judgment because Mr. Jayyousi set forth sufficient evidence of actual injury).

risk of physical attack post-release); *Lazor*, 97 F. App'x at 740 (disciplinary record affected the plaintiff's "parole determination in the past, and there is no showing that it will not be of consequence in the future"); *Del Raine*, 826 F.2d at 707 (case not moot despite defendant's argument that disciplinary record is too old to affect parole chances when nothing in the Parole Commission's regulations suggest it would ignore an old disciplinary record); *West v. Cunningham*, 456 F.2d 1264, 1265 (4th Cir. 1972) ("Where there remains a 'possibility' that 'adverse collateral legal consequences' will inure to the complaining party" case is not moot), *citing Sibron v. New York*, 392 U.S. 40, 55 (1968); *Black*, 467 F.2d at 204 ("there may be a continuing effect in the penal institutions from the use of records maintained concerning this punishment").

A released prisoner-plaintiff identified similar adverse consequences in *Dorn v. Mich. Dep't of Corr.*, No. 1:15-CV-359, 2017 WL 2436997, at *9 (W.D. Mich. June 6, 2017). Dorn was found guilty of violating a prison policy against sexual conduct by a prisoner with HIV and was released from prison during the course of his procedural due process challenge. *Id.* at *1-2, *9. He argued that his request for expungement showed a concrete, continuing injury. *Id.* at *8. The court found his claim not moot (*id.* at *9), relying on *Hewitt v. Helms*, 482 U.S. 755, 766 n.1 (1987) (Marshall, J., dissenting) ("Petitioners have offered no authority, nor can they, for the remarkable proposition that the request for expungement of

respondent's record became moot upon his parole. Nor, since the expungement would have depended upon the finding that respondent's due process rights were violated, have they explained how the request for declaratory relief supposedly became moot.").[3] *See also, Friedland v. Otero*, No. 3:11CV606 JBA, 2014 WL 1247992, at *15 (D. Conn. Mar. 25, 2014) (expungement available to prisoner challenging disciplinary offense despite release from prison).[4]

[3] *Hewitt v. Helms* involved the question of whether a prisoner-plaintiff was a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988; a five-Justice majority ruled he was not. 482 U.S. at 763-64. The availability of expungement as a form of relief post-release was not directly at issue in the case, and the majority decision does not address it. Thus, there is no indication the majority disagreed with the legal proposition cited in *Dorn*.

[4] In other contexts, courts seem to presume that negative records have enough potential to harm plaintiffs so as to routinely order expungement and reject arguments of mootness without any evidentiary inquiry into how the information might cause injury in the future. *See, e.g.*, *Flint v. Dennison*, 488 F.3d 816, 823–24 (9th Cir. 2007) (university student's case not mooted by graduation, as student sought expungement of censure and student senate seat denial, and "[s]uch expungement is certainly a form of meaningful relief") (internal quotation marks and citations omitted); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 & n.15 (4th Cir. 2005) (student's request that law school expunge her failing grade not moot despite graduation); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274-75 (9th Cir. 1998) (claim regarding unconstitutional blood and urine tests not mooted despite cessation of testing because defendant retained the test results and could be ordered to expunge them); *Sullivan v. Murphy*, 478 F.2d 938, 958, 961-62 (D.C. Cir. 1973) (expungement of police records related to arrests avoids impact which may result from their dissemination to other public and private institutions). There is no reason why this jurisdictional question should operate differently in different contexts.

B. Expungement Would Provide Meaningful Relief to Mr. Jayyousi

Under this straightforward precedent, Mr. Jayyousi's claims are not moot. Mr. Jayyousi has been released from prison, but the documents created through the flawed CMU designation processes present a threat of future harm that is not unduly-speculative. Specifically, the information he seeks to expunge may be shared with law enforcement agencies and may impact his pending motion to modify his 20-year term of supervised release.

First, there is a significant threat that highly prejudicial information about Mr. Jayyousi generated through the CMU's faulty designation and review procedures *is being shared* and will continue to be shared by the BOP with outside agencies. [Doc.184-1@4-6, 8-9, 14-15]; [Doc.189@11]. As described in Plaintiff's opening brief, the CTU documents CMU prisoners' communications and behavior; indeed, part of the reason for the CTU's existence is to "monitor and continue to track inmates and share intelligence with other law enforcement agencies." *See* [Doc.184-1@6], *see also* [*id.*@4, 7] (describing information sharing between CTU and federal courts); [*id.*@10-11] (describing FBI and BOP intelligence sharing). That Mr. Jayyousi has been interviewed by the FBI since his release from BOP custody gives real substance to this threat. [Doc.189@11]; [Doc.184-1@15].

Defendants decline to "confirm or deny" whether the inflammatory information developed during Mr. Jayyousi's CMU placement and review

procedures has been or will be shared with law enforcement and has contributed to FBI interest in Mr. Jayyousi. IBA at 25. While it would be a simple matter for the BOP to get a declaration from a CTU staff-member disavowing such sharing; it has not done so. Instead, Defendants speculate that there "is no reason to conclude" that such records would lead to FBI attention. *Id.*

Defendants are correct that Mr. Jayyousi was convicted of a crime related to terrorism, and it is true that his conviction could also impact his interactions with law enforcement, but the inaccurate and prejudicial information Mr. Jayyousi seeks to expunge is different in nature from the conduct proven in his criminal trial. Mr. Jayyousi's notice of transfer to the CMU stated that his crime of conviction included using "religious training to recruit other individuals in furtherance of criminal acts in this country … [and] included significant communication, association and assistance to al-Qaida." [Doc.138-19@2]. This is not accurate. [Doc.139-1]; [Doc.139-2]. When the CTU recommended against Mr. Jayyousi's transfer several years later, it reiterated the same erroneous information, along with additional statements that in the CMU Mr. Jayyousi "continued to espouse anti-Muslim [sic] beliefs. . . and made inflammatory comments regarding the United States and other non-Muslim countries and cultures;" and Terre Haute staff who reviewed Jayyousi's placement decided not to recommend him for transfer from the CMU "due to his continued radicalized beliefs and associated comments."

[Doc.138-30@20-22]. None of these statements are true. [Doc.153-4@2-3] (Feb. 9, 2009 Intelligence Summary indicating that the only possible "inflammatory" comment made during this time was a private comment to Mr. Jayyousi's daughter about a school project); [Doc.138-2@59-60], ¶¶ 390-98 (demonstrating that Terre Haute staffs' decision was based on Mr. Jayyousi's conviction and offense conduct, and had nothing to do with any alleged recruitment or radicalization). Mr. Jayyousi had no opportunity to correct these false statements. [Doc.138-2@61], ¶¶ 406-409; [Doc.138-30@16-17]; [Doc.138-6@167-69]; [Doc.138-30@48]. Indeed, when Mr. Jayyousi was finally released from the CMU in 2013, the CTU's final redesignation memo noted that he "is likely to radicalize or recruit other inmates while in Bureau custody" and "does warrant continued monitoring and supervision to preclude illicit activity." [Doc.138-30@71, 73]. A determination by this Court that Mr. Jayyousi's CMU designation violated due process, and an order requiring the extremely prejudicial information created through those flawed procedures be expunged would change the nature of the information the BOP could share with the FBI or other law enforcement agencies, whether on its own initiative or in response to future inquires.

Second, Mr. Jayyousi's due process claim and his request for expungement will impact his pending motion to modify the terms of his 20-year supervised release. [Doc.189@11]; [Doc.184-1@14-15], ¶ 3, 4; IBA at 29. 18 U.S.C. §

3583(e) allows a court to authorize modification of supervised release after considering *inter alia* "(1) the nature and circumstances of the offense and the defendant's history and characteristics; (2) deterrence of criminal conduct; [and] (3) protection of the public from further crimes of the defendant." *United States v. King*, No. 03-CR-249 (BAH), 2019 WL 415818, at *2 (D.D.C. Feb. 1, 2019). One's behavior in prison is relevant to these factors. *See, e.g.*, *United States v. Harris*, 258 F. Supp. 3d 137, 143, 146 (D.D.C. 2017) (considering prison disciplinary record, among other factors, in ruling on § 3583(e) motion).

As evidenced above, sharing information is one of the main reasons for the CTU's existence. *See supra,* p. 10, *citing* [Doc.184-1@4, 7]. In fact, while Mr. Jayyousi was in the CMU, a BOP staff member suggested sending a video of Mr. Jayyousi leading a *Jumah* prayer service to Mr. Jayyousi's federal court judge, who was then considering his resentencing motion. *See* [Doc.184-1@8-9]. And CTU staff have testified that they are sometimes obligated to provide to a Probation Office information about individuals on supervised release that is gleaned from CMU communications monitoring. [*Id.*@12]. Thus, there can be no question that erroneous information—like that Mr. Jayyousi supported al-Qaida and spouted vitriol about the United States—could be shared with the court, and could harm his chances to prevail on a § 3583(e) motion.

A determination by this Court that Mr. Jayyousi's CMU designation violated due process and an order requiring that the extremely prejudicial information created through those flawed procedures be expunged ameliorates this risk. This Court has previously relied on similar reasoning to reject the government's claims that release from prison moots a challenge to one's sentence. *See United States v. Epps*, 707 F.3d 337, 345 (D.C. Cir. 2013) (sentencing challenge not mooted by petitioner's release from prison, as determination of whether he overserved his sentence might influence the court's decision on a § 3583 modification motion), *see also, Levine v. Apker*, 455 F.3d 71, 76-77 (2d Cir. 2006); *Mujahid v. Daniels,* 413 F.3d 991, 993-95 (9th Cir. 2005); *Townes v. Jarvis,* 577 F.3d 543, 546-49 & n.3 (4th Cir. 2009).

Defendants object that the possibility that Mr. Jayyousi's modification prospects will be enhanced by expungement is too speculative to save the case from mootness (IBA at 26), but that same argument was made and rejected in *In re Sealed Case*, 809 F.3d 672, 674-75 (D.C. Cir. 2016) (rejecting Government's argument that potential modification of term of supervised release is "unlikely in the extreme" and "simply too speculative to give rise to a case or controversy" and holding case not moot).

Defendants seek to distinguish this precedent, arguing that Mr. Jayyousi has not shown a "very substantial likelihood" that the decision at issue would improve

his chances to modify supervised release. IBA at 29. But in noting the somewhat weaker case presented by *In re Sealed Case* than in *Epps,* the Court made it clear that a "substantial likelihood" is not the legal standard—rather the question is whether the possibility of an impact on reduction of supervised release is "unduly speculative." *In re Sealed Case*, 809 F.3d at 675.

Certainly, the potential that inaccurate and prejudicial information in Mr. Jayyousi's CMU records could harm his chance at modification is far less speculative than the grounds relied upon by other courts to support expungement and reject mootness. *See Lazor*, 97 F. App'x at 740 (relying on absence of evidence that disciplinary records would not be of consequence in future); *Del Raine*, 826 F.2d at 707 (same); *West*, 456 F.2d at 1265 ("[w]here there remains a 'possibility' that 'adverse collateral legal consequences' will inure to the complaining party" case is not moot).

Defendants suggest that even if the threat to Mr. Jayyousi's modification motion previously supported his request for expungement, now that the motion has been fully briefed without the Government sharing the highly prejudicial information in question, and with Mr. Jayyousi himself acknowledging his time in the CMU, the information poses no threat to Mr. Jayyousi's chances to prevail on the motion. IBA at 29-30. While undersigned counsel does not represent Mr. Jayyousi on the modification motion, and thus cannot speak with authority

regarding the motivation for his factual assertions, it is certainly logical that Mr. Jayyousi would acknowledge his CMU placement in his motion as he had not yet received the expungement he sought, and likely expected the issue to be raised by the Government. Similarly, there is no way to know whether the Government's decision to exclude CMU information from its submission was intended to undercut Mr. Jayyousi's entitlement to a remedy here.

Regardless, until the Eastern District of Michigan rules on Mr. Jayyousi's motion, this Court's determination of whether Mr. Jayyousi's due process rights were violated (a determination necessary to his request for expungement) could itself have significant impact on Mr. Jayyousi's chances for success. Should this Court rule that Mr. Jayyousi was unconstitutionally placed and retained in a CMU for years, it may very well impact the Eastern District of Michigan's approach to the motion before it. *See, e.g.*, *Epps*, 707 F.3d at 345 (noting "very substantial likelihood that a ruling that Epps' incarceration should have been shorter would influence the district court's readiness to reduce his term of supervised release"); *Pope v. Perdue*, 889 F.3d 410, 414 (7th Cir. 2018) (challenge to sentence by released prisoner under supervised release "not moot so long as he could obtain 'any potential benefit' from a favorable decision") (citation omitted); *accord, Shorter v. Warden*, 803 F. App'x. 332, 334-35 (11th Cir. 2020).

Mr. Jayyousi has been seeking expungement of the inaccurate and highly prejudicial information developed through his CMU designation and reviews for nearly a decade. Amended Complaint, [Doc.No.88-1], ¶ 12. His release from prison does not moot this possible form of relief, as he has the "right not to be adversely affected by" information that "(1) is inaccurate, (2) was acquired by fatally flawed procedures, or (3) . . . is prejudicial without serving any proper purpose." *See Chastain v. Kelley*, 510 F.2d 1232, 1236 (D.C. Cir. 1975).

II. CMU PROCEDURES VIOLATE DUE PROCESS

Turning to the merits, Defendants emphasize the "broad discretion" due prison administrators in making "predictive judgments," which require only "informal, non-adversarial procedures." IBA at 33, *quoting Wilkinson v. Austin*, 545 U.S. 209, 229 (2005), *Hewitt v. Helms*, 459 U.S. 460 (1983), *disapproved on other grounds, Sandin v. Conner*, 515 U.S. 472 (1995). Plaintiff agrees that *Hewitt* procedures apply and makes no argument for formal process. CMU designation and review procedures are so fundamentally flawed, however, they fail to satisfy even *Hewitt's* relatively forgiving requirements.

A. Mr. Jayyousi Did Not Receive Adequate Notice of the Reasons for his CMU Placement.

As detailed in Plaintiff's opening brief, Mr. Jayyousi did not receive notice of the decisionmaker's reasons for designating him to the CMU, in violation of due process. The evidence gathered in discovery on this point is strong: the BOP's

30(b)(6) witness conceded that the notice of transfer provided to Mr. Jayyousi *did not* indicate the Regional Director's reasons for designating Mr. Jayyousi to the CMU, rather the notice provided reasons *supporting* Mr. Jayyousi's designation. [Doc.138-6@164]. The witness acknowledged that the Regional Director might have designated Mr. Jayyousi to the CMU for a completely different reason. [*Id.*] The evidence shows that the Regional Director *did not* document his reasons for Mr. Jayyousi's designation, and he testified that, in general, if he was provided ten reasons supporting a CMU prisoner's designation and he only found two compelling, he would not document which two were compelling, and the only way to find out *his* reasons for approving designation was to ask him. [Doc.138-18@3]; [Doc.138-4@55-57].

Defendants ignore these inconvenient facts. Instead, they rest their argument on the Regional Director's declaration, prepared in support of Summary Judgment, that Mr. Jayyousi's notice of transfer "accurately summarized the reasons why [he] ordered [Jayyousi's] placement in a CMU." IBA at 37; [Doc.147-2@5-6], ¶ 10. However, a party cannot create "an issue of material fact by contradicting prior sworn testimony unless the 'shifting party can offer persuasive reasons for believing the supposed correction' is more accurate than the prior testimony." *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1030 (D.C. Cir. 2007)

(*quoting Pyramid Sec. Ltd. v. IB Resol., Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991)).

Defendants do not explain why the Regional Director stated at his deposition that the only way to know which reasons he found compelling was to ask him, if in fact he ensured all his reasons were summarized in the notice. Moreover, that the declaration truthfully describes the Regional Director's practice is contradicted by his testimony that it was fine that former-Plaintiff Aref's notice of transfer excluded the fact that Aref's name was found among documents found in certain camps in Iraq, because "there's enough information in the notice to justify his placement" in a CMU and Aref could file a FOIA request if he wanted to know *all* the reasons for his transfer. [Doc.138-4@48-49]. Taken together, this evidence compels the conclusion that it was the Regional Director's practice to provide CMU designees, including Mr. Jayyousi, with "enough" information to "justify" CMU designation, even if that information did not comprise his particular reasons, or all of the reasons for CMU designation. [Doc.138-4@48-49].

Next, Defendants insist that excluding some of the reasons for CMU designation is consistent with due process, because BOP "policy" is to summarize all reasons for placement "except to the extent specific information supporting the placement cannot be provided without jeopardizing prison operations or public safety." IBA at 37, *citing* [Dkt.149@9-10] ¶¶ 22, 27. Defendants rely on the

affidavit of David Schiavone for this assertion, but Schiavone was also Defendants' 30(b)(6) witness, and he testified that reasons for CMU placement were sometimes left off prisoner notices *for space reasons*, with no reference to security concerns: [Doc.138-6@141-42] ("Q. Why is there no reference in this notice to [former plaintiff] Daniel McGowan's communications while incarcerated? A. I wish I had a specific answer. It certainly was relevant in the referral. And through review, a determination was made that this was the most relevant information to put in this notice in the limited space available.")

According to Defendants, a decision to exclude a relevant reason for a prisoner's transfer due to "limited space" on a form is the type of "professional judgment" to which a court must defer. IBA at 38. Deference has been held appropriate for "complex and intractable" questions of prison administration which require "expertise, comprehensive planning, and the commitment of resources." *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974). To the extent that a prison administrator decided it was more important to save paper than to provide CMU prisoners with a short, non-confidential summary of *all* the reasons they were placed in a unit impacting their liberty, this is not the kind of decision requiring deference.

Finally, Defendants object that even if BOP practice resulted in incomplete notice for other CMU prisoners, all that matters is that Mr. Jayyousi received a

notice accurately summarizing the reasons for his placement. IBA at 39. But Defendants' only evidence regarding the completeness of Mr. Jayyousi's notice is the Regional Directors' sham declaration, which, as explained above, must be disregarded. In fact, the evidence presented in Plaintiff's opening brief shows significant confusion as to exactly why Mr. Jayyousi was sent to the CMU, including that it may have been for a reason *not listed* on Mr. Jayyousi's notice. Brief for Plaintiff-Appellant ("BP"), Doc. 1893562 at 37-39. Regardless, as explained in the opening brief, other prisoners' experiences are relevant for the Court to assess what, exactly, the BOP's practices are, and due process is determined based on the risk of error endemic to the procedures in place, irrespective of whether error occurs in the specific case. *See id.* at 41-42 (collecting cases). Defendants fail to respond to Plaintiff's precedent, and provide no citation for their assertion that evidence of BOP practices drawn from other CMU prisoners' records is irrelevant. IBA at 37, 44.

B. Mr. Jayyousi Did Not Receive an Adequate Hearing

Defendants cannot deny that Mr. Jayyousi's only opportunity to challenge the factual basis for his CMU designation consisted of appeal to an administrative body that has *never once* reversed a CMU prisoner's designation and that failed to even acknowledge (much less respond to) the factual disputes Mr. Jayyousi raised. IBA at 40-45. This is not the *meaningful* "opportunity for rebuttal" required by due

process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) ("Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.").

Defendants appear to assume that the Regional Director *considered* Mr. Jayyousi's factual disputes and found them irrelevant to his decision that Mr. Jayyousi's placement in the CMU was proper, presumably believing other grounds for the decision were adequate. IBA at 44. But Defendants cite no evidence for this assumption and there is none in the record. From the documents, one simply cannot tell whether the Regional Director and other reviewers considered the factual disputes irrelevant, or assumed Mr. Jayyousi was incorrect on the facts. BP at 37-39. This is inadequate, not only because the opportunity for rebuttal must provide an "effective way to eliminate misunderstandings and focus issues" but also because "it is crucial that [society's] members perceive that their rights and interests are taken seriously and thoughtfully by the officials who are deciding their claim." *Gray Panthers v. Schweiker*, 652 F.2d 146, 161-63 (D.C. Cir. 1980).

Moreover, "no component of a procedure can be analyzed independently of the others." *Id.* at 165. If one points out a factual error in the reasons provided for placement and the decisionmaker ignores that error as irrelevant, this suggests a deficiency in notice, if not in hearing. *Id.* at 168-69 (failure to notify the individual of the reasons found determinative by the decisionmaker means that the individual

"is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether.").

Though Defendants fail to direct the Court to *any* precedent approving of a paper hearing process in which no one ever succeeds and factual errors are not even acknowledged, they take issue with Plaintiffs' reliance on *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016), insisting that the case has "nothing to do" with due process and the hypothetical remedy process described in that opinion bears no resemblance to the ARP. IBA at 41. Plaintiff explicitly noted in the opening brief that *Ross* is not a due process case (BP at 35 n. 9); it does not follow that it is irrelevant. *Ross* required the Supreme Court to consider when an administrative remedy program is "available," interpreting this word to mean "'capable of use' to obtain 'some relief for the action complained of.'" 136 S. Ct. at 1859, *quoting Booth v. Churner*, 532 U.S. 731, 738 (2001). This is similar to the question of whether a remedy program provides a meaningful opportunity for rebuttal. As for the resemblance between the Supreme Court's hypothetical ARP and the real ARP described herein, in both "administrative officials have apparent authority, but decline ever to exercise it." *Id.* at 1859.

Finally, Defendants misunderstand Plaintiff's point regarding the Regional Director's failure to generate a CMU "review form" when considering a CMU

ARP. *Compare* BP at 36 *with* IBA at 43. Plaintiff does not argue that due process *requires* the Regional Director to route an ARP challenge through his administrators; rather, that he *does not* do so is evidence that he does not reconsider placement when reviewing such challenges, as the evidence is clear that every time the Regional Director *considers* re-designating a prisoner from the CMU, he uses a CMU "review form" to solicit written feedback from his staff. [Doc.138-15@83], [Doc.138-15@59].

Due process requires that individuals designated to a CMU have an opportunity to rebut the *real and determinative* reasons for their placement, and the decisionmaker (whether a newcomer to the issue or not) *actually* reviews the evidence with fresh eyes, open to the possibility of error. Mr. Jayyousi did not receive anything like this.

C. Mr. Jayyousi Did Not Receive Adequate Periodic Review of his CMU Placement

Periodic review is also an essential due process component, necessary to ensure that segregation does not become indefinite. *Hewitt*, 459 U.S. at 477 n.9. Defendants, like the district court, ignore completely Plaintiff's evidence that Mr. Jayyousi and other men designated to the CMU were provided with erroneous information about how and when they could earn release from the CMU. BP at 43-44. This, in itself, requires reversal.

Defendants concede that the district court erred in finding that Mr. Jayyousi received periodic review of his CMU placement every six months, starting in December of 2008. *See* BP at 43, IBA at 47 (acknowledging Mr. Jayyousi received his first CMU review in December of 2009). However, Defendants cite *Isby v. Brown*, 856 F.3d 508, 525 (7th Cir. 2017) for the proposition that the frequency of periodic review is left to the discretion of prison officials. But *Isby* involved periodic review every 30 days. *Id*. How frequently to conduct review within a constitutionally adequate period is certainly a matter of discretion; this does not mean prison officials have discretion to conduct reviews so infrequently as every 18 months. The cases Plaintiff cites, which Defendants ignore, suggest otherwise. BP at 42.

According to Defendants, Mr. Jayyousi cannot challenge his first 18 months without review, because those months have no continuing impact. IBA at 48. But Plaintiff challenges the inadequate structure of CMU periodic review as a whole. It is not *only* that Mr. Jayyousi did not receive his first periodic review until 18 months after his confinement, but that the reviews were structured so as to allow prisoner administrators, whom Defendants admit are unlikely "to have the background and knowledge to adequately assess all available intelligence and law enforcement information relevant to the question of whether an inmate warrants

the monitoring and controls of a CMU" ([Doc.149@13], ¶ 38) to block transfer from the CMU for years on end. *See* BP at 45.

Moreover, Plaintiff produced evidence that, contrary to BOP policy, he and other CMU prisoners were not provided any explanation of why they were maintained in the CMU at their periodic reviews, and thus had no opportunity to shape their behavior accordingly. BP at 46-47. Defendants argue this failing has no constitutional significance without "substantial evidence of bad faith or pretext on the part of prison officials." IBA at 49, *citing Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1184 (D.C. Cir. 1986). This fails to acknowledge contradictory Supreme Court reasoning. *See Wilkinson*, 545 U.S. at 217, 225-226 (approving of OSP's requirement of a short statement of reasons for placement and for retention after periodic review; "This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior."); *see also Williams v. Hobbs*, 662 F.3d 994, 1008 (8th Cir. 2011) (review was meaningless because of the failure to explain with "reasonable specificity" why the prisoner continued to constitute threat to prison security). And while Defendants are correct that in *Crosby-Bey* the court found no due process violation despite the prison's failure to provide written reasons for retention in

segregation for a four-month period, the court said nothing to indicate such a failing could continue for years on end. 786 F.2d at 1183.

According to Defendants, none of these periodic review failings matter, because "there is no prospective conduct to enjoin and expungement would not redress any asserted constitutional violation." IBA at 49. But Plaintiff's request for expungement is directly tied to information created through these constitutionally infirm procedures. As explained above, the erroneous and prejudicial information in the CTU's recommendation against Mr. Jayyousi's transfer out of the CMU remains in the BOP's files, and is the subject of Mr. Jayyousi's request for expungement.

D. Additional Procedures Serve Both Parties' Interests.

Defendants all but ignore Plaintiff's arguments showing that the Government's interest aligns with Mr. Jayyousi's, BP at 50-52, instead relying on generalizations about the need for deference. IBA at 51-53. To accept Defendants' argument, this Court would have to find that requiring the CMU decisionmaker to summarize all his reasons in writing, requiring the reviewer of any rebuttals to acknowledge and respond to claims of factual error, or requiring the BOP to follow its policy and provide an individual with an explanation of why he is denied transfer out of the CMU, would "hamper[]" the BOP's ability to "effectively maintain the CMUs." IBA at 53. If such units cannot operate without the lies,

secrecy, and obfuscation Defendants relied upon to deprive Mr. Jayyousi of his liberty for nearly five years, perhaps they cannot constitutionally operate at all.

CONCLUSION

The district court must be reversed, and Summary Judgment granted to Mr. Jayyousi.

Dated: July 9, 2021

Respectfully submitted,

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

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

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

CERTIFICATE OF COMPLIANCE WITH RULE 32

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B) because this brief contains 6,397 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

Dated: July 9, 2021

s/Rachel Meeropol

Rachel Meeropol

CERTIFICATE OF SERVICE

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

Dated: July 9, 2021

/s/ *Rachel Meeropol*

Rachel Meeropol